



SUBMISSION TO THE REVIEW OF THE EQUAL OPPORTUNITY ACT 1995

January 2008

**Belinda Lo
Meghan Fitzgerald**

Fitzroy Legal Service
124 Johnston Street
FITZROY 3065
Phone: (03) 9419 3744
Fax: (03) 9416 1124
Web: www.fitzroy-legal.org.au

Fitzroy Legal Service gratefully acknowledges the contribution
of

The logo for Loddon Campaspe Community Legal Centre features a stylized red and white graphic element resembling a flag or a set of horizontal lines to the left of the text 'loddon campaspe community legal centre' in a lowercase, sans-serif font.

**Loddon Campaspe Community Legal
Centre**
29 Queen Street
BENDIGO 3550
Ph (03) 5444 4364
Fax: (03) 5441 1033
Web:
www.communitylaw.org.au/loddoncampaspe

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Ltd*

ABOUT US

Fitzroy Legal Service

Fitzroy Legal Service (“FLS”) is one of the oldest community legal centres in Australia. Located in the inner Melbourne suburb of Fitzroy, our doors first opened in 1972 to provide casework to clients who live, study or work in a catchment area consisting of Fitzroy, Collingwood, Abbotsford, Brunswick, Richmond, Carlton, East Melbourne and Clifton Hill.

Our service operates both day and night services to best meet the needs of clients and to take full advantage of the many highly experienced lawyers and willing legal students who provide their valuable skills on a pro bono basis.

The service also plays a significant role in the areas of law reform and community legal education, which is closely bound up with the practice of preventative law, demystification of the law, self-help and empowerment. FLS also has a long history of running public interest cases and working closely with communities and individuals experiencing discrimination.

Our experiences in the casework practice serve to inform our law reform and community legal education activities, and we therefore hope that our submission will be given careful consideration during the review of this very important statute.

FLS has also been engaged over a number of years in casework research and advocacy around criminal records and employment issues. In 2005, FLS in conjunction with Jobwatch produced ‘Criminal Records in Victoria: Proposals for Reform’, a report addressing the discriminatory impacts of irrelevant criminal records upon a person’s ability to obtain gainful employment. We have addressed similar issues in this submission and have attached the 2005 report as an annexure.

ABOUT LODDON CAMPASPE COMMUNITY LEGAL CENTRE

Loddon Campaspe Community Legal Centre (“LCCLC”) is a generalist community legal centre based in Bendigo, Victoria. It provides free legal services that target disadvantaged and vulnerable individuals living in the local government areas of Macedon, Mt Alexander, Central Goldfields, City of Greater Bendigo, Loddon and Campaspe. LCCLC seeks to improve access to justice by undertaking community legal education and engaging in law reform and policy work.

The writers would like to thank the following for their advice and research assistance in preparing this submission

Chloe Duncan
Sarah Capper
Gemma McInerney
Giana Urma

Jennifer Anderson
Peter Noble
Karen Gurney
Stephen Stokes

Robin Inglis
Hui Zhou
Patrick Brady
Wendy Sengotta

Overview

We are pleased to have the opportunity to respond to this Review (“the Review”). The Equal Opportunity Act 1995 (“the Act”) is generally structured in a manner that makes for ease of reading and interpretation, especially as the jurisdiction encourages self-representation by complainants, at least in the initial stages where their matters are being considered by the Human Rights and Equal Opportunity Commission (“the Commission”).

Whilst the complaints based system is useful for those empowered enough to make complaints, FLS notes that our clients are unlikely to be able to use this system effectively due to systemic disadvantage which results in significant disempowerment.

In this submission, we discuss areas of the Act that have created problems for our clients. We recommend changes to the conciliation process, amending existing and adding new attributes to the Act and overhauling the Commission’s role. We note that due to the time constraints in responding to this Review, we did not have the opportunity to fully consult with our members and clients. We hope to have this opportunity in the future as the Reviewer’s consultation process evolves.

We also note that Part 1 of the Review does not incorporate discussion of the exceptions and exemptions in the Act. As the exceptions and exemptions to discrimination comprise of more than half of the Act’s provisions, it is clear that these provisions are significant in the review of the Act.

For example, we note in relation to the ‘gender identity’ attribute that the exceptions under section 27B would seem to do more to consolidate discriminatory practice than to negate its acceptability in our culture and community.

We look forward to a thorough review of these sections during the second part of this Review.

Why should the law be reformed?

Discriminatory practices and conduct continue to exist in Victoria. Anecdotal evidence of FLS indicates that discriminatory practices, particularly in employment, remain significant. This is notwithstanding the existence of the Victorian and federal legislations prohibiting discrimination in various areas. This is also despite significant educational initiatives over the last few years.¹

1. Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth); Human Rights and Equal Opportunity Commission Act 1986; Equal Opportunity Act 1995; Racial and Religious Intolerance Act 2001; Victorian Charter of Human Rights and Responsibilities Act 2006

Educational Initiatives include:

“Discrimination. It’s Still against the Law” developed by Workplace Rights Advocate/Equal Opportunity Commission, to “ensure that people are aware of their equal opportunity rights at work”.

Pregnancy and Work Postcard http://www.humanrightscommission.vic.gov.au/postcards_pregnancy.pdf

Parents and Work Postcard http://www.humanrightscommission.vic.gov.au/pdf/DIIRD%20212%20-%20postcards_parent.pdf

Carer and Work http://www.humanrightscommission.vic.gov.au/pdf/DIIRD%20212%20-%20postcards_carer.pdf

Disability Rights Factsheet: http://www.hreoc.gov.au/disability_rights/publications.html

Sex Discrimination Factsheets: http://www.hreoc.gov.au/sex_discrimination/publication/get_the_facts/GTF_kit2006.pdf

Information for Employers: http://svc013.wic009tp.server-web.com/info_for_employers/index.html

Equal Employment Opportunity Factsheet: <http://www.labor.net.au/campaigns/uwaw/background/files/Factsheet%20EEO.doc>

We submit that in practice, the application of the Equal Opportunity Act in establishing discrimination is cumbersome and unnecessarily onerous upon an individual. The Commission's focus upon conciliation fails to acknowledge the generally stark power differences between opposing parties. Most of the time, an individual will be pitted against a well-resourced organization, which is more likely to be able to afford to retain legal representation. Further, the individual party is less likely to be aware of legal processes, remedies or strategies. As such, the individual party is more likely to withdraw from proceedings or agree to premature settlements due to the lack of legal representation, support or guidance.

Whilst equality of opportunity is a worthy concept, the current EOA conciliation process fails to ensure that equality of opportunity applies across the board in terms of 'evening the starting point' between the parties. The conciliation process is not considered effective or protective of the individual party. In 2007, Western Suburbs Community Legal Service undertook a project to investigate people's experiences of racism and the discrimination law process in Victoria. It was found that participants were wary of the conciliation process as it failed to support the individual complainants:

Yeah the whole process even at EOCV, we were disgusted with the mediators, we were disgusted they made the mistake of saying 'poor Mr. [other party] is so sorry what do these women want' sort of thing. It was really atrocious. Because he was saying to them "I'm really sorry, I've told these women I am sorry for what I have done.' He was playing the victim basically. The mediators are supposed to be impartial but they proved that they weren't being. I didn't feel safe in the process at all.²

The Western Suburbs Legal Service report notes that in "[i]n some cases, interviewees felt further discriminated against during the process, discouraging them from making further complaints or recommending the process to others."³

It is submitted that the Commission should either a) take a more proactive role in assisting individual complainants to run their cases (including the ability to provide legal advice), or b) ensure that the opposing parties' starting position for any type of pre-action procedures are equal. In recognition of 'evening the starting point' it is proposed that either:

- a) in circumstances where the parties' bargaining power is clearly unequal, the onus of proof should shift from the complainant to the defendant to disprove that it has discriminated against the complainant; or
- b) the Commission should play an active role in representing or facilitating representation of the interests of the complainant

Pregnancy and discrimination at Work Factsheet:<http://labor.net.au/campaigns/uwaw/background/fspregandwork.html>
"Racism: No Way" Contains links to various anti-racism resources for schools teachers and students across Australia:
<http://www.racismnoway.com.au/strategies/programs/>
VicHealth-Discrimination and Violence:<http://www.vichealth.vic.gov.au/Content.aspx?topicID=113>

² Western Suburbs Legal Service (Vic), "Racial & Religious Discrimination, Vilification & Harassment Project", 2007 44

³ Ibid., 43

With the introduction of the Victorian Charter for Human Rights and Responsibilities (“the Charter”), this is a timely opportunity for the EOA to embrace a wider purpose, that it, to recognise discrimination as a breach of human rights as recognized expressly in the Charter.

The elimination of discrimination is a laudable goal. In order to achieve this, it is submitted that the Commission should take an active leadership role in addressing discrimination issues. This would include not only education of organizations and other bodies, but also the ability to bring discrimination actions of its own accord and performing an advocacy and enforcement role.

Systemic discrimination

In the last decade, the federal Coalition has overseen an atmosphere where minority groups have been continuously vilified and publicly attacked. Australia’s cultural and social environment has seen changes which have resulted in the following shifts: erasing of the word “multiculturalism” from political discourse; tacitly encouraging racist motivations behind the violent Cronulla race riots; increasingly negative publicity about the Indigenous community; and stigmatizing of new arrivals and refugees to Australia, particularly those from Middle Eastern or African backgrounds.

The environment has also altered to ensure that punitive sentencing has become a bipartisan priority for governments. Subsequently, the greater use of Police Checks has abounded in all areas of employment and also affected the volunteering sector. (We will discuss the impact of discrimination on the basis of irrelevant criminal records upon our clients further in this submission.) These patterns have only served to further entrench systemic discrimination in Australia.

The Commission should be more proactive in leading the shift to prioritizing the recognition and celebration of cultural inclusion in our society. In light of the significant changes in Australia’s political and social environment, it is essential that the Commission vigorously utilise cultural inclusion methods as a foundation to tackle systemic discrimination.

It is our view that the majority of our clients are affected by systemic discrimination. Systemic discrimination is often disguised in institutionalized “policies and procedures”, “common practices” and “work cultures.” The subtle, insidious nature of systemic discrimination is difficult to name and identify. However, the impact of systemic discrimination is widely felt and can affect communities and individuals for generations⁴.

We believe the Charter has created a receptive environment for the Commission to take an increased role in the monitoring and evaluation of protections against discrimination in Victoria. In particular, we believe the Commission should embrace the opportunity to engage in research, education and regulation around issues of systemic discrimination relating to protected attributes.

⁴ ⁴ Western Suburbs Legal Service (Vic)., Racial & Religious Discrimination, Vilification & Harassment Project”, 2007

We also support the submission of the Federation of Community Legal Centres (Vic) that recommends that the Commission be resourced to undertake substantial and systematic research on the existence, nature of, and prevention of systemic discrimination.

Discrimination in the media

We also believe the Commission should be actively engaged in developing professional guidelines for the media that respond to the attributes protected under the Act and the rights under the Charter.

The impact of media in developing discriminatory stereotypes and discourses is a pivotal issue in the promotion and protection of rights. The capacity of media representations to send shockwaves through minority communities in Victoria was again made evident in stories late last year linking Somali Youths in Australia to terrorist training facilities in Africa. The aftermath of such reports in terms of the way members of minority groups experience and process these accusations can be extremely detrimental.⁵

We believe the Commission should be actively engaged in promoting professional and ethical practice guidelines for the industry that recognize the attributes protected under the Act and promote the rights of all community members to be free of prohibited discrimination. We note that freedom of speech in this country, including freedom of political speech, is subject to a number of restrictions directed to the protection of the rights and freedoms of others.⁶ We recommend also that the Commission have the power to review the operation and effectiveness of these guidelines every few years.

Social and economic costs and benefits to reforming the law

Discrimination largely affects communities who are already marginalized either socially or economically. The impacts of discrimination can result in significant health issues including life expectancy rates, infant mortality rates, diabetes, violence and mental health issues.⁷ The impacts of discrimination can also affect a refugee or new arrival's ability to resettle successfully in Australia.⁸

Discrimination additionally impacts detrimentally upon marginalized communities' ability to participate effectively in society. FLS' client base consists of people who experience discrimination largely on the grounds of social status; homelessness, medical status, race and criminal record history. We have noted that our clients who experience discrimination also have associated adverse health issues and are often isolated in society.

⁵ Human Rights And Equal Opportunity Commission (HREOC) Ismae-Listen: National consultations on eliminating prejudice against Arab and Muslim Australians (2004) available at http://www.humanrights.gov.au/racial_discrimination/ismae/report/index.html

⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

⁷ VicHealth *Discrimination and Violence* as determinants of mental health and Wellbeing January 2005 Research Summary 3; Glover JD, Hetzel, DMS, Tennant, SK., *The socioeconomic gradient and chronic illness and associated risk factors in Australia.*, 2004 Public Health Information Development Unit, The University of Adelaide, South Australia, Australia (also found at <http://www.anzhealthpolicy.com./content/1/1/8>)

⁸ November 2007, "Experience of Discrimination among refugee youth in Melbourne' 5 year study , Good Start. www.latrobe.edu.au/rhrc/refugee_youth.html

Case studies

Client A has lived in public housing since the 1970s. She first identified as transgendered approximately thirty years ago. As a result of her gender identity, she has been subjected to discriminatory behaviour from a number of service providers and has been violently attacked on a number of occasions. She has attempted to seek assistance from public authorities in relation to the violence, but has been treated with ridicule and contempt. Client A has undergone legal proceedings in relation to the attacks, but she has felt disheartened by the attitude of the police, court officials and other government bodies.

Client A has no family and a limited social circle. She has suffered from depression and mental health issues for many years.

Client B was employed in government department for 3 years. Client has a hearing disability. He resigned from his employment as he felt that he was being discriminated against due to his disability. His fellow colleagues had also taunted him about his disability, and the workplace did not address or prevent this behaviour.

The client entered into legal proceedings, and the government department offered to settle the matter but refused to provide financial compensation. The client lived alone, and did not have any family supports. He also did not have a support worker to advocate for his case. He was extremely isolated and decided to discontinue his claim as he was too distressed to continue the proceedings.

The social costs of discrimination can include higher rates of unemployment, growing pressures upon the public healthcare system, and increased numbers of early school leavers. This would result on a broader scale to decreased workplace and lifetime productivity.

Additionally, discriminating against a job applicant due to an irrelevant criminal record results in a smaller pool of able workers from which to choose. While the individual discriminated against bears a personal cost in terms of less or lack of opportunity, lower self-esteem and wealth, the costs of discrimination would result in lower productivity, alienation and resultant social instability. Obviously, this would have wider implications due to the subsequent burden on those (including the government) required to support victims of discrimination.

Case study⁹

Client C entered a contract of employment as a cleaner with a private aged care employer. Client C had a significant employment history with the employer and was a diligent employee. Client C was employed on a casual basis. This income was a critical supplement to Client C's Carer pension. She was the sole earner in her family. Client C's work duties included general cleaning. She did not provide any nursing or personal care services.

⁹ We thank Peter Noble from Loddon Campaspe Community Legal Centre for his assistance in this section of the submission. See Annexure – Case studies for a more detailed description of this and other case studies from LCCLC

She had been charged with possession and use of marijuana some years ago. No convictions were imposed. As part of her employment contract, she was required to disclose any convictions not more than 6 months old. According to the contract, failure to disclose would result in instant dismissal.

The consent form included a question whether the client had any convictions, findings of guilt and/or pending charges against her that were less than 10 years old in Victoria. Client C consented to the police check and indicated on the consent form that she did not have any prior convictions. She mistakenly believed that this question pertained only to findings of guilt for which a conviction was formally imposed.

After Client C's employer in due course received the police check, her employment was immediately terminated. When Client C tried to clarify with her employer that she did not have any convictions, the employer refused to engage in any negotiations.¹⁰ Client C suffered immediate financial disadvantage upon her termination. Her income was a vital supplement to her carer's pension.

Client C's employment was a significant source of personal pride. She believes in the value of work and the importance of demonstrating this ethic to her children.

Shortly after Client C was terminated she was forced to relocate from her private rental accommodation. Client C had been in private rental for eight years, notwithstanding the fact that she and her family would have easily qualified for public housing. Client C had to relocate because the landlord was assuming occupancy of the dwelling as his primary place of residence.

Client C applied for many private rental homes in her locality and was advised on several occasions that because she didn't have any income in addition to her social security payments that she would not be accommodated privately. After several weeks of trying, Client C secured emergency accommodation (transitional housing) funded by the State Government.

If effective protections reduce the flexibility of employers to discriminate at will, it stands to reason that introducing such protections could have a detrimental economic impact on employers. They would have to follow due process when considering the relevance of an offence, and the time and effort taken in doing so could be characterised as a cost. The risk associated with hiring someone with any criminal record, notwithstanding its irrelevance, could also be considered as a cost.

However, these potential costs must be weighed against the cost of discrimination against the individual. The perceived risk factor could also be seen as an economic opportunity, if individuals are provided with the chance to prove themselves to be trustworthy and are given appropriate workplace support.

An example of good practice

Toll is a company which has demonstrated how the perceived risks associated with employing people with criminal records can become a financial opportunity.

¹⁰ Client C was unable to claim unfair dismissal as she was a casual employee. She instead complained to HREOC on the basis that she had been discriminated against in employment because of her criminal record. The matter has yet to be resolved.

Based in St Kilda, in inner Melbourne, First Step is a not-for-profit organisation assisting people who are dependent on drugs.¹¹ Many of these people also have criminal records.

Since 2004 **Toll** have been deeply involved with First Step, providing not only financial support but time and expertise as well. Toll's connection with First Step has led directly to the development of the Second Step program.¹² Second Step:

... is designed to offer employment experience for people who have overcome their drug addictions and successfully completed a preparation for employment training program with the Disability Employment Action Centre (DEAC).

The initial selection of potential candidates for the Second Step is made by the team at First Step. DEAC then provides specific training programs for those who have been absent from the workforce for an extended period as a result of their addiction.

Successful candidates are then offered employment and training, under special conditions, within the Toll Group for a period of twelve months (or 24 months part-time), as well as on-site mentoring in conjunction with continued support of the First Step program, DEAC and the Toll Chaplaincy program.

Toll employees have embraced the concept, extending the same non-judgmental approach to candidates as is fostered at First Step. Genuine commitment is shown by all those concerned, and candidates who have begun employment through Second Step prove to be enthusiastic members of the Toll community, whose contribution to the work place is recognised by colleagues and supervisors alike. They are valuable ambassadors for the ideals and goals of the First Step and Second Step programs, and Toll is proud to be able to participate in this marvellous combination.¹³

No economic modeling of the effect of preserving the status quo or introducing reforms is provided by this report. However, we suggest that reforming the law to prevent discrimination to the greatest extent possible would result in a more cohesive society that consists of members with wide and varied skills and experiences to support sustained economic growth.

A recent UN Report¹⁴ measured the social costs of gender inequality in the Asia-Pacific region, finding that the region was losing between US\$42-\$47 billion a year because of restrictions on women's access to employment opportunities, and US\$16-\$30 billion a year because of gender gaps in education. This amounts to a significant opportunity cost.

In many of the cases that we have seen, effective protection from unreasonable discrimination would have significant benefit not only to those affected individuals but also to the community generally. Some of the costs of exclusion from employment include welfare dependence, loss of human resources, wasted expenditure on study/ training and

¹¹ Toll Holdings Limited Annual Report 2006 p32.

¹² Ibid., pp32-33

¹³ Ibid., p33

¹⁴ United Nations Economic and Social Survey of Asia and the Pacific 2007

so on. In some cases increased alienation and recidivism should also be included as a long-term community cost of failing to provide appropriate protection.

Are the current ways of preventing discrimination currently working?

The EOA currently does not equip the Commission with tools or mechanisms to proactively prevent discrimination either on an individual or systemic level.

Whilst the Commission has a strong reputation for public education, it is submitted that the Commission's powers require expansion in order to effect real cultural change.

As stated above, we believe the Commission's complaints processes are unsuitable in addressing the needs of marginalized individuals, due to the lack of support mechanisms and the inability to provide or resource legal representation. Whilst the Commission is able to provide free complaint handling and dispute resolution services, the processes have been criticised by users as unhelpful and unsupportive.¹⁵ Complaints based systems work well for groups of people who are already empowered to self-represent or obtain legal representation.

The first objective of the Act is to promote recognition and acceptance of everyone's right to equality of opportunity. This objective should be recognized by the Commission at the outset in its complaint handling processes. This would include recognizing that marginalized community members will not necessarily have had the same opportunities to acquaint themselves with legal processes or terminology and that the Commission should be actively engaged in assisting these community members. This would then ensure that experiences such as the following need not reoccur:

I was shocked that the EOC process wasn't as I thought it was. If someone has broken the law, they will deal with the law. Even if there was support from the EOCV to write up our complaint, I remember that being a task in itself. I remember very clearly to begin with they asked us what we wanted as an outcome. I was like hang about, it sounds like an easy thing to do but we had no idea. We wanted someone to fix the problem not knowing that was part of the process, that they wanted us to fix the problem¹⁶

As the current system relies on individuals making complaints, it is difficult, if not impossible, to address many discrimination matters. The Review discussion paper notes that if the Commission became aware of discrimination via the inquiry line, the Commission is not currently empowered to initiate an investigation ex officio. Whilst it is important to protect an individual's privacy, it should also be acknowledged that individuals often do not feel empowered enough to initiate proceedings themselves. The fear of reprisals including the risk of employment termination is a significant factor in the decision not to pursue legal actions against discriminatory practices.¹⁷ Furthermore, anecdotal evidence suggests that complainants feel discouraged by the conciliation process and

¹⁵ Western Suburbs Legal Service (Vic.), Racial & Religious Discrimination, Vilification & Harassment Project", (year), 44-46.

¹⁶ Ibid., 45

¹⁷ Ibid..

therefore choose not to pursue unsuccessful conciliation outcomes to VCAT. It is understood that the potential legal costs and lengthiness of the VCAT anti-discrimination processes also act as a deterrent for our clients in pursuing this avenue of redress.

We therefore submit that in the event the Commission obtains consent from an individual, the Commission should thereafter be empowered to actively investigate potential individual discrimination claims.

This is separate to and in addition to the discussion in the Review paper of the Commission's ability to make a representative claim. We support the submission of the Federation of Community Legal Centres (Vic) ("the Federation") as regards amendments to the Act so that the representative mechanism, similar to that in the Human Rights and Equal Opportunity Act (Cth) applies.

FLS has been approached on recent occasions by community organizations with an interest in pursuing collective actions in relation to systemic discriminatory practices – e.g. targeting by enforcement authorities, and misrepresentative biased media reporting.

Attributes

In relation to the present attributes protected under the legislation, we would suggest that some attributes be redefined to reflect contemporary understandings of social constructed identities and the paradigm of individual and community empowerment that the Act should be involved in promoting.

We also recommend the inclusion of new attributes to give broader protection to those in our community experiencing economic social and cultural vulnerability, disadvantage and related discrimination

FLS supports the views expressed by Vivaidis in relation to this aspect of the Review.

Amendments to existing attributes

We suggest the following amendments to existing attributes in order to reach the above recommended standards:

- ***Impairment***¹⁸

We consider the language presently used is insensitive to the need for individuals utilising protection under the Act to engage in positive self-identification. In particular we point to the terminology in the Act such as 'malformation',¹⁹ 'disfigurement',²⁰ 'disease',²¹ and 'disorder',²² should be amended to reflect the ideal community vision that values difference. The current terminology is problematic as it portrays those who may fall within this definition as having a deficiency. In light of ensuring inclusiveness, it is recommended that

¹⁸ section 4, EOA

¹⁹ *Ibid.*,

²⁰ *Ibid.*,

²¹ *Ibid.*,

²² *Ibid.*,

the 'impairment' attribute be rephrased as ***'diagnosed medical status or engagement in treatment'***.

The concept of 'medical status/ engagement in treatment' enables those who are able to show their connection with the attribute to retain independent self-identifying language. For instance, an individual who has a diagnosed mental illness may not necessarily feel empowered through identification with that attribute, but is less likely to experience disempowerment by utilising an external diagnosis in nominating an attribute. Included in the medical status/ engagement in treatment attribute would be those matters already covered by the Act – e.g. the diagnosis and treatment of psychiatric conditions, conditions such as Hepatitis C and HIV/AIDS, and a wide variety of other diagnosable medical conditions.

Additionally, those included in the ambit of protections are those persons with drug and alcohol conditions. This protection would operate within a context wherein some forms of drug use are illegal and cannot therefore be given protection per se as an attribute under the Act. However, where persons affected are engaged in legal forms of treatment such as maintenance programs protection, should be given against discrimination on the basis of such engagement with treatment. The economic arguments supporting such an approach include facilitating rehabilitation and re-entry into the workforce as discussed above.

We envisage affected individuals would be given the opportunity to access their daily treatment (i.e. pick up their maintenance dose at a local chemist) by a workplace in much the same way as a diabetic person is permitted the opportunity to administer insulin if necessary. It is our experience that many individuals experience difficulty in coordinating working hours with picking up their dose at the chemist who may have similar operating hours. Issues arise also where individuals fear being identified as being on a maintenance program if they regularly pick up their dose at a chemist in the vicinity of their place of employment. Additionally, we note that it is understood optimum treatment outcomes for individuals on maintenance programs involve dosing in the earlier parts of the day.

- ***Gender Identity***²³

In relation to the gender identity attribute, we recommend the exclusion of 'on a bona fide basis' from the definition of this attribute. This definitional approach creates a paradigm wherein a person's identification with a gender may be otherwise than on a bona fide basis, and does not add anything meaningful or of value to the present definition.

In this context, we endorse the contents of the submission put forward by the Australian W-O-M-A-N Network.

Inclusion of new attributes:

- ***'Irrelevant Criminal Record'***

We strongly believe that the new Act should offer protection to individuals with a criminal history from unreasonable discrimination in pursuing the right to work.

²³ EOA s 4

In failing to provide enforceable remedies, we believe the protection afforded at Federal level by the Human Rights and Equal Opportunity Commission Act is inadequate, and should in any case, be buttressed by State recognition and protections. The protected attribute could be phrased similarly to federal provisions in prohibiting discrimination on the basis of an irrelevant criminal record, with relevance further defined as involving grounds related to the inherent requirements of the job.

We note the present policy of disclosing all findings of guilt (including non-conviction records) for a period of 10 years includes in its ambit a wide proportion of community members who may have been charged for a minor offence at some stage in their lives. We mention also the massive increases in the number of criminal record checks conducted in various fields of employment over the past ten years. This occurs alongside increased legislative regulation of specific areas of employment/ voluntary work, such as aged care and services, teaching, and working with children.

We believe the prejudicial impact of a criminal record history is significant, as employers tend to be increasingly risk-adverse and industries increasingly regulated. Our client base presents with a consistent stream of matters in which discrimination and exclusion from employment and voluntary work is experienced (often overtly) on the basis of criminal record history.

We have numerous case studies that demonstrate the need for irrelevant criminal record to be included as a new attribute. However, we have included only a few in this submission. For further information please refer to Annexure "Criminal Records in Victoria: Proposals for Reform"²⁴

Case studies

Client D was found guilty eight years ago with 'Behave in Offensive Manner Public Place' several years ago as a result of being picked up by police for urinating in a public place. When the matter was heard no conviction was recorded and Client D was fined \$150.

Client D is an older man and applied to volunteer at a charity in his local area. When his criminal record check was completed his application was rejected. Client D suspected he was being viewed as a 'flasher' as a consequence of his record though no one had discussed this with him.

Client D has no other criminal prior history.

On Client D's behalf we applied for police records relating to his offence so that the true nature of the offending could be made clear from the outset the next time he applied for a position doing charity work.

Later Client D discussed this issue with one of the coordinators at another charity where he had been volunteering for a lengthy period of time. The coordinator there agreed that had

²⁴ Fitzroy Legal Service and JobWatch Criminal Records in Victoria: Proposals for Reform (2005) is also available at http://www.fitzroy-legal.org.au/law_reform_projects.html

We are indebted to the numerous case studies provided by Loddon Campaspe CLC, Job Watch and the Federation of Community Legal Centres (Vic).

she not known Client D and seen the further information, she would indeed have assumed he was a flasher and would not have given him permission to volunteer with their organization.

Client E has recently completed a degree that will allow him to work as a teacher. Nine years ago he was found trespassing after hours at the local park near his home. He was found guilty of trespass but no conviction was recorded.

Client E was required to give written consent to a criminal record check by the Department of Education. At the time of filling out the relevant forms he was unsure as to whether he had a criminal record that he was obliged to disclose. At the time of trial he had been told by his lawyer that the 'no conviction' meant his record would not be disclosed in the future. Client E indicated he had not been found guilty of any criminal offences.

Client E later received correspondence indicating his fitness to teach was in question as a result of his misrepresentation. We were able to assist Client E in making representations as to fitness and he has subsequently been admitted to teach. However, this was an extremely traumatic and frustrating experience for Client E.

In 2005 Client F²⁵ applied for part-time employment as a disability support worker at a private disability support service.

She was eminently qualified for the role having been a disability services officer within the public service, and had been a direct case worker for 13 years.

Given her background and desire to obtain more “family friendly” employment (Client F has young children), she responded to the job advertisement, submitting her application and resume. She obtained an interview and was interviewed by the program manager. The interview was very favourable and Client F was informed that assuming that all paper work was in order, she would be offered a position.

Client F informed the manager that she had had a police check within the last couple of years (Client F had been the president of a local kindergarten) and there had been no disclosable outcomes. The employer clarified that the check needed to be within the last six months. Therefore, Client F completed her police record consent form

Within weeks Client F received correspondence from the service informing her that all employment vacancies had been filled. Client F had not been successful. The police record check was enclosed.

Contrary to the earlier check in 2003 undertaken for the purposes of the Kindergarten role (which contained no disclosable outcomes) this check disclosed a range of offences. The earlier offences in 1987 and 1992 (the 1992 offence related to the 1987 matters) were all without conviction and occurred when Client F was 18. They included three counts of theft, using insulting words and indecent language in a public place, and failing to answer bail. This group of offences did not appear on her 2003 check as 10 years had elapsed since they were first committed.

The offence in 2004, also without conviction, related to a firearm offence of possessing ammunition without a licence. Client F did not own a gun and had two old shotgun cartridges in her possession, which had previously belonged to her step father. The cartridges were bundled up with other possessions given to Client F by her mother who lived in Tasmania. (Police found the cartridges while searching Client F's house on the suspicion that Client F's brother, residing with her at the time, had been using drugs).

Given the subsequent offence in 2004 all previous offences were disclosable under Victoria Police procedures. Client F had pleaded guilty to the firearms offence but now wonders whether this was the right course to have taken given that mere findings of guilt are disclosable and that this offence triggered the disclosure of the earlier offences

Client F attempted to explain the context of her history to the employer to no avail. She believed that she was unlawfully discriminated against on the basis of her criminal record as the employer had not reached the relevant threshold in assessing her as a person of unsuitable character.

Client F did not wish to pursue a complaint to HREOC and has resigned herself to remaining in her current employment until the most recent charge lapses under Victoria Police protocols.

²⁵ We thank Peter Noble for supplying this case study. For fuller discussion of this case study, please see Annexure attached.

▪ **‘Social Cultural and Economic Status’**

We submit that a new attribute of ***Social, Cultural and Economic Status*** should be included in the EOA.

The inclusion of protections in relation to this broader attribute is vital to address a range of discrimination issues that are not adequately addressed under the present Act.

Specific matters that should be included in the definition of this attribute include

- being a recipient of welfare payments;
- experiencing homelessness/ choosing a 'transient' lifestyle
- maintaining cultural practices different to those of the dominant culture.

We consider protections in relation to this broader attribute particularly important in addressing issues of systemic discrimination that are connected to the social, cultural or economic status of those affected, (without detracting from the necessity to address issues of systemic discrimination in relation to other attributes).

From our casework experience, we have noted recipients of welfare payments will often experience extreme difficulty in the private rental market. If people are unable to obtain accommodation from the Department of Housing will ultimately find themselves paying around 70% of their income for sub-standard accommodation in rooming houses and caravan parks. This is significantly more than they would be paying for private rental accommodation. We note the situation has been reported to be the same for some individuals engaging in lawful employment in the sex industry regardless of their level of income.

Community members who are more likely to make use of public spaces, (such as public parks, sidewalks and other facilities) are frequently targeted by laws and policing activities that indirectly operate to criminalize their social cultural and/ or economic status. We would note in this context that racial signifiers also frequently play a significant role in this context. Common instances include laws and policing relating to public drinking, and the issuing of exclusion orders at bail or sentencing stage to prevent individuals re-entering a designated area. The Commission should have clear messages regarding the equal rights of community members to the use and enjoyment of public space, and should be active in monitoring and responding to laws and policing activities that are primarily directed to 'cleaning up' the image of an area as opposed to responding to legitimate and proportionate law and order objectives.

It is submitted that in order to prevent and address discrimination, the Commission should also have enforcement powers similar to the British Equality and Human Rights Commission that is, to conduct investigations, provide unlawful act notices; monitor action plans; enter into agreements to ensure that discrimination does not reoccur and make applications to the court in the event that a person is likely to commit an unlawful act of discrimination.²⁶

²⁶ Equality Act 2006 (UK)

If the Commission had a dual role, would this cause a conflict of interest?

In order to avoid any potential conflicts of interests, FLS submits that the Commission's former conciliation role be repositioned within a different agency such as the Dispute Settlement Centres or be part of regionalized and local dispute settlement center outposts linked to local community organizations. Transferring the conciliation services to established organizations ensures that the option of neutral conciliation remains available for parties who *choose* to use this avenue of redress. Conciliation can be a valuable tool in legal negotiation processes and should not be abandoned. An assortment of community outposts across Victoria would also provide more accessibility than the current centralised regime.²⁷ We note that prior to 1992, dispute settlement centers were located regionally. These were abolished during the Kennett era but should be reinstated.

In relinquishing the conciliation focus, the Equal Opportunity Commission would then have the capacity to focus on preventing discrimination via advocacy, representation and research. In focusing on preventing discrimination through public campaigns and advocacy, Commission would subsequently be able to build on and the strengthen relationships with NGO's and other organizations. NGO's would then educate and encourage their clients to utilize the more effective, workable and user-friendly system.

- **Timeliness of the conciliation process**

Whilst the average conciliation process is considered to take only 60 days, FLS argues that this is not workable for the marginalized community members who seek to use these processes. For example, discrimination that takes place in relation to education, housing or child protection issues often require urgent intervention in order to avert potentially harmful outcomes. The party with greater bargaining power has the ability to forestall a matter that may require quick attention. In urgent circumstances, it is recommended that the conciliating body have the ability to fast-track a conciliation matter to obtain resolution.

A new role for the Commission

This Review is an important opportunity for the Commission to ensure that it can function well and fairly, maintain its independence, and, by virtue of its reputation as an effective anti discrimination advocate, command greater respect from the community. We believe Victoria should use this opportunity to actively integrate and practically apply the principles and protections of the international covenants to which Australia is a signatory as they pertain to discrimination.

In looking to suitable good practice models for the role of the Commission, we point the reviewer to a 2005 paper by the European Centre for Minority Issues on good practice for Ombudsman institutions in relation to discrimination and human rights issues relating to

²⁷ Whilst conciliators from the EOC are able to travel to locations outside the Melbourne office, it is understood that there are limitations to this ie: this is dependent on availability, both of the venue and of the conciliator; conciliators often wait to schedule a few conciliations from a particular area on the one day, or wait until the EO officers are in the area for some other reason, ie a conference, and perform the conciliation at the same time.

minority groups.²⁸ The guide points to a mandate, functions and powers of minority ombudsman institutions that have parallels to the matters raised in this Review. We reiterate that the Commission should be empowered to advocate, enforce compliance and educate the community.

In particular, we point to the following as new roles and responsibilities that should reside with the Commission.

The Commission should:

- Have the power to commence ex officio investigations and to conduct studies in fields where structural problems seem to occur
- Have the power to initiate or pursue legal action in the courts or tribunals on behalf of an individual
- Have the power to challenge laws or policies in the courts
- Channel its expertise and information as much as possible to the policy making process
- Have an active role in monitoring existing laws and policies with respect to human rights and discrimination and to recommend amendments and changes
- Draw on higher international standards and have the duty to promote ratification and implementation of international instruments
- Make proposals for new legislation or legislative amendments
- Make public comment on governmental and parliamentary legislative initiatives and existing legislation
- Offer advice on government action programs and policy and be involved in training and liaising with programs to improve practices
- Monitor the progress of government action programs and policy
- Be involved in evaluating programs and projects supporting anti discrimination practices
- Promote, initiate and support policy research helping the creation and implementation of policies relating to anti discrimination practices
- Use its reports to provide feedback on laws, policies and practices and to signal the necessity of change
- Develop good practice guides
- Train the media in anti discrimination awareness in reporting
- Monitor the media's representation of community groups or individuals in relation to discriminatory profiling according to the attributes under the EOA.
- Develop and promote anti-discrimination campaigns in cooperation with the media²⁹

Additionally, the Commission should retain its role in developing and promoting training and teaching of anti discrimination laws to public and private bodies, community groups and educational institutions.

²⁸ 2005 Ombudsman Institutions and Minority Issues- a guide to good practice, European Centre for Minority Issues

²⁹ With the exception of the recommendation to monitor discriminatory representation in the media, these recommendations have been sourced from ²⁹ 2005 Ombudsman Institutions and Minority Issues- a guide to good practice, European Centre for Minority Issues

We note that the above roles would work towards allowing systemic and public interest issues to be raised by the Commission. Any structural changes to the Commission should reflect the attributes that are protected under the Act (e.g. staff composition, including Executive staff) as the Commission needs to obtain and maintain the trust of marginalized communities in order to encourage comprehensive use of the Commission's functions.

Other Issues

We look forward to the Part II of this Review where we anticipate the opportunity to discuss the exceptions and exemptions within the Act. FLS welcomes the opportunity to discuss any issues raised in this submission with the Reviewer.