Victorian Equal Opportunity & Human Rights Commission

1 February 2012

Mr Matt Hall
Assistant Secretary
Human Rights Policy Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Consolidation of Commonwealth Anti-Discrimination Laws Project

Dear Mr Hall

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission in response to the Commonwealth Attorney-General's Department (AGD) *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*; an initiative under Australia's Human Rights Framework.[1]

The Commission helped to develop and supports the submission of the Australian Council of Human Rights Agencies (ACHRA) made to this consolidation project.[2] Particularly, the Commission believes it is important that a Consolidated Commonwealth Anti-Discrimination Act (a Consolidated Act) should promote the following objectives:

1. Identifying and eliminating systemic discrimination, by setting objectives that target the causes and manifestations of discrimination.

2. That the ongoing focus of anti-discrimination and human rights legislation should be the realisation of substantive equality, with a focus on positive and proactive measures to

[1] Commonwealth Attorney-General's Department (AGD) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper; an initiative under Australia's Human Rights Framework (the Discussion Paper), 22 September 2011, available at: http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc/$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.doc

[2] Australian Council of Human Rights Agencies, *Submission, Consolidation of Anti-Discrimination Laws*, 1 February 2012 (ACHRA submission)

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encourage compliance, and effective mechanisms for enforcing equal opportunity law as a means of last resort.[3]

The Commission notes that, following the 2008 review of the *Equal Opportunity Act 1995* (Vic), there was a wholesale replacement of the legislation,[4] which reflected the need to introduce a legislative framework to address systemic discrimination and introduce measures to actively promote substantive equality.[5]

The Commission takes this opportunity to discuss some further, limited issues that could be addressed in the drafting of a Consolidated Act.

1. Further review of exceptions and temporary exemptions provisions

The Commission supports the recommendation made by ACHRA[6] that, if the decision is taken not to introduce a general limitations clause in a Consolidated Act (that would replace the permanent exceptions as far as possible), then a separate review of the existing exception and temporary exemption provisions currently in force in Commonwealth anti-discrimination Acts[7] should be conducted.

This review would scrutinise all permanent exception provisions, and the scope of the temporary exemptions power, for scope, application and consistency with human rights obligations and the objects and purpose of equal opportunity law. Recommendations could then be made in relation to whether each exception provision should be retained, amended or repealed in a Consolidated Act.

The Commission also generally supports ACHRA's recommendation[8] that clear statutory criteria for granting temporary exemptions be included in a Consolidated Act, and that the following factors be included in such criteria:

- exemptions should not be inconsistent with the objects and purposes of the Act;
- exemptions should encourage and exhort compliance with the law wherever possible (including by requiring timetables for compliance); and

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[3] ACHRA submission, pp. 6 – 7
[4] Now the *Equal Opportunity Act 2010* (Vic)
[5] See: Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report)*, June 2008 (the Gardner Review)
[6] ACHRA submission, Recommendation 49, p. 49
[7] *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth), noting that the *Racial Discrimination Act 1975* (Cth) does not have an express exemptions power
[8] ACHRA submission, pp. 33 – 34, Recommendation 32

- the decision-maker should take into account relevant human rights when making a decision.[9]

The Commission considers that, if a formal review of the exceptions and exemptions provisions in the Commonwealth Acts was conducted, such a review could provide a timely opportunity to revisit the statutory criteria for granting temporary exemptions, and the procedures that are followed by a decision-maker in considering temporary exemptions.

Specifically, the Commission considers that, should such a review occur, there could be merit in considering whether a Consolidated Act should vest the power to grant temporary exemptions with the Administrative Appeals Tribunal (AAT) rather than with the Australian Human Rights Commission (Federal Commission). The Commission notes that this model is applied in the Victorian jurisdiction, where the Victorian Civil and Administrative Tribunal (VCAT) has the power to consider exemption applications, and must consider certain statutory criteria, set out in section 90 of the Victorian Act, when doing so. While there is no review jurisdiction for exemption applications under the Victorian Act, review of AAT exemption decisions at the Commonwealth level could vest with the Federal Magistrates Court, which already has jurisdiction for determining anti-discrimination complaints.

When considering this option, the Commission notes that temporary exemptions granted under Commonwealth law apply nationally, and have the potential to affect a large class of people across jurisdictions. This means that the rights of a large class of people can be limited by the grant of one temporary exemption.

In light of this, the Commission considers that it could be appropriate for exemption applications (at a federal level) to be afforded the same public procedure and degree of administrative scrutiny as complaints of discrimination, and that an appropriate means of achieving impartial scrutiny of measures against the legal standards might be vesting this power with the AAT, as an independent tribunal. This approach could promote objectivity and consistency of approach to exemption applications, and would enable the Federal Commission to intervene as an expert body in exemption applications and make formal submissions on key points of law.[10] One outcome could also be a body of jurisprudence on the application of the exemption power under a Consolidated Act, which would in turn

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[9] Section 90 of the *Equal Opportunity Act 2010* (Vic) provides one example of a 'guiding' provision for granting exemptions. Section 90 of the *Equal Opportunity Act 2010* (Vic) relevantly provides that, when deciding whether to grant or revoke an exemption application, VCAT must consider whether the proposed exemption is unnecessary (for example, because the measure is a special measure and therefore not discrimination), and whether the proposed action is a reasonable limitation on the right to equality set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

[10] Further information about proposed changes to the powers and functions of AHRC is discussed further below at headings 6.4

promote consistency, and guide decision-making in relation to exemption applications at a State and Territory level.

Recommendation: that, in any review of the exception and exemption provisions in the Commonwealth Acts, the question of whether the power to grant temporary exemptions be vested with the AAT be included in the terms of reference.

2. Improvements to the Court process: litigation costs

The Commission notes that ACHRA explored a range of the pros and cons with the current costs jurisdiction of the Federal Magistrates Court and the Federal Court.[11]

Given our experience with different frameworks, the Commission is of the view that there is no real need for legislative change in terms of the costs jurisdiction of the Federal Magistrates Court and Federal Court.[12] ACHRA notes that the Federal Court and Federal Magistrates Court both have a discretion not to make a costs order in anti-discrimination matters, and that there has been a suggestion that the principle that costs follow the event should not be 'readily applied' to federal unlawful discrimination matters.[13]

The Commission considers that movement to a 'no-costs system' at the federal level would not adequately address the issues associated with unrepresented complainants in litigation, and could in fact cause other hardships to complainants which overshadow the risks of a costs order being made. One unwelcome effect of moving to a no-costs system would be to reduce the adequacy of compensation to successful complainants. In a jurisdiction where amounts of compensation awarded have traditionally been low,[14] this could be a serious disincentive for complainants bringing an action to court in the federal system. Further, the ability of complainants to obtain legal representation at first instance can be diminished where there is no prospect of recouping legal costs.

The Commission notes that, under the existing framework, complainants have the option of choosing their jurisdiction for making a complaint of discrimination, and can (in most cases) choose to take their complaint through a largely 'no-costs' system in a State jurisdiction, rather than pursuing their claim through the federal system. This choice is a useful one as it gives flexibility for complainants in different circumstances.

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[11] See: ACHRA Submission, pp. 62 – 64

[12] 6.3.3 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 following provisions: *Federal Court Act 1976* (Cth), section 43; *Federal Magistrates Act 1999* (Cth), section 79

[13] AHRC, *Federal Discrimination Law*, Chapter 8, Costs Awards, 8.3.3, available at: http://www.hreoc.gov.au/legal/FDL/fed_discrimination_law_05/fdl2005chap08.html;

[14] See: Discrimination Law Experts' Group, *Submission: consolidation of Commonwealth anti-discrimination laws*, 13 December 2011, available at: http://www.equalitylaw.org.au/elrp/submissions/;

Further, while some State tribunals do have the general discretion not to award costs in anti-discrimination matters, this does not necessarily equate to a total 'no-costs' jurisdiction, but rather is framed as a general presumption that parties each bear their own costs.[15] The Commission notes that in these circumstances, State tribunals have made substantial costs orders against complainants in anti-discrimination matters.[16] As noted in the ACHRA submission,[17] in one recent VCAT decision, the Tribunal ordered that an unrepresented complainant pay the respondents' total party/party costs for five full days of hearing, assessed on County Court Scale D.[18] VCAT accepted the respondents' application that subsections 109(b) and 109(c) applied, on the basis that the complainant's allegations were 'baseless, and a matter of invention' and because the complainant had unreasonably delayed the hearing by prolonging her cross-examination by 'making statements about her case', by producing documents during the course of the hearing which the respondent had to consider, and by getting married on a day listed for hearing.[19]

The Commission considers that there is particular risk in adopting a provision into a Consolidated Act that only enables a court to make a costs order where a party has acted 'unreasonably'.[20] The Commission is of the view that, given the relative balance of legal representation and resource allocation between applicants and respondents in anti-discrimination proceedings, there is a real risk that respondents will be more likely to successfully demonstrate that they have technically acted 'reasonably' in a matter when making costs orders, and more difficult for complainants to satisfy the same test, particularly in matters where complainants are unrepresented, and do not fully understand the consequences of a court or tribunal making a costs order. This has a particular impact on complainants with disabilities that impact on the way they can manage their own litigation matters.

The Commission considers that problems experienced by complainants in the federal anti-discrimination jurisdiction are better addressed by publicly promoting the dispute resolution functions of the Federal Commission as a no-cost and informal means of resolving complaints, and by enabling the Federal Commission to act as an advocate for complainants in court proceedings, where the complainant has consented to this course of action, and where the subject-matter of dispute deals with a serious or systemic issue, of an issue of public interest.

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[15] For example: subsection 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) provides that, as a general rule, parties pay their own costs. However, subsection 109(2) provides that VCAT may depart from this general rule and order that a party pay all or some of the opposing party's costs in a matter. Subsection 109(3) provides the conditions on which VCAT may make a costs order

[16] See for example: *Rae v Commissioner of Police, New South Wales Police Force (No 3)* [2010] NSWADT 254; *Finch v The Heat Group Pty Ltd* (Unreported, Victorian Civil and Administrative Tribunal, Harbison VP, 31 January 2011)

[17] ACHRA submission, p. 63 at [6.3.7]

[18] *Singh v RMIT University and Ors* (Anti-Discrimination) [2011] VCAT 1890

[19] *Singh v RMIT University and Ors* (Anti-Discrimination) [2011] VCAT 1890 per DP Coghlan, at [17] – [18]

[20] This approach has been suggested by the Discrimination Law Experts Group, in their 13 December 2011 submission, p. 26

The Commission considers that recognising the value of the Federal Commission pursuing matters that are in the public interest will result in better use of the 'public interest' test by courts, and should make it easier for appropriate matters to be treated as 'public interest cases'. This goes in some way to addressing the concern that responsibility for promoting substantive equality outcomes and addressing entrenched discrimination does not rest solely with individual complainants, either at a dispute resolution level or in a formal litigation framework.

Recommendation: that no legislative change is required to alter existing the discretion of the Federal Courts to award costs.

The Commission thanks the Commonwealth Attorney-General's Department for the opportunity to contribute to this consultation process. The Commission is happy to continue to engage with the Department on these issues and share our experience of the new Victorian legislation. We may provide further detailed comment in response to draft provisions as these are made available by the Attorney-General's Department.

Yours sincerely

Karen Toohey
Acting Commissioner