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**Submission to the  
Victorian Attorney-General's  
Independent Review of the  
Equal Opportunity Act 1995 (Vic)**

**Response to the Options Paper**

**May 2008**



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### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre (*HRLRC*) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

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## 1. Introduction

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### 1.1 Impetus for Review of the *Equal Opportunity Act 1995 (Vic)*

1. In May 2006, the Victorian Attorney-General issued a *Justice Statement* outlining the need to address systemic barriers to equal opportunity and initiated an independent review (**Review**) to make recommendations in relation to particular aspects of the *Equal Opportunity Act 1995 (Vic)* (**EO Act**).
2. As part of the Review, the Reviewer, Julian Gardner, prepared a Discussion Paper entitled *Equal Opportunity Review (Discussion Paper)* which invited responses to a series of questions and sought comments on how the EO Act should be reformed to better promote the right to equality and improve protection from discrimination.
3. The HRLRC submitted a submission in January 2008 in response to the Discussion Paper (**HRLRC Submission**). Comments made in this submission should be read in conjunction with comments made in the HRLRC Submission (attached for reference).
4. On the basis of the submissions received, the Reviewer prepared an Options Paper which sets out the suggested options for reform (**Options**) on the following key issues:
  - (a) the future scope of the *EO Act*;
  - (b) powers for the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to eliminate discrimination;
  - (c) dispute resolution; and
  - (d) Governance structures for the Commission.

### 1.2 Scope of this Submission

5. This submission is made by the Human Rights Law Resource Centre (**HRLRC**) and focuses on the options presented by the Reviewer under the 5 key areas. This submission addresses the following aspects of the Discussion Paper:
  - (a) the future scope of the *EO Act*;
  - (b) powers for the Commission to eliminate discrimination;
  - (c) dispute resolution;

Given the HRLRC's expertise, the HRLRC has not addressed the topic of the VEOHRC's governance.

**1.3 About the HRLRC**

6. The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law. The HRLRC’s activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.
7. The HRLRC has a significant and diverse body of stakeholders represented in its membership and the composition of both its Board and Advisory Committee. The HRLRC’s stakeholders include community legal centres, legal aid, a number of major commercial law firms, legal professional associations, a number of university law schools, and a range of local, state, national and international non-government organisations.

## 2. Executive Summary

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### 2.1 The Human Right to Freedom from Discrimination

8. As noted in HRLRC's Submission, discrimination is at the heart of virtually all human rights violations. The Preamble to the Victorian Charter recognises that human rights belong to all people in the Victorian community without discrimination and that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.
9. In this context, the HRLRC welcomes the Review and the opportunity to provide a response to the Options and considers that the most effective way to eliminate discrimination and promote equal opportunity in Victoria is through a human rights framework. The HRLRC recalls its recommendations in the HRLRC Submission that:
- (a) the range of attributes that should be protected by the EO Act should be expanded to include all those attributes which constitute 'other status' for the purpose of the International Covenant on Civil and Political Rights (*ICCPR*) and the International Covenant on Economic, Social and Cultural Rights (*ICESCR*), including in particular criminal record, homelessness and social status;
  - (b) the scope of the EO Act should be amended to provide broader powers and measures to address systemic discrimination;
  - (c) the VEOHRC should be conferred with broader powers to investigate and remedy discrimination; and
  - (d) the test of standing should be broadened to allow class actions and complaints by representative organisations.

### 2.2 Recommendations

10. In regards to the Options Paper, the HRLRC makes the following recommendations for reform:

***Recommendation 1:***

Proposed reforms of the EO Act must be consistent with Australia's international human rights obligations. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are successfully identified and addressed.

**Recommendation 2:**

In regards to a new framework, adopt Option 3 in Chapter 2 of the Options Paper. This would ensure that the links between the EO Act and the Charter are expressly recognised and reinforced. Further, this option would create a broad and positive duty not to discriminate under the EO Act which recognises the need to create substantive equality in a broad sense which is not limited to the attributes and areas currently protected by the EO Act.

**Recommendation 3:**

In regards to mechanisms for the elimination of discrimination, the HRLRC recommends the adoption of Option 2 in Chapter 3 of the Options Paper, in addition to adopting some of the elements of Option 3, in regards to enforcement.

- Under this approach, VEOHRC would perform both an educative and guidance role that would enable the VEOHRC to address systemic discrimination.
- VEOHRC would also accrue additional and important powers in regards to advocacy to better enable it to address systemic discrimination.

**Recommendation 4:**

In regards to dispute resolution, the HRLRC recommends the adoption of elements of Option 1 and the elements outlined in Option 2 of Chapter 4 of the Options Paper. Under this approach, a complainant could elect to pursue a complaint either at VCAT or at VEOHRC.

### **3. A new framework for the EO Act: chapter 2 of the Options Paper**

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#### **3.1 Introduction**

11. HRLRC welcome the Reviewer's recognition in Chapter 1 of the Options Paper that:
  - (a) a significant degree of discrimination continues to be experienced in Victoria, including that which is systemic in character;
  - (b) discrimination, particularly systemic discrimination, both creates and perpetuates a position of disadvantage;
  - (c) the EO Act needs to be changed in order to avoid costs to the individual and community from the effects of discrimination, and to produce a fairer, more productive community;
  - (d) an EO Act that has more active prevention strategies and improved dispute resolution processes would be more effective than the current EO Act in eliminating discrimination.
12. In this regard, we refer to chapter 5 and 6 of the HRLRC Submission and urge the Reviewer to consider adopting an EO Act that does engage with and consider active prevention strategies. In particular, we reiterate the need for the EO Act to protect against discrimination experienced by people who are homeless, unemployed or in receipt of social security payments, or who have a criminal record.

#### **3.2 Addressing 'Systemic Discrimination'**

13. Systemic discrimination is caused by the underlying causes of discrimination that may be the outcome of institutional and social structures, policies and practices. Legislative protection against such discrimination is only one way to address such discrimination. Prevention strategies that ensure that people who are homeless, unemployed or in receipt of social security payments, or who have a criminal record, are protected from discrimination is also needed. Such measures may include developing and implementing policies and programs to ensure that they are afforded opportunities to obtain adequate housing, employment and the other requirements of an adequate standard of living.
14. Providing methods to address systemic discrimination should be considered a policy priority as such methods may, for example, tackle:
  - (a) insidious forms of discrimination;

- (b) issues of discrimination faced by groups and not just (important as they are) individuals (as is the case with current anti-discrimination laws); and
  - (c) social fragmentation and exclusion.
15. As the Options Paper identifies, exclusion and social fragmentation caused by discrimination creates and perpetuates a position of disadvantage and produces adverse costs to the individual and community. Social exclusion leads to an inability to participate in fields such as employment, education and the market generally, which ultimately results in a variety of inequalities. Such consequences are a waste of human capital.
16. The HRLRC refers to section 6.4 of the HRLRC Submission noting that a human rights approach is the best way to address issues relating to systemic discrimination. In considering ways that the EO Act may be amended, the HRLRC encourages the Reviewer to consider the measures outlined in section 6.4 implemented in other jurisdictions regarding the range of measures required to address systemic discrimination effectively.

### **3.3 Analysis of Options**

17. The three options as set out in the Options Paper in regards to new framework for recognising and addressing discrimination are:
- (a) Option 1: update the EO Act to reflect passage of the Charter;
  - (b) Option 2: provide a framework to address systemic discrimination (by recognising in the objectives of the EO Act the clear links between the Charter and the EO Act); and
  - (c) Option 3: provide a framework to address systemic discrimination and create equality.
18. The HRLRC prefers Option 3 in regards to a framework to address systemic discrimination and create equality. Option 3 comprises the elements which make up Option 2, which recognises the links between the *Charter* in the objectives of the EO Act, in addition to recognising the need to create substantive equality in a broad sense which is not limited to the attributes and areas currently protected by the EO Act.
19. The following section describes the HRLRC's support of the Option 2 elements which would also be found in Option 3. In summary, Option 2 would include an obligation on the VEOHRC to protect and promote human rights, and confirm the requirement that acts and decisions of the Commission must be compatible with the Charter. Addressing systemic discrimination may occur by a number of mechanisms 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.

### **3.4 Special measures**

20. HRLRC notes that under section 8(4) of the Charter special measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination. Including this provision in the EO Act ensures that in addressing systemic discrimination, a more holistic approach is required in order to better address systemic discrimination issues within the community.

### **3.5 Express requirement to make reasonable adjustments**

21. Option 2 includes a requirement to make 'reasonable adjustments' which means a duty to overcome the effects of indirect discrimination by making special adjustments to usual requirements, policies or practices to allow a person with a particular attribute to achieve substantive equality. This duty would mean that requirements, policies and practices would have to be sufficiently flexible to accommodate different needs, and that any adjustment that is reasonable in the circumstances occurs to accommodate those differences. The aim of this element is to minimise the barriers that a person with an attribute faces to achieving substantive equality.
22. HRLRC supports the inclusion of an express requirement to make reasonable adjustments in regards to all attributes and all areas regulated by the EO Act. The Options Paper notes the list of considerations set out in the *Equal Opportuntiy Amendment (Family Relations) Act 2008* that prohibits an employer from unreasonably refusing to accommodate a person's parental or carer responsibilities. The list assists in determining whether a refusal is unreasonable and includes:
- (a) the nature of the person's work and family responsibilities;
  - (b) the nature and cost of the arrangements required to accommodate the responsibilities;
  - (c) the financial circumstances of the employer, principal or firm;
  - (d) the size and nature of the workplace and the business of the employer, principal or firm;
  - (e) the effect on the workplace of the accommodation, including the financial impact on the business;

- (f) the consequences for the employer, principal or firm of making the accommodation; and
  - (g) the consequences for the person of not making the accommodation.
23. In HRLRC's submission, a modified form of this list could be used to assist in determining whether an adjustment is reasonable. However, the list should more accurately reflect the principles in regards to permissible limitations on human rights, such as the right to freedom from discrimination and to equality and so should be linked to, reference or repeat the factors outlined in section 7(2) of the Charter. Section 7(2) of the Victorian Charter provides that:
- A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society<sup>1</sup> based on human dignity, equality and freedom and taking into account all relevant factors.
24. Section 7(2) also sets out the following inclusive list of these relevant factors:
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relationship between the limitation and its purpose; and
  - (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
25. It is desirable that, so far as possible, section 7(2) is interpreted and applied consistently with international law including placing the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate.<sup>2</sup>
26. The Human Rights Consultative Committee which investigated and recommended the adoption of the Victorian Charter recognised that rights need to be balanced against one another and against competing public interests. According to the Explanatory Memorandum, section 7 'reflects Parliament's intention that human rights are, in general,

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<sup>1</sup> According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

<sup>2</sup> See, eg, P Hogg, *Constitutional Law of Canada* (2004) 795-6.

not absolute rights, but must be balanced against each other and against other competing public interests'.<sup>3</sup>

27. HRLRC recognises that in addition to outlining the factors in section 7(2), additional detailed information and examples should be provided to assist employers and other parties with obligations under the EO Act to ascertain whether an adjustment is reasonable. This educative function may be carried out by the VEOHRC in line with their existing educative role under the Charter.
28. Finally, the HRLRC agrees with the comment in the Options Paper that by expressly requiring reasonable adjustments in the EO Act, the obligation on employers, providers of education, accommodation and goods and services would be far clearer and the law would provide greater certainty for all. The concept of reasonable requirements will assist such parties ascertain how they might better protect and promote the right to freedom from discrimination in their workplaces. In this way, the right is given meaningful protection which is not illusory. This is consistent with the obligation to interpret and apply rights in a manner which renders them 'practical and effective, not theoretical and illusory'.<sup>4</sup>

### **3.6 Positive duty not to discriminate**

29. The HRLRC supports the inclusion of a positive duty not to discriminate. This duty is consistent with sections 8 and 32 of the Charter and the current framework set out in the EO Act in the areas of employment, goods and services and accommodation.
30. Section 32(1) of the *Charter* provides that:
- So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*
31. This obligation applies when interpreting both past and future legislation. It is not dependent on the legislation having any ambiguity. The purpose and effect of this provision is to require any person or entity that interprets and applies legislation to do so in a way that gives effect to the human rights promoted and protected by the *Charter*. This means that in acting under legislation, all interpreters are obliged to interpret their rights and obligations consistently with the *Charter*.

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<sup>3</sup> Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

<sup>4</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

32. Section 32(1) goes much further than the common law requirement that, where a statute is ambiguous, the courts should favour a construction which accords with Australia's human rights obligations.<sup>5</sup> Jurisprudence in overseas jurisdictions considering similar provisions supports the proposition that section 32 may involve the implication (or 'reading in') of provisions<sup>6</sup> to ensure human rights compatibility.

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<sup>5</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at 287 (Mason CJ and Deane J). See also *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38.

<sup>6</sup> See, eg, *Ghaidan v Godin-Mendoza* [2004] AC 557, 585; *R v A* [2001] 3 All ER 1; *R v A (No 2)* [2002] 1 AC 45. For example, in *R v Offen* [2001] 2 All ER 154, the UK Court of Appeal interpreted s 2 of the *Criminal (Sentences) Act 1977* to take a broad view of the meaning of 'exceptional circumstances' in making the power to impose a life sentence following a conviction for a second serious offence compatible with the prohibition from inhuman and degrading treatment.

## **4. Mechanisms for the Elimination of Discrimination: chapter 3 of the Options Paper**

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### **4.1 Summary**

33. The Options Paper sets out three possible packages of amendments:
- (a) Option 1: the educator role;
  - (b) Option 2: the facilitator role; and
  - (c) Option 3: the enforcer role.
34. The HRLRC supports the proposal which go beyond the individual complaints mechanism to target systemic discrimination. For this reason, HRLRC supports the inclusion of many of the elements in Option 2 where the VEOHRC has a role as a facilitator. This is done through both an educative and guidance role; and through advice and increased litigation powers. This option would also include research and inquiry powers which would enable the Commission to address systemic discrimination and overcome some of the short comings of the individual complaints system. However there are some further proposals contained in option three that the HRLRC also supports, proposals which would strengthen the regulatory role of the Commission.
35. The HRLRC believes that a balance must be struck which 'induces employers and other relevant actors to adopt to best practice without at the same time using the threats of punishment that will drive employers to resist an open investigation and evaluation of their existing procedure'.<sup>7</sup> This balance is best represented largely by Option 2. The HRLRC does, however, believe that some strengthening of the Commissions role in enforcement will enhance access to justice and ensure that marginalised and disadvantaged groups are protected from discrimination.
36. The HRLRC broadly supports the proposals set out in option two and will not comment on each and every proposal. There are however, some comments we would like to make on the following specific proposals within option two and where appropriate we will also comment on the related proposal of option three.

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<sup>7</sup> H Collins, *Employment Law* (2003), 74.

#### **4.2 Enabling the Commission to provide specific advice on the EO Act**

37. While HRLRC can see value for people contacting the VEOHRC obtaining advice on their particular situation, we have some concerns regarding the Commissions later role in conciliation of disputes if it has already given advice on the substance of the complaint. The current system of referral to community legal centres may be preferable however the HRLRC is also interested in the resources currently directed at the training and resourcing of community legal centres to receive and deal with these referrals.

#### **4.3 Making an express power for the Commission to issue guidelines**

38. The HRLRC supports this proposal but notes that there should be specific reference to their status in the EO Act including their significance to further actions around non-compliance. Alternatively, the HRLRC, while understanding the issue of resourcing, supports mechanisms that provide a greater incentive for compliance such as codes of practice or the development of standards/regulations.
39. For this reason the HRLRC supports the following proposals from option three which would give the VEOHRC the power
- (a) to issue enforceable codes of practice; and/or
  - (b) develop standards to be made by regulation
40. The HRLRC believes that anti-discrimination compliance in Victoria would be greatly assisted by introducing the power for VEOHRC to make binding codes of practice regarding the requirements of the EO Act. These measures have been successful in many other jurisdictions including Canada, the UK and New Zealand. These codes of practice could serve to reduce the 'legalese' involved in the administration of anti-discrimination laws by providing the community with greater clarity regarding their rights and responsibilities under the EO Act. These standards or codes of practice would have more force if they are enacted through regulation.

#### **4.4 Making action plans mandatory for public authorities and voluntary for the private sector.**

41. The HRLRC supports the use of action plans, and the proposal that they be mandatory for public authorities while encouraged, supported and published in the private sector. The HRLRC suggests that this mechanism could also be linked to a scheme which imposes equality conditions on public sector procurement. This would be a way of including the private sector in the process and developing the practice until it is considered usual business practice. The HRLRC also supports the introduction of a power to compel an

organization to compile an action plan, however, the power to compel an action plan should rest with VCAT; initiated on the application of the Commission.

42. The HRLRC supports a mandatory reporting mechanism against the implementation of action plans and a mandatory updating of the plans. We also support the implementation of action plans which at least address all attributes, while perhaps focusing on some that are particularly pertinent for that particular workplace or organization.
43. In addition to these proposals, the HRLRC also supports the proposal from option three which empowers the VEOHRC to develop a State action plan. Such a process could showcase best practice in the development and implementation of actions plans and in that way set the standard for statutory authorities and the private sector alike. The action could draw upon and be integrated with the use of 'state of equality reports' and their mechanisms outlined below.

#### **4.5 Enabling the Commission to report every 3 years to government on the “state of equality” in Victoria.**

44. The HRLRC supports this proposal and suggests that as part of the process the Commission could develop some equality diagnostic tools or 'equality scorecards' which enables a clear and focused analysis of the extent to which discrimination is being eliminated. These 'equity scorecards' could then also be used by the private sector to assist them as they engage through action plans and other measures.

#### **4.6 Advocacy**

45. The HRLRC is particularly supportive of the final proposals of option two that increase the powers of the VEOHRC to
- (a) act as *amicus curiae* in relation to EO Act matters
  - (b) apply for a court order to enforce VCAT orders in public interest cases
  - (c) initiate complaints following an own motion inquiry or investigation
  - (d) apply to VCAT to issue an unlawful act notice
  - (e) apply to VCAT to enforce undertakings, unlawful act notices and/or require the preparation of or compliance with an action plan by a public authority.
46. In addition to those set out in option two, the HRLRC would also support the following proposals from option three that further increase the powers of the VEOHRC to
- (a) apply for injunctions to prevent discrimination occurring

- (b) initiate complaints that are not limited to matters arising from investigations or inquiries
47. The HRLRC strongly supports these proposals as it believes that the current powers under part 8 are too restrictive. The ICCPR and the subsequent Paris Principles which set out the minimum standards for human rights institutions require that such powers should be exercisable on individual or collective issues. The Paris Principles state that a human rights institution's roles, powers and mandate should be as broad as possible.<sup>8</sup>
48. Specifically, and relevantly to the review of VEOHRC's powers under the EO Act, human rights institutions are more effective in protecting and promoting rights when they, among other things:
- (a) treat human rights issues systematically;
  - (b) handle individual complaints speedily and effectively;
  - (c) have a broad and non-restrictive mandate;
  - (d) have an all-encompassing jurisdiction; and
  - (e) have power to monitor compliance with their recommendation and advice<sup>9</sup>
49. The HRLRC commends this review and its efforts to give further effect to the Paris Principles and the underlying provisions of the ICCPR and the ICESCR. We have no doubt that these reforms will mean actual and effective improvement in the protection of the people of Victoria from discrimination.

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<sup>8</sup> Paris Principles, UN DOC A/RES/48/134 (20 December 1993)

<sup>9</sup> International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005), 7.

## **5. Chapter 4 of the Options Paper: Dispute Resolution**

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### **5.1 Introduction**

50. The three options set out in the Options Paper are:
- (a) the VEOHRC continues to handle complaints and offer free ADR;
  - (b) early and free ADR, no investigation or decision by the VEOHRC with the option of direct access to VCAT; and
  - (c) direct Access to VCAT.
51. Similar to the LIV's submission to the Options Paper, the HRLRC supports a model that includes elements of both Option 1 and Option 2.
52. As discussed above, Australia's international obligations require that governments at all levels take steps to ensure that all persons are protected from discrimination on any ground. This is detailed in section 7.1 of the HRLRC Submission.
53. In summary, the HRLRC submitted that there is greater scope for the EO Act to empower the VEOHRC and its officers to enforce the EO Act in order for the VEOHRC to:
- (a) investigate potential breaches of the EO Act, including powers to enter premises and to require the production of material;
  - (b) take proactive steps to investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
  - (c) commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
  - (d) develop enforceable codes of conduct and guidelines to encourage a culture of compliance.
54. As noted in our Submission, there remain key deficiencies relating to VEOHRC's powers to:
- (a) conduct investigations into breaches of the EO Act;
  - (b) monitor compliance with anti-discrimination norms; and
  - (c) initiate 'own motion' proceedings absent a complaint.

55. The HRLRC submits that expanding the VEOHRC's powers will ensure compliance with Australia's international human rights obligation and the requirement of all Victorian legislation to be compatible with the Victorian Charter.
56. The VEOHRC currently performs an important role in receiving complaints and assisting parties to conciliate and resolve the complaint in an informal process. Further, investigation and decision functions currently performed by the VEOHRC provide a useful function in that they assist in informal and accessible complaint resolution. However, HRLRC recognises that in some circumstances, the current procedure is inappropriate. For example, the current requirement to conciliate before approaching VCAT results in complaints being drawn out and conducted over a lengthy period of time. This period of time impacts on the complainant and also reduces the resources available to the VEOHRC to perform other functions to address systemic discrimination.
57. Finally, the HRLRC note that maintaining the VEOHRC's role in complaint resolution is benefit for a few reasons, including providing an informal avenue for complainants and enabling VEOHRC to monitor the experience of systemic discrimination and collect information to assist in identifying and addressing systemic discrimination.
58. While the HRLRC recognises the problems identified by practitioners regarding the actual and perceived conflict as a result of VEOHRC performing both a conciliatory and educative function. However, the benefits derived from VEOHRC's involvement in conciliation and complaint resolution are important. The expertise of the VEOHRC makes it particularly well equipped to conciliate discrimination disputes; and in light of the Reviewer's consideration of the VEOHRC's governance, careful management of this function alongside the investigative function can maintain the integrity of these functions and the VEOHRC more generally.
59. HRLRC also welcome the option to proceed directly to VCAT where the parties feel that a more formal setting is appropriate. This will reduce the time and cost of resolving complaints and will also ensure that parties take their responsibilities under the EO Act seriously where a proceeding before VCAT is possible without any requirement to conciliate.

## **5.2 Examples of Regulatory Powers in other Jurisdictions**

60. In section 7.4 of the HRLRC Submission, the HRLRC noted examples of regulatory power in other jurisdictions to illustrate the ways VEOHRC's powers could be expanded so that they accord with internationally accepted norms relating to the powers of human rights

bodies. This section briefly summarises the elements found in those jurisdictions that are currently being considered by the Reviewer in relation to Chapter 4 of the Options Paper.

61. In Canada, the Canadian Human Rights Commission administers the Canadian *Human Rights Act* and is empowered to investigate and settle complaints of discrimination in the fields of employment and the provision of goods, services and accommodation within the federal jurisdiction. The Canadian Human Rights Commission may also issue guidelines (binding on the Commission in their determinations) setting out the extent and manner in which any provision of the Canadian *Human Rights Act*.<sup>10</sup> In HRLRC's submission, such guidelines would provide useful instruction to stakeholders on their obligations, however such be produced and disseminated in a way in which maintains the independence and credibility of VEOHRC in their dispute resolution role.
62. Like the Canadian Human Rights Commission, the UK Equality and Human Rights Commission issued codes of practices in connection with an equality matter.<sup>11</sup>
63. New Zealand has established an independent human rights body known as the Human Rights Commission. One of its key functions is to resolve disputes arising under the *Human Rights Act 1993 (NZ)* (***NZ Human Rights Act***). The Human Rights Commission is provided with additional functions and powers that are not shared by the VEOHRC. In New Zealand, a complainant may take a dispute to the Director of the Office of Human Rights Proceedings. The Director's Office is independent of the Human Rights Commission. The Director may investigate disputes, attempt settlements and/or decide whether to take disputes to the Human Rights Review Tribunal. The Director also may on request provide representation for a complainant or aggrieved person or group of persons or the Human Rights Commission in proceedings before the Tribunal or related proceedings (eg., seeking to enforce a settlement reached on a previous occasion, and appeals to High Court, Court of Appeal and Supreme Court).<sup>12</sup>

### **5.3 Summary of Key Points and Recommendations**

64. In summary, the HRLRC is grateful for the opportunity to present a submission on the Options Paper. The HRLRC submits:
  - (a) proposed reforms of the EO Act must be consistent with Australia's international human rights obligations. Lessons and experiences from international, regional

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<sup>10</sup> Canadian *Human Rights Act*, section 27(2).

<sup>11</sup> UK *Equality Act*, section 14.

<sup>12</sup> NZ *Human Rights Act*, sections 90(1)(a),(c)&(3).

and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are successfully identified and addressed.

- (b) In regards to a new framework, adopt Option 3 in Chapter 2 of the Options Paper. This would ensure that the links between the EO Act and the Charter are expressly recognised and reinforced. Further, this option would create a broad and positive duty not to discriminate under the EO Act which recognises the need to create substantive equality in a broad sense which is not limited to the attributes and areas currently protected by the EO Act.
- (c) In regards to mechanisms for the elimination of discrimination, the HRLRC recommends the adoption of Option 2 in Chapter 3 of the Options Paper, in addition to adopting some of the elements of Option 3, in regards to enforcement.
  - (i) Under this approach, VEOHRC would perform both an educative and guidance role that would enable the VEOHRC to address systemic discrimination.
  - (ii) VEOHRC would also accrue additional and important powers in regards to advocacy to better enable it to address systemic discrimination.
- (d) In regards to dispute resolution, the HRLRC recommends the adoption of elements of Option 1 and the elements outlined in Option 2 of Chapter 4 of the Options Paper. Under this approach, a complainant could elect to pursue a complaint either at VCAT or at VEOHRC.