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## THE (HUMAN) RIGHT TO EQUALITY

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COVER STORY





# THE (HUMAN) RIGHT TO EQUALITY

Sweeping changes to equal opportunity legislation recognise that the human right to equality is as important as equality of opportunity. **By Anna Forsyth**

**T**he *Equal Opportunity Act* 2010 (Vic) ("new Act") was passed by Parliament on 15 April 2010 and came into operation on 1 August 2011. It replaces the *Equal Opportunity Act* 1995 (Vic) ("old Act") with the aim of modernising and strengthening Victoria's equal opportunity and human rights laws.

Like the old Act, the new Act defines and prohibits discrimination, victimisation and sexual harassment in Victoria. The legislative framework of both Acts remains largely unchanged in so far as discrimination is prohibited on the basis of certain personal attributes,<sup>1</sup> such as age, race and sex, in certain areas of activity, such as employment,<sup>2</sup> education and the provision of goods and services.

Despite its schematic similarity with the old Act, the new Act introduces significant amendments, which will change the way in which lawyers bring and defend equal opportunity claims in Victoria. Underpinning each of these changes is the recognition by government that laws capable of resolving the underlying causes of discrimination are required.

Soon after its introduction, the new Act was amended by the *Equal Opportunity Amendment Act* 2011 (Vic) ("amending Act"), which reinstated broader exceptions relating to religious

bodies and schools, removed the power of the Victorian Equal Opportunity and Human Rights Commission ("Commission") to conduct public inquiries and altered its power to investigate systemic discrimination.

## KEY CHANGES

### Meaning of discrimination

Under s7 of the new Act, discrimination means direct or indirect discrimination on the basis of an attribute. In addition, the meaning of discrimination now includes a contravention of the duty to make reasonable adjustments for people with a disability or reasonable alterations to common property. A breach of such a duty will constitute discrimination without the need to prove direct or indirect discrimination under the Act.

### Direct discrimination

Direct discrimination under s8 of the new Act occurs if a person treats or proposes to treat unfavourably a person with an attribute because of that attribute. This revised definition removes the requirement that the treatment was less favourable than would have been the case for someone without the attribute or with a different attribute in the

same or similar circumstances. The intention of this new definition is to avoid the technicalities involved with identifying an appropriate comparator when determining whether direct discrimination has taken place.<sup>3</sup>

This new definition of direct discrimination centres on the effects of the treatment on the complainant rather than on the differential treatment per se and, through the words "because of", requires causation between the protected attribute of the complainant and the unfavourable treatment to which the complainant is subject. Identifying an appropriate comparator is unlikely therefore to be a mandatory consideration in assessing whether direct discrimination has occurred. In practice, however, the comparator test may well remain useful in assessing unfavourable treatment. Thus, it remains to be seen whether a change in definition will translate into different judicial reasoning.<sup>4</sup>

### Indirect discrimination

The definition of indirect discrimination is intended to be simplified by the new Act. Indirect discrimination under s9 occurs if a person imposes, or proposes to impose, a requirement, condition or practice that is not reasonable and that has, or is likely to have, the effect of disadvantaging people with an attribute.





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The new definition:

- removes the requirement that the person claiming indirect discrimination must demonstrate that he or she cannot comply with the requirement, condition or practice;
- requires the person claiming indirect discrimination to instead demonstrate that the requirement, condition or practice has, or is likely to have, the effect of disadvantaging that person;
- removes the requirement that the person claiming indirect discrimination must establish that a substantially higher proportion of people without the attribute can comply with the requirement, condition or practice;
- shifts the onus of proof regarding the reasonableness of the requirement, condition or practice from the person claiming indirect discrimination to the person who imposed or proposes to impose such requirement, condition or practice; and
- extends and clarifies the factors to be considered in determining whether a requirement, condition or practice is reasonable.<sup>5</sup>

#### Extended application of sexual harassment

Importantly, the new Act extends the operation of the sexual harassment prohibition to people who perform voluntary or unpaid work.<sup>6</sup>

#### Positive duty

A fundamental reform is found in s15 of the new Act, which introduces a positive duty on a person to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible. This new duty is aimed at providing a proactive approach to eliminating systemic discrimination<sup>7</sup> and a breach of this duty may be investigated by the Commission.<sup>8</sup>

This duty will require lawyers to advise clients of their obligations under the new Act and may involve the implementation of organisational compliance and continuing quality assurance measures. In assessing the content of this duty, that is, whether a measure is reasonable and proportionate, several factors specified in the new Act<sup>9</sup> must be considered, including the size of the person's

business or operations and the practicability and cost of the measures required.

#### Special measures

Section 12 of the new Act strengthens equal opportunity laws in Victoria by explicitly providing for the implementation of special measures where the purpose is to promote or realise substantive equality. This new provision reflects the intention that special measures be viewed as a means of progressively realising substantive equality, rather than as an exception to discrimination as previously classified.<sup>10</sup> Thus, where members of a group with a particular attribute require special measures, any preferable treatment taken for the purpose of achieving substantive equality will not constitute discrimination under the Act.

Significantly, not all measures will be deemed special measures, there being factors that must be satisfied in ensuring that their purpose is necessary, genuine, objective and justifiable.<sup>11</sup> Where the person imposing the measure is unable to prove on the balance of probabilities that it is a special measure for the purposes of the new Act, such action may constitute unlawful discrimination against the group subject to the measure.

#### Reasonable adjustments

The new Act introduces a duty to make reasonable adjustments for people with a disability in employment, in education and in the provision of goods and services.<sup>12</sup> Historically, these kinds of obligations have been implied through the prohibition on indirect discrimination and through the "special services and facilities exceptions" under the old Act. In the context of employment, the duty to make reasonable adjustments applies only to employees and those offered employment – not job applicants.

The new Act provides guidance on the factors to be considered in determining whether an adjustment is reasonable. These factors aim to balance the needs of the person with the disability with those of the employer, educational authority and service provider. If, for example, a proposed adjustment will cause a disproportionate expenditure or disruption, then it is unlikely to be considered reasonable.<sup>13</sup>

The only exceptions to the duty to make reasonable adjustments arise where such adjustments are not reasonable or where the person with the disability cannot perform the genuine and reasonable requirements of employment nor participate in, access or derive any benefit from an educational program or the provision of services.<sup>14</sup>

#### Exceptions and exemptions

Section 13 of the new Act provides that discrimination is not prohibited where an exception or exemption applies.<sup>15</sup> In an attempt to balance competing rights, exceptions and exemptions prevent relief from being sought in relation to treatment that would otherwise fall within the definition of discrimination. A number of changes to these provisions have been made by the new Act.<sup>16</sup>

Importantly, under s90 of the new Act, the Victorian Civil and Administrative Tribunal ("Tribunal"), in deciding whether to grant, renew or revoke an exemption, must consider whether the proposed exemption is a reasonable limitation on the right to equality set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("Charter"). This amendment reflects the recent decision of Bell J, sitting as President of the Tribunal, in *Lifestyle Communities Ltd* (No 3).<sup>17</sup>

As reflected in cases after *Lifestyle Communities* (No 3), the likely impact of such analysis is to raise the threshold for granting exemptions in an attempt to find an appropriate balance between the right to equality and those other human rights with which it competes.<sup>18</sup>

Further, s32 of the Charter may have an effect on the construction of exceptions generally. In *Cobaw Community Health Services Limited v Christian Youth Camps Limited & Anor*, Hampel J held that when interpreting the religious exceptions under the *Equal Opportunity Act 1995*, she was required to do so by reference to s32 of the Charter.<sup>19</sup>

## KEY PROCEDURAL CHANGES

#### Dispute resolution

The complaints process under the old Act has been replaced with a dispute resolution mechanism. This means that instead of lodging a formal written complaint, a person can inform the Commission that he or she wishes to proceed with the dispute resolution procedure under s113 of the new Act. This change is designed to provide a quicker and more flexible response to claims of discrimination, giving the Commissioner discretion to use a wide variety of techniques such as making a telephone call to inform a person of their





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obligations, providing information on compliance or offering parties access to conciliation.<sup>20</sup>

This process is a significant change to that in place under the old Act. As a result of the new dispute resolution mechanism, the Commission no longer has the power to investigate individual complaints. Further, unlike the conciliation process under the old Act, participation in conciliation under the new Act is voluntary.<sup>21</sup>

The new Act also provides a person with direct access to the Tribunal pursuant to s122 without having to lodge a written complaint with the Commission, as was the requirement under the old Act. While s122 does not set a timeframe on applications, lawyers should be aware that Item 18 of Part 7 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) now allows the Tribunal to

summarily dismiss an application if the alleged contravention occurred more than 12 months ago.

### Investigations

Section 127 of the new Act allows the Commission, in limited circumstances, to conduct investigations into discrimination, sexual harassment or victimisation where the objectives of the Act will be advanced.<sup>22</sup> Although originally anticipated by the new Act, the amending Act has provided that the Commission is unable to enter into an enforceable undertaking or to issue a compliance notice following such investigation. Before the Commission undertakes an investigation, there must also be reasonable grounds to suspect that a contravention of the Act has occurred.

After an investigation, the Commission can enter into an agreement with a person about action required to comply with the Act, refer the matter to the Tribunal or make a report with respect to the matter to the Attorney-General or to the Parliament. The Commission can also compel the production of documents or the attendance of witnesses during an investigation as long as VCAT approves.

### Litigation

When appearing for clients, lawyers should be aware that s159 of the new Act allows the Commission, with leave of the court or a tribunal, to intervene in proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation. The Commission's power to intervene is potentially very broad and one that may well traverse a variety of jurisdictions.

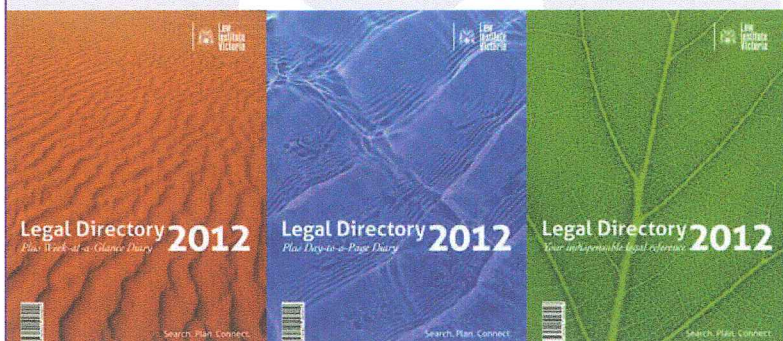
Equally, s160 of the new Act allows the Commission, with leave of the court or tribunal, to assist as a friend of the court where, among other considerations, the Commission is satisfied that it would be in the public interest to so assist.

Finally, lawyers should be cognisant of the provision for the issuing of practice guidelines by the Commission on any

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matter relating to the new Act. While practice guidelines issued pursuant to s148 of the new Act are not legally binding, a court or the Tribunal may consider evidence of compliance with such guidelines where relevant.<sup>23</sup>

## CONCLUSION

With the introduction of the new Act, Victoria will benefit from some timely changes to its equality laws, which recognise that eliminating discrimination is as much about upholding human rights as it is about promoting equal opportunity. This framework places Victorian lawyers in a unique position, providing a clear mandate to test the limits of the right to equality through robust casework and future litigation. ●

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1. No additional attributes have been introduced by the new Act, although the term "impairment" has been replaced with the term "disability" to reflect the language used in other Australian equal opportunity legislation. See Schedule "Further Consequential Amendments to Principal Act", *Equal Opportunity Amendment Act 2011* (Vic), s2.1.

2. This includes contractors via the definitions of "employee", "employer" and "employment" in s4 of the new Act. In addition, separate provisions apply to the employment of people by partnerships.

3. Victorian Parliament, *Equal Opportunity Bill 2010*, Explanatory Memorandum, pp12-13.

4. See *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62.

5. Section 9(3) of the new Act prescribes factors akin to those found in s7(2)(a)-(e) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which constitutes a reasonable limits test for the human rights protected therein. It is envisaged that they will overcome situations such as that arising in *State of Victoria v Deborah Shou* [2004] VSCA 71 where considerations of flexibility were sidelined in the imposition of government policy.

6. See the definition of "employee", "employer" and "employment" in s4 of the new Act.

7. Victorian Parliament, *Equal Opportunity Bill 2010*, Explanatory Memorandum, pp16-17. Section 15(5)(b) of the new Act states that this duty is imposed in addition to the duty of a public authority under s38 of the Charter. Section 38(1) provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

8. This occurs under the Commission's investigation powers in Part 9 of the new Act, provided the breach meets the prerequisites for Commission investigation set out in s127 of the new Act. Breach of the duty does not give rise to dispute resolution, nor can it be the subject of a complaint to the Tribunal; ss111 and 112.

9. Section 15(6) of the new Act.

10. Victorian Parliament, *Equal Opportunity Bill 2010*, Explanatory Memorandum, p14.

11. Section 12(3)(a)-(d) of the new Act. See also Victorian Parliament, *Equal Opportunity Bill 2010*, Explanatory Memorandum, p15.

12. See ss20, 33, 40 and 45 of the new Act.

13. See the examples provided following s20 of the new Act. See also s20(3) of the new Act.

14. See ss20(2), 33(2), 40(2) and 45(2) of the new Act.

15. Exemptions must be applied for and granted by the Tribunal for periods of up to five years. They can prevent a claim being made. Exceptions, however, must be proved to apply by a respondent on a case-by-case basis. The proven application of an exception can render otherwise unlawful conduct lawful.

16. See the report produced by the Scrutiny of Acts and Regulations Committee ("SARC") following a review commissioned in December 2008. See also the government's response tabled in parliament on 10 March 2010, which supports either fully, in part or in principle, 56 of SARC's 59 recommendations. See also Victorian Parliament, *Equal Opportunity Amendment Bill 2011*, Explanatory Memorandum, which explains the reasons for revisiting the exceptions as set out in the amending Act.

17. (*Anti Discrimination*) [2009] VCAT 1869.

18. See *Travel Sisters (Anti-Discrimination Exemption)* [2009] VCAT 2427. See also *Carey Baptist Grammar School Ltd (Anti-Discrimination Exemption)* [2009] VCAT 2221; *Wesley College (Anti-Discrimination Exemption)* [2010] VCAT 247.

19. [2010] VCAT 1613 (8 October 2010) per Hampel J at [25].

20. Victorian Parliament, *Equal Opportunity Bill 2010*, Explanatory Memorandum, p52.

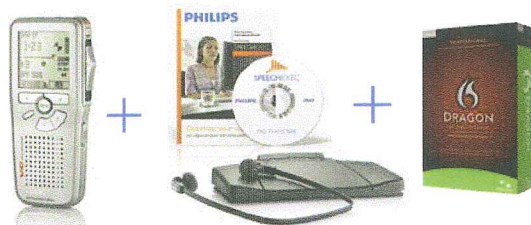
21. See s112(d) of the new Act.

22. See s21 of the *Equal Opportunity Amendment Act 2011*.

23. The Commission must publish notice of the issue of practice guidelines in the *Government Gazette*, in an appropriate publication and on its internet site in accordance with s150 of the new Act.



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