



# Submission

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## Administrative Law & Human Rights and Workplace Relations Sections

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### Equal Opportunity Review – Options Paper

To: Julian Gardner, Equal Opportunity Review

A submission from the Law Institute of Victoria (LIV)

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**Queries regarding this submission should be directed to:**

Contact person	Laura Helm	Elizabeth Hayes
Ph	(03) 9607 9381	(03) 9607 9389
Email	<a href="mailto:lhelm@liv.asn.au">lhelm@liv.asn.au</a>	<a href="mailto:ehayes@liv.asn.au">ehayes@liv.asn.au</a>

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## 1 Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the Equal Opportunity Review Options Paper (the Options Paper). A submission was also made in relation to the first stage of the review – the Discussion Paper – earlier this year. Comments made in this submission should be read in conjunction with comments made in our earlier submission (attached for reference).

## 2 Executive Summary

This submission outlines LIV support for the following options, as described in the Options Paper:

- Chapter 2 – Option 2
- Chapter 3 – Option 2
- Chapter 4 (Dispute resolution)– Combination of Options 1 and 2
- Chapter 4 (Legal advice and representation) – Option 2
- Chapter 5 – Option 2, or where Commission retains an individual complaint handling role, Option 4.

The LIV further recommends a statutory review provision similar to s44 of the Charter of Human Rights and Responsibilities (the Charter), requiring a review of the EO Act in 3 years time to consider whether it would be appropriate to introduce a positive duty to promote equality in the terms set out in Option 3 of Chapter 2.

## 3 List of Options:

### 3.1 Chapter 2 – A New Framework for the Equal Opportunity Act (the EO Act)

The three options as set out in the Options Paper are:

- Option 1 - Update the *Equal Opportunity Act* 1995 (Vic) (the EO Act) to reflect passage of the Charter
- Option 2 - Framework to address systemic discrimination
- Option 3 - Framework to address systemic discrimination and create equality

The LIV prefers Option 2, which would recognise the links with the Charter in the objectives of the EO Act. It would include an obligation on the Victorian Equal Opportunity and Human Rights Commission (the Commission) to protect and promote human rights, and confirm the requirement that acts and decisions of the Commission must be compatible with the Charter.

Within option 2, there are a number of proposals that are designed to address systemic discrimination including the use of a general exception for special

measures, an express requirement to make reasonable adjustments and the imposition of a positive duty not to discriminate.

*Special measures are not discriminatory*

Section 8 of the Charter provides that special measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination. The LIV supports the incorporation of this provision from the Charter into the EO Act in order to better address systemic discrimination issues within the community.

*Express requirement to make reasonable adjustments*

The LIV supports the inclusion of an express requirement to make reasonable adjustments which would apply to all attributes and all areas regulated by the EO Act. A list of factors to be taken into account in order to determine whether an adjustment is reasonable would also be included. This would need to provide detailed information and examples in order to provide sufficient guidance to all parties who might be affected by the provision. Specifically, with respect to employers and employees, this sort of guidance material is essential given that the employment relationship is already highly regulated often with rights and responsibilities

The LIV notes that a breach of the provision to make reasonable adjustments would be a form of discrimination in itself without the need to prove either direct or indirect discrimination. The LIV submission in relation to the Discussion Paper has already noted the difficulties in bringing successful discrimination claims given the narrow and highly technical definitions of direct and indirect discrimination set out in the EO Act. The LIV supports amendments to the definition of indirect discrimination in the EO Act which would remove the proportionality test and shift the onus of proof in relation to the reasonableness requirement from the complainant to the respondent. While these changes would assist in ensuring that the law itself does not prevent the elimination of discrimination, the inclusion of a further option, that is the express requirement to make reasonable adjustments, recognises that not all acts of discrimination fall neatly within the current definitions of discrimination under the EO Act.

*Positive duty not to discriminate*

The LIV also supports the inclusion of a positive duty not to discriminate. It is noted that this duty exists in the Charter and is consistent with the EO Act as it currently stands. This would apply to both the public and private sector.

The LIV also recommends a statutory review provision within the EO Act similar to s44 of the Charter, providing for review of the EO Act in 3 years time to consider whether it would be appropriate to introduce a positive duty to promote equality in the terms set out in Option 3. The LIV considers that it may also be appropriate to recognise the need to take steps towards achieving substantive equality within the objectives of the EO Act. This would clarify that the EO Act is trying to achieve substantive equality and would provide a basis for any statutory review provision, as described above.

### **3.2 Chapter 3 – Mechanisms for the Elimination of Discrimination**

The three options set out in the Options Paper are:

- Option 1 - The educator role
- Option 2 - The facilitator role
- Option 3 - The enforcer role

The LIV supports Option 2 which sets out the role of the Commission as the facilitator of compliance by providing information, guidance, advice and increased litigation powers. This option would also include improved research and inquiry powers and other measures designed to address systemic discrimination which cannot be done using the individual complaints system alone.

The LIV makes the following comments on some of the proposals included in this option.

The LIV considers that the ability for the Commission to issue guidelines would be of great benefit to the community in that it would provide more guidance that could be used in proceedings as a factor to be taken into account when considering whether discrimination has occurred. The LIV prefers the use of guidelines to the proposal in option 3 that the Commission might issue enforceable codes of practice which could be used as a defence in discrimination proceedings. Although we recognise that enforceable codes of practice may provide greater certainty, we consider that they can be too bureaucratic and rigid and may in fact diminish the impact of the EO Act due to a lack of flexibility. The application of guidelines allows other factors to be taken into account to ensure that the objectives of the EO Act are achieved.

The LIV considers that the introduction of action plans should be voluntary for both the public and the private sector, to ensure that they do not become merely a bureaucratic exercise. The LIV proposes however that the Commission be able to require an action plan as a result of an inquiry into systemic discrimination. We agree that an action plan should be taken into account in proceedings when determining whether discrimination has occurred.

The LIV seeks further clarification on the proposed power for the Commission to agree to enforceable undertakings to remedy or prevent breaches of the EO Act identified through own motion inquiries or investigations and how this would work in practice. The LIV considers that any such measures should be used sparingly, as an outcome of a co-operative process that falls short of action in VCAT, emphasising the preventative role of the Commission and the importance of its role in enabling organisations to comply with the law.

The LIV recommends that there be a policy which sets out how and under what circumstances the Commission would use the powers that it might be provided with under an amended EO Act. This would provide the community with more information about the powers and specifically how they intend to use them to address the objectives of the EO Act.

### **3.3 Chapter 4 – Dispute Resolution**

The three options set out in the Options Paper are:

- Option 1 - Commission continues to handle complaints and offer free ADR
- Option 2 - Early and free ADR, no investigation or decision by Commission with the option of direct access to VCAT

- Option 3 - Direct Access to VCAT

The LIV supports a model that includes elements of both Option 1 and Option 2. The LIV recognises the value of the Commission as a filter for the complaints made under the EO Act. Of concern however is the lengthy periods of time spent on the investigation of each complaint which prevents the Commission from being able to undertake other work to address issues of systemic discrimination in the broader community. The LIV also notes that the information that the Commission is able to collect through the investigation process assists in identifying and addressing systemic discrimination.

As was raised in our previous submission, there is a divided view amongst practitioners as to whether the Commission should retain its role in relation to the conciliation of disputes. It is recognised by all that early conciliation or mediation of a complaint is of great value in resolving a dispute. The difference of opinion arises in relation to the view that on the one hand, the expertise of the Commission makes it particularly well equipped to conciliate discrimination disputes; and on the other that in the many cases where conciliation does not resolve the dispute, the parties are forced to participate in the alternative resolution (ADR) process twice – once at the Commission and once at VCAT – which adds to the length and costs of legal proceedings.

The LIV considers that in the event conciliation remains at the Commission, more resources must be allocated to bolster the conciliation process at the Commission. The LIV is of the view that conciliation could be more effective if the Commission is able to take a more interventionist approach to conciliation, similar to that taken by the Human Rights and Equal Opportunity Commission (HREOC). In this respect, the LIV supports the proposal in Option 1 that that EO Act be amended to allow greater flexibility by ensuring that a range of ADR processes could be used by the Commission.

In the LIV submission on the Discussion paper, it was proposed that there should be a right for complaints to be made directly to VCAT. The LIV notes that this is an element of option 2 and continues to support this proposal. The LIV also suggested that respondents should have the ability to make an application to VCAT for an order that the VEOHRC refer any complaint to VCAT.

The LIV notes the comments in the Options Paper about a potential conflict of interest between the proposed greater advisory/enforcement/preventative role of the Commission and the continued role in conciliating and resolving disputes. The LIV considers that this issue needs further discussion before recommendations are made for how disputes can best be resolved. Potential conflict issues may be dealt with in the choice of a governance model so that the two issues – the role of the Commission and its governance - will each be considered and determined in light of the other.

### **3.4 Chapter 4 – Legal Advice and Representation**

The three options in the Options Paper are:

- Option 1 - Commission to provide legal advice and representation
- Option 2 - Increase funding to existing legal service providers

- Option 3 - Create an independent statutory office of equal opportunity proceedings

The LIV prefers option 2 which would provide funding to specialist discrimination lawyers in community legal centres where parties cannot afford legal representation. This would have the benefit of being able to provide greater services to Victorians in rural areas.

### **3.5 Chapter 5 – The Commission’s Governance**

The four options in the Options Paper are:

- Option 1- Single Commissioner
- Option 2 - Commissioner supported by Board with strategic management function
- Option 3 - Commissioner supported by an advisory Board
- Option 4 - Commissioner Supported by representative Board or Portfolio Commissioners

The LIV prefers option 2, however if the Commission retains its role in the management of individual complaints, then option 4 would provide a better model to avoid potential conflicts of interest between the complaint handling and advocacy functions of the Commission. The LIV notes however that there are also potential problems with the option 4 model relating to conflicts between a Commissioner’s role and the members he or she represents in their portfolio.