Commissioner's message

In 2018 we celebrated 40 years of Victoria's equal opportunity laws. Over that time, we have seen progressive growth in our understanding of the impact of discrimination in our community. Victoria's Equal Opportunity Act 2010 recognises that discrimination can cause social disadvantage, and access to opportunities is not equitably distributed through society. The law, therefore, plays a critical role in providing a framework to recognise rights and to eliminate discrimination, sexual harassment and victimisation as much as possible.

As our understanding of the nature and impact of discrimination has progressed, so have our laws. In 2013 the Commission released Victorian Discrimination Law to give the community clear, accessible information about the anti-discrimination laws in this state. At the time, Victoria's Equal Opportunity Act had been substantially revised, with key changes to legal definitions of discrimination, a new, simpler dispute resolution process, and greater scope to address systemic discrimination. Victorian Discrimination Law quickly became an essential tool for navigating the anti-discrimination landscape in Victoria.

This second edition of Victorian Discrimination Law:

- updates commentary about how courts and tribunals implement Equal Opportunity laws
- provides important information about how Equal Opportunity laws apply to particular areas of life in Victoria, such as in schools, at work, in sport, in accommodation and when accessing services such as shops, transport or government assistance
- explains how the laws relate to the many groups in our community who may experience discrimination
- includes a new comprehensive section on the Racial and Religious Tolerance Act 2001
- is restructured to provide clearer, more accessible information for our readers.

We hope you find it informative and useful.

Kristen Hilton
Commissioner
Victorian Equal Opportunity and Human Rights Commission

About this publication

This publication references decisions publicly available on austlii.edu.au. For authorised versions of decisions, you can check citations in LawCite: http://www.austlii.edu.au/lawcite/
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Explaining this resource

Scope of this resource

In 2018, we celebrated 40 years of anti-discrimination legislation in Victoria. The *Equal Opportunity Act 2010* (Vic) (*Equal Opportunity Act*) commenced on 1 August 2011 and built on more than 30 years of anti-discrimination law in Victoria. The new *Equal Opportunity Act* completely replaced its predecessor and allowed the Commission to develop a new case law resource for the new Act. This is the second edition of that case law resource.

This resource provides an overview of the *Equal Opportunity Act* and an analysis of the case law that helps to guide how the Act is applied in practice. It also guides users on the scope of, and interaction between, exceptions and exemptions under the *Equal Opportunity Act*, reflecting its objective to promote substantive equality.

This second edition provides information about how the 2011 changes to Victoria's anti-discrimination law have been considered and applied. This edition refers to issues that arose under the predecessors to the *Equal Opportunity Act*, principally the *Equal Opportunity Act 1995* (Vic), where they are still relevant.

In this edition, we also provide information about Victoria's *Racial and Religious Tolerance Act 2001* (the RRTA), including case law about how that law promotes racial and religious tolerance and provides mechanisms for redress.

This resource is not intended to be an academic text. Rather, it is a practical guide to the law as it currently applies in this jurisdiction and the significant issues that have arisen in cases brought under the *Equal Opportunity Act* and RRTA. The resource focuses on the Victorian legislation, but, where relevant, it refers to principles as they apply in other jurisdictions including in other states and territories and at the Commonwealth level. It is not intended to be an exhaustive study of discrimination law in these other jurisdictions. Nor is it intended to be a substitute for legal advice. It is, by its nature, general.

Importantly, case law from other jurisdictions, and decisions of the Victorian Civil and Administrative Tribunal (VCAT) are informative and provide guidance about how these issues may be approached in the future. But, they are not binding precedent that must be followed in future cases.

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Abbreviations used in this resource

The following abbreviations are used throughout this resource.

Charter: Charter of Human Rights and Responsibilities Act 2006 (Vic)
Commission: Victorian Equal Opportunity and Human Rights Commission
*Equal Opportunity Act*: Equal Opportunity Act 2010 (Vic)
Explaining the Equal Opportunity Act

The *Equal Opportunity Act 2010* (Vic) (Equal Opportunity Act) makes it unlawful to discriminate against a person on the basis of a protected attribute listed in the Act; to sexually harass someone; or to victimise someone for speaking up about their rights, making a complaint, helping someone else make a complaint or refusing to do something that would be contrary to the Equal Opportunity Act.

The Equal Opportunity Act also puts in place measures to help identify and eliminate discrimination, sexual harassment and victimisation, and to promote and facilitate the progressive realisation of equality.

To help achieve this, the Commission provides a timely and effective dispute resolution service and several statutory functions to encourage and facilitate best practice and compliance.

People can also bring a complaint about discrimination to the Victorian Civil and Administrative Tribunal (VCAT) for determination.

The objects of the Equal Opportunity Act

Section 3(a) of the Equal Opportunity Act describes one of its objectives: to 'eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent'.

Amendments to the Equal Opportunity Act added new objects to section 3 of the Act, which include a greater focus on identifying systemic issues.

The objectives, or aims, of the Equal Opportunity Act include the following:

a. to eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible
b. to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities
c. to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
d. to promote and facilitate the progressive realisation of equality, as far as reasonably practicable by recognising that … the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.

A complete statement of objectives is under *Equal Opportunity Act 2010* (Vic) s3.

The objectives are not merely aspirational statements. Rather, they are important tools for interpreting the Equal Opportunity Act. This is because where different interpretations are available, VCAT and courts are required to interpret the legislation in a way that promotes the Equal Opportunity Act's objectives over an interpretation that does not.¹ For example, an interpretation that would help to eliminate discrimination will generally be preferred to an interpretation that would further entrench inequalities.
Substantive equality goes further than simply treating all people the same (sometimes referred to as 'formal equality'). The phrase 'substantive equality' used in section 3(d)(iii) of the Equal Opportunity Act means achieving equal outcomes for individuals and groups of people in addition to equal opportunities. The Equal Opportunity Act aims to achieve this outcome in several ways. First, the Equal Opportunity Act requires people with obligations under the Act, described as 'duty holders', to make reasonable adjustments and accommodations for persons with disabilities and parent/carer responsibilities. This requirement helps remove some of the structural barriers to equality.

Second, the Equal Opportunity Act promotes special measures to achieve substantive equality (discussed in Procedures and evidence). By aiming for the progressive realisation of substantive equality, the Equal Opportunity Act recognises that 'Victorians are competing on uneven ground' and positive steps must be taken to 'level the playing field'.

However, the Equal Opportunity Act recognises substantive equality cannot be achieved immediately. The Equal Opportunity Bill 2010 Explanatory Memorandum states the 'progressive realisation' of equality refers to the 'gradual implementation of measures over time' and 'will be dependent on the capacity and resources of the duty holders' (page 4). The Equal Opportunity Act reflects the need to balance the ultimate aims of equality with the practical realities faced by duty holders (for example, in the factors that are relevant to deciding whether adjustments or accommodations are reasonable in all the circumstances).

**How the Equal Opportunity Act interacts with other legislation**


This means that people – such as employers, educators, service providers, clubs, sporting bodies and local governments – must avoid breaching their obligations under the laws at both the Commonwealth and Victorian Government levels. Generally speaking, however, a person claiming discrimination must select one jurisdiction in which to bring the claim. The Commission may decline to provide dispute resolution services if the person has already initiated proceedings in another forum, or if the complaint has already been, or would more appropriately be, dealt with by another court or tribunal. A person is also barred from bringing a complaint under federal anti-discrimination legislation if they have already made a complaint or commenced proceedings under state law. For example, Racial Discrimination Act 1975 (Cth) section 6A; Sex Discrimination Act 1984 (Cth) section 10; Disability Discrimination Act 1992 (Cth) section 13; and Age Discrimination Act 2004 (Cth) section 12.

In Victoria, the Equal Opportunity Act also operates alongside laws including the Charter of Human Rights and Responsibilities (Vic) (Charter) and the Racial and Religious Tolerance Act 2001 (Vic) (RRTA). The Charter provides human rights protections for people in Victoria, including protecting the right to equality (see section 8). The RRTA promotes racial and religious tolerance in Victoria by prohibiting acts that constitute racial and religious vilification, and provides an avenue of redress for the victims of such vilification. The section on Compliance powers contains more information about the RRTA.

**How the Equal Opportunity Act interacts with the Charter**

The Charter interacts with the Equal Opportunity Act in a number of ways. Under section 38 of the Charter, 'public authorities' must not act in a way that is incompatible with a human right, or fail to give proper consideration to relevant human rights in making a decision. That is, if a public authority unlawfully discriminates against a person in breach of the Equal Opportunity Act, the conduct may also constitute a breach of the right to equality under the Charter. Importantly, VCAT operates as a 'public authority' when carrying out certain administrative functions under the Equal Opportunity Act, including granting temporary
exemptions from unlawful discrimination (see Section 4(2)(j)). In those circumstances VCAT must also consider and comply with Charter rights. For this reason, VCAT must consider its obligations under the Equal Opportunity Act in the context of the human rights protected by the Charter. VCAT must also consider the Charter right to equality when deciding whether to grant an exemption under the Equal Opportunity Act 2010 (s 90).

Section 32 of the Charter also requires Victorian legislation to be interpreted consistently with human rights, 'so far as it is possible to do so consistently with their purpose'. VCAT and the courts need to look at human rights, therefore, when they are interpreting laws, including the Equal Opportunity Act. This has been found to require:

if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. (See Slavesci v Smith & Anor [2012] VSCA 25 [24]).

VCAT and the courts may look to international law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right for guidance when interpreting a provision.

How the Equal Opportunity Act interacts with the RRTA
Conduct that constitutes unlawful discrimination under the Equal Opportunity Act may also constitute racial or religious vilification under the RRTA. The section on Racial and religious vilification discusses the provisions of the RRTA in more detail.

What unlawful discrimination means
Unlawful discrimination includes both 'direct' and 'indirect' discrimination, which are explored in the section on Explaining the types of discrimination.

In addition, several stand-alone provisions also constitute unlawful discrimination:

- an unreasonable refusal to accommodate a person's responsibilities as a parent or carer in work-related contexts (see Permanent exceptions to discrimination)
- failure to make reasonable adjustments for a person with a disability in employment or in the provision of goods and services (see Reasonable adjustments for persons with a disability)
- a failure to allow reasonable alterations to accommodation to meet the special needs of a person with a disability (see Areas of public life in which discrimination is prohibited)
- refusing to provide accommodation to a person with a disability because he or she has an assistance dog (including requiring the person to pay an extra charge or keep the assistance dog elsewhere) (see Temporary exemptions by VCAT)

If a complaint is brought under one of these stand-alone provisions, the complainant does not need to establish that the conduct constitutes 'direct' or 'indirect' discrimination.

Areas of life where discrimination is unlawful
The Equal Opportunity Act prohibits unlawful discrimination that occurs in specified areas of public life. The Equal Opportunity Act does not seek to operate in respect of purely private activities of private citizens. In essence, the Equal Opportunity Act prohibits unlawful discrimination in the following areas of activity:

- employment and related areas – which include partnerships, industrial organisations, employment agencies and qualifying bodies (including contracting and pre-employment)
- education
- the provision of goods and services and the disposal of land
• the provision of accommodation
• clubs and club membership
• sport and competitive sporting activities
• local government.

Even within these areas of activity, not all discrimination will be unlawful. Conduct is unlawful only where that discrimination occurs on the basis of a protected attribute, and provided no exemption or exception applies.

**The protected attributes**

The Equal Opportunity Act prohibits discrimination on any of the following grounds:

• age
• breastfeeding
• employment activity
• expunged homosexual conviction
• gender identity
• disability
• industrial activity
• lawful sexual activity
• marital status
• parental status or status as a carer
• physical features
• political belief or activity
• pregnancy
• race
• religious belief or activity
• sex
• sexual orientation.

The *Equal Opportunity Act* s 7(2) also prohibits discrimination against a person because of a personal association that they have to a person with any of the attributes identified above.

The chapter on Protected attributes explores the grounds for discrimination in more detail.

**The duty to eliminate discrimination, sexual harassment and victimisation**

Where a person has an obligation not to discriminate, section 15(2) of the Equal Opportunity Act imposes a positive duty on that person to avoid engaging in discrimination, sexual harassment and victimisation. As far as possible, that person must also take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment or victimisation. That is, a person must be proactive and take steps to prevent discriminatory practices before they occur.

The explicit statement of the positive duty was part of changes introduced in the 2010 Equal Opportunity Act. It requires similar steps to those that employers may take to reduce their risk of vicarious liability.
Reasonable and proportionate measures to avoid discrimination

The duty for people and organisations to take reasonable steps to avoid discrimination requires an assessment of whether measures are reasonable and proportionate – see section 7(2). The Equal Opportunity Act recognises that what may be possible for one duty holder may not be possible for another. It also allows duty holders to implement policies and procedures progressively where appropriate.

Section 15(6) provides guidance on what constitutes reasonable and proportionate measures. Factors that must be considered include:

- the size of the business or operations
- the resources of the business
- the nature of the business
- the business and operational priorities
- the practicability and cost of the measures in question.

Complying with the positive duty might mean having policies aimed at preventing discrimination, harassment and victimisation, and ensuring all staff are aware of their obligations. It might also include having an effective complaint handling or grievance procedure, and mechanisms for reviewing and improving compliance where appropriate.

Examples of the steps a duty holder may need to take to comply with the requirement to eliminate discrimination, sexual harassment and victimisation are:

- making staff aware of a ‘zero tolerance’ of discrimination, sexual harassment and victimisation
- having policies on discrimination, sexual harassment and bullying and training staff
- developing an action plan setting out proposed reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation, and an implementation timeframe. This plan could include introducing policies and training on discrimination, sexual harassment and victimisation.
- conducting a baseline assessment or audit of existing policies and practices to identify actual or potential discrimination, sexual harassment and victimisation. This action could involve monitoring the handling and outcomes of complaints – both internal and external – including aspects such as dismissal, resignations and absenteeism.
- monitoring and publicising baseline assessments and annual progress in eliminating discrimination, sexual harassment and victimisation.

An individual cannot pursue an alleged contravention of this duty to the Commission or to VCAT, but a contravention may enable the Commission to investigate potential serious systematic discrimination.

In Collins v Smith [2015] VCAT 1029 [46] VCAT confirmed it does not have jurisdiction to hear an application regarding a breach of the positive duty in section 15. The positive duty applies to a person with a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation. A breach of the duty may be the subject of an investigation undertaken by the Commission under Part 9 (Investigations) of the Equal Opportunity Act (see section 15(4)).

1 Interpretation of Legislation Act 1984 (Vic) s 35(a). See also Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 [388]–[389].
2 Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 783 (Robert Hulls, Attorney General).
'Public authority' is defined in s 4(2)(i) of the Charter of Human Rights and Responsibilities Act 2006 (Vic). For further consideration about who may be a public authority, see Metro West v Sudi (Residential Tenancies) [2009] VCAT 2025.
Explaining the types of discrimination

Unlawful discrimination includes both 'direct' and 'indirect' discrimination on the basis of a protected attribute. The tests for direct and indirect discrimination are general tests that may apply to any circumstances of discrimination covered by the *Equal Opportunity Act 2010* (Vic) (Equal Opportunity Act).

**Direct discrimination**

Under section 8 of the Equal Opportunity Act, direct discrimination occurs if a person treats, or proposes to treat, someone with a protected attribute unfavourably because of that attribute. Section 8 also includes examples of direct discrimination:

1. An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.

2. A real estate agent refuses an African man's application for a lease. The real estate agent tells the man that the landlord would prefer an Australian tenant. The real estate agent has discriminated against the man by denying him accommodation on the basis of his race.

In determining whether a person directly discriminates, under section 8(2) it is irrelevant:

- whether that person is aware of the discrimination or considers the treatment to be unfavourable
- whether the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

**A new test for direct discrimination**

The 'unfavourable treatment' test for direct discrimination under the Equal Opportunity Act differs from the test under the *Equal Opportunity Act 1995* (Vic) (1995 Act). It also differs from most formulations of direct discrimination under other state and federal anti-discrimination legislation. The more traditional test for discrimination is the 'comparator test', such as that contained in section 5(1) of the *Sex Discrimination Act 1984* (Cth), for example. This test requires that a person needs to be treated 'less favourably' than someone without the protected attribute.¹

Parliament's stated intention in shifting away from the 'comparator test' was to simplify the definition by avoiding the unnecessary technicalities often associated with identifying an appropriate comparator.²

**What 'unfavourable treatment' means**

Direct discrimination under section 8 of the Equal Opportunity Act uses the term 'unfavourable treatment' but does not define it. It is generally understood to bear its ordinary meaning, which includes adverse treatment. See *Al Abody v Director of Housing (Human Rights)* [2017] VCAT 431 [37], citing *Aitken v State of Victoria – Department of Education & Early Childhood Development* [2012] VCAT 1547.

In *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 VCAT determined the concept of 'unfavourable' requires simply 'an analysis of the impact of treatment on the person complaining of it' [53]. It does not require an assessment of the way in which a person who has a particular attribute is treated, compared with a person without that attribute or who has a different attribute, as was the case under the 1995 Act [51]–[53]. Senior Member Nihill noted, however:
This analysis may be informed by consideration of the treatment afforded to relevant others, particularly in circumstances where it is not clear whether the treatment is unfavourable [53].

In determining unfavourable treatment it is, therefore, not necessary in all cases to determine whether a complainant with a particular attribute has been dealt with less favourably because of that attribute when compared with persons without that attribute. What is required is determining whether the consequences of the treatment are adverse to the complainant's interest or disadvantages them, and whether the dealing has occurred because of a relevant attribute of the complainant. See, for example, Lewin v ACT Health & Community Care Services [2002] ACTDT 2 [47]; Edgley v Federal Capital Press of Australia [2001] FCA 379 [53]–[54]; Prezzi, Patricia Anne and Discrimination Commissioner [1996] ACTAAT 132.

Unfavourable treatment is likely, therefore, to occur where the treatment and its consequences are – or would be – unfavourable or adverse to the complainant. See Prezzi, Patricia Anne and Discrimination Commissioner [1996] ACTAAT 132. Treatment may also be 'unfavourable' if a person is singled out, or treated differently, because of a particular attribute. See, for example, NC v Queensland Corrective Services Commission [1997] QADT 22.

For example, in Kuyken v Lay (Human Rights) [2013] VCAT 1972 VCAT was satisfied a direct threat of disciplinary action could amount to unfavourable treatment [113]–[114]. In the matter of Jemal v ISS Facility Services Pty Ltd (Human Rights) [2015] VCAT 103 VCAT observed unfavourable treatment can include attribute-based harassment or bullying, being subjected to humiliation or being denied a benefit that is offered to others [90].

Treatment that is likely to constitute 'unfavourable' treatment in employment, for example, can include (this is not an exhaustive list):

- providing a benefit on unfavourable terms (for example, less pay or greater inconvenience)
- unfairly allocating tasks (too many tasks or an unfair share of unpleasant tasks)
- unfair rostering (including the allocation of leave and overtime)
- excluding a person from essential communications
- refusing essential resources needed to do the job
- subjecting a person to humiliation.

However, not all adverse decisions will be discriminatory. In Sinopoli v Harrison (Human Rights) [2017] VCAT 355 VCAT concluded a doctor's decision to not offer treatment because of the risks involved was not unlawful discrimination based on a patient's disability. It held a clinical decision based on medical evidence may be right or wrong as a clinical decision, but it is not unlawful treatment: it is a recognition of the limits of medical science [53]. Further, VCAT found it is not unlawfully discriminatory to withhold medical treatment on the basis that it would be too risky or of no benefit, even if that decision relates to a protected attribute, such as the patient's weight [62]–[63].

**Humiliation as unfavourable treatment**

Humiliation is not defined in the Equal Opportunity Act and its definition has not been the subject of significant Victorian case law. Examples of humiliation that have been found to be 'unfavourable treatment' (and have subjected an employee to a detriment) are:

- publicly humiliating or ridiculing an employee
  See Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd [2001] VCAT 1706 [7]; cf Walgama v Toyota Motor Corporation Australia Ltd (Anti-Discrimination) [2007] VCAT 1318 [51]–[53] where there was detriment in the form of denigration, but not humiliation.
- requiring an employee to attend a painful and humiliating meeting about performance, resulting in a 'black mark' against their employment record

- depriving an employee of quiet enjoyment of employment and interfering with an employee’s quiet enjoyment of employment
- being laughed at by other employees
  See *Packer v Vagg & the Department of Education* [2001] VCAT 2218 [22].
- loss of status and responsibility.
  See *King v Nike Australia Pty Ltd (Anti-Discrimination)* [2007] VCAT 70 [148]–[149].

Humiliation as unfavourable treatment was considered in detail in *Walgama v Toyota Motor Corporation Australia Ltd (Anti Discrimination)* [2007] VCAT 1318. Mr Walgama made a complaint of discrimination against his employer Toyota, including on the grounds of race because he alleged he had been subjected to racial abuse by his colleagues. In particular, a draft roster prepared by Mr Walgama had been defaced with offensive sexual and racial language (‘black c–t’). VCAT considered the defacement of the roster constituted a ‘denigration’ of Mr Walgama, but did not constitute ‘humiliation’.

VCAT considered the Oxford English Dictionary definition of humiliation in its decision – ‘[t]he action of humiliating or condition of being humiliated; humbling, abasement formerly often equal humbled or humbled condition, humility’. It also considered the meaning of ‘humiliate’: ‘To make low or humble imposition, condition, or feeling; … to humble or abase oneself, to stoop, sometimes to prostrate oneself, to bow’ [51]–[52].

VCAT concluded because there was no evidence the defaced document was shown to anyone other than Mr Walgama and those to whom he complained, it was ‘difficult to see that in the circumstances he has been humiliated’ [53]. Importantly, this reasoning only applied to ‘humiliation’ and did not consider whether acts that contributed to a hostile working environment could amount to unlawful discrimination and a detriment in other ways, such as harassment.

VCAT took a similar view in *Poulter v State of Victoria* [2000] VCAT 1088, involving a complaint of victimisation in employment. The complainant’s former employer advised his current employer that she had seen him attending VCAT regarding a complaint about his former employer. While VCAT found the former employer’s conduct was improper, it was not satisfied the complainant’s subjective perception of the situation with nothing more was sufficient to comprise humiliation, denigration and, therefore, detriment under the Equal Opportunity Act [25].

However, in *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd* [2001] VCAT 1706 VCAT found humiliation had occurred as a result of verbal racial abuse in the workplace. In particular, VCAT found humiliation occurred in a situation where:

> [T]he language used, the circumstances of its use and the tone observed by independent witnesses were such as to attract to this conduct all the hallmarks of racial abuse, designed to cause humiliation and denigration of the Complainant (Member O’Dwyer [7]).

The complainant was called ‘black prick’ and ‘black bastard’ and told to go back to his place of birth in an abusive and derogatory tone. The comments were made in the workplace, not in a joking manner or as part of workplace banter, and where work colleagues could overhear/witness the abuse.

**Treatment 'because of' a protected attribute**

Establishing direct discrimination requires establishing a causal connection between the treatment complained of and the protected attribute. Direct discrimination occurs only where the unfavourable treatment occurred ‘because of’ a person’s protected attribute. In discrimination law, this is sometimes referred to as ‘causation’. 
Commonly, discriminatory treatment can have multiple reasons. To prove direct discrimination under section 8(2)(b) of the Equal Opportunity Act the protected attribute must be a 'substantial' reason for the treatment. It does not have to be the 'only' or 'dominant' reason. See Martin v Padua College [2014] VCAT 1652 [84].

This requirement was discussed in Stern v Depilation & Skincare Pty Ltd [2009] VCAT 2725, where Deputy President McKenzie said:

> The attribute need not be the only or dominant reason for the treatment, but must be a substantial reason for it. This means that the attribute must be a reason of substance for that conduct. The motive of the discriminator is irrelevant, and it is also irrelevant whether the discriminator was aware of the discrimination or considered the treatment less favourable (Deputy President McKenzie [8]).

VCAT held Ms Stern's pregnancy was a 'substantial reason' for her redundancy. Although the 'dominant reason' for the redundancy was a downturn in business, the actuating factor in choosing Ms Stern for redundancy was that she was a part-time employee working reduced hours due to pregnancy. Pregnancy was a substantial reason, therefore, for the treatment [67].

In a case about race discrimination, VCAT upheld the claim where no other explanations for the conduct were plausible. In Kibet v Empire Club [2018] VCAT 1868, Mr Kibet was denied entry to a club. VCAT found that 'It is not controversial that race-based discrimination occurs in our community. Neither is it controversial to say that a person might make decisions based on race some of the time, without being racist all the time. The most immediately obvious thing about Mr Kibet, in a crowd of white people, is that he is not white. Given that none of the innocent explanations offered for excluding Mr Kibet were at all likely on careful examination, I was satisfied that he was excluded from the club because of his race, specifically his appearance (SM Steele [118]).'

**Knowledge of a protected attribute**

Knowledge of the complainant's protected attribute is relevant to whether the unfavourable treatment or proposed treatment was 'because of' that protected attribute, so constitutes direct discrimination.

For example, in Tate v Rafin [2000] FCA 1582 (Rafin), the respondent revoked the complainant's membership of a club following a dispute. The complainant claimed the reasons for revoking his membership included his psychological disability that resulted in aggressive behaviour. In this case, the respondent was unaware of the complainant's disability. Judge Wilcox found the respondent had not treated Mr Tate less favourably because of his psychological disability:

> The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability [67].

Justice Wilcox's reasoning in Rafin is consistent with the decision of the Full Federal Court in Forbes v Australian Federal Police (Commonwealth) [2004] FCAFC 95 (Forbes). In that case, the Court considered whether the Australian Federal Police discriminated against the complainant when it withheld certain information about her depressive illness from a review panel convened to consider her re-deployment. The Court accepted the respondent had withheld information about the complainant's medical condition on the ground that it considered she did not have a disability, and that this did not amount to discrimination 'because of a disability [71]–[73] [76].

Nonetheless, to succeed in this type of defence, it is likely that a respondent will need a plausible and legitimate basis for claiming that it had no knowledge of the particular attribute.
In *Forbes*, there was evidence Ms Forbes had lodged a claim for a depressive illness with Comcare that had been rejected (including on review). An internal review had also found Ms Forbes’ allegations about a workplace incident she claimed had caused her illness were unsubstantiated. On those bases, the respondent had formed the view that the complainant did not have a disability.

The question of the respondent's knowledge, however, is not always straightforward. The case of *Wiggins v Department of Defence* [2006] FMCA 800 (Wiggins) demonstrates that, where something about the complainant's protected attribute is known by a respondent organisation, that knowledge may be imputed to individuals who engage in discriminatory conduct. In Wiggins, an officer of the respondent who demoted the complainant knew only that the complainant had a medical condition confining her to on-shore duties. He had no specific knowledge of the complainant's disability. However, Federal Magistrate McInnis deemed the officer knew the nature and extent of the complainant's disability as he could have accessed her medical records. This was sufficient to 'establish knowledge in the mind of' the Navy [168]. His Honour stated:

> I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer [168].

This decision suggests that where information about a person's protected attributes is known within a respondent organisation, the respondent cannot rely on its own failure to communicate to avoid liability for discrimination, even where the information is of a confidential or sensitive nature.

**Knowing a specific individual**

A person can be treated unfavourably because of their protected attribute even where the respondent does not have individual knowledge of them, as the following cases show.

In *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613, VCAT considered a discrimination claim where accommodation was refused to a person booking on behalf of a support group for same sex attracted youth. The respondent argued it had no knowledge of the specific sexual orientation of the group members. VCAT considered whether the refusal was based on the attributes of sexual orientation or personal association with another person. VCAT noted people did not need to be identified to the respondent by name and attribute [175].

The Supreme Court adopted a similar approach in *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28 (Obudho). It was alleged the respondent had cancelled a booking for an event entitled 'Africa Fest'. VCAT found the cancellation was because the prospective patrons of the event would be African, amounting to discrimination on the basis of race [13]. On appeal, the respondent submitted because treatment must be directed towards a person, there must be a 'connection or nexus between the discriminator and victim' [84]. However, the Supreme Court rejected this and stated:

> Behaviour may be directed 'towards a person' when it is directed to people that share a protected attribute, whether or not the individuals are known to the discriminator. The word 'treat' means, in the context of s 8, to 'deal with or behave or act towards in specified way'. It is commonplace to speak of governments, ministers and bureaucrats treating groups of people, such as refugees, Indigenous or homeless people, in a particular way. Those people may or may not be known to the person or entity meting out the treatment [86]–[86].
The Supreme Court decided conduct such as policies that are directed towards groups of people with a particular attribute and are adverse to those people may be direct discrimination, contravening section 8 of the Equal Opportunity Act.

This draws into question the findings in Kuyken v Lay [2013] VCAT 1972. In that case, the Supreme Court found introducing a grooming policy that required police officers to be cleanly shaven with short hair was not unfavourable treatment on the basis of physical features, because it was not conduct directed at the complainants. In Obudho, the Supreme Court decided conduct such as policies that are directed towards groups of people with a particular attribute and that are adverse to those people may be direct discrimination that contravenes section 8 of the Equal Opportunity Act.

Inferring a reason for the treatment

The reason for the treatment in discrimination claims – the causation element – is often not explicit or overt. Courts and tribunals often need, therefore, to infer the reason for the treatment from the surrounding facts and evidence to make a finding.

When inferring a discriminatory reason for conduct, the court or tribunal must be satisfied there is no ‘equally or more probable explanation of the conduct’. This does not require the court or tribunal to accept the innocent explanations proffered by the respondent in all circumstances. See, for example, Poniatowska v Hickinbotham [2009] FCA 680; Oyekanmi v National Forge Operations Pty Ltd [1995] VADT 3. Rather, if an innocent explanation is equally or more probable on the basis of the evidence and circumstances, an inference of unlawful discrimination cannot be drawn.

In Department of Health v Arumugam [1988] VR 319 (Arumugam), the complainant alleged the Department of Health had discriminated against him on the ground of his race on two occasions. First, by declining to appoint him permanently to the position of Psychiatric Superintendent of Plenty Hospital in Bundoora (he had been acting in this position for six months). Second, by determining that a person other than the complainant be appointed to the position. Justice Fullagar said it was not open to a tribunal to draw the inference that Dr Arumugam was not selected for the position of Psychiatrist Superintendent because of his race simply because another less qualified candidate was ultimately selected. Justice Fullagar said:

\[\text{T}he\ \text{mere}\ \text{fact}\ \text{that}\ \text{the}\ \text{appointment}\ \text{did}\ \text{not}\ \text{go}\ \text{to}\ \text{the}\ \text{man}\ \text{whom}\ \text{the}\ \text{Board} \\text{considered}\ \text{to}\ \text{be}\ \text{clearly}\ \text{the}\ \text{better} \\text{qualified}\ \text{candidate},\ \text{did}\ \text{not}\ \text{of}\ \text{itself} \\text{indicate}\ \text{discrimination}\ \text{of}\ \text{some}\ \text{kind}[325].\]

His Honour went on to say:

If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inference to be drawn against dishonest explainers with greater certainty, but that is all. In the present case 'the ground of race' was, in the absence of explanation clearly lacking, and the non-acceptance of this proffered explanation could not provide the missing elements [330].

In Arumugam, Justice Fullagar held it was necessary to show intention to make a case of direct discrimination. But this requirement was later negated by the High Court in Waters v Public Transport Corporation (1992) 173 CLR 349 and then by section 10 of the Equal Opportunity Act, which provides that motive is irrelevant. Intention is discussed further below.

A different conclusion was reached in Oyekanmi v National Forge Operations Pty Ltd [1995] VADT 3. VCAT considered a complaint by Mr Oyekanmi, an engineer originally from Nigeria, who claimed he was dismissed from employment because of his race. VCAT inferred the reason for Mr Oyekanmi's dismissal was race based. Relevantly, Mr Oyekanmi was asked during an employment interview whether he anticipated he would have any problems working in an organisation that was 'all white'. The chairman of the company also gave evidence it was crucial for Mr Oyekanmi to have 'credibility' with his colleagues. This credibility included
being able to strike up working relationships and be accepted by his workmates [78]. VCAT rejected the argument that the credibility requirement was racially neutral. It found the credibility requirement was applied to Mr Oyekanmi because of a perception that others in the workforce might not accept him due to his race. For this reason, VCAT found the reason for the dismissal – the failure to satisfy the credibility requirement – was because of Mr Oyekanmi's race.  

Justice Smith considered these decisions, especially the findings in Arumugam, in the case of *State of Victoria v McKenna* [1999] VSC 310 (McKenna). In his reasons, his Honour cautioned Justice Fullagar's comments in Arumugam ought to be understood in the context of the facts of that particular case. He pointed out that the selection panel in Arumugam had proffered an alternative, innocent explanation – namely, that the candidate appointed to the position was better suited to the role because he was more dynamic and articulate, albeit lesser qualified than Dr Arumugam.

Justice Smith went on to say that in discrimination complaints the person's attribute, as well as societal prejudices and attitudes towards persons with that attribute, are relevant to drawing inferences. The existence of racist attitudes and stereotypes within a community or organisation, for example, may leave open an inference of racial discrimination. It is then a matter for the court or tribunal to decide whether an innocent reason is equally or more probable than the proscribed reason. Justice Smith found a finding of discrimination would have been open in *Arumugam* 'if, on the evidence, it was open to the Board to find no selection Board acting reasonably could have preferred [the other applicant] to Dr Arumugam' [43].

Justice Smith applied these principles in *McKenna*, holding that it was appropriate for VCAT to infer that a police officer, Crossley, had disclosed the personal address of his colleague, the complainant, to her ex-partner because of the complainant's sex. Crossley had told VCAT that he would have disclosed the personal address of any colleague in similar circumstances, regardless of whether the colleague was a man or woman. However, Justice Smith agreed it was open to VCAT to reject that evidence and infer that the reason for the conduct was discriminatory, particularly given the surrounding evidence about a sexist culture within the workplace and the sexist attitude of Crossley. In those circumstances, 'it was open to VCAT to conclude Crossley was reacting again in a sexist manner to aggression on the part of a woman' [97].

**Irrelevance of motive and intention**

Under the Equal Opportunity Act, it does not matter whether the respondent was aware of the discrimination, or whether he or she intended to breach the law. Unlawful discrimination may be unintentional. In other words, the relevant question is, what was the 'true basis' for the conduct, putting the respondent's intention aside?  

Section 8(2)(a) of the Equal Opportunity Act states that it is not relevant, in determining whether a person directly discriminates against another, whether that person – the discriminator – is aware of the discrimination or considers the treatment to be unfavourable.  

Section 10 of the Equal Opportunity Act also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'. For example, page 14 of the *Explanatory Memorandum* of the Equal Opportunity Bill 2010 outlines that an employer who refuses to employ a candidate because she is Aboriginal, not because the employer dislikes Aboriginal people, but because the employer thinks that an Aboriginal person working in the job would be given a hard time by other employees, who are prejudiced towards Aboriginal people, still discriminates against that candidate.

In *Obudho v Patty Malones Bar Pty Ltd* [2017] VSC 28, VCAT found it is necessary for complainants to prove their case on the balance of probabilities. A fact is proved if the complainants satisfy VCAT that it is more probable than not that it occurred and that there is no equally or more probable innocent explanation of the conduct. Regard must be had to the allegations made. The seriousness of the allegations will influence the evidence sufficient to
prove those allegations and the inferences VCAT is entitled to draw. The standard of proof is discussed further in the chapter on Procedures and evidence.

Indirect discrimination

Legal protections against indirect discrimination recognise treating all people the same, regardless of difference, may unfairly disadvantage some people or groups of people. Indirect discrimination is often subtler and more difficult to recognise than direct discrimination.

Under the Equal Opportunity Act, indirect discrimination occurs when an unreasonable requirement, condition or practice – which may appear to treat people equally – has the effect of disadvantaging, or potentially disadvantaging, a group of people with a particular protected attribute.

Section 9 of the Equal Opportunity Act defines ‘indirect discrimination’ as follows:

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –

(a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
(b) that is not reasonable.

(2) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

(3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following –

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
(b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
(c) the cost of any alternative requirement, condition or practice;
(d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;
(e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

(4) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

Examples

(1) A store requires customers to produce photographic identification in the form of a driver's licence before collecting an order. This may disadvantage a person with a visual disability who is not eligible to hold a driver's licence. The store's requirement may not be reasonable if the person with a visual disability can provide an alternative form of photographic identification.

(2) An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.
A new test for indirect discrimination

There are some key features of the tests for indirect discrimination in the Equal Opportunity Act.

Section 9 of the Equal Opportunity Act requires a complainant to establish that the requirement, condition or practice causes, or is likely to cause, 'disadvantage' to people with the particular attribute. It is not necessary to draw comparisons between people with and without the attribute. Under the 1995 Act, the complainant needed to demonstrate he or she could not comply with the relevant requirement, condition or practice, and that a substantially higher proportion of people without the particular attribute could comply.

The onus of proving whether a condition, requirement or practice is reasonable falls on the respondent to a claim of indirect discrimination. Under section 9, the complainant has to prove the circumstances giving rise to the claim, namely the requirement, condition or practice that caused them to suffer disadvantage. However, the respondent then has the burden of proving the requirement, condition or practice is reasonable. This key change from the 1995 Act reflects the fact that the respondent is usually better placed to justify and provide evidence about why the condition, requirement or practice was imposed.

What 'requirement, condition or practice' means

A complaint must be based on a 'requirement, condition or practice' to satisfy the test for indirect discrimination. The complainant must precisely formulate the requirement, condition or practice complained of.\(^{10}\)

The Equal Opportunity Act does not define the terms 'requirement', 'condition' or 'practice'. However, courts have said similar provisions in anti-discrimination laws should be interpreted in a broad rather than technical manner – for example, to encompass 'any form of qualification or prerequisite demanded'.\(^{11}\)

VCAT is not bound by the complainant's formulation of the requirement, condition or practice. It must determine the true nature of a requirement, condition or practice. It may decide the requirement, condition or practice complained of did not exist, or that a different one existed, based on all the facts and circumstances.\(^{12}\)

For example, in State of New South Wales v Amery [2006] HCA 14, a group of female casual teachers brought an indirect discrimination complaint on the basis of sex. They argued their employment was subject to a condition that to access higher salary scales required permanent employment status [17]. The complainants' family responsibilities precluded deployment around the state in the same way as permanent teachers. They argued as women with family responsibilities they could not comply with the condition, but a substantially higher proportion of men could comply.

In upholding the State of New South Wales's appeal, the majority of the High Court determined there had been no indirect discrimination. Justices Gummow, Hayne and Crennan held the phrase 'requirement or condition' must be given a broad meaning rather than a technical one, given 'the nature of the mischief' [63].

However, despite a broad interpretation of the phrase, their Honours found the alleged condition had not been imposed on the teachers' employment with the State of New South Wales because they had been specifically employed as 'casual teachers' under a statutory scheme, rather than as permanent teachers. The High Court considered this a material distinction between the positions and their terms of employment. Moreover, the distinction was not adopted by a decision or practice of the state as a condition placed on the teachers' employment. Rather, it was imposed on the state by statute and industrial award [78]–[82].\(^{13}\)

The extent to which a discriminatory requirement, condition or practice must be articulated and proven varies in case law. Commonwealth cases suggest the requirement, condition or practice does not need to be explicit and can be implied from the circumstances. In Waters v Public Transport Corporation [1991] HCA 49; (1992) 173 CLR 349, for example, the complainants had various physical or intellectual disabilities and relied on the assistance of
tram conductors and railway station assistants in order to travel on public transport. The High Court found the removal of conductors from trams gave rise to a requirement or condition that tram travellers be able to use the system without the help of conductors. In Catholic Education Office v Clarke [2004] FCAFC 197 the Full Court of the Federal Court of Australia stated the expression 'requirement or condition should be construed broadly to include any form of qualification or prerequisite, although the actual requirement or condition should be formulated with some precision' [103]. The Court went on to say, 'the legislation should be given a generous interpretation and alleged discrimination should not be permitted to evade the statutory definition … by defining its services so as to incorporate the alleged requirement or condition'.

Case law also suggests the 'requirement or condition' does not need to be absolute to support a claim of indirect discrimination. In Secretary, Department of Foreign Affairs and Trade v Styles [1989] FCA 342 the Full Court of the Federal Court of Australia held the employer's 'preference' for a candidate employed at a particular grade (within the public sector classification scale) constituted a 'condition or requirement', even though candidates from lower grades could apply for a role. It found a requirement or condition meant a stipulation that must be satisfied if there is to be a practical (not just theoretical) chance of selection. The Court stated 'we agree with the learned primary judge that something falling short of an absolute bar to selection may be a 'requirement or condition' (Bowen CJ and Gummow J [26]).

A different approach was taken in Bevilacqua v Telco Business Solutions [2015] VCAT 269, where the respondent refused the complainant's request to reduce her full-time working hours. VCAT rejected the submission that this refusal was evidence of a requirement, condition or practice that employees work full time, regardless of any need for adjustment. It found the evidence involved one request by one employee at one time, and that a pattern of requests and refusals was needed to prove a 'requirement' [187]–[188].

Other examples of requirements, conditions or practices found to exist in recent Victorian cases include:

- a requirement to take on 'significantly extra work', characterised by an inability to complete the required work on each day, a lack of meal or other breaks, the need to either skip meals or eat while working, and very long hours See Ferris v Department of Justice and Regulation (Human Rights) [2017] VCAT 1771.


- the requirement for passengers to be able to sit safely in an economy-sized seat to be guaranteed air travel in economy class See Perrett-Abrahams v Qantas Airways Limited [2000] VCAT 1634.

- a requirement that a doctoral candidate at university take no more than 12 months' break from study See Torres v Monash University [2006] VCAT 1208 [54].

- a requirement that moviegoers access cinemas by stairs only. See Hall Bentick v Greater Union Organisation Pty Ltd [2000] VCAT 1850.

**Essential terms of an employment contract**

Case law under the 1995 Act suggests that the requirement, condition or practice must be something more than an essential term of the employment contract to support a claim of indirect discrimination. Something inherent to the "nature of the job itself" cannot support a claim of indirect discrimination. 14

Generally, it will be a policy or practice that impacts on a person's ability to be employed, remain employed or fully enjoy the benefits of their employment.
These principles were applied in *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211 (McDougall), a case where the complainant claimed her employer indirectly discriminated against her by not paying her salary continuance during a time when she claimed she suffered an impairment – a gambling addiction. Her employer also required her to work in Victoria, though her impairment resulted in a practical inability to do so. VCAT held:

> [T]he complainant must identify a requirement or condition that is separate from the terms of her employment contract or from the nature of the job itself. In this case, the nature of the complainant's job was to work within a specific designated territory that happens to be within Victoria. The relevant requirement or condition must apply not just to the complainant but to all the relevant persons, in this case all the employees of the company [35].

VCAT held a requirement for the complainant to work in Victoria was not a ‘requirement, condition or practice’ capable of supporting a claim of indirect discrimination. Ms McDougall had accepted a sales role based in Victoria, then voluntarily relocated to Perth where she sought help for her gambling problem. Later, she told the company that she could not work in Victoria. VCAT found:

> It cannot be said that the fact that her duties involve working in Victoria constitutes the imposition of a discriminatory requirement or condition … In this context, the company was not imposing any requirement on her; rather, she was in effect seeking to vary her terms of employment so that the location of her employment was Western Australia rather than Victoria [36].

To support this reasoning, Vice President Judge Davies relied on *State of Victoria v Schou [No 2]* [2004] VSCA 71 (Schou [No 2]) (also discussed in the section Whether the condition, requirement or practice is ‘reasonable’). The complainant Ms Schou was a sub-editor of the Hansard reports. She claimed the requirement to attend work full time at Parliament on house sitting days was unreasonable. Ms Schou suggested she, unlike her colleagues, could not comply because of her status as a carer and parent. VCAT upheld Ms Schou’s complaint, but on appeal to the Court of Appeal her complaint was rejected.

The key question on appeal in *Schou [No 2]* was whether the requirement as formulated was reasonable in all the circumstances. Justice Phillips held in the context of Ms Schou’s employment and the duties she was required to perform it was reasonable. He found ‘[t]here was ample reason, surely, to justify such a requirement or condition which was, after all, a term of the contract of employment when first made’ [24].

However, the reasoning in *Schou [No 2]* and *McDougall* does not appear to have been followed in later indirect discrimination cases. Further, in *McDougall*, VCAT found the relevant requirement or condition must apply not just to the complainant but to all the relevant persons. This finding appears to contradict other cases that have found an unreasonable condition that applied to only one person.

For example, in *Kelly v TPG Internet* [2003] FMCA 584, Federal Magistrate Raphael found an employee had been indirectly discriminated against. A condition was imposed that her promotion be on an 'acting' rather than permanent basis, in circumstances where the employee was pregnant and planning to take maternity leave. Another employee who the company knew intended to take leave was appointed to a permanent role around the same time [56].

These aspects of *McDougall* and *Schou [No 2]* should be treated with caution.

**Essential terms of other contracts**

Whether any essential term of a contract or service can constitute a condition or requirement for the purpose of making out an indirect discrimination claim may also be relevant to other areas of public life.

For example in, *Catholic Education Office v Clarke* [2003] FCA 1085, Justice Madgwick found a school had indirectly discriminated against a deaf student [45]. His Honour held the
school had imposed a ‘requirement or condition’, namely ‘to participate in and receive classroom instruction without the assistance of an interpreter’ [42]. In considering what were essential terms of the service offered by the school, Justice Madgwick found:

It is not necessarily inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter. It is not perhaps even necessarily inherent, in an age of computers and cyberspace, that it be conducted to any particular degree in spoken English or in any other spoken language, although the concept of conventional classroom education may be accepted as necessarily implying the use of a spoken language [45].

Reliance on these principles in future cases may be affected by key changes under the Equal Opportunity Act such as:

- Section 15, the positive duty to eliminate discrimination
- Section 19, the requirement to make 'reasonable adjustments' for a person with a disability
- Section 20, to not unreasonably refuse to accommodate a person's responsibilities as a parent or carer.

What 'disadvantage' means

Section 9(1)(a) of the Equal Opportunity Act is concerned with the consequences of the treatment complained of. To satisfy the test for indirect discrimination, the requirement, condition or practice must be unreasonable and have the effect (or likely effect) of 'disadvantaging' persons with an attribute.

The Equal Opportunity Act does not define 'disadvantage'. Given the objects and purposes of the Equal Opportunity Act, the term 'disadvantage' is likely to be interpreted broadly. Under the Discrimination Act 1991 (ACT), for example, disadvantage has been held to occur simply where the treatment is 'adverse to the interests' of persons with the relevant attribute. It is not necessary to draw a comparison between the outcomes for people with and without the relevant attribute. See Prezzi v Discrimination Commissioner (1996) 39 ALD 729.

In the case of Petrou v Bupa Aged Care Australia Ltd [2017] VCAT 1706. (Petrou), Judge Harbison considered the meaning of disadvantage under section 9. The complainant suffered from multiple sclerosis and lived in aged care accommodation run by the respondent. When the complainant moved into the facility, one of the personal care items she took with her was a bed pole to assist her mobility. The respondent banned bed poles in its residential care homes. This was in response to safety alerts following several inquests into deaths of residents of aged care facilities using bed poles. The complainant alleged indirect discrimination.

Using a 'common sense and practical approach' to the word disadvantage, together with the objectives of the Act, Judge Harbison considered two matters relevant to assessing disadvantage:

- whether the requirement to remove the bed pole disadvantaged Mrs Petrou because it gave her less mobility and a feeling of less independence. Judge Harbison noted:
  
  A person's right to dignity and a sense of self-worth should not be under estimated. Any activity, however small, that enhances that dignity and self-worth is a significant advantage and any measure which diminishes even to a small part the ability to move is a disadvantage [78].

- whether it was possible for the requirement to remove the bed pole to be a disadvantage when the purpose was to increase Mrs Petrou's safety and avoid potential risk of death. Judge Harbison concluded the policy was ultimately beneficial and that it was counterintuitive to describe such a measure as a disadvantage.

It may also be necessary to show that the disadvantage occurs for a class of persons, not just an individual, in certain circumstances.
In *Petrou* Judge Harbison asked whether the Equal Opportunity Act required her to also consider whether the requirement disadvantaged persons in general with the attribute possessed by the complainant (people living with multiple sclerosis). Judge Harbison held:

Although the comparator principle is no longer part of the definition of indirect discrimination in Victoria, I take the view that it is still necessary for any complainant to prove that the requirement has, or is likely to have, the effect of disadvantaging persons with an attribute.

This is because the Act says so. That use of the plural 'persons' is important. The form of words is ‘the effect of disadvantaging persons with an attribute’ … I take the fact that this section is not cast in individual terms but is instead cast in terms of identifying a group of persons with an attribute who are or are likely to be disadvantaged by the requirement, to be an essential feature of the claim of indirect discrimination [102]–[103].

The complainant needed to prove, therefore, that the requirement that bed poles not be used disadvantaged persons with multiple sclerosis or with her physical characteristics, not just her as an individual.

**Whether the condition, requirement or practice is 'reasonable'**

As explained above, the person who imposed the requirement, condition or practice must prove it was reasonable in all relevant circumstances. If the requirement, condition or practice is found to be reasonable in the circumstances, it does not constitute indirect discrimination.

The question of reasonableness is factual. In relation to Commonwealth discrimination law, the Federal Court of Australia stated:

As Wilcox J. held the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. We agree. The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.  

Section 9(3) of the Equal Opportunity Act is consistent with this approach. It sets out a number of factors to be considered in deciding reasonableness. In summary:

a. the nature and the extent of the disadvantage caused

b. whether the outcome is proportionate to what the respondent sought to achieve by imposing the requirement, condition or practice

c. the costs of any alternative measures

d. the respondent's financial circumstances

e. whether reasonable adjustments or accommodation could be made to reduce the disadvantage caused.

The Explanatory Memorandum of the Equal Opportunity Bill 2010 clarifies that none of these factors in isolation will determine reasonableness. There may also be other relevant factors depending on the particular case (page 14).

In *Schou [No 2] [2004] VSCA 71* Chief Justice Phillips commented the central question is whether the condition, requirement or practice actually imposed is reasonable, and not whether some alternative arrangement proposed by the complainant is also reasonable:

As I have said, so far from being not reasonable, the attendance requirement was perfectly reasonable. The existence of the alternative – an alternative which was put forward merely as a short-term solution to the temporary problem – did not dictate the contrary. That is not to say that alternatives are irrelevant: as already noticed, the fact that an alternative could have been adopted will ordinarily be one of the circumstances that must be examined in
Chief Justice Phillips went on to provide an example where one condition or requirement is no 'better suited' to the employer's needs than another, in which case 'it ceases to be reasonable to insist upon the one over the other' [27].

Irrelevance of motive and intention

Indirect discrimination may be unintentional. Section 9(4) of the Equal Opportunity Act states that it is not relevant, in determining whether a person indirectly discriminates, whether or not that person is aware of the discrimination. This complements Section 10 of the Equal Opportunity Act, which also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'.

1 The test in the Equal Opportunity Act no longer requires a comparison between the way the complainant was treated (or proposed to be treated) and the way in which another person, without the protected attribute or with a different attribute, would be treated in 'the same or similar circumstances' or 'in circumstances that are the same or are not materially different'.
2 Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).
13 Their Honours did not go on to consider whether the conduct was reasonable, but Gleeson CJ, Callinan and Heydon JJ did, and found the conduct was reasonable in the circumstances. Kirby J dissented.
15 Firestone v Australian National University [2009] ACTDT 1 [45]. See, for example, J v Federal Capital Press of Australia Limited [1999] ACTDT 2 where 'disadvantage' was taken to include treatment that denied the complainant the opportunity to 'participate in an activity that is generally perceived contain advantages to those who are allowed to participate'.
Protected attributes

Attributes that are protected

Section 6 of the Equal Opportunity Act 2010 (Vic) (Equal Opportunity Act) sets out the 'attributes' on the basis of which discrimination is prohibited in the areas of activity in Part 4 of the Equal Opportunity Act. Those attributes are:

(a) age
(b) breastfeeding
(c) employment activity
(d) gender identity
(e) disability
(f) industrial activity
(g) lawful sexual activity
(h) marital status
(i) parental status or status as a carer
(j) physical features
(k) political belief or activity
(l) pregnancy
(m) race
(n) religious belief or activity
(o) sex
(p) sexual orientation
(pa) an expunged homosexual conviction
(q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Many of the protected attributes are self-explanatory – for example, age, breastfeeding and sex. For others, the Equal Opportunity Act contains more detailed definitions. Some of the more complex attributes are explored further below.

The onus of proving the existence of an attribute is on the person bringing a complaint.¹

Extensions of protected attributes

Importantly, section 7(2) provides:

(2) Discrimination on the basis of an attribute includes discrimination on the basis—

(a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
(b) of a characteristic that a person with that attribute generally has;
(c) of a characteristic that is generally imputed to a person with that attribute;
(d) that a person is presumed to have that attribute or to have had it at any time.
Section 7(3) of the Equal Opportunity Act also makes it clear that the use of an assistance aid, such as an assistance dog, by somebody with a disability will be treated as a 'characteristic' that a person with that attribute generally has, as discussed further in this chapter.

These provisions require a broader inquiry than simply whether the complainant actually has the protected attribute and whether there is a causal nexus between that attribute and the alleged discriminatory conduct.

**Presumed attribute**

In *Daniels v Hunter Water Board* (1994) EOC 92–626, Mr Daniels alleged he was harassed and discriminated against by the respondent over a number of years on the grounds of his presumed homosexuality, even though he did not identify himself as being homosexual.

The alleged conduct began after Mr Daniels adopted a 'trendy' haircut and an earring in his left ear. He also took up jazz, ballet, drama and modelling. At this time, his co-workers started to call him a 'weirdo' and suggest that he must be 'gay'. After Mr Daniels removed a poster of a naked woman from his workplace because it had offended a female colleague, the frequency of these derogatory comments increased.

Mr Daniels' claim on the basis of his presumed homosexuality was upheld. While this decision was made in New South Wales, the wording in section 7(2) of the Equal Opportunity Act suggests the same principles would apply in Victoria.

**Imputed characteristic**

In *Waterhouse v Bell* (1991) 25 NSWLR 99 the complainant was refused registration as a racehorse trainer because her husband had been 'warned off' all racecourses due to his involvement in a horse substitution scandal. The New South Wales Court of Appeal found the registration refusal was because of a characteristic imputed to married women – that is, that all wives are liable to be corrupted or influenced to do wrong by their husbands. On that basis, the Court held the refusal constituted discrimination against the complainant on the ground of marital status.

**Attributes under Commonwealth anti-discrimination laws**

Most of the attributes in the Equal Opportunity Act overlap with protected attributes under federal anti-discrimination legislation and industrial legislation such as the *Fair Work Act 2009* (Cth). A number of protected attributes, however, remain particular to Victoria (and a few other states). These attributes are discussed below.

**What 'protected attributes' means**

**Employment activity as a protected attribute**

'Employment activity' is defined in section 4 of the Equal Opportunity Act to mean:

- An employee in his or her individual capacity—
  1. making a reasonable request to his or her employer, orally or in writing, for information regarding his or her employment entitlements; or
  2. communicating to his or her employer, orally or in writing, the employee's concern that he or she has not been, is not being or will not be, given some or all of his or her employment entitlements.

'Employment entitlements' in relation to an employee are broadly defined in section 4 of the Equal Opportunity Act to mean:

- the employee's rights and entitlements under an applicable—
  1. contract of service; or
(b) federal agreement or award; or
(c) minimum wage order under the *Fair Work Act 2009 (Cth)*; or
(d) contract for services (such as independent contractor); or
(e) Act or enactment; or
(f) law of the Commonwealth.

The 1995 Act was amended in 2007 to include these definitions. The *Explanatory Memorandum* to the amending Bill stated the amendment sought to:

> [P]rovide further protection to Victorian employees where, in their individual capacity, they make a reasonable request to their employer for information about their employment entitlements or communicate concerns to their employer about whether they have been, are being or will be given their employment entitlements (page 1).

The *Explanatory Memorandum* to the amending 2007 Bill provides extensive guidance about the interpretation of 'employment activity':

A request for information does not extend to questions unrelated to or outside of an employee's existing employment entitlements. A request for information would include questions about the source of the employee's employment entitlements, what the entitlements are and whether the employee has been, is being, or will be given those entitlements. For example:

- what is my rate of pay?
- how many holidays have I accrued?
- do I have an entitlement to paid maternity leave?
- have I been paid for those extra hours I worked?
- will I be able to take my annual leave next month?

A request for information can be made verbally or in writing but the request must be reasonable. This means that the nature of the information sought about the employment entitlements should be reasonable and that the request should be made in a reasonable manner and at a reasonable time. For example, a request will not be reasonable if the employee asks the employer for confidential or unduly complicated information that the employer cannot readily access. Some examples of a request that may not be made in a reasonable manner or at a reasonable time is a request made in a violent or threatening manner or made outside of normal work hours.

The attribute also covers an employee communicating a concern to his or her employer about whether his or her employment entitlements have not been, are not being or will not be given to him or her.

This may cover concerns such as:

- I am worried that I have not been paid my overtime allowance.
- why am I not being paid at the correct rate of pay?
- someone has told me that the company is going under and I will not be paid my redundancy pay.

It is not intended, however, that the attribute provide a mechanism for enforcing employment entitlements or for negotiating a pay rise or other terms and conditions of employment more generous or different than those to which an employee is currently entitled (pages 2–4).

See also *Loevski v Jacobson [2010] VCAT 1428*. 

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Sex as a protected attribute

The term sex is not defined in the Equal Opportunity Act. As discussed below, in 2001 the Victorian Civil and Administrative Tribunal (VCAT) considered this term to mean being male or female.\(^2\) While sex has historically been understood as exclusively female or male, it is now known and accepted by courts that biological sex characteristics include many variations and that 'the sex of a person is not ... in every case unequivocally male or female'.\(^3\)

Gender identity as a protected attribute

In 2000 gender identity was added to the Equal Opportunity Act as a protected attribute. The intention was to extend protection against discrimination to those whose gender identity does not match their physical sex at birth. This ranged from people who occasionally dress in a style usually associated with the opposite sex to persons undergoing gender reassignment surgery.\(^4\)

The matter of *Menzies v Waycott [2001] VCAT 415* in 2001 highlighted the need to include the attribute of 'gender identity'. After gender identity had been included as an attribute in the 1995 Act, VCAT considered a complaint made by an employee regarding discrimination in employment that pre-dated the reform. The complaint was made by a woman who had transitioned and had reassignment surgery. VCAT contemplated whether the attributes of sex, physical features and impairment could include 'transsexualism'. VCAT found the attribute of sex in the Equal Opportunity Act had the straightforward meaning of being male or female. VCAT found neither sex nor physical features could cover the 'condition of transsexualism' however there were grounds for concluding it to be an 'impairment' \([198]–[199], [205], [230]\).

Gender identity covers a range of expressions of gender, from the way that a person dresses or speaks, to gender reassignment surgery. 'Gender identity' is defined in section 4 to mean:

(a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such):

(i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or

(ii) by living, or seeking to live, as a member of the other sex; or

(b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):

(i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or

(ii) by living, or seeking to live, as a member of the other sex.

However, the definition of 'gender identity' under the Equal Opportunity Act does not extend to people who do not identify as either 'male' or 'female' gender. People who identify as of 'indeterminate sex' (often due to their mixed or indeterminate sex characteristics), are not protected, though people who are physically intersex are protected, on the basis of the 'sex' protected attribute.

Gender identity is protected under Commonwealth law and in Victoria, Queensland, and Tasmania. Very similar protections are afforded in some other states, such as 'chosen gender' in South Australia and the more ambiguous 'gender history' in Western Australia.

The Commonwealth *Sex Discrimination Act 1984* specifically protects people who experience discrimination because of their sexual orientation, gender identity or intersex status. Intersex people who do not identify as being either female or male are covered by Commonwealth law.\(^5\)
Disability as a protected attribute

‘Disability’ is defined in section 4 of the Equal Opportunity Act to mean:

(a) total or partial loss of a bodily function; or
(b) the presence in the body of organisms that may cause disease; or
(c) total or partial loss of a part of the body; or
(d) malfunction of a part of the body, including:
   (i) a mental or psychological disease or disorder;
   (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or
(e) malformation or disfigurement of a part of the body—

and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.

The 1995 Act used the term 'impairment' rather than the more commonly used term 'disability'.

The words 'includes a disability that may exist in the future' have been found to extend to any disability that may exist at any time in the future. In Ingram v QBE Insurance (Australia) Ltd [2015] VCAT 1936 the respondent issued an insurance policy that included a clause excluding all claims from people who experienced a mental illness. The complainant, who developed depression after purchasing the policy, argued the exclusion in the policy was unlawful discrimination. VCAT found at the time the complainant bought the insurance policy, she did have a disability. Reading the words of section 4 widely, VCAT said 'the definition of disability applies to a person at a point in time when a future disability did not yet exist or had not been diagnosed, was not known to the person or others or was not otherwise apparent' [49]. On the evidence that the complainant later did develop a disability, VCAT accepted at the time she bought the insurance policy, she was a person for whom a disability may exist in the future [50].

A disability may also be temporary. In Bevilacqua v Telco Business Solutions [2015] VCAT 269, VCAT found although a pregnant woman suffering morning sickness is generally not considered to be a person with a disability, morning sickness may constitute a ‘disability’ involving the malfunction of a part of the body. Morning sickness also falls within the pregnancy attribute (in this case, the complainant had suffered from a very severe form of morning sickness as well as ordinary morning sickness) [154] [192] [195] [199].

Characteristics of an attribute

Section 7(2) of the Equal Opportunity Act provides that attributes include characteristics of an attribute. For this reason, it is also unlawful to discriminate against a person on the basis of a characteristic generally pertaining or imputed to a person with a disability.

Sections 7(2) and 7(3) of the Equal Opportunity Act also make clear that the use of an assistance aid, such as equipment, an assistance dog or a person who provides assistance, is a characteristic that a person with a disability generally has. This means discrimination on the basis of the assistance aid will be unlawful (unless a defence or exception applies).

The provisions in sections 7(2) and 7(3) were inserted to deal with the situation in Walker v State of New South Wales [2003] NSWADT 13 (Walker). In Walker, the complainant used a walking stick and an aluminium scooter as mobility aids to cope with a back injury. On several occasions he tried to access the Parramatta Court complex but was initially denied entry with his stick or scooter until the court staff were able to ascertain that these items were assistance aids. Once the court staff were satisfied Mr Walker used his stick and scooter to cope with a disability, he was granted special dispensation to use these items within the court complex. Mr Walker argued he should not be required to obtain special dispensation to enter the court complex for a matter in which he was personally involved.
One of the issues the New South Wales Administrative Tribunal considered was whether the use of a scooter or stick as a mobility aid was a characteristic that pertains generally to, or is generally imputed to, people with a back injury. Mr Walker, who was unrepresented, had not led any evidence on this point. In the absence of evidence, the tribunal said it was not open to it to make such a finding. In other words, it was not ‘common knowledge’ that the use of a walking stick or scooter are characteristics generally pertaining or imputed to a person with a back injury. The tribunal noted the Disability Discrimination Act 1992 (Cth), unlike the NSW legislation they were dealing with, dealt expressly with palliative or therapeutic devices or auxiliary aids.

Sections 7(2) and 7(3) bring the Equal Opportunity Act more closely into line with the Disability Discrimination Act 1992 (Cth). Complainants do not need, therefore, to lead evidence to prove the use of an assistance aid is a characteristic generally pertaining or imputed to a person with a disability.

In circumstances that fall outside sections 7(2) and 7(3), the complainant will still need to identify the particular characteristic and satisfy VCAT that it is a characteristic that a person with a disability generally has, or is generally imputed to have. In O’Connor v State of Victoria (Dept of Education and Training) [2004] VCAT 118, for example, VCAT did not accept that taking sick leave is a characteristic a person with a disability generally has.

Manifestations or symptoms of a disability

Broadening the definition of disability in section 4 of the Equal Opportunity Act to include behaviour that is a symptom or manifestation of a disability clarified issues raised in the High Court of Australia’s decision in Purvis v New South Wales (Department of Education) [2003] HCA 62 (Purvis). 6

The Purvis case concerned the treatment of a high school student, Daniel Hoggan, who suffered from a number of disabilities as the result of a brain injury acquired when he was a baby. Daniel's disabilities manifested in certain behaviours, including violent behaviour and swearing. Daniel was suspended several times, and later expelled, from South Grafton High School on the basis of his violent and disruptive behaviour. Daniel's foster parents brought a claim of discrimination under the Disability Discrimination Act 1992 (Cth) on his behalf. The case went to the High Court of Australia on appeal. One of the issues before the High Court was whether Daniel's behaviour — which was described as a 'symptom' or 'manifestation' of his disability — fell within the meaning of 'disability' under the Disability Discrimination Act 1992 (Cth).

When the case was first decided by the Human Rights and Equal Opportunity Commission, Purvis Hoggan v New South Wales (Department of Education) [2001] EOC 93–117, Commissioner Innes had not drawn a clear distinction between Daniel’s disabilities and the manifestation of those disabilities. In the Federal Court of Australia, however, Justice Emmett applied a narrow interpretation of ‘disability’. He stated ‘it is the disorder or malfunction, or the disorder, illness or disease that is the disability’. 7

A majority of the High Court disagreed with Justice Emmett's narrow interpretation of the term ‘disability’. The High Court concluded the definition of disability does include behaviour resulting from the disability. 8 In reaching the conclusion to apply this broader interpretation of ‘disability’, the majority looked at the purpose and objectives of the Disability Discrimination Act 1992 (Cth) that, as Justices McHugh and Kirby said, was intended to be 'beneficial and remedial in nature'. 9

The issue of manifestations of a disability was considered in Slattery v Manningham City Council [2013] VCAT 1869. In 2009 the complainant had been declared a ‘proscribed prohibited person’ by the council and was banned from attending any council building. The ban was imposed in response to Mr Slattery’s behaviour and interactions with council staff (including acting aggressively and making thousands of complaints about safety issues). The complainant had requested the ban be reviewed and lifted in 2012, but the council had refused. The complainant had a number of disabilities, including post-traumatic stress...
disorder, bipolar disorder, a brain injury following a stroke, a hearing impairment and sleep apnoea. He argued his conduct was a manifestation of his disabilities and he had been treated unfavourably by being refused access to council services.

VCAT stated a complainant, to prove discrimination has occurred because of a manifestation of a disability, must provide evidence to establish the symptoms experienced consequent to their disability. VCAT cannot infer from the evidence that a complainant experiences symptoms ‘typical of people with the disabilities he suffers from’ [78]. Ultimately, Senior Member Nihill found there was sufficient evidence to show that the complainant’s compulsive complaining was a symptom of his disabilities, and although there may have been other reasons for his conduct, ‘at least to a significant extent’ the combination of his ‘irrational and anti-social behaviours’ were a manifestation of his disabilities [79]–[83].

In coming to this conclusion, Senior Member Nihill noted there is no qualification to the definition of disability in section 4 of the Equal Opportunity Act. In other words, the definition ‘does not address the situation where some other cause in addition to the disability may be operative’ [83]. However, Senior Member Nihill considered the definition did not require total or absolute certainty that the behaviours were manifestations of the disability. It was enough that VCAT was satisfied the behaviours were, to a ‘significant extent’, manifestations even if other contributing factors may have existed. This was considered the most appropriate interpretation in light of the context of other sections of the Equal Opportunity Act (such as the objects in section 3 and the test for direct discrimination in section 8). Senior Member Nihill also took into account VCAT’s obligation under section 32 of the Charter of Human Rights and Responsibilities to interpret statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistent with their purpose [83].

VCAT also considered manifestations of a disability in the education context in two similar cases AB v Ballarat Christian College [2013] VCAT 1790 and USL obo her son v Ballarat Christian College [2014] VCAT 623 (USL). Those cases involved students with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder (ADHD) respectively. However, there was insufficient evidence provided by the complainants to prove the behaviours were manifestations of their disability.

In USL, Judge Harbison noted it was ‘fundamental’ that the complainant first establish that the student (her son) had the alleged disability (ADHD) at the time of the alleged discrimination. The complainant must then also establish what the symptoms or manifestations of the disability were – ‘particular to her own child not as a general proposition’ for people with ADHD [47]. Judge Harbison’s concern was that there may be many different manifestations arising out of a particular disability (in this case, ADHD). Without evidence of the student’s own manifestations, the complainant would be unable to establish that the discrimination had occurred as a result of the symptoms or manifestations of the disability [22] [43]–[44]. Judge Harbison ultimately accepted the student had ADHD and certain manifestations of ADHD including a short attention span, hyperactivity and impulsivity. However, she did not accept that other behaviours were related to the disability, such as being disruptive in class, using inappropriate language and taunting other children [75]–[79].

Industrial activity as a protected attribute

The Equal Opportunity Act protects against discrimination on the basis of a person’s industrial activity.

The definition of ‘industrial activity’ in section 4 of the Equal Opportunity Act continues that which existed in the 1995 Act from 2006. The definition of ‘industrial activity’ was amended in 2006 to include:

- the setting up of an industrial organisation or association
- organising or promoting, encouraging, assisting or participating in, or not participating in a lawful activity, organised by an industrial organisation or association
representing or advancing the views, claims or interests of an industrial organisation or association.

These amendments were designed to more explicitly reflect various VCAT decisions relating to the interpretation of 'industrial activity'. In Dickinson v Shire of Yarra Ranges [2000] VCAT 1093, for example, Deputy President McKenzie stated 'industrial activity' includes:

- Action taken by groups of employees acting or expressing themselves in a collective way, or action to promote compliance with relevant awards or workplace regulations, or to improve workplace conditions where a union, or group of staff acting collectively, is also involved in that activity, or encourages, assists or supports that activity.

Similarly, in Aylett v Australian Paper & Purdy [2004] TASADT 4, the complainant's level of participation in occupational health and safety issues with the support and/or sanction of a union was defined as industrial activity.

In Hendrickson v Victorian Association of State Secondary Principals Inc [2007] VCAT 1193, not joining or not being a member of the Australian Principals Federation was held to be industrial activity as defined in the 1995 Act. The complainant was charged a higher subscription fee to join only the Victorian Association of State Secondary Principals than the fee charged to individuals who wished to join both the federation and the association. VCAT held the complainant had been discriminated against because of his industrial activity.

More recently, in Dulhunty v Guild Insurance Limited [2012] VCAT 1651, VCAT held Guild Insurance Limited had discriminated against a chiropractor on the basis of his 'industrial activity'. The complainant was charged a higher premium as a non-member of the Chiropractor's Association of Australia than the premium charged to members of the association. VCAT found not being a member of the association was an 'industrial activity' within the meaning of the Equal Opportunity Act.

Under section 4 'Industrial association' is defined as 'a group of employees or employers, formed formally or informally to represent or advance the views, claims or interests of the employees or employers in a particular industry, trade, profession, business or employment, not including an industrial organisation'.

The definition was amended in 2006 to reflect decisions of VCAT, which established that while a collective dimension is required to constitute an industrial organisation, a formal link with a union is not required.

'Industrial organisation' is defined in section 4 as:

- One of the following organisations that is registered or recognised under a State or Commonwealth Act or enactment—
  - (a) an organisation of employees;
  - (b) an organisation of employers;
  - (c) any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment.

This definition was also amended in 2006 to stipulate an industrial organisation must be registered or recognised under a State or Commonwealth enactment. This is intended to distinguish an industrial organisation from an industrial association.

**Lawful sexual activity as a protected attribute**

Lawful sexual activity is defined in section 4 as 'engaging in, not engaging in or refusing to engage in a lawful sexual activity'. This definition applies to consensual adult relationships, including legal prostitution.

The attribute of 'lawful sexual activity' has been raised where a person has been treated unfavourably because of extramarital affairs or sexual relationships between co-workers. In Rowley v Goodyear Tyres Pty Ltd [2011] VCAT 1536, for example, the respondent's application to strike out a complaint of discrimination in employment on the ground of lawful
sexual activity was denied. In that case, the complainant was terminated because of his alleged extramarital sexual relationship with another member of the executive leadership team. VCAT refused to strike out the application because the question of whether the attribute extends to relationships (as opposed to actually engaging in lawful sexual activity) needs further consideration.

Lawful sexual activity was raised in Martin v Padua College [2014] VCAT 1652 and on appeal in Pearson v Martin [2015] VSC 696. VCAT and the Victorian Supreme Court considered whether a school principal's decision to dismiss a teacher was based on the teacher's 'lawful sexual activity' with a former student. It was alleged the teacher started a relationship with an 18-year-old former student shortly after she completed her studies. VCAT accepted although the reasons for dismissal were multifaceted – involving, among other things, allegations of 'boundary transgressions' and 'grooming' – the lawful sexual activity was a substantial reason for the decision (Martin v Padua College [94]–[95]). The Supreme Court considered this finding was reasonably open to VCAT, and that the existence of lawful sexual activity formed a decisive factor in the chain of reasoning that led the principal to investigate the teacher and finally terminate his employment (Pearson v Martin [26] [70]–[71]).

Examples of sexual activities that fall outside of the scope of this definition include paedophilia, incest, bestiality or sexual assault – regardless of gender or sexual practice – because they are unlawful.

Marital status as a protected attribute

The Equal Opportunity Act protects against discrimination on the basis of a person's 'marital status'. Under section 4 this includes being single, married (whether living separately or apart from one's spouse), in a domestic partnership, divorced, or widowed.

Protections against discrimination on the basis of a person's 'marital status' do not necessarily extend to circumstances where the discrimination occurs because of the identity or situation of a person's spouse – as opposed to the relationship itself – unless the personal association discrimination applies.

For example, in Tebby v Davies [2002] VCAT 1023 (Tebby) Deputy President Coghlan applied an earlier New South Wales case Boehringer Ingelheim Pty Ltd v Reddrop [1984] 2 NSWLR 13. Deputy President Coghlan found the prohibition against discrimination on the basis of a person's 'marital status' does not 'extend to characteristics of the particular spouse or partner' [45]. In that case, the Deputy President dismissed a complaint by an employee about the termination of their employment due to their spouse working for a competitor.

The outcome would be different under the Equal Opportunity Act if the discrimination occurred because of a person's 'personal association' with another – including a spouse – who has a protected attribute. It would be unlawful, for example, for an employer to refuse to employ a candidate on the basis that he or she is married to a union official or a person of a particular religion. Such conduct would constitute unlawful discrimination against the candidate on the basis of his or her personal association with somebody who had engaged in industrial activity in the first example, or on the basis of religion in the second.

An exception to the rule may also exist where discrimination in relation to the identity or situation of a person's spouse is based on an assumption about a characteristic generally imputed to marital status, as in Waterhouse v Bell (1991) 25 NSWLR 99. In that case, the New South Wales Court of Appeal considered a complaint of discrimination brought by horse trainer Gai Waterhouse. Ms Waterhouse had applied to the Australian Jockey Club for a trainer's licence but her application was rejected on the basis that her husband had been involved in betting fraud. The Court of Appeal found, where there was no suggestion that Ms Waterhouse had a relevant character deficiency, the reason for the refusal to grant her a licence was the respondent's belief that 'all wives are liable to be corrupted by their husband', which was held to be a characteristic attributed or imputed to married women.
Physical features as a protected attribute

Victoria is the only Australian jurisdiction that protects against discrimination on the basis of a person's physical features.

'Physical features' is defined to mean a person's height, weight, size or other bodily characteristics. The term 'bodily characteristics' has been interpreted widely and has been found to include tattoos and the styling, colour and location of hair (see *Fratas v Drake International Ltd* (1998) EOC 93–038). However, personal hygiene (such as body odour), not wearing underwear and overeating are not 'physical features' (See *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365).

In *Ruddell v DHS* [2001] VCAT 1510 VCAT considered whether the complainant's loud voice fell within the meaning of a 'physical feature'. VCAT did not rule out the possibility that a 'physical feature' may include 'not only visible bodily characteristics like height or weight but any other bodily characteristics with an external manifestation such as voice which is audible' [55]–[56]. However, VCAT found the loudness of Mr Ruddell's voice – which he could control at his own will – was not within the meaning of a 'physical feature'.

In *Kuyken v Lay* [2013] VCAT 1972 (*Kuyken*), VCAT found the complainants were directly discriminated against on the basis of their physical features through the promotion and enforcement of a new grooming policy in the Victoria Police Manual, banning police officers wearing long hair and all forms of facial hair except moustaches. VCAT accepted hair and facial hair are physical features. However, VCAT found the respondent's conduct was authorised by the Police Regulations Act 1952 (Vic) and, therefore, covered by the general exception in section 75 of the Equal Opportunity Act and not unlawful (*Kuyken* [70]–[71] [166]–[167]). See Exception for things done with statutory authority for a detailed discussion about section 75.

Personal association as a protected attribute

The Equal Opportunity Act also protects against discrimination of a person on the basis that the complainant has a 'personal association' (whether as a relative, friend or otherwise), with somebody who has another protected attribute. The complainant must prove the association and that the person has one of the protected attributes. See, for example, *Lund v Eyrie Common Equity Rental Housing Cooperative Ltd* [2000] VCAT 1078 and *Johnson v Berwick City Soccer Club* [2010] VCAT 1093.

This protection was introduced with the 1995 Act. In the second reading speech for the Bill, the Honourable Haddon Storey said:

Discrimination based on the attribute of personal association is prohibited under the Bill. This ground of prohibited discrimination is intended to protect people who are discriminated against because of the association, whether as relatives or otherwise with a person who has any of the [protected attributes] ... For instance, relatives, friends and helpers of disabled persons often suffer discrimination when attempting to gain access to accommodation and services. Such people are provided with an avenue of redress under this Bill.13

In *Lund v Eyrie Common Equity* [2000] VCAT 1078 Mr Lund claimed his landlord, in giving him a notice to vacate, had directly discriminated against him because of his 'personal association' with another person, Mr Milsom. Mr Lund lived with and cared for Mr Milsom, who had a psychological impairment. VCAT referred to the second reading speech (cited above) in considering the purpose and scope of the personal association protections. While VCAT accepted the personal association attribute applied, VCAT was not satisfied it was the reason for issuing the notice to vacate. Rather, VCAT accepted the notice was issued to resolve a long running dispute between tenants.

Personal association relates to 'persons' rather than companies. In *Cassidy v Leader Associated Newspapers Pty Ltd* [2002] VCAT 1656, VCAT found personal association
requires association between natural persons and not between a person and a company [75].

**Political belief or activity as a protected attribute**

Under section 4 of the Equal Opportunity Act 'Political belief or activity' means:

(a) holding or not holding a lawful political belief or view;

(b) engaging in, not engaging in or refusing to engage in a lawful political activity.

Political belief or activity has been interpreted more narrowly by courts and tribunals in Victoria than in other jurisdictions. In Victoria, 'political' has been interpreted as a matter or activity that involves the state and 'bears on government'. ‘Political belief' has been distinguished from beliefs basic to the structure of society such as honesty (see *Richardson v City of Casey Council* [2014] VCAT 1294 [23]), and must be related to 'mores of society' (see *Jolly v Director-General of Corrections* (Vic) (1985) EOC 92–124). A belief is not political where 'it has no bearing on the form, role, structure, feature, purpose, obligations, duties or some other aspect of government' (see *Richardson v City of Casey Council* [2014] VCAT 1294 [23]). Political belief or activity covers a continuum, beginning with the mental state of belief (which includes expressing that belief, or holding a view), an intention to act, and actual action. In other words, the word 'political' describes both 'belief' and 'activity'. What is political must be determined objectively, accounting for the nature of the activity or belief. A teacher's public expression of views about the age of consent, for example, may be 'political' (see *Thorne v R* (1986) EOC 92–182).

'Political activity' means more than 'capable of being political', but can relate to deeply held political views manifested in refusal to support certain union action of a political nature. Dismissal of a builder's labourer after re-joining a deregistered union was found not to be discrimination on the ground of 'political activity' because there was no evidence the employer had the employee dismissed for engaging in political activity as defined, or that his failure to present a financial clear card was political. In the provision of goods and services, failure to allow a municipal hall to be used by protesters against a United States base, when it had been made available to supporters, was held to be discriminatory on grounds of political belief and activity. Holding placards at a council meeting, where those placards focused on individual concerns, was engaging in political activities. In the case of *Yianni v Moonee Valley City Council (Human Rights)* [2018] VCAT 1990, VCAT said such conduct was 'one of the most ancient, accessible and common forms of political activity' [24].

In *Justice Abolish Child Support and Family Court v State of Victoria* [2015] VCAT 771 the complainant contended a name can constitute a political statement, or a reflection of a political view. The complainant argued the police would not have made close inquiries about him when he applied for a gun license if he had another name. VCAT accepted a name is capable of being characterised as a political belief or activity if a person changes a surname to a statement with a clear meaning advocating particular action [126] [129].

**Race as a protected attribute**

Race is defined in section 4 of the Equal Opportunity Act as:

(a) colour;

(b) descent or ancestry;

(c) nationality or national origin;

(d) ethnicity or ethnic origin;

(e) if 2 or more distinct races are collectively referred to as race—

(i) each of those distinct races;

(ii) that collective race.
Courts have generally taken the view that 'race' as described in anti-discrimination legislation is a broad term and should be understood in the popular sense. The meaning of 'race' was considered in the context of disputes between Aboriginal People in *Williams v Tandanya Cultural Centre* [2001] FMCA 46, in which Federal Magistrate Driver held:

> The word 'race' is a broad term. Also, in addition to race, the *Racial Discrimination Act 1975* (Cth) (RDA) proscribes discrimination based upon national or ethnic origins or descent. It will be apparent to anyone, with even a rudimentary understanding of Aboriginal culture and history, that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides relief, not simply against discrimination against 'Aboriginals' but also discrimination against particular Aboriginal peoples [21].

'Descent or ancestry' was considered in *Australian Macedonian Human Rights Committee (Inc) v State of Victoria* [2000] HREOCA 52 in which it was found:

> 'Descent' and 'national or ethnic origin' must also be given a liberal construction. 'Descent' has a meaning that includes coming from, by birth or lineage, an ancestor or ancestors and does not require any particular citizenship, country of birth or particular territorial link. The terms 'national' and 'ethnic' give expanded scope to the term 'origin'.

There is a distinction between discrimination on grounds of national origin and discrimination on grounds of nationality. National origin is normally a status acquired and fixed at birth and incapable of change, whereas a person may acquire a number of different nationalities over the course of a lifetime. In *Australian Medical Council v Sir Ronald Wilson, Elizabeth Hastings, Jenny Morgan, Dr B Siddiqui and Commonwealth Minister of Health* [1996] FCA 1618 Justice Sackville held 'national origin' does not simply mean citizenship. However, citizenship may be treated as synonymous with nationality.

The distinction between national origin and ethnic origin was considered in *Australian Macedonian Human Rights Committee (Inc) v State of Victoria* [2000] HREOCA 52:

> 'National origin' has a meaning that includes coming from, by birth or lineage, an identifiable nation or country of people. In particular, the nation or country need no longer exist or indeed have a particular international status. In my opinion, the term 'ethnic origin' has a meaning that includes coming from an identifiable group or community who use speech different to the majority language (here in Australia English) and does not require any particular territorial link.

'Ethnic origin' has been interpreted broadly in a number of jurisdictions to include Jewish and Sikh people. The Court in *King–Ansell v Police* [1979] 2 NZLR 531 held Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Justice Richardson stated:

> [A] group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents [543].

Similarly, in *Mandla v Dowell Lee* [1983] 2 AC 548, the House of Lords held a group (such as Sikh people), to constitute an ethnic group for the purposes of the legislation in question, had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.

In an application made in *Linfox Australia Pty Ltd* [2015] VCAT 528 (*Linfox*) to exempt the company from the Equal Opportunity Act, VCAT observed decisions about employment on
the basis of someone's citizenship may amount to prohibited discrimination under the Equal Opportunity Act. Section 6 makes 'race' a protected attribute, that is defined to include nationality. Deciding whether to employ a person on the basis of their citizenship may amount to unlawful discrimination. Section 107 of the Equal Opportunity Act also prohibits requests for discriminatory information, such as someone's citizenship (Linfox [3]). For more information see the section on Discriminatory requests for information.

Race has also been raised in connection with immigration status. VCAT found there had been direct discrimination based on race in *Khalid v Secretary Department of Transport Planning and Local Infrastructure* [2013] VCAT 1839. A full-time student from New Zealand applied for a public transport concession card, but was rejected because of his visa status. If the complainant had been an Australian citizen, he would have been entitled to a student concession. Despite this finding, the discrimination was found to be authorised by legislation [39]–[42]. See further detail in the section on Permanent exceptions to discrimination.

The matter of *Faulkner v ACE Insurance Ltd* [2011] NSWADT 36 concerned a complaint made by a New Zealand man who was a permanent resident of Australia. He was denied insurance services on the basis of his visa category basis. The NSW Administrative Decisions Tribunal found Mr Faulkner was indirectly discriminated against by the insurer, because of his race, because there was a requirement to be an Australian resident to be able to obtain cover. Mr Faulkner fell into none of the categories of Australian resident required in the insurance policy.

Certain insults have also been found to be discrimination on the basis of race. Using the words 'monkey' or 'ape' is derogatory and humiliating when referring to or used in connection with a person of colour or of some racial or ethnic backgrounds (see *Dirckze v Holmesglen Institute* [2015] VCAT 1116 [155]–[161]). VCAT was also satisfied a comment that a complainant 'looked like a gorilla' amounted to unfavourable treatment based on race in the matter of *Jemal v ISS Facility Services Pty Ltd* [2015] VCAT 103 [116], [119].

### Religious belief or activity as a protected attribute

Religious belief or activity is defined under section 4 of the Equal Opportunity Act as:

(a) holding or not holding a lawful religious belief or view;

(b) engaging in, not engaging in or refusing to engage in lawful religious activity.

'Religious belief or activity' has been interpreted broadly, and includes atheism (see *Aitken v The State of Victoria – Department of Education & Early Childhood Development* [2012] VCAT 1547. 'Religious belief' has been extended to a union member who refused to make a welfare payment on account of his religious belief that charitable works and welfare support was the sole province of the church and was not a function of union members (see *Marett v Petroleum Refineries (Aust) Pty Ltd* (1987) EOC 92–206; *Petroleum Refineries (Australia) Pty Ltd v Marett* [1989] VicRp 69; [1989] VR 789). Discrimination on the basis of religious belief or activity has also been found where fresh Halal meat was not provided to a Muslim prisoner who requested it (see *Queensland v Mahommed* (2007) EOC 93–452; [2007] QSC 018).

### Expunged homosexual conviction as a protected attribute

An attribute was added to section 6 of the Equal Opportunity Act in 2015, prohibiting discrimination on the basis of an expunged homosexual conviction. Until 1981, it was possible to be convicted of certain sexual and public morality offences in Victoria. Although these laws no longer exist, the criminal records arising from those offences have remained for some people for over 30 years.

The purpose of the amendments is to remove the stigma of a criminal record along with the practical impediments created by having a criminal conviction in Victoria such as a person's right to travel or to find a job. The inclusion of the attribute in the Equal Opportunity Act makes it unlawful to discriminate against a person who has 'a conviction for a historical
homosexual offence that has become expunged followed by a determination of the Secretary of the Department of Justice and Regulation or a review by VCAT.'

1 See discussion of onus and evidence in AB v Ballarat Christian College (Human Rights) [2013] VCAT 1790 [15]–[18], [81], [122]–[123], [142]; Also see USL obo her son v Ballarat Christian College (Human Rights) [2014] VCAT 623 [18], [22], [53], [267].
3 NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11; (2014) 250 CLR 490, [1], [35], [37], citing AB v Western Australia [2011] 244 CLR 390, 402; [2011] HCA 42.
4 Victoria, Parliamentary Debates, Legislative Assembly, 13 April 2000, 1014–1015 (Rob Hulls, Attorney General).
5 See also Australian Human Rights Commission, Sexual orientation, gender identity or intersex status discrimination Fact Sheet 2013, p 3.
6 Applied recently in Slattery v Manningham CC (Human Rights) [2013] VCAT 1869 [26]–[27]; AB v Ballarat Christian College (Human Rights) [2013] VCAT 1790 [79]–[80] and USL obo her son v Ballarat Christian College (Human Rights) [2014] VCAT 623 [20]–[21].
9 Ibid [80]. Note although the High Court accepted the broader meaning of 'disability', it adopted a narrow approach to the comparator test, that meant the discrimination claim ultimately failed. This aspect of the case is no longer directly relevant to the Equal Opportunity Act due to the recent changes that remove the comparator test from the definition of 'direct discrimination'.
10 See, for example, the test for direct discrimination in Equal Opportunity Act 2010 (Vic) s 8.
12 In Jamieson v Benalla Golf Club Inc [2000] VCAT 1849, VCAT assumed without deciding that tattoos are physical features.
13 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1251 (Jan Wade, Attorney-General).
14 See, for example, Croatian Brotherhood Union of WA (Inc) v Yugoslav Clubs & Community Associations of WA Inc (1987) EOC 92–190, EOT (WA).
22 (1996) 68 FCR 46, 75.
Areas of public life in which discrimination is prohibited

As discussed above, the Equal Opportunity Act does not apply to all interactions between people. Rather, it prohibits unlawful discrimination in certain areas of public life. This chapter examines those areas in which discrimination is prohibited, including issues that commonly arise in each of these contexts.

Discrimination in employment and related areas

Part 4, Division 1 of the Equal Opportunity Act makes it unlawful to discriminate in employment, while Part 4, Division 2 prohibits discrimination in employment-related areas.

The protection against discrimination in employment extends beyond the traditional employer–employee relationship to include independent contractors and people whose remuneration is commission based.

Subject to the relevant exceptions, these divisions prohibit discrimination against:

- job applicants (section 16)
- employees (section 18)
- contract workers (section 21)
- partners (including prospective partners) of firms comprising five or more partners (sections 32–33)
- members of industrial associations (including prospective members) (section 35)
- members of professional qualifying bodies (including prospective members) (section 36).

The Equal Opportunity Act also broadly describes how discrimination may occur in employment and employment-related contexts. In summary, this includes discrimination:

- in deciding who should be offered employment, membership of an industrial association or a professional qualifying body
- in the terms or conditions of work
- by denying access to benefits such as ongoing education, training or opportunities for promotion
- by subjecting the complainant to a 'detriment'.

There are some differences in the way in which discrimination is described in relation to applicants, employees, contract workers, partners, members of industrial associations and members of professional qualifying bodies. Claimants and respondents should refer to the applicable sections within Division 1 of the Equal Opportunity Act for clarification.

How discrimination in employment may occur

Offers of employment

Fundamentally, candidates for employment must be judged on their individual merits, rather than stereotypical assumptions based on their attributes. It is unlawful to presume a person who has parental responsibilities will not be available for weekend work, or that a male candidate will not 'fit in' with the team as well as a female candidate because of his sex, for example.

Section 20 of the Equal Opportunity Act specifically requires that in offering employment to a person with a disability, an employer also must consider any 'reasonable adjustments' necessary for accommodating the person's special needs (provided the candidate could
'adequately perform the genuine and reasonable requirements' of the job once those reasonable adjustments were made). The chapter on Reasonable adjustments for persons with a disability considers this requirement in more detail.

Similar issues were considered under the 1995 Act in Davies v State of Victoria [2000] VCAT 819 (Victoria Police). In that case, VCAT found Victoria Police directly discriminated against the complainant by rejecting his application to join the police force because he failed a colour vision test. Ultimately, VCAT was not satisfied the results of the colour vision test proved whether the complainant either was, or was not, able to perform the genuine and reasonable requirements of employment as a constable. Those requirements included motor vehicle pursuits and identifying people and things. VCAT ordered Victoria Police to undertake more rigorous testing before it made a decision.

Terms on which employment is offered

Section 16(b) of the Equal Opportunity Act specifically prohibits discrimination against prospective employees 'in the terms on which employment is offered to the person'. This may encompass things such as the basis of the employment, salary package arrangements, working hours and work-related benefits such as vehicle allowances.

For example, offering female candidates part-time or casual work and male candidates full-time permanent work, because of the candidates' sex, would constitute unlawful discrimination in the terms on which the employment is offered.

Contract work

The Equal Opportunity Act protects contract workers against discrimination. Section 21 provides that a principal must not discriminate against a contract worker in the terms on which they are allowed to work; by not allowing a contract worker to work or continue to work; by denying or limiting a contract worker's access to a benefit connected with the work; or by subjecting a contract worker to any other detriment.

The specific protection offered in this section is limited to the 'principal' and 'contractor' relationship. In Perekrestov v Ward (Human Rights) [2019] VCAT 115 [44]–[45], VCAT considered whether a person engaged as a sub-contractor was covered by the Act. The complainant was an independent contractor, acting in the capacity of a sole trader. However, VCAT found her allegations of discrimination were made not against her 'principal' but another related party. On this basis, she did not satisfy the threshold requirement of being a contractor for the purpose of section 21 of the Equal Opportunity Act.

Employment-related medical testing

An employer may investigate issues in relation to job applicants if the employer can establish that the information sought relates to the inherent requirements of the job. The inherent requirements of employment must be determined having regard to the circumstances in which the employment is carried on and the dangers to which an employee may be exposed or may expose others (see X v The Commonwealth [1999] HCA 63; 200 CLR 177).

In Davies v State of Victoria [2000] VCAT 819 (Victoria Police), VCAT considered these matters were also relevant in determining the 'genuine and reasonable requirements of employment' for the purposes of section 22 and section 23 of the 1995 Act (relating to specific exceptions to discrimination).¹

In that case, VCAT found Victoria Police had directly discriminated against the complainant by rejecting his employment application because he failed a colour vision test. VCAT held the inability to perform the inherent requirements of the role must be assessed in a practical way that enables the employer to conclude it is more probable than not that the person will not be able to perform adequately the requirements of the employment. A decision needs to be genuinely made and based on information capable of supporting that decision:

An assumption based on no information or on scant information, will not be enough.
In *Kassir v State of Victoria (Anti-Discrimination) [2012] VCAT 1977* Mr Kassir was unsuccessful in his application to join Victoria Police. He had disclosed a history of mental health issues including post-traumatic stress disorder, depression and anxiety. He claimed he had been discriminated against in the recruitment process because of his disabilities. The respondents relied on the opinion of the Assistant Police Medical Officer and the Police Psychologist who both formed the view that Mr Kassir would be unsuitable for the role. In this case the respondents conceded Mr Kassir had been treated unfavourably because of his disability but that the treatment was not unlawful because he was unable to perform the genuine and reasonable requirements of the job. VCAT agreed the exception in section 23 of the Act applied.

In *Vickers v The Ambulance Service of NSW [2006] FMCA 1232* the complainant applied for a job as a trainee ambulance officer with the Ambulance Service of NSW. The complainant was required to undergo a pre-employment medical assessment, and disclosed he had Type 1 insulin-dependent diabetes. Despite providing a letter from his treating endocrinologist supporting his application for employment, the medical service conducting the assessment recommended to the ambulance service that the complainant was unsuitable for the position because of his diabetes. Based on this recommendation, the ambulance service rejected the complainant for the position.

Mr Vickers claimed he had been directly discriminated against on the basis of his diabetes. Mr Vickers also argued the ambulance service’s selection process for determining who should be offered employment amounted to direct discrimination. The Ambulance Service relied on the defence that it is not unlawful for an employer to discriminate against a person who is unable to carry out the inherent requirements of the job.

The Federal Magistrates’ Court emphasised employers must investigate each case on its own circumstances. It held the ambulance service had unlawfully discriminated against the complainant by refusing to consider his employment application on the basis of his diabetes. The Court found the ‘inherent requirements’ defence could not be relied upon because the complainant had never had a hypoglycaemic event; had previously been able to control his diabetes during hospital shift work; and that he would easily be able to take appropriate remedial measures if his blood glucose levels altered. For this reason, his diabetes would not pose a threat to patients of the ambulance service. VCAT concluded the respondent was in no position to assess the extent of the risk factor identified, reasoning that medical testing before employment needs to be specifically related to the work the person has to do.

In *Tarr v Torrens Transit Services (North) Pty Ltd [2008] SAEOT 12* the Equal Opportunity Tribunal found failing a back fitness test should not have disqualified a bus driver from getting a job. The complainant was told he could not do the job because he had failed a back fitness test given as part of pre-employment medical tests. VCAT found a back fitness test did not show whether Mr Tarr could do the job.

VCAT found the respondent did not:

[A]ttempt to undertake an overall assessment of an applicant, having regard to recent work experience and history. [The respondent] did not make a balanced assessment of all of the test results in context. It seems, from the evidence, that [the respondent] did not appreciate the difference between the fulfilment of job requirements and the presence of risk factors [33].

In the decision of *Melvin v Northside Community Service Incorporated [1996] HREOCA 20* the complainant was dismissed on the basis of an optometrist’s report that she was ‘legally blind’. The report, however, did not answer the questions the employer had asked, which were in relation to the complainant’s optical capacity, or address the complainant’s ability to perform the inherent requirements of the job. The Australian Human Rights and Equal Opportunity Commission found Ms Melvin had been unlawfully discriminated against. It accepted specialist medical and other evidence that she could perform the inherent requirements of the job. In this context the exception contained in section 86 relating to the protection of health, safety and property may also be relevant. This is discussed further in the chapter on Special Measures.
Access to 'benefit' including opportunities for promotion, training, transfer etc

The Equal Opportunity Act also prohibits discrimination in relation to advancement opportunities such as promotions and further training. This is important because opportunities for training and promotion often lead to further benefits within the workplace, such as greater seniority and better remuneration. See, for example, Keenan v The Age Company Limited [2004] VCAT 2535 regarding failure to provide a vehicle.

Any other 'detriment'

The Equal Opportunity Act also prohibits discrimination in work by subjecting an employee to 'any other detriment'. Section 4 of the Equal Opportunity Act specifies that 'detriment' includes 'humiliation and denigration'. See the discussion in relation to humiliation and Walgama v Toyota Motor Corporation Australia Ltd [2007] VCAT 1318 above in the chapter on Explaining the types of discrimination.

However, the Equal Opportunity Act does not exhaustively define 'detriment'. Case law suggests that a person suffers detriment where he or she is placed 'under a disadvantage of a matter of substance' (see Bogie v University of Western Sydney (1990) EOC 92–313) or 'suffers a material difference in treatment' (see Bailey v Australian National University [1995] HREOCA 274) that is 'real and not trivial' (see Sivanathan v Commissioner of Police (NSW) (2001) NSWADT 44).

Examples of other treatment that may constitute a detriment in employment include:

- dismissal
- demotion
- terminating employment during a probationary period on the basis of pregnancy See, for example, Tran v Swinburne University & Ors [2000] VCAT 1083
- selecting an employee for redundancy on the basis of a protected attribute See, for example, Stern v Depilation & Skincare Pty Ltd [2009] VCAT 2725
- unlawfully requiring a pregnant employee to take unpaid parental leave See, for example, Kogoi v East Bentleigh Child Care Centre [1997] VADT
- altering an employee's position in a manner that is prejudicial to the employee (for example, by requiring the employee to change their work location, hours or duties)
- being laughed, and in certain circumstances smirked, at by fellow employees See Packer v Vagg & the Department of Education [2001] 2218 [22]
- denying flexible work arrangements/ refusing access to part-time employment See Howe v QANTAS Airways Ltd [2004] FMCA 242 [62], [129]
- threatening an employee with disciplinary action See Kuyken v Lay [2013] VCAT 1972
- sexual harassment See XVC v Joanne Baronessa (Human Rights) [2018] VCAT 1492

In XVC v Joanne Baronessa (Human Rights) [2018] VCAT 1492, there was a dual finding of sexual harassment in a workplace and sex discrimination. The Applicant was subjected to comments of a sexual and violent nature on several occasions. These incidences were reported to the employer, Marriot, through the staff member, Ms Baronessa, who dealt with the complaint. VCAT was satisfied that the Applicant's sex was a substantial reason for Ms
Baronessa's unfavourable treatment of her which included statements along the lines of, 'you are working in man's working environment and you need to expect that kind of unwanted attention,' and 'you look tired maybe you are perceiving it wrong. Maybe you are being oversensitive' [46]. The humiliation and distress suffered by the Applicant constituted a 'detriment' and damages were assessed at $10,000.

In *Dickie v State of Victoria* [2009] VCAT 713 VCAT was not satisfied an 'emotionally charged exchange of views' between the complainant and another person constituted a 'detriment' to the complainant.

**Humiliation**

The Equal Opportunity Act is clear that causing a person to experience humiliation – for example, by subjecting a person to public ridicule, racial abuse (see *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd* [2001] VCAT 1706; *Walgama v Toyota Motor Corporation Australia Ltd* [2007] VCAT 1318; *Poulter v State of Victoria* [2000] VCAT 1088) or sexual harassment (see *XVC v Joanne Baronessa (Human Rights)* [2018] VCAT 1492) in the workplace – constitutes a 'detriment'. This is discussed in more detail in the section on Humiliation as unfavourable treatment.

**Reasonable requirements and conditions**

Despite what is set out above, the Equal Opportunity Act does not prohibit an employer from imposing or maintaining reasonable terms of employment, provided the employer does not breach specific obligations, such as the obligation to accommodate parental/carer responsibilities and to make reasonable adjustments for somebody with a disability. This is discussed in more detail in Genuine and reasonable requirements of employment.

**Accommodating a person's responsibilities as a parent or carer in employment**

In work-related contexts, employers have specific obligations under the Equal Opportunity Act to accommodate the responsibilities of parents and carers, provided it is reasonable to do so. These obligations are separate to, but broadly consistent with, the right to request flexible working arrangements under the *Fair Work Act 2009 (Cth).* The Equal Opportunity Act applies to all employers in Victoria, irrespective of whether the Fair Work Act covers the employer.

The Equal Opportunity Act specifically provides that an employer, principal or firm must not 'unreasonably refuse' to accommodate a person's responsibilities as a parent or carer in relation to their 'work arrangements'. These obligations are set out in various different sections of the Equal Opportunity Act and apply in relation to:

- people who are offered employment (section 17)
- employees (including casual employees) (section 19)
- contract workers (section 22)
- partners (including people who are invited to become partners) of firms – such as legal and accounting firms – comprising more than five partners (section 32).

The Equal Opportunity Act includes several examples of the types of working arrangement that may assist in accommodating a person's responsibilities. These may include, for example, changing a person's hours of work, rescheduling meetings so that people with parent/carer's responsibilities can attend, or permitting work from home.

**Responsibilities as a 'parent' or 'carer'**

Under section 4 a person has responsibilities as a 'carer' if 'another person is wholly or substantially dependent [on them] for ongoing care and attention'. This may include, for example, a person's responsibilities to care for an elderly person or somebody with an illness or disability. The definition of carer excludes circumstances where the caring arrangements are wholly or substantially commercial (for example, paid nurses or carers).
For the purposes of the Equal Opportunity Act, a ‘parent’ includes step-parent, adoptive parent, foster parent or guardian.

**Requirement for complainant to make a request**

A person must make a request for accommodation of their responsibilities as a parent or carer. VCAT found this to be an implicit requirement, although the Equal Opportunity Act does not contain an explicit requirement for such a request (see *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 [38].) VCAT has also determined a complainant must establish (see *Tate v Department of Human Services* [2015] VCAT 507 [56]):

- Was there was a request to accommodate the complainant's responsibilities as a parent or carer?
- What are the responsibilities?
- Was the request refused?
- Was the refusal unreasonable?

**Unreasonable refusal**

The Equal Opportunity Act sets out a number of factors to be considered in determining whether it was reasonable for the employer, principal or partnership to refuse the employee's request (section 17(2), section 19(2), section 22(2), section 32(2)). Broadly, these factors include:

- the complainant's personal circumstances including the nature of his or her responsibilities as a parent or carer
- the nature of the complainant's role or the work performed by them
- the respondent's circumstances (including its finances, size, and operations)
- the effect that accommodating the complainant's responsibilities would have on the respondent (including efficiency, productivity, customer service and the impacts on other people in the workplace)
- the consequences, for the complainant, of the refusal to accommodate his or her parental or carer responsibilities.

In determining whether the respondent's conduct was reasonable, VCAT must balance the competing interests of the complainant and respondent by reference to these 'commonsense considerations' [4]. In *Richold v State of Victoria, Department of Justice* [2010] VCAT 433 (*Richold*) VCAT clarified the obligation ‘does not require an employer to entirely subjugate its own interests to the interests of the employee as a parent or carer. Rather it requires a reasonable accommodation to be reached between the two’ [43].

In *Richold*, the complainant was employed as a casual prison guard. Her complaint related to a new policy that changed the way shifts were allocated to casual staff. The policy aimed to ensure work that attracted higher penalty rates (such as weekend work) was distributed fairly. The change meant that if Ms Richold refused more than two shifts per week – which she often had to do due to her parental responsibilities – she received fewer shifts in total. This differed from the previous policy, under which casual staff had been rostered for days they were available and the number of hours were distributed as evenly as possible. Ms Richold argued the new policy constituted an unreasonable failure to accommodate her parental responsibilities.

VCAT found although the previous policy was more accommodating of Ms Richold’s family responsibilities, the new policy was ‘not unreasonable’, especially because it was designed to address concerns raised by other employees about the fair allocation of work [44]. VCAT looked at a number of factors in reaching this conclusion. Ms Richold's status as a casual employee was found to be especially relevant because VCAT considered 'the very nature of casual employment […] grants the fullest possible flexibility' [42].
A different result may have been reached in this case if the changes had impacted the working arrangements of permanent full-time or part-time employees [34].

In *Tate v Department of Human Services* [2015] VCAT 507 [29], [108], [110] Ms Tate, a child protection practitioner and single parent of two school age children, alleged her employer had unreasonably refused to accommodate her parental responsibilities. Ms Tate had requested to not work one day per week (taking time in lieu) over a summer school holiday period and also sought to reduce her working week to four days. She also alleged she was required to work excessive hours, which meant she was unable to fulfil her parental responsibilities. Ms Tate’s employer refused her requests.

To assess the reasonableness of the refusal, VCAT considered the factors outlined in section 19(2). In particular, VCAT considered evidence regarding Ms Tate’s performance and her employer’s concerns about her ability to manage her workload. VCAT considered ‘the size and nature of the workplace, the effect on the workplace and the consequences’ under sections 19(2)(e), 19(2)(f) and 19(2)(g), as well as the unpredictable nature of the role, relevant to section 19(2)(b). In all the circumstances, the refusal to reduce Ms Tate’s working hours was not found to be unreasonable. Her claim regarding the taking of leave also failed.

**Exceptions relating to employment and related areas**

There are several permanent exceptions that make discrimination lawful in employment and related areas. These exceptions, discussed in *Exceptions relating to employment* in the chapter on Permanent exceptions to discrimination, relate to:

- adjustments for a person with disabilities that are not reasonable, or the person could not adequately perform the genuine and reasonable requirements of the role even after the adjustments were made (section 23 and section 34)
- offering employment for domestic or personal services (section 24)
- employment for the care of children, where discrimination is necessary for their wellbeing (section 25)
- offering employment to people of one sex where it is a genuine occupational requirement of employment that employees be people of a particular sex (section 26)
- offering employment on the basis of political belief or activity for political employment (section 27)
- offering employment to people with a particular attribute to deliver services for people with the same attribute (section 28)
- measures that are reasonably necessary to protect health, safety and property – for example, measures to promote occupational health and safety (section 86)
- the payment of youth wages (section 28A)
- early retirement schemes (section 29)
- reasonable terms of an occupational qualification (section 37).

**Discrimination in education**

Part 4, Division 3 of the Equal Opportunity Act prohibits discrimination in education.

Under this division, an ‘educational authority’ (that is, a person or body that administers a school, college, university or other educational institution) must not discriminate against students or prospective students. Discrimination must not occur in relation to admissions, the delivery modes, access to benefits, expulsion or ‘any other detriment’ experienced by the student. (Section 38 and section 40.)

These provisions apply to entities that manage schools, TAFE institutes, and universities in the private and public sectors. They also apply to any other entity or person that runs an...
educational institution. An educational institution is defined broadly to include any institution at which education or training is provided.

Where educational providers also employ staff or provide any other services, such as services to parents of students, they will also be subject to other aspects of the Equal Opportunity Act discussed elsewhere in this resource.

A school may provide parents with 'services' in the course of providing education to their offspring, for example. In Murphy v New South Wales Department of Education [2000] HREOCA 14 Commissioner Carter held the parents of a disabled student were treated less favourably by the school than the parents of able-bodied children. The school created a hostile environment, which caused the parents to leave the suburb where they had lived for some years and transfer their daughter to another school. This change was found to be a substantial detriment that occurred because of their daughter's disability. Note, however, that 'services' under section 4 of the Equal Opportunity Act do not include training and education in an educational institution, but may include things ancillary to the provision of training and education, such as enrolment, case management, the provision of facilities and furniture, and communication with parents about the wellbeing of their children.

An educational authority must not directly or indirectly discriminate against a student or prospective student in its dealings with that person in their capacity as a student or prospective student. This prohibition extends to both direct and indirect discrimination. Under section 38 of the Equal Opportunity Act discrimination may include:

- refusing an application for admission as a student
- imposing discriminatory terms on which a student is admitted
- denying or limiting a student's access to a benefit provided by an educational authority
- expelling a student
- subjecting them to any other detriment.

Discrimination at the time of enrolment was considered in Arora v Melton Christian College (Human Rights) [2017] VCAT 1507. In that case, parents of a five-year-old Sikh boy, who had uncut hair and wore a head covering as part of his religious belief and practice, sought to enrol him at a Christian school. The boy's enrolment did not proceed after the school's principal told the boy's parents he would have to comply with the school's uniform policy. The policy required boys to have short hair and not wear any head coverings related to a non-Christian faith. VCAT held the complainant was excluded from the school because his religious belief prevented him from complying with the uniform policy.

Obligation to make reasonable adjustments for students with disabilities

Section 40 of the Equal Opportunity Act also includes an express and positive obligation on educational providers to make reasonable adjustments for students or prospective students with a disability who need adjustments to enable them to 'participate in or continue to participate in or derive or continue to derive any substantial benefit from an educational program'. Under section 41 this obligation applies unless the educational authority can demonstrate the person would not be able to participate or derive a substantial benefit from the educational programme even if adjustments were made.

Section 40(2) provides examples of the adjustments an educational authority could make for a person with a disability, such as the provision of a teachers' aide or particular computer software program or moving a course or event from an inaccessible venue to an accessible one.

Types of adjustment will depend on the student's disability, but could include:

- modifying educational premises – for example, providing ramps, modifying toilets and ensuring that classes are in rooms accessible to the student
- modifying or providing equipment – for example, lowering lab benches, enlarging computer screens, providing specific computer software or an audio loop system
- changing assessment procedures – for example, allowing for alternative examination methods, such as oral exams, or allowing additional time for someone else to write an exam for the student
- changing course delivery – for example, providing study notes or research materials in different formats.

A range of factors relevant to whether an adjustment is reasonable are set out in detail in section 40(3). Reference is made in this provision to acts that comply with the various requirements of the Disability Discrimination Act 1992 (Cth). In the education context, the Disability Discrimination Act provides that the Minister may, by legislative instrument, formulate disability standards in relation to any area in which it is unlawful for a person to discriminate against another.

In 2005 the Commonwealth Government promulgated the Disability Standards for Education under the Disability Discrimination Act 1992 (Cth). The Equal Opportunity Act operates concurrently with Commonwealth discrimination law including the Disability Discrimination Act 1992 (Cth). Not only does it do so by operation of law, but this interaction is expressly referred to and relied upon in the way in which section 40 is drafted. Section 40(4), for example, expressly provides:

An educational authority is not required to make an adjustment under subsection (2) to the extent that the educational authority has complied with or has been exempted from compliance with, a relevant disability standard made under the Disability Discrimination Act 1992 of the Commonwealth in relation to the subject matter of that adjustment.

This provision aims to ensure consistency across state and Commonwealth jurisdictions in dealing with the concepts of disability discrimination and the need to make reasonable adjustments. It also avoids situations where an educational authority is held to be compliant with Commonwealth discrimination laws but in breach of state laws.

**Discrimination in education case law**

**Disability discrimination**

Many of the cases brought under the 1995 Act in the education context related to claims of disability discrimination. They generally involved significant consideration of the technical requirements needed to establish either direct or indirect discrimination.

In *Turner v Department of Education and Training* [2007] VCAT 873 [586] VCAT found the Department of Education and Training discriminated against a student with a severe learning disorder by imposing a requirement that she access her education without a full-time teacher's aide. This requirement limited her participation in and access to curricula in those classes and diminished her opportunity to attain successful educational outcomes. VCAT found the opportunity for class participation, to access the educational curriculum and to achieve her educational potential, are benefits provided by the Department of Education and Training. These benefits were not provided when the schools did not provide adequate or reasonable educational assistance to the student.

This case predated the requirement to make reasonable adjustments, now included in the Equal Opportunity Act.

The case of *RW v State of Victoria* [2015] VCAT 266 was a claim of indirect discrimination on the basis of disability, under both the 1995 Act and the Equal Opportunity Act 2010. In relation to an educational authority's obligation to make reasonable adjustments for a student with a disability, Member Megay stated:

The requirement to make reasonable adjustments and the factors included in section 40(3), make it clear that section 40 is not a requirement to create a perfect environment for every student with a disability regardless of the
nature and extent of the disability, and regardless of the funding or teacher time required.

Financial impact on the school, and the impact on staff and other students are relevant factors to take into account in determining whether an adjustment is reasonable. This signals, in my view, that it is not assumed that a school will have unlimited funds and staff resources.

By including these factors, section 40 makes it clear, in my view, that a school is not required to use all available funds and all available teacher time in order to make adjustments for one student. Nor is it required to do so to the detriment of the needs of other students, and the ability of teachers to use their time, expertise and energy towards the education of all the students in their class.

Including the effect on the person of making the adjustment as a factor also makes it clear, in my view, that need and effectiveness are relevant considerations [99].

These cases make clear, however, that claims turn on their specific facts. Issues that are likely to arise include:

- whether the person has a protected attribute.
  See, for example, *Turner v Department of Education and Training* [2007] VCAT 873; *Zygorodimos v Department of Education and Training* [2004] VCAT 128

- whether they were subjected to unfavourable treatment

- if so, whether there is a causal nexus between that treatment and their protected attribute
  See, for example, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

- in the case of indirect discrimination, whether any condition or requirement that has been imposed is reasonable.

Whether the condition, requirement or practice complies with the Disability Standards for Education is likely to be particularly relevant to the consideration of 'reasonableness'.

**Religion in education**

In the case of *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development* [2012] VCAT 1547 VCAT considered a claim of direct discrimination against the Department of Education and Early Childhood Development made by parents of children at Victorian state primary schools. The complainants argued the method of providing religious instruction in these schools, which is based on distinctive religious tenets and beliefs, was discriminatory because:

- children not participating in religious instruction (non-participating students) were identified as different, and separated from, their classmates when religious instruction classes were held

- there was no curriculum instruction during religious instruction classes for non-participating students, denying them the opportunity to be taught secular subjects

- religious instruction was timetabled during school hours.

The complainants sought that:

- the department require parents to opt-in to religious education. The department amended its policy to an opt-in system in 2011 following the lodgement of the complaint.

- religious instruction occur after school or at lunchtime
non-participating students be provided with proper educational alternatives. The amendments to department policy also included a commitment that non-participating students would be engaged in meaningful activities.

Judge Ginnane held the complainants had failed to establish that the department had discriminated against the non-participating students within the meaning of the 1995 Act or the Equal Opportunity Act 2010. His Honour found 'the evidence did not establish that the children, who did not attend [Special Religious Instruction] at the three schools, were treated in any discriminatory manner' [6]. His Honour accepted evidence of teachers that there was no teasing, bullying or pressure on students to attend religious instruction. His Honour reasoned 'instruction is not compulsory and parents have a choice whether their children attend. If they do not, they engage in useful, non-curriculum activities under teachers' supervision' [6].

In dismissing the complaint, His Honour noted 'attendance by a child at special religious instruction does not, necessarily, indicate that the child, or the parents, hold any particular religious beliefs'[6].

The complainants appealed VCAT's decision to the Supreme Court of Victoria in Aitken & Ors v State of Victoria [2013] VSCA 28, however leave to appeal was refused.

Exceptions relating to education

There are several permanent exceptions that make discrimination lawful in education. These exceptions, discussed in Exceptions relating to education, relate to:

- dedicated programs for students of a particular sex, race, religious belief, age or age group, or students with disabilities (section 39).
  See Arora v Melton Christian College [2017] VCAT 1507
- adjustments for a person with disabilities in education that are not reasonable (section 41)
- standards of dress and behaviour (section 42)
  See Arora v Melton Christian College [2017] VCAT 1507
- age-based admission schemes and age quotas (section 43).

Discrimination in the provision of goods, services and land

Part 4, Division 4 of the Equal Opportunity Act makes it unlawful to discriminate in the provision of goods and services and in the disposal of land. The Equal Opportunity Act prohibits discrimination:

- by refusing to provide goods or services to a person (section 44(1)(a))
- in the terms on which goods or services are provided (section 44(1)(b))
- by subjecting the person to 'any other detriment' in connection with the provision of goods or services (section 44(1)(c))
- by refusing to dispose of any land to the other person (section 50(1)(a))
- in the terms on which land is offered to the other person (section 50(1)(b)).

Under section 45 there are also specific obligations on service providers to make reasonable adjustments for a person with a disability, as discussed in Reasonable adjustments for persons with a disability.

What 'services' means

Section 4 of the Equal Opportunity Act defines 'services' as follows:
Services includes, without limiting the generality of the word—

(a) access to and use of any place that members of the public are permitted to enter;
b) banking services, the provision of loans or finance, financial accommodation, credit guarantees and insurance;
(c) provision of entertainment, recreation or refreshment;
(d) services connected with transportation or travel;
(e) services of any profession, trade or business, including those of an employment agent;
(f) services provided by a government department, public authority, State owned enterprise or municipal council—

but does not include education or training in an educational institution.

'Services' is defined inclusively and is not limited to the categories listed in section 4 of the Equal Opportunity Act. Education or training in an educational institution, however, is not a service, but would be covered under the provisions of the Act relating to education.

This means a generous interpretation of 'services' is appropriate (see IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1), particularly given the Equal Opportunity Act is beneficial legislation. An interpretation that furthers the objectives of the Equal Opportunity Act and provides access to redress for those alleging discrimination is also likely to be consistent with the Charter of Human Rights and Responsibilities.

In the decision of Bayside Health v Hilton [2007] VCAT 1483 VCAT made general comments about the scope of 'services' that are consistent with this interpretation. Specifically, Deputy President McKenzie stated:

The definition of 'services' in section 4 is inclusive and not exhaustive. Even from the inclusions, one can see that the definition is extremely broad. It covers a diverse range of things provided by a diverse range of individuals and bodies. Putting the inclusions to one side, 'services' has its ordinary dictionary meaning and covers any act of helpful activity [17].

Deputy President McKenzie considered services can be tangible or intangible, voluntary or provided for payment, and can be provided to more than one person. Furthermore, the fact that services may be regulated by statute does not deprive them of the character of services [18].

However, VCAT noted not every benefit that one person derives from the act of another constitutes a 'service', such as benefits derived from the exercise of a judicial or quasi-judicial discretion, or from something done by a body acting as a legislator.

The decision of Bayside Health v Hilton was cited with approval in Slattery v Manningham City Council [2013] VCAT 1869 [29]. See Services provided by government for a discussion of that case.

Services established in case law
The following have been held to constitute 'services' for the purposes of predecessors to the Equal Opportunity Act:

- activities of an owners' corporation in managing, administering, repairing and maintaining common property
  See Anne Black v Owners Corporation OC1-POS539033E [2018] VCAT 185
- protection of, and assistance to, members of the public and victims of crime by police
- staging of a parade or a general exhibition by a council
  See Falun Dafa Association of Victoria Inc. v Melbourne CC [2003] VCAT 1955
• a service that may be provided in the future
  See Waters v Rizkalla [1991] 1 VR 12

• provision of pastoral services and conduct of mass by a parish priest
  See Tassone v Hickey [2001] VCAT 47

• actions of the Principal Registrar in responding to a request to amend the Birth Register
  under the Births Deaths & Marriages Act 1973 to the benefit of an complainant who has had
gender reassignment surgery
  See AB v Registrar Births, Deaths and Marriages [2006] FCA 1071 [65]

• provision of facilities within prisons for the care and custody of children by prisoners

• visits by a spouse to a prisoner
  See Clarkson v Governor of Metropolitan Reception Prison (1986) EOC 92–153

• provision of legal aid to a child
  See George v Victoria Legal Aid [2000] VCAT 2014

• access to infertility treatment under the Victorian Infertility Treatment Act 1995 (Vic)
  See McBain v Victoria [2000] FCA 1009

• consideration of a planning application by a council (but not a decision to approve or
  reject the application)
  See IW v Perth [1997] HCA 30; (1997) 191 CLR 1

• actions of a Protective Services Officer in refusing entry into a building
  See Phillips v Andrews (Human Rights) [2018] VCAT 1714

• accepting advertisements for publication, on payment of an applicable free

These categories of services are discussed in more detail below.

Particularity in identifying the 'service'

In Waters v Public Transport Corporation [1991] HCA 49; (1992) 173 CLR 349 (Waters) the High Court of Australia considered a complaint about the discriminatory effect of changes to the Victorian public transport system on people with disabilities. The changes included the removal of conductors from trams and the introduction of a new ticketing system described as 'scratch tickets' [2]–[3]. In considering the case before it, a majority of the High Court held the view that it is important to define what the 'service' is with particularity. In this instance, the service was defined broadly as the 'public transport system'. The majority held the introduction of 'scratch tickets' and the removal of conductors were incidental to the provision of the service and not, as the respondent sought to argue, separate services in themselves.

The same reasoning was adopted by VCAT in Towie v State of Victoria [2007] VCAT 1489 (Towie). Mr Towie complained the Magistrate's Court failed to accommodate his hearing impairment by not providing him with a graphic equaliser and headphones during a hearing, despite his requests for this equipment. Mr Towie argued the State of Victoria provides a service that can be described as 'access to justice', or 'access to court processes'. He argued he was discriminated against by the State of Victoria's failure to provide equipment that would allow him to participate in this service in the same way as others.

VCAT rejected Mr Towie's argument and concluded the 'service' he had identified was so vague, undefined and non-specific that it was not a service at all. VCAT considered adopting Mr Towie's reasoning would mean the 'service' would vary according to the needs of individuals seeking access to the courts. For a person with an impairment who needs special equipment to effectively participate in the hearing process, the service would relate to the provision of equipment. For a non-English speaker who needs an interpreter to effectively participate in the hearing process, the service would vary to relate to the provision of interpreters. VCAT considered such variation removes the distinction between the 'service' and the terms on which the service is provided. VCAT considered Mr Towie was seeking the
provision of a new service and a policy change, rather than making a claim regarding an
existing service and seeking a remedy under the 1995 Act.

The *Towie* matter was successfully appealed to the Victorian Supreme Court as *Towie v State of Victoria* [2008] VSC 177. The Court accepted there had been a breach of natural justice in VCAT finding there was no 'service' without giving him any prior notice of its intention to do so, and in the State of Victoria not making any submissions on this point.

Further, the Court found VCAT should have made a finding regarding whether the service for which Mr Towie alleged discrimination was a service under the definition in section 4(1) of the Equal Opportunity Act, by reference to that definition and the applicable case law. The Supreme Court ordered the matter back to VCAT for hearing on its merits.

In contrast to VCAT's decision in *Towie*, in *Falun Dafa Association of Victoria Inc. v Melbourne CC* [2003] VCAT 1955, VCAT noted 'the performance of an activity can represent the provision of services to more than one person or group of persons, and that the nature or character of the service so provided can differ from recipient to recipient' [36].

While *Towie* and *Waters* highlight the importance of specifically identifying the service, the decisions appear to turn on the particular facts and identification of the 'service' in each case.

It is unclear whether VCAT would make the same finding if *Towie* were heard today, in light of *Charter of Human Rights and Responsibilities* considerations and explicit reasonable adjustment requirements that require a service provider to consider individual circumstances.

**Service not directed to the complainant**

While there needs to be some service offered, provided or denied to the complainant for the conduct to come within 'services', the service does not need to be directed solely to the complainant. It is also unnecessary that the complainant be the 'main' recipient of a service, as long as services are offered, provided or denied to the complainant.

In *Phillips v Andrews (Human Rights)* [2018] VCAT 1714, Mr Phillips alleged unlawful discrimination for being refused entry into a court building by Mr Andrews, a Protective Services Officer, on account of his assistance dogs. When applying for summary dismissal, Mr Andrews argued that his decision to refuse entry was not providing services to the complainant [2]. VCAT noted that although Mr Andrews actions at the court were part of his general function of 'providing services for the protection of… the general public in certain places' under the *Victoria Police Act 2013* (Vic) s37, Mr Phillips was individually in receipt of a service, at least at the point of entry [40]–[42].

In *Bayside Health v Hilton* [2007] VCAT 1483 Mr Hilton made a complaint about the way he was treated by a hospital where his partner was a patient. The hospital lodged an application to strike out Mr Hilton’s complaint on the basis that the following should not be considered services:

- support provided to Mr Hilton by the hospital's social workers and psychologists
- ad hoc accommodation provided to Mr Hilton by the hospital
- other services that were broadly described as the provision of information by the hospital to Mr Hilton
- communication by the hospital with Mr Hilton, and involvement of Mr Hilton in decision making concerning the Mr Hilton's partner's treatment and care.

Although the hospital's application was rejected, VCAT noted not every hospital provides services to every member of a patient's family. However, in Mr Hilton’s case, services were directly provided to Mr Hilton on account of him being the patient's partner and his direct involvement in decision making regarding the patient's care.

In contrast, VCAT in *Judd v State of Victoria & Anor* [2000] VCAT 2495 found no service was provided to the complainant. The complainant claimed the Department of Transport had discriminated in the provision of services by permitting a design of buses that did not accommodate a tall person comfortably. VCAT found there was no service to the
complainant because the design rules in question are determinations made by the Commonwealth Minister for Transport in administering the *Motor Vehicle Standards Act 1989* (Cth). Considering the provisions of that legislation, VCAT concluded the design rules represent vehicle standards that are instruments of a legislative character and not services directed to the complainant.

In the case of *Zangari and St John Ambulance Service* [2010] WASAT 6 the Western Australia State Administrative Tribunal held two paramedics who attended Dr Zangari's surgery to provide a service to one of her patients did not provide a service to her as the attending doctor.

VCAT noted even though Dr Zangari had called the ambulance, she was not the 'pivotal link' or 'conduit' between St John Ambulance and the patient. VCAT found the paramedics were required to take control of the situation and provide medical care to the patient, and that a medical practitioner should step back when an ambulance arrives.

VCAT commented 'the mere fact that Dr Zangari might have benefited from St John Ambulance providing services to her patient is not sufficient to establish that she was a person receiving a service within the meaning of [the legislation]' [198].

VCAT noted it might be possible for St John Ambulance to provide a service to another medical practitioner who called an ambulance in different circumstances, but that each case would be assessed on its facts.

**Differing nature and character of services across recipients**

In *Falun Dafa Association of Victoria v Melbourne CC* [2003] VCAT 1955 VCAT considered whether the council had refused to provide a service to Falun Dafa (an organisation promoting meditation and exercise, among other things) in excluding it from participation in the 2003 Moomba Parade.

Falun Dafa argued the council, in staging the Moomba Parade and determining who would be permitted to participate, provided a service to participants and potential participants (including Falun Dafa) by allowing them to present their culture and beliefs to a large audience. Falun Dafa contended the proper characterisation of the service was one of exercising decision-making power, and that the conduct of the parade (while a service to the public as entertainment) was also a service to the participants.

Judge Bowman agreed services can be reciprocal and represent the provision of services to more than one person or group, so the nature and/or character of the service provided differs between recipients. His Honour expressly agreed with the proposition that different facets of an activity may represent services that can be characterised differently.

His Honour concluded the council, in organising and staging the Moomba Parade, provided a service to participants and prospective participants (whereby they could promote themselves). Furthermore, the council was found provide a service in deciding who could participate in the Moomba Parade.

**Categories of service**

**Statutory services**

There is some uncertainty around whether services provided by a statutory authority in accordance with legislation constitute 'services' for the purposes of anti-discrimination laws, including the Equal Opportunity Act.

In the matter of *Kavanagh v Victorian Workcover Authority* [2012] VCAT 2009 VCAT considered a range of factors that would not amount to services. These included:

- exercising or refusing to exercise a statutory discretion that is a quasi-judicial discretion, for instance a duty to decide whether to prosecute
- a refusal to consider to exercise discretion however may be a refusal of a service
the performance of statutory duties.

In the matter of *Khalid v Secretary Department of Transport Planning and Local Infrastructure [2013] VCAT 1839* [38] VCAT found setting the conditions for who is entitled to use public transport under the *Transport (Compliance and Miscellaneous) Act 1983* (Vic), including determining who could receive concessional public transport, is the provision of a service under the Equal Opportunity Act.

The question of what governmental activity will constitute a service was considered by the High Court in *IW v City of Perth [1997] HCA 30*; (1997) 191 CLR 1 in the context of Perth City Council's decision to reject an application for town planning approval for a centre for people with HIV. In that case, the members of the High Court took different approaches to deciding whether the council was providing a service and, if it was, how that service should be identified. The majority determined the council had not provided a service by refusing to exercise a statutory discretion to approve the application for rezoning. The judges did not share the same reasoning for their conclusion, making the application of the case to other situations difficult. However, the majority did agree that in some cases the performance of statutory duties may also amount to a 'service' to a particular individual.

In later cases, the courts have held:

- the provision of additional superannuation benefits under retirement benefits regulations was a service
- a regulatory impact statement prepared by the Commonwealth Attorney-General for Cabinet in relation to a disability standard was not a service
  See *Vintila v Federal Attorney-General [2001] FMCA 110*
- the alteration of a person's sex on birth registration was a service
  See *AB v Registrar Births, Deaths and Marriages [2006] FCA 1071*.

**Services provided by government**

A broad range of activities undertaken by local councils can be 'services' for the purpose of the Equal Opportunity Act:

- access to council meetings
  See *Byham v Preston City Council* (1991) EOC 92–377
- a parade or general exhibition
- access to a customer service counter at a council office
  See *Slattery v Manningham City Council [2013] VCAT 1869*
- considering a planning application but not the approval or rejection of it

In *Slattery v Manningham City Council [2013] VCAT 1869* (Slattery) VCAT held provision by the council of access to the local library, swimming pool, toilets in council parks and other council buildings and facilities were services. VCAT also determined provision of access to customer service counters at council offices are services, as well as the assistance offered by council staff to those who attend the council offices [29]. In Slattery, VCAT found direct discrimination based on disability had occurred in the provision of goods and services under section 44 of the Equal Opportunity Act. The complainant in this case was a member of the community with psychosocial disabilities that caused him to engage in challenging behaviours. He was banned from accessing any council building and contacting the council. *(This case is discussed under What unfavourable treatment means and Disability as a manifestation of a disability.)*

**Attendance at council meetings**
Byham v Preston City Council (1991) EOC 92–377 considered a complaint by a person with disabilities who was keenly interested in local affairs and made a point of attending council meetings, which were located on the second floor of a building. The complainant was usually able to attend council meetings by having his son assist him up the stairs.

The complainant had raised the issue of a lift numerous times before the council. A preliminary feasibility study estimated a lift would cost around $150,000 to install – an expense that the council considered unjustified. The council has received no other complaints about the lack of access to the first floor, although the complainant pointed to a large number of elderly and disabled ratepayers who could benefit from the installation of a lift.

The complainant alleged this was a case of indirect discrimination. The relevant requirement was that the complainant access the first floor using a staircase to attend council meetings. The complainant argued a lower percentage of people with a disability could comply with this requirement compared with people without a disability.

The former Equal Opportunity Board held, while the complainant usually attended council meetings with the assistance of his son, he could not comply with the requirement to access the first floor using the staircase. Accessing the first floor with the assistance of another person was not sufficient.

The Board held it was not reasonable to refuse to install a lift, and ordered the council to do so by a prescribed date.

In Richardson v Casey City Council [2014] VCAT 1294 VCAT also found the 'meaning of service under the Equal Opportunity Act encompasses a range of activities including attendance at public meetings' as well as public question time [99].

Council recreation services

Recreational services provided by a local council such as swimming, aerobics and leisure facilities, will also be considered a 'service' under Part 4, Division 4 of the Equal Opportunity Act. In Slattery v Manningham City Council [2013] VCAT 1869 VCAT found provision by the council of access to the local library, swimming pool, toilets in council parks and other council buildings and facilities were services [29].

In Pulis & Banfield v Moe City Council (1986) EOC 92–170; (1988) EOC 92–243 the former Equal Opportunity Board considered a complaint in relation to discrimination in services by two men, who were refused entry to a recreation centre's 'women's night' for aerobics, sauna and swimming on Monday evenings. In that case the Board found the women's night did constitute discrimination.

This decision was made prior to the introduction of section 12 of the Equal Opportunity Act in relation to 'special measures'. Council recreational services including after-hours aerobics, swimming and other events specifically designed to cater for the needs of culturally and linguistically diverse groups (such as Muslim women) may be covered by the special measures provision in section 12. See the chapter on Special measures for a more detailed discussion.

In Casey Aquatic & Recreation Centre [2012] VCAT 893 the applicant applied for an exemption under section 89 of the Equal Opportunity Act. It wished to open the Casey Aquatic & Recreation Centre on any Friday evening (when it would otherwise be closed) between 8pm and 10pm for women, girls and boys aged up to seven years only. It also applied for an exemption to staff the centre with women only during those hours and to advertise that service. The particular focus was on providing a service to Muslim women and their children, and evidence was provided to support the need for the segregated services. VCAT found the Casey Aquatic & Recreational Centre did not require an exemption as the proposed services fell within the special measure provision of the Equal Opportunity Act, meaning the conduct would not be discriminatory.

Similarly, in Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission [2011] VCAT 1693 the council applied for an exemption under section 89
of the Equal Opportunity Act to host two women’s only events – to mark the end of Ramadan and to provide a music based social event. VCAT found the proposed conduct was a special measure under section 12 of the Equal Opportunity Act and no exemption was necessary.

Ignoring customers as refusal of service

Whitehead v Criterion Hotel (1985) EOC 92–129 considered circumstances where the complainant entered a hotel dining room with her three children and a friend. After changing dining rooms at the manager’s request, the group waited for some time for service. The complainant began to breastfeed her youngest child. The manager again approached the group and displayed annoyance at the act of breastfeeding in a dining room. The group left the hotel after being ignored for another 10 minutes.

The Equal Opportunity Board found the refusal of service amounted to discrimination on the ground of parenthood, and the refusal of service included the ignoring of customers. However, no damages were awarded.

Ejection from a hotel due to drunkenness

In Cruikshank v Walker (1987) EOC 92–212 the complainant alleged discrimination on the ground of impairment after being told to leave the respondent's hotel and being barred from drinking at the hotel.

The complaint was based on an incident two years earlier, when the complainant had suffered a nervous breakdown that involved hospitalisation and psychiatric attention. During the breakdown, he had burst out crying at the bar and had been allowed to lie down for several hours at the hotel.

The hotel argued the complainant had been ejected from the hotel because he and his friends were drunk and noisy, and it was his behaviour while leaving that had led to him being barred.

The Equal Opportunity Board was satisfied the complainant's impairment was not a factor in the refusal of service by the hotel under the 1995 Act.

 Provision of government accommodation and associated benefits

In Power v State of Victoria (1988) EOC 92–221 a man with a profound intellectual disability lodged a complaint that he was discriminated against in the provision of accommodation and services provided by the Victorian Government. The complainant's allegations concerned living conditions and access to training, recreational and other activities.

The Equal Opportunity Board held the respondent had discriminated against the complainant. It found particular activities had a bias towards persons with certain skills and against others who, as a result of their impairments, did not possess such skills. All other allegations of discrimination were dismissed. Although less favourable treatment had been established, it was not established this treatment was on the ground of the complainant's impairments.

The respondent was directed to review its activities and to provide additional unit-based activities to the complainant.

Services provided by police members

For the actions of police officers to be covered by the Equal Opportunity Act, members of the public alleging discrimination by police need to prove the discrimination occurred in the provision of 'goods and services'. The decision of Djime v Kearnes [2015] VCAT 941 clarifies the definition of 'services' in the Equal Opportunity Act in relation to policing [70] [138].

Mr Djime made allegations against four police officers and Victoria Police, alleging discrimination based on race in the provision of goods and services, victimisation and sexual harassment. Mr Djime, originally from Mali, believed his treatment by police was racially motivated. The allegations arose out of many incidents arising between 2008 and 2013.
VCAT dismissed 21 of the 27 allegations for being misconceived or lacking in substance, or not falling within the definition of 'services'. Six allegations did proceed to hearing. These included allegations of being taken in a police van 'to the middle of nowhere' and allegations regarding the police response to an incident when Mr Djime was assaulted by his housemate and called police, but was asked by them to leave his home (rather than the housemate).

Member Dea set out the general principles determining when police activity will constitute a 'service' for the purposes of the Act. These principles include:

- conduct that is helpful or beneficial for the individual is likely to be a service where it is consistent with the interests or welfare of the individual
- the fact that conduct might arise in the exercise of a statutory power or in the performance of a statutory duty might assist in identifying whether conduct falls within the meaning of a service, but is not determinative
- a distinction can be drawn between services provided to the community at large, and an arresting officer's dealings with an alleged offender
- police functions associated with the prevention and detection of crime when they intervene in situations where there is a disturbance of peace, or where an offence has been, or may be, committed are all services provided to the public at large and individuals who may suffer injury or harm are likely to be services under the Act. In those circumstances, the service might include other functions such as protecting persons from injury or death and restoring and maintaining peace and good order
- police provide a service where they respond to a specific request for assistance, such as when an emergency call is made. Following this, a service may be provided to a person being asked to leave or move on when that is intended to diffuse a situation rather than because an offence is suspected of having been committed
- police may have a public duty to provide services to an alleged offender who has been arrested by way of protecting the person from injury or death and protecting property from damage
- investigating an alleged offence, questioning and arresting alleged offenders, dealing with bail applications, decisions to lay or prosecute charges and decisions on how matters will proceed in court, serving summonses, executing warrants are not services
- in dealing with a situation or event, police may at some point in time cease to provide a service – for example, taking action to investigate a possible offense or deal with an alleged offender.

This decision provides clarity around when police activity will constitute a 'service' for the purposes of discrimination claims under the Equal Opportunity Act. Prior to this decision, Victorian case law only addressed situations where police conduct was not providing a service. It is now clear that police may be providing a service to the public at large, or to a specific individual in a range of circumstances. Importantly, the fact the police are exercising a statutory power does not necessarily prevent the conduct from being discriminatory.

The requirement under the Equal Opportunity Act to demonstrate policing constitutes a 'service' to receive the benefit of discrimination protections contrasts with the Charter of Human Rights and Responsibilities. The charter imposes obligations on public authorities such as Victoria Police to act compatibly with, and give proper consideration to, human rights in all acts and decisions.

In Kyriakidis v State of Victoria (Kyriakidis) [2014] VCAT 1039 the complainant was arrested by the police. He alleged when he repeatedly asked for a doctor, telling them 'he was sick, unwell and having a panic attack', the arresting officer ignored him. He later saw, in the notes by the arresting officer, a note observing he had 'possible psych issues'. He considered 'this should have put them on notice as to his disability' [19]–[22].
In *Kyriakidis*, VCAT found it was not possible to construe the activities that the complainant complained of as ‘services’ being provided to him. VCAT agreed with the conclusions on this point in *Rainsford v State of Victoria* [2000] VCAT 2496 and *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770:

> The relevant question was whether the acts constituting the service were helpful or beneficial to a group to which the person alleging discrimination belongs. In this case, the acts of an arresting police officer would not be characterised as being helpful or beneficial to the individual being arrested [and] …

> [I]n deciding whether to characterise an activity as a ‘service’ to focus on whether the services are being provided or refused to that person in particular – that is the person claiming discrimination (*Kyriakidis* [19]–[20]).

As set out in Djime, there are circumstances in which it could conceivably be argued the police do provide services in the sense envisaged by the Equal Opportunity Act, such as to victims of crime. This distinction was approved in *Field Meret v State of Victoria* [1999] VCAT 615. In that case VCAT held in fulfilling their duty to investigate crime, the police do not provide a service to any individual.

**Services provided to prisoners**

This issue has arisen in a number of cases and the answer will depend on the particular factual circumstances.

In the case of *Garden v Victorian Institute of Forensic Mental Health* [2008] VCAT 582 VCAT held the following were not services provided to the complainant, a prisoner at the hospital:

- reports made to the Adult Parole Board. VCAT considered the provision of the reports was a service, however, the service was provided to the Board, not to the complainant. The reports were not for treatment purposes and no copy of them was provided to the complainant.
- the continued presence of a particular staff member in the ward in which the complainant was located despite the complainant’s requests that he be removed. VCAT considered the true nature of the service provided was the provision of nursing services to each patient, and not the provision of a particular individual as primary nurse, or the provision of a primary nurse chosen by the complainant.

VCAT found, however, that the sending and receiving of mail was a service provided to prisoners.

In *Egan v State of Victoria* [2011] VCAT 1364 VCAT found Corrections Victoria did not provide a service in classifying a prisoner and in separating him from other prisoners, dismissing the proceeding under section 75 of the VCAT Act [24]–[26]. The actions of prison staff in classifying Mr Egan and separating him from other prisoners were found to be functions of maintaining the management, security and good order of the prison and of administering Mr Egan’s sentence of imprisonment, rather than conducting an activity of help or benefit to him. These activities were inherent parts of his incarceration and were not services provided to him.

The findings in Egan can be contrasted with the NSW cases of *Contreras-Ortiz v Commissioner, Department of Corrective Services* [2008] NSWADT 308 and *Whiteoak v State of New South Wales* [2014] NSWCA 45. In both these cases, brought under Anti-Discrimination Act 1977 (NSW), the NSW Civil and Administrative Decisions Tribunal found the classification of prisoners is a service, because it can be characterised as helpful and beneficial to inmates.

In *Charles v State of Victoria* [2015] VCAT 375 VCAT approved Egan. VCAT listed a number of activities considered not to be services and left the question open regarding whether a range of other items could be services. The critical factor for determining a service was whether the prisoner was provided a benefit, or whether, as in Egan, the act was part of the
security and order or the prison, or an inherent part of incarceration. The matters that VCAT found to not be a service included complaints about:

- decisions made in relation to disciplinary and security issues
- a urine screen drug test and ill treatment after a positive test
- a change to a personal security rating
- rules with regard to hair clippers
- decisions made regarding where Mr Charles was located within prisons
- conduct of prison officers towards Mr Charles
- the conduct of other prisoners towards Mr Charles
- provision of standard food to prisoners (although there is an arguable exception where special food is provided to an individual prisoner based on medical advice) [55]–[60].

See also Mahommed v State of Queensland [2006] QADT 21.

In Charles v State of Victoria [2015] VCAT 375 VCAT found conduct that may amount to a service included:

- the prison's refusal to allow an application to perform volunteer work in the Prison Visit Centre Canteen
- complaints about medical treatment
- complaints related to access to telephone, problems with lost property [60].


The complainant claimed the bed he was required to sleep in was inappropriate for his impairment, a prolapsed disc in his back, and that transport without breaks to enable him to stretch aggravated his impairment. One of the questions posed in this case was whether Corrections Victoria provided the prisoner with transport services or accommodation.

At first instance (Rainsford v Victoria [2007] FCA 1059), Justice Sundberg held the activities of transport between prisons and cell accommodations were not 'services' to the complainant, but rather were basic and inherent aspects of prison incarceration. In making these findings, Justice Sundberg observed although some government functions are undoubtedly services, not all of them are. Whether a government function is a service will be determined by the particular circumstances of the case.

On appeal (Rainsford v State of Victoria [2008] FCAFC 31), the Full Court considered it was unnecessary to decide whether Justice Sundberg erred in his interpretation of what constitutes a 'service'. However, the Full Court did note, while the issue was not argued in depth, there was 'some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility' [9].

Section 32(1) of the Charter of Human Rights and Responsibilities imposes a duty to interpret legislation consistently with human rights. This means an interpretation of 'services' in the Equal Opportunity Act that limits prisoners' access to equality and anti-discrimination rights would be less likely to be adopted by VCAT or the Victorian Supreme Court in future cases.

In Mahommed v State of Queensland [2006] QADT 21 the Queensland Anti-Discrimination Tribunal held the Corrective Services Department indirectly discriminated against a Muslim prisoner, Mr Mohammed in the provision of goods and services on the basis of religious belief or activity. Mr Mahommed was required to eat general prison fare (without fresh halal meat) during the first three months of his prison term. The Tribunal held the fact that Mr
Mohammed was serving a long prison sentence was a very relevant consideration as to the reasonableness of the requirement to eat standard prison fare [58].

Services provided by an owners’ corporation

In Anne Black v Owners Corporation OC1-POS539033E [2018] VCAT 185 Ms Black lived in an apartment she had owned since December 2013. She later developed disabilities that required her to use a wheelchair, scooter or sometimes crutches move around. Ms Black had difficulty accessing her home on the fourth floor of the apartment building because she was unable to operate the doors in the building, including entry doors from the street and car park and a car park ramp. The complainant sought an order that the owners’ corporation was responsible for making alternations to the common property, including modification of the doors and the ramp to the car park. The owners’ corporation argued they were not responsible for making the alterations but said it was were willing to allow Ms Black to make the alterations if she paid for them herself, in accordance with section 56 of the Equal Opportunity Act. VCAT found the owners’ corporation provided services to the complainant for the purposes of section 44 and section 45 of the Equal Opportunity Act.

The owners’ corporation sought leave to appeal against the VCAT decision. On appeal to the Supreme Court (Owners Corporation OC1-POS539033E v Black [2018] VSC 337), Justice Richards found the definition of ‘services’ under section 4 of the Equal Opportunity Act included the activities of an owners’ corporation in managing, administering, repairing and maintaining common property. This means that owners’ corporations are required to perform the obligations of a service provider, including the need to make reasonable adjustments. Importantly, the Supreme Court found owners' corporations could play a dual role as both a provider of services under section 44, and accommodation under section 56 of the Equal Opportunity Act. The Court found these sections do not negate each other, and there is no inconsistency in both these sections applying in a particular circumstance.

The matter was returned to VCAT for decision (Black v Owners Corporation OC1-POS539033E and Owners Corporation OC3-POS539033E (Human Rights) (Corrected) [2018] VCAT 2014). VCAT found that the owners’ corporation had not made reasonable adjustments for Ms Black. VCAT ordered that the owners' corporation carry out certain specified adjustments to the building to accommodate the Ms Black’s needs. In addition, VCAT ordered the owners' corporation pay $10,000 in compensation to Ms Black for her suffering.

Volunteers who receive and provide services

Section 4 of the Equal Opportunity Act specifically excludes volunteers and unpaid workers from its definition of employees (except for the purposes of sexual harassment. See Nason v RVIB [2002] VCAT 403). However, in keeping with the notion of reciprocal services endorsed in Falun Dafa v Melbourne CC [2003] VCAT 1955, and with the broad application of the term 'services', volunteers can be considered to both receive and provide services within the meaning of the Equal Opportunity Act. A volunteer who has contact with others in their volunteer role may provide a service to another person, and their conduct while providing these services will be subject to the Equal Opportunity Act. For example, see Buljan v Ethnic Broadcasting Association of Victoria Ltd [2000] VCAT 2020. (See Protection of volunteers in ‘employment' for related discussions). A volunteer in an organisation can also receive services from that organisation, such as training.

Exceptions relating to the provision of goods and services and disposal of land

The exceptions that make discrimination in the provision of goods and services lawful under the Equal Opportunity Act, discussed in the section on Exceptions relating to the provision of goods and services, and the disposal of land, relate to:

- adjustments for a person with disabilities that are not reasonable (section 46)
- offering insurance, or the terms on which an insurance policy is provided (section 47)
- offering or refusing an application for credit (section 48)
- requiring adult supervision as a term of providing goods and services to a child (section 49)
- the disposal of land by will or gift (section 51).

**Discrimination in accommodation**

Part 4, Division 5 of the Equal Opportunity Act makes it unlawful to discriminate in relation to accommodation. The Equal Opportunity Act prohibits a person from discriminating against another person in:

- offering to provide accommodation (section 52)
- providing accommodation (section 53).

The Equal Opportunity Act also prohibits discrimination by refusing to:

- provide accommodation to a person with a disability because they have an assistance dog, or by requiring the person to pay an extra charge or to keep the assistance dog elsewhere (section 54)
- allow reasonable alterations to be made to accommodation to meet the special needs of a person with a disability (section 55). A number of conditions apply to these obligations, including that the adjustments to the accommodation must be made at the expense of the person with the disability and not unduly impact other occupiers
- in relation to lots affected by an owners’ corporation, allow reasonable alterations to be made to common property to meet the special needs of a person with a disability (section 56).

**What 'accommodation' means**

Section 4 of the Equal Opportunity Act defines 'accommodation' as including:

- (a) business premises;
- (b) a house or flat;
- (c) a hotel or motel;
- (d) a boarding house or hostel;
- (e) a caravan or caravan site;
- (f) a mobile home or mobile home site;
- (g) a camping site.

Accommodation should be looked at broadly and given a wide interpretation, as found in *Burton v Houston* [2004] TASSC 57 [18]–[23]. It expressly covers the most obvious categories such as renting houses, apartments and hotel rooms, but also extends to areas such as camping, caravan and mobile home sites and property intended to be used for business purposes.

**Discrimination in offering to provide accommodation**

Under section 52, a person must not discriminate against another person:

- (a) by refusing, or failing to accept the other person's application for accommodation
- (b) in the way in which the other person's application for accommodation is processed
- (c) in the terms on which accommodation is offered to the other person.
Discrimination in providing accommodation

Section 53 of the Equal Opportunity Act provides that a person must not discriminate against another person:

(a) by varying the terms on which the accommodation is provided to the other person
(b) by denying or limiting access by the other person to any benefit associated with the accommodation
(c) by evicting the other person from the accommodation
(d) by refusing to extend or renew the provision of accommodation to the other person
(e) in the terms on which the provision of accommodation to the other person is extended or renewed
(f) by subjecting the other person to any other detriment in connection with the provision of accommodation to that person.

Examples of discrimination in the provision of accommodation

The following circumstances have been found to give rise to unlawful discrimination in the provision of accommodation:

- refusing to allow a family with teenage sons to book holiday park accommodation
  See *Galea v Hartnett – Blairgowrie Caravan Park [2012] VCAT 1049*
- refusing to rent premises to be occupied by women without husbands and their children
  See *Calman v Haloulos (1986) EOC 92–163*
- refusing to hire a caravan to people of a certain ethnic background
  See *Bull v Kuch [1993] HREOCA 15*
- using tenancy application forms that included discriminatory questions, such as, ‘Are you single, married, divorced, widowed, separated?’; ‘What are your child care arrangements?’
  See *Calman v Haloulos (1986) EOC 92–163*
- refusing to rent a flat to two adults because they are both men
  See *Wagen v Nicholas Moss (Vic) Pty Ltd (1985) EOC 92–121.*

In *Galea v Hartnett – Blairgowrie Caravan Park [2012] VCAT 1049* the respondent, a caravan park operator, was alleged to have discriminated against the complainant by refusing the complainant's holiday booking because he and his wife had two sons (one adult and one older teenager), who were also to come on the holiday.

The complainant had telephoned the respondent to make an enquiry about booking a caravan site over the summer holidays. The complainant was advised a site was available, and several days later, drove to Blairgowrie to confirm the booking and pay the required deposit. The complainant alleged on arriving at the caravan park and informing the respondent the ages of his two sons, 18 and 21 years old, the respondent stated because the children were young adults, the complainant's family did not fit in with the park's clientele. The respondent allegedly stated he preferred middle aged couples with young children, and that he could not help the complainant with a booking.

At hearing, the respondent gave evidence he believed the caravan park would not be suitable for the complainant's family because he thought the complainant's sons would not enjoy spending all of the holiday with their parents. He stated the only issue he had with the ages of the complainant's sons was in relation to the tariffs to be charged.

VCAT was satisfied a substantial reason for the respondent's refusal to provide accommodation to the complainant was because he intended to bring his two sons on the holiday. This amounted to direct discrimination and breached both the prohibition against discrimination in offering to provide accommodation and the prohibition against discrimination
in the provision of goods and services (the offering of accommodation being a service). While VCAT did not consider the circumstances sufficient to warrant an award of aggravated or exemplary damages, VCAT did award the complainant damages of $1,000 for distress, hurt and humiliation.

In *Bull v Kuch* [1993] HREOCA 15 the respondent operated a business providing emergency caravan hire accommodation. When a council officer sought to obtain emergency accommodation for the complainants, an Aboriginal couple, the first respondent replied 'she would not rent to 'Aboriginals' under any circumstances whatsoever' (page 3). When the first respondent was told by the council officer that her refusal might amount to discrimination, she replied she did not care. The Australian Human Rights and Equal Opportunity Commission described the case as a 'serious and significant case of blatant racial discrimination' (page 8), particularly as the refusal arose in emergency circumstances, and ordered the owners to pay the complainants compensation of $20,700.

In *Calman v Haloulos* (1986) EOC 92–163 two women seeking new premises for a women's refuge answered an advertisement for a rental property. The respondent, whose daughter owned the property, intimated to one of the complainants that they would not be able to afford the rent, and suggested she come back with her husband. When she replied she had no husband, the respondent asked her to leave. When advised of the complainants' intention that four women and two children would live in the property, the respondent told all the women present to leave. VCAT held the respondent had treated the women less favourably than applicants who were married couples, and had not made any enquiries about the complainants' ability to pay the rent.

In the case of *Wagen v Nicholas Moss* (1985) EOC 92–121 the complainant, a single male who sought to rent a house with a male friend, was advised by the real estate agent that his application was unsuccessful because the owner had requested the property be leased to a 'happy family'. The complainant was told the house would be re-advertised and his application might be reconsidered if no suitable applicant responded to the advertisement. Eventually, the complainant was told his application had been unsuccessful, forcing him to rent another house on less favourable terms (higher rent and a shorter lease).

VCAT held the real estate agent had discriminated against the complainant on the ground of marital status by rejecting his application and giving it a lower order of precedence than other applications. The damages awarded took into account the extra rent and shorter lease of the house the complainant ended up leasing. No order was made against the owner of the house.

In *Owners Corporation OC1-POS539033E v Black* [2018] VSC 337 (21 June 2018) the Supreme Court held owners' corporations could perform a dual role in providing a service under section 44 as well accommodation under section 56 of the Equal Opportunity Act. See Services provided by an owners' corporation above for a more detailed discussion.

**Protection for people with assistance dogs in accommodation**

**Assistance dogs**

An 'assistance dog' is defined under section 4 of the Equal Opportunity Act as a dog that is trained to perform tasks or functions that assist a person with a disability to alleviate the effects of his or her disability. This is a shift away from the more limited term 'guide dog' used in the '1995 Act.

According to the Equal Opportunity Bill 2010 Explanatory Memorandum, the definition of 'assistance dog' may include, for example, a dog trained to assist people who suffer from seizures or psychiatric disorders. However, the Explanatory Memorandum also confirms that the definition is not intended to be so broad to encompass companion or comfort dogs, but may extend to animals trained to assist with 'navigating social interactions where the nature of the impairment is such that this helps to alleviate the impairment'.

In *State of Queensland (Queensland Health) v Che Forest* [2008] FCAFC 96 [106]; (2008) 168 FCR 532 Justices Spender and Emmett considered the meaning of 'assistance animal'
under the *Disability Discrimination Act 1992 (Cth)*. They said the question is not whether a dog assists a complainant to alleviate the effects of a disability, but whether the animal was trained with that purpose or object in mind. In that case, Queensland Health reported the complainant's dogs were ill behaved and ill controlled, so requested evidence of the dogs' training. In their reasons, Justices Spender and Emmett suggested a complainant may need to provide evidence of proper assistance dog training, where the existence or quality of training is in question [118].

In *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCCA 157 the Federal Circuit Court of Australia considered civil aviation regulations that required an assistance animal to be trained by an approved organisation. A passenger with cerebral palsy who relied on a dog to assist him with his balance, hearing and sight difficulties advised an airline that he wished to be accompanied by his assistance dog on a flight. The airline refused to allow the dog into the aircraft cabin, citing the dog's lack of approved training and accreditation. The Court found the dog was excluded in accordance with a prescribed law and that allowing the dog to travel would have imposed an unjustifiable hardship on the airline because doing so would be contrary to the regulatory requirements and a potential offence [18].

**Refusing accommodation to a person because they have an assistance dog**

Discrimination against someone because of their assistance dog can be discrimination on the basis of the disability if it occurs in any area of public life. See, for example, See eg. *Phillips v Andrews (Human Rights)* [2018] VCAT 1714.

Section 54 of the Equal Opportunity Act specifically provides that a person must not refuse to provide accommodation to a person with a disability because he or she has an assistance dog. In particular, it is unlawful to require a person with a disability to keep the dog elsewhere (other than in the accommodation) or to require the person to pay an extra charge because of the dog. Section 54 is a stand-alone provision and does not require proof of direct or indirect discrimination as defined under section 7(1)(b).

**Other discrimination in connection with accommodation**

A number of cases have considered broader connections between the provision of accommodation and unlawful discrimination.

For example, the federal case of *Ross v Loock* [2000] HREOCA 6 considered circumstances where a landlord, his female tenant and others were socialising together in the landlord's unit. At the end of the evening when the other guests left, the landlord asked the tenant to stay behind to discuss something. He then made unwelcome sexual advances on the tenant. Soon after, the landlord terminated the tenancy. The Commission found the landlord's conduct was unlawful sexual harassment because the landlord was her accommodation provider. It was held in this case that the landlord had sexually harassed the tenant in the course of providing accommodation.

The case of *Houston v Burton* [2003] TASADT 3 considered complaints about noise in connection with accommodation. In that case, the complainant and respondent were neighbours and shared a balcony in an apartment complex. The complainant complained to the respondent about noise levels in the apartment complex. The respondent later started shouting vilifying statements at the complainant while on their shared balcony, on the basis that she was transgender. The Tasmanian Anti-Discrimination Tribunal considered section 22(1) of the *Anti-Discrimination Act 1998* (Tas), which prohibits discrimination in any activity in connection with protected areas of public life, including accommodation. The Tribunal found at the time of the conduct complained of, the complainant was undertaking an activity in connection with accommodation within the meaning of the legislation (section 22 of the *Anti-Discrimination Act 1998* (Tas)). This was because the complainant was engaged in the activity of speaking to the respondent about his conduct as her neighbour, which was impacting on the quality of her accommodation. On appeal (*Burton v Houston* [2004] TASSC 57), the Supreme Court of Tasmania upheld the Tribunal's findings. Justice Blow considered section 22(1) applies to anyone who has any
contact with someone who is engaged in or undertaking an activity that has some degree of
connection with one of the matters listed in section 22 – in this case, accommodation.

In the case of *H v G* [2010] TASADT 5 the Tasmanian Anti-Discrimination Tribunal
considered applying the prohibition against discrimination in accommodation to people in a
personal relationship living under the same roof, would stretch the connection too far. The
Tribunal considered the conduct complained of, namely Mr G’s treatment of Ms H, related to
their relationship. Although the fact they lived together facilitated Mr G’s conduct, the Tribunal
did not believe the alleged discrimination was sufficiently connected with accommodation to
properly bring the claim within unlawful discrimination in accommodation. Distinguishing
*Burton v Houston* [2004] TASSC 57, the Tribunal considered the only connection was that
the parties shared accommodation, and Mr G considered Ms H should do all of the
housework. The connection to accommodation must be clear and cogent for the prohibition
to apply.

**Accommodation services provided to prisoners by Corrections Victoria**

In *NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of
Matthews v Queensland Corrective Services Commission* (1998) EOC 92–940, the
Queensland Anti-Discrimination Tribunal considered complaints on behalf of five prisoners
that the respondent had discriminated against them in accommodation on the basis of their
HIV positive status. The allegations of discrimination included being housed in a medical
segregation unit, not being given the option to work in the kitchen at the prison, and for a time
not being permitted to attend the oval at the same time as the mainstream protection
prisoners. Applying *Hoddy v Executive Director, Department of Corrective Services*
(1992) EOC 92–397, the Tribunal noted it is open to a prisoner to complain of discrimination in
the provision of services or facilities, accommodation and work (that is, work at the prison). The
Tribunal found the treatment of the complainants in the correctional centres was less
favourable than that of other prisoners who were not HIV positive, so the respondent was in
breach of the *Anti-Discrimination Act 1991* (Qld).

**Discrimination in access to public premises**

*Section 57* of the Equal Opportunity Act prohibits discrimination on the basis of disability in
relation to access to, or the use of, any premises that the public or a section of the public is
entitled or allowed to enter or use (whether or not for payment). This prohibition includes
discrimination:

- by refusing to allow access to, or use of, the premises or any facilities in the premises
  (*section 57(1)(a)–(d)*)
- in the terms or conditions on which a person is allowed access to, or use of, the premises
  or facilities in the premises (*section 57(1)(b)(e)*)
- in providing the means of access to the premises (*section 57(1)(c)*)
- by requiring a person to leave or cease use of any facilities in the premises (*section
  57(1)(f)*).

For the purpose of these provisions, ‘premises’ includes a structure, building, aircraft, vehicle,
vessel, a place and a part of premises (*section 57(2)*).

**Exceptions relating to the provision of accommodation and access
to public premises**

Several exceptions make it lawful to discriminate in the provision of accommodation and
access to public premises (discussed in Exceptions relating to the provision of
accommodation and access to public premises). The exceptions relate to:

- accommodation that is unsuitable or inappropriate for occupation by a child because of its
design or location (*section 58A*)
shared rental accommodation (section 59)
accommodation provided by a hostel or similar institutions for the welfare of persons of a particular sex, age, race or religious belief (section 60)
accommodation for students (section 61)
accommodation for commercial sexual services (section 62)
access to, or use of, public premises that is not reasonable (section 58).

Access to cinema
In the case of Hall-Bentick v Greater Union Organisation Pty Ltd [2000] VCAT 1850 VCAT found the respondent had indirectly discriminated against the wheelchair-bound complainant by not providing wheelchair access to him in its cinemas and cinema facilities such as bathrooms. VCAT required the respondent to modify its premises and screening practices to ensure all discriminatory circumstances were eliminated, and to screen latest release films in the smaller theatre that had wheelchair access.

Discrimination in clubs
What a 'club' means
Section 4 of the Equal Opportunity Act defines a club by reference to:
- the number of members (i.e. more than 30)
- whether the members are associated together for social, literary, cultural, political, sporting, athletic or other lawful purpose
- whether it has a licence to supply liquor
- whether it operates its facilities wholly or partly from its own funds.

The definition does not extend to temporary limited licences and major event licences issued for events over a limited period or for one-off events, as outlined in the Explanatory Memorandum of the Equal Opportunity Bill 2010 (page 6).

The definition differs from the definition of club in the 1995 Act. The change aimed to bring the concept of what is a club, and thus what falls within the jurisdiction of the Equal Opportunity Act, into line with similar definitions under federal anti-discrimination laws (the Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth).

As a consequence, in Pines Community Men's Shed declaration [2013] VCAT 1878, VCAT was satisfied no exemption was required to exclude women from becoming members of a men's shed or its committee of management as the men's shed did not have a liquor licence, and did not fall within the meaning of a club.

Similarly, in Bakopoulos v Greek Orthodox Parish of Mildura [2014] VCAT 323 VCAT dismissed a claim of discrimination for the refusal of a parish to grant financial membership to a female congregant because there was no area in the Equal Opportunity Act that applied to her claim. VCAT noted the complainant's claim that she was denied the 'opportunity to become a participant in the governance arrangements of the Parish', rather than to receive or participate in a religious or spiritual service, was more closely associated with a club than a service. However, as a liquor licence is a prerequisite to the definition of a club and the Parish did not hold a liquor licence, her claim did not fall within this area [20].

Associations that fall within this definition cannot discriminate against existing or prospective members of the club, unless an exception applies.

There is no separate definition for voluntary bodies in Victoria, nor any requirements regarding incorporation or non-incorporation of clubs.
Discrimination against applicants for membership

Subject to the relevant exceptions, Part 4 Division 6 of the Equal Opportunity Act prohibits discrimination against applicants for club membership (section 64) and club members (section 65).

Section 64 of the Equal Opportunity Act provides that:

A club, or a member of the committee of management or other governing body of a club, must not discriminate against a person who applies for membership of the club—

(a) in determining the terms of a particular category or type of membership; or
(b) in the arrangements made for deciding who should be offered membership; or
(c) by refusing or failing to accept the person's application for membership; or
(d) in the way the person's application for membership is processed; or
(e) in the terms on which the person is admitted as a member.

Discrimination against club members

Further, under section 65 a club, or a member of the committee of management or other governing body of a club, must not discriminate against a member of the club by:

(a) refusing or failing to accept the member's application for a different category or type of membership
(b) denying or limiting access to any benefit provided by the club
(c) by varying the terms of membership
(d) by depriving the member of membership
(e) by subjecting the member to any other detriment.

Examples of discrimination in clubs

Exclusion from club due to race

In Toledo v Eastern Suburbs Leagues Club Ltd [1992] HREOCA 22 the complainant and his party of Japanese visitors sought entry to the club. A heated altercation took place between the complainant and the club doorman when the visitors were unable to produce adequate identification. The complainant alleged he and his visitors were refused entrance to the club on the basis of their race.

The Australian Human Rights Commission considered it unlikely that management of the club was influenced by racist attitudes. The Commission noted the club had a multicultural membership and that the doorman had been employed at the club for 22 years. Rather, the incident was due to an inflexible application of identification rules. No mention was made of race or national origin as a cause of the refusal. There was also no suggestion of racist remarks other than that made by the complainant.

The Federal Commission recommended the club apologise to the complainant.

Refusal of club membership due to marital status

In Ciemcioch v Echuca-Moama RSL & Citizens Club Ltd [1994] HREOCA 2 the Australian Human Rights Commission found in rejecting the complainant's application for club membership, the club had discriminated against her on the ground of her marital status.

The complainant argued her application was rejected because of hostility toward her husband, who had been involved in a dispute with the club ending in legal action. The club
argued their decision to reject her application was based on negative comments and views the complainant had made about the club and not on her marital status.

The Commission favoured a liberal construction of the definition of marital status in section 6 of the Sex Discrimination Act 1984 (Cth) and held the presence of the characteristics of loyalty and support in interpersonal relationships other than marriage did not prevent their classification as characteristics pertaining generally to a person's marital status.

The Commission considered there was enough evidence to raise a suspicion in the mind of the complainant that she had been discriminated against, and that suspicion was more than just a fanciful one. The club was ordered to reconsider the complainant's application to join the club, and to pay her $3,000 damages by way of compensation.

Refusal of club membership due to political belief

Section 4 of the Equal Opportunity Act defines political belief or activity as:

(a) holding or not holding a lawful political belief or view;

(b) engaging in, not engaging in or refusing to engage in a lawful political activity.

This is the same definition that was in the 1995 Act.

The Supreme Court in Tasmania considered the implications of discrimination on the grounds of political belief or activity in relation to the refusal of club membership. In Lindisfarne R & SLA Sub-Branch and Citizen’s Club Inc and Another v Buchanan (2004) 80 ALD 122 Mr Buchanan claimed the Sub-Branch and the Citizen's Club had discriminated against him on the grounds of his political beliefs when he tried to join the clubs. Mr Buchanan was required to sign a declaration that he was prepared to swear or affirm loyalty to the sovereign of the Commonwealth, and that he would uphold the Constitution of the Commonwealth, which was a precondition for membership of the clubs.

Mr Buchanan was a republican. He considered it hypocritical for him to swear loyalty to the monarch and amended his application to swear loyalty to the Commonwealth. His application was rejected on this basis, because it did not comply with the prescribed requirements for eligibility for membership. Mr Buchanan brought a claim that he had been discriminated against on the basis of his political beliefs. The Anti-Discrimination Tribunal of Tasmania upheld his claim. The clubs appealed this decision to the Supreme Court of Tasmania.

The Supreme Court found the monarchist aspect of the clubs' objectives did not negate the attraction of membership for some republicans. For this reason, it found the membership requirement disadvantaged those republicans barred from membership because they could not meet the requirement. The Court was satisfied that otherwise qualified applicants for membership being unable to reconcile their republican beliefs with the membership requirement was an identifiable ground. It found the requirement disadvantaged those holding that political belief more than those who were not a member of that political group. On that basis, the appeal was dismissed, and the finding of unlawful discrimination was upheld.

Club playing times

Corry v Keperra Country Golf Club (1986) EOC 92–150 considered the case of a Queensland golf club that had limited the number of highly sought-after Saturday tee-off times available for women members. No limit was applied to male members. The restriction meant only eight women could play on Saturday, and only at designated times, whereas men were able to tee-off at all other times.

The female members complained the restriction constituted unlawful sex discrimination under section 25(2)(c) of the Sex Discrimination Act 1984 (Cth) because it limited the female members' 'access to any benefit provided by the club'.

The club relied on an exception under section 25(4) of the Sex Discrimination Act 1984 (Cth) (identical to section 69 of the Equal Opportunity Act) that provided the discrimination complained of would not be unlawful if:
• it is not practicable for the benefit to be used or enjoyed to the same extent by both men and women (First Limb)

• either the same or an equivalent benefit is provided for the use of men and women separately from each other, or men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit (Second Limb).

The Equal Opportunity Commission found the opportunity to tee-off on a Saturday was a benefit and that female members' access to this benefit had been restricted. The commission was not persuaded by the club's argument that it would be impracticable to have more than two women's tee-off times on a Saturday because the men participate in a separate competition on that day.

The commission found it was practicable for the benefit to be used by men and women to the same extent, noting that the question of practicability is different from 'whether it is desirable, or whether the committee may think it desirable, that the men members should have a greater use of the course on the Saturday'. (See Corry v Keperra Country Golf Club (1986) EOC 92–150.) The restricted playing times were held to constitute sex discrimination because women had their access to a benefit of the club limited, and did not receive a fair and reasonable proportion of use of the benefit (even allowing that fewer women played golf than men).

Because the First Limb of the exception was not made out, the discrimination was unlawful and the commission was not required to rule on the Second Limb, regarding whether men and women members were each entitled to 'a fair and reasonable proportion of the use and enjoyment of the benefit'.

The club had argued the availability of two tee-off times was a fair and reasonable proportion given the respective numbers of men and women that were likely to wish to play the course on a Saturday. However, the chairman of the commission expressed doubt that the club's arrangements met the 'fair and reasonable proportion' test in the Second Limb of the exception.

The commission declared the club must permit all members, regardless of sex, to sign up in single sex groups, choosing tee-off times on a 'first-come, first-served' basis.

Exceptions relating to discrimination by clubs and club members

Discrimination by clubs and club members may be lawful under several exceptions (discussed in Exceptions relating to clubs), including:

• clubs for minority cultures (section 66) and political purposes (section 66A)

• clubs and benefits for particular age groups (section 67)

• single sex clubs (section 68)

• a club providing separate access to benefits for men and women (section 69).

Discrimination in sport

The Equal Opportunity Act prohibits discrimination in sport. Specifically, under section 71 of the Equal Opportunity Act, it is unlawful to discriminate against a person on the basis of a protected attribute (for example, disability, sex or race) by:

(a) refusing or failing to select them in a sporting team

(b) excluding them from participating in a sporting activity.

What 'participating in a sporting activity' means

'Participating in a sporting activity' is broadly defined to include the activities of people who are themselves not 'playing' the particular sport – for example, coaching, umpiring or refereeing, and participating in the administration of a sporting activity (section 70).
What 'sport' and 'sporting activity' mean

'Sport' and 'sporting activity' have their ordinary meaning, and section 70 of the Equal Opportunity Act expressly states that they include a game or a pastime.

In the past, VCAT has confirmed the ordinary meaning of sporting activity includes activities that may normally be regarded as recreational rather than purely sporting, and includes non-competitive games where physical athleticism is not a factor.

In Robertson v Australian Ice Hockey Federation [1998] VADT 112 Deputy President McKenzie summarised the scope of 'sport' in considering a complaint by Ms Robertson that, on the basis of her sex or age, she was banned by the federation from playing ice hockey, unless she played in a women's competition. Deputy President McKenzie noted:

[T]he ordinary meaning of 'sporting activity' is expanded to include certain activities that would normally be regarded as recreational rather than sporting, and to include non-competitive games and games where physical athleticism is not a factor. The breadth of the term is made clear in the explanatory memorandum speech for the bill which eventually became the Equal Opportunity Act 1995. The memorandum pointed out that 'sporting activity' could include activities such as chess or debating.

The Explanatory Memorandum to the Equal Opportunity Bill 2010 also makes clear that 'sporting activity' includes games and pastimes like chess and debating (page 70).

Interaction with other provisions

Where a complaint may be lodged in the 'sport' area, there may also be the potential for a complaint to be lodged in the 'services' or 'clubs' areas.

It is unlawful for a club, or a member of a club, committee or management body, to discriminate against a person on the basis of a protected attribute by denying them membership to a club or in the terms on which the person is admitted as a member (section 64). This could include opportunities to be involved in sporting activities, as was the case in Robertson v Australian Ice Hockey Federation [1998] VADT 112.

It is also unlawful to discriminate against a person on the basis of a protected attribute by refusing to provide goods or services to them, or in the terms on which goods or services are provided. Arguably this would include, for example, a sporting body refusing to provide the same range of sporting equipment to a women's cricket team as for the men's team, or offering competition or training opportunities to one sex only.

The provision of sporting facilities, as well as access to sporting teams and competitions, can be considered to be provision of services.

Exceptions relating to competitive sporting activity

Section 72 of the Equal Opportunity Act provides an exception to discrimination on the basis of sex and gender identity for competitive sporting activities where strength, stamina or physique of competitors is relevant. It also permits a person to exclude or restrict participation of people of one sex in competitive sporting activity where participation is necessary for progression to an elite level competition or to facilitate participation by people of a particular sex in certain circumstances. An exception also exists to restrict participation to people who can effectively compete, to people of a specified age or age group and to people with disability.

This exception is discussed in Exceptions for competitive sporting activities.

Discrimination in local government

Part 4, Division 8 of the Equal Opportunity Act makes it unlawful to discriminate in local government. Specifically, section 73 of the Equal Opportunity Act prohibits a councillor of a municipal council in the performance of his or her public duties from discriminating against:
(a) another councillor of that council
(b) a member of a committee of that council who is not a councillor of that council.

To the extent that local governments provide services or employ staff, their activities are also covered by other parts of the Equal Opportunity Act.

In the case of *Evans v Brimbank CC* [2003] VCAT 1904 a local councillor complained individual fellow councillors had discriminated against him on the basis of his impairment when they refused to grant him leave of absence from a number of council meetings. The refusal occurred in circumstances where leaves of absence had been routinely granted to other councillors when requested. The complainant indicated the reason for his absences was his stress-related illness. The council had put the complainant on notice that if he wished to be granted leaves of absence, some evidence of his medical condition would be needed, together with an indication as to when he would be able to resume duties. This information was not provided. Ultimately, after the complainant missed four meetings without leave being granted, an extraordinary vacancy was declared and a by-election was triggered for the councillor's area.

Senior Member Lyons noted the complainant had not provided medical certificates indicating that he was unfit to attend meetings, and had not indicated when he would be able to resume attendance. VCAT considered providing such information would not have imposed an unreasonable burden on the councillor.

In circumstances where the councillor appeared capable of attending other council-related events and making media comments in his capacity as a councillor, VCAT considered the complainant's actions led to the stated reasons for his absences legitimately being called into question.

For these reasons VCAT determined, in all the circumstances, the councillors had not unlawfully discriminated against the complainant councillor.

**Exceptions relating to local government**

Section 74 of the Equal Opportunity Act provides an exception to discrimination by councillors on the basis of political belief or activity. This exception is discussed in Exceptions relating to local government.

1 Note these exceptions have been removed from the Equal Opportunity Act; claims could now be made under section 20 of the Equal Opportunity Act.
2 Section 65 of the *Fair Work Act 2009* (Cth) contains similar obligations, although a person may make a request only if they are: a parent or carer of children who are school age or under; a carer; an employee with a disability; or an employee who is experiencing family violence or caring for those who experience family violence.
3 Section 4 of the Equal Opportunity Act defines ‘work arrangements’. Broadly, it encompasses arrangements that apply or would apply to the individual as well as the workplace.
5 The new tickets were to be bought from retail shops and validated by the traveller making a scratch mark in designated places to show the journey being undertaken. Each of the nine complainants suffered from a disability making it 'exceedingly difficult, if not impossible, to use scratch tickets' (Mason and Gaudron JJ).
6 See also *Smith v Jamsek* [2012] NSWADT 3.
Reasonable adjustments for people with a disability

The *Equal Opportunity Act 2010* (Vic) (*Equal Opportunity Act*) imposes express obligations to make 'reasonable adjustments' in certain areas for a person with a disability. While these obligations were implicit in the Act's predecessors, the duty is now explicit.

Each of the 'reasonable adjustment' obligations are 'stand-alone' provisions. So, a contravention of any of them constitutes unlawful discrimination and can be an additional head of claim for a person bringing a complaint to the Victorian Civil and Administrative Tribunal (VCAT) or the Victorian Equal Opportunity and Human Rights Commission.

**When reasonable adjustments are required**

The obligations to make reasonable adjustments are set out in various sections of the Equal Opportunity Act. They apply to:

- Employment, including adjustments for employees and people offered employment (**section 20**), and partners/people offered partnership (**section 33**)
- education (**section 40**)
- the provision of services (**section 45**).

The Equal Opportunity Act contains examples of practical steps that may constitute 'reasonable adjustments', including:

- installing access ramps for wheelchairs
- allowing a person or employee to be absent from work for rehabilitation or medical treatment
- allowing a person to take more frequent rest breaks during work
- providing a teacher's aide to a student
- including subtitles in audio-visual presentations.

**Whether the adjustments are reasonable**

In determining whether it is reasonable to require adjustments to be made for a person with a disability, VCAT must look at all relevant facts and circumstances. Sections **20(3)**, **33(3)**, **40(3)** and **45(3)** of the Equal Opportunity Act prescribes the factors that may be relevant, including:

- the person's circumstances, including the nature of the person's disability
- in employment, the nature of the work offered or performed
- the type of adjustment needed to accommodate the disability
- the respondent's circumstances, including their nature, size and financial circumstances
- the effect on the respondent of making the adjustment (including the number of other people who would be benefited or disadvantaged by the adjustment, the financial impacts and the impacts on employment efficiency and productivity)
- the consequences for the respondent if adjustments are made
- the consequences for the person if the adjustment is not made and, if an adjustment in education is made, the effect on the person's achievement, participation and independence
• any relevant disability action plan made under the *Disability Discrimination Act 1992* (Cth) or the *Disability Act 2006* (Vic).

**When adjustments are not required**

The requirements to make reasonable adjustments apply unless the adjustment would be ineffective because:

- in a work-related context, the person or employee could not ‘adequately perform the genuine and reasonable requirements’ of the employment or partnership even after the adjustments are made (sections 20(2) and 33(2))

- in an education context, the person 'could not participate in or continue to participate in or derive or continue to derive any substantial benefit from the educational program' even after the adjustments are made (section 40(2))

- in relation to the provision of services, 'the person could not participate in or access the service or derive any substantial benefit from the service' even after the adjustments are made. (sections 45(2) and 46).

In *Dziurbas v Mondelez* [2015] VCAT 2056 (*Dziurbas*), for example, VCAT considered there was a failure to make reasonable adjustments when a confectioner returned to work following a non-work-related injury. The confectioner's role involved duties such as lifting, tipping and stacking boxes weighing 10–15 kilograms. His manager asked him to attend a meeting, which Mr Dziurbas anticipated would discuss his return to work. Instead, at that meeting, his employment was terminated. There was no evidence that the manager discussed the implications of Mr Dziurbas's medical condition for his actual duties. Mr Dziurbas was given no opportunity to identify any adjustments needed and to contribute his thoughts on whether they would be reasonable.

Under sections 23, 34, 41 and 46 specific defences are available to respondents:

- the adjustments are not reasonable and/or

- the adjustment would be ineffective for the reasons summarised above in When adjustments are not required.

In *Dziurbas*, VCAT found the adjustments the employee required must be identified, and the party relying on the exception must prove those adjustments are not reasonable under section 23(3) of the Equal Opportunity Act [135]. Further, the party relying on the exception must prove it complied with its requirements.

An employee needs to articulate what adjustments they need and expect from an employer so they can perform the genuine and reasonable requirement of the job. In *Walker v Heathcote Health* [2017] VCAT 171 the complainant (a personal care attendant) had been away from work when the respondent notified her that she was to be placed on a performance management plan. The performance management plan required her to work only day shifts. The complainant claimed she could not work day shifts because of her disability (depression and seizures), and that the respondent failed to make reasonable adjustments to allow her to perform her role. VCAT held there was no breach of section 20 because there was no evidence the complainant had told her employer that her disabilities meant she required an adjustment to working only night shifts:

> The first thing that strikes me about section 20 is that an employee needs to articulate what he or she needs and expects from an employer by way of adjustment so as to enable him or her to perform the genuine and reasonable requirement of a particular job. As counsel for the respondent put it, his clients are not mind readers [85].

Further, even if the complainant established she had told the respondent what she needed, whether the adjustments sought were reasonable in all the circumstances is still a question.
In *Butterworth v Independence Australia Services* [2015] VCAT 2056 VCAT stated the duty to make reasonable adjustments does not require an employer to create another job for the employee or to keep the employee in work, but it may require the employer to consider redeploying the employee in suitable roles in other parts of the organisation [208]–[209]. In this case, a complainant who sustained a shoulder injury at a call centre while sitting for extended periods successfully argued her employer failed to make reasonable adjustments for her disabilities during this period. The reasoning was that she was not redeployed to a role that was available in another team, and instead was terminated due to her workplace injury.

The matter of *Bevilacqua v Telco Business Solutions* [2015] VCAT 269 has important implications for women who cannot work full time, or who need certain adjustments, due to morning sickness. VCAT found morning sickness is a disability under the Equal Opportunity Act. The decision means the Act's requirement to make reasonable adjustments for employees extends to pregnant employees who need adjustments due to morning sickness.

Reasonable adjustments are also required in education, as discussed in *When reasonable adjustments are required*.

**Genuine and reasonable requirements of employment**

To understand the 'genuine and reasonable requirements' of an employment, VCAT must look at all the circumstances surrounding the employment. These circumstances include any contract of employment, statutory functions, and organisational or operational requirements.

VCAT considered the phrase 'genuine and reasonable requirements of the employment' in the case of *Davies v State of Victoria (Victoria Police)* [2000] VCAT 819 in the context of the equivalent exception under section 22 of the Equal Opportunity Act 1995 (Vic). In that case, VCAT said:

> What are the genuine and reasonable requirements of the employment? In our view, these are wider than the inherent or essential requirements of the employment... The requirements of the employment and the requirements of the employer are not necessarily the same thing, although they will often be the same. The requirements of the employment refers to what the job or position requires to be done, as well as what is necessary to do those duties. The term covers the whole range of these requirements, and not just the ‘essential’ ones. The requirements must be requirements ‘of the employment’. In other words, they must relate to and derive from the employment. They must be genuine requirements. An employer cannot invent requirements which are not truly requirements of the employment. They must be reasonable requirements. As was pointed out in the context of indirect discrimination, ‘reasonable’ is a more demanding test than one of convenience but a less demanding test than one of necessity (*Secretary, Department of Foreign Affairs and Trade v Styles* [1989] FCA 342; [1989] 23 FCR 251 at 263 per Bowen CJ). So, a requirement for abilities or qualifications that are grossly disproportionate to the degree of difficulty of the duties, might not constitute a reasonable requirement of the employment.

VCAT went on to say the genuine and reasonable requirements of employment may include certain abilities and skills that are relevant to the duties of the employment. A certain degree of physical or mental fitness is an example.

VCAT commented, that the circumstances in which the employment is carried out, including dangers to which the employee may be exposed or may expose others, may also be relevant in determining the genuine and reasonable requirements. On that point, VCAT cited the reasons of Justices Gummow and Hayne in *X v Commonwealth of Australia* [1999] HCA 63, which concerned whether a soldier with HIV/AIDS could perform the 'inherent requirements' of combat duties and whether the risk of others being infected in the course of the employment was relevant.

Other cases in which genuine and reasonable requirements of employment were considered include:
• **Dziurbas v Mondelez Australia [2015] VCAT 1432** – Mr Dziurbas was terminated from his employment because his employer Mondelez concluded he did not have the capacity to undertake the inherent requirements of his role. Mondelez had obtained an independent medical report following two inconsistent reports from Mr Dziurbas's doctor about his capacity. VCAT held Mondelez had not properly investigated Mr Dziurbas's role at the time of his termination. Mondelez had assumed Mr Dziurbas was largely required to operate a steel bank machine, which was accepted to be a fairly onerous task. In reality, however, he performed a myriad of other less physical tasks, which meant Mondelez's claim was unfounded. On that basis, VCAT held Mr Dziurbas had been directly discriminated against by reason of his disability, and Mondelez had not made appropriate enquiries as to whether Mr Dziurbas's role could be reasonably adjusted to accommodate him.

• **Kassir v State of Victoria [2012] VCAT 1977** – Mr Kassir was unsuccessful in his application to join Victoria Police. He had disclosed a history of mental health issues, including post-traumatic stress disorder, depression and anxiety. He claimed the recruitment process discriminated against him because of his disabilities. The respondents relied on the opinion of the Assistant Police Medical Officer and the Police Psychologist, who both formed the view that Mr Kassir would be unsuitable for the role. In this case, the respondents conceded Mr Kassir had been treated unfavourably because of his disability, but considered the treatment was not unlawful because Mr Kassir could not perform the genuine and reasonable requirements of the job. VCAT agreed, and this case was determined on the specific medical evidence (including expert evidence) of the genuine and reasonable requirements of employment in policing.
Permanent exceptions to discrimination

The Equal Opportunity Act 2010 (Vic) contains exceptions to discrimination. These exceptions operate on an automatic, permanent basis, as opposed to temporary exemptions that the Victorian Civil and Administrative Tribunal (VCAT) may grant. The effect of the permanent exceptions is to deem certain activities, that would otherwise constitute unlawful discrimination, to be lawful conduct under the Equal Opportunity Act. The Equal Opportunity Act covers two exception categories: general and specific.

General exceptions apply to discrimination in all areas of public life, meaning discrimination may be lawfully permitted in certain circumstances in all areas covered by the Equal Opportunity Act. An example is a situation when it is necessary to protect someone's health and safety.

Specific exemptions apply to only a certain area or areas of public life. In employment, for example, an employer providing welfare services that are special measures, or designed to meet the needs of people with a particular characteristic, may discriminate to select employees who best meet the needs of clients. This chapter discusses each of these permanent exceptions.

In addition, a person may apply to VCAT for an order granting them a temporary, specific exemption so they can discriminate in certain circumstances. See Temporary exemptions by VCAT for a further discussion.

VCAT decisions on permanent exceptions and temporary exemptions often overlap. When a person or entity applies for a temporary exemption from the Equal Opportunity Act, VCAT must consider whether such an exemption is necessary, or whether the proposed discriminatory conduct is already lawful under one of the permanent exceptions to discrimination.

General exceptions to discrimination

Exception for things done with statutory authority

Section 75 of the Equal Opportunity Act replicates section 69 of the 1995 Act. It allows a person to discriminate if that discrimination is necessary to comply with, or is authorised by, a provision of a Victorian Act or enactment. Such discrimination is permitted only in very specific circumstances.

The case of H.J. Heinz Company Australia Ltd v Turner (1998) 4 VR 872 (Heinz) illustrates how this provision can operate in practice. Following a series of work-related injuries, Mr Turner returned to work on 'limited duties', which restricted him to the operation of only two machines. Heinz had a policy that did not allow workers who were on modified duties to work overtime because, Heinz said, it could not guarantee the duties performed on overtime would be appropriate for the employee's modified duties. Mr Turner was not permitted to work overtime.

The Equal Opportunity Board of Victoria found the exclusion of Mr Turner from overtime was discriminatory because Heinz had applied a 'blanket policy' and not considered how Mr Turner might be permitted to undertake overtime work.

Heinz appealed this decision and argued its obligations under the Occupational Health and Safety Act 1985 (Vic) (as in force at the time) meant the overtime policy was reasonable, practicable and, most significantly for this exception, one that Heinz was authorised to implement by law. The Court of Appeal found in favour of Heinz.

The Court of Appeal decided Heinz, having introduced an appropriate policy in fulfilment of its legal obligations to provide safe working conditions, was authorised to implement the policy without considering whether its implementation was discriminatory. The only question for determination, therefore, was whether the discrimination occurred because of a bona fide application of the policy. Given Heinz had applied its overtime policy in good faith, the
discrimination was not unlawful. See also Garden v Victorian Institute of Forensic Mental Health t/as Thomas Embling Hospital [2008] VCAT 582.

VCAT considered the Heinz decision in the case of Slattery v Manningham City Council [2013] VCAT 1869 (Slattery). In that case, the respondent council had implemented a ban on the complainant accessing council services. The council argued, if discriminating against the complainant, it had done so to comply with the provisions of the Occupational Health and Safety Act 2009 (Vic). That is, it argued it was ensuring, as far as reasonably practicable, the health and safety of staff and members of the public.

VCAT observed the Heinz decisions set out a test of proportionality. In Slattery, the council's actions were not 'appropriately designed' to secure the health and safety of employees, and did not constitute an 'appropriate and commensurate measure of protection from an identified level of risk' [138]. As such, the council could not say it was required to take the action of banning the complainant from council to protect health and safety.

In Butterworth v Independence Australia Services [2015] VCAT 2056 an employer required Ms Butterworth to undergo a medical assessment to establish whether it needed to make any reasonable adjustments after she disclosed she had two medical conditions. Among other claims, Ms Butterworth alleged this request discriminated against her. VCAT found, however, it was reasonable for the employer to assess whether the disclosed conditions required adjustments, and to ask for more information because the disclosure triggered obligations under the Occupational Health and Safety Act 2004 (Vic) to reduce risks to health and safety [88]. The employer's conduct was also necessary to protect the health or safety of any person under section 60 of the 1995 Act [93]. The conduct in this instance was done with statutory authority, while other actions, such as when the employer terminated Ms Butterworth's employment, were not.

In Khalid v Secretary Department of Transport Planning and Local Infrastructure [2013] VCAT 1839 VCAT observed the main controversy was not whether discrimination had occurred but whether it was authorised by legislation [43]. In this case, transport legislation permitted the Secretary to include a condition that overseas students are not eligible for student concessions to use public transport [92].

**Exception for things done to protect health, safety and property**

Section 86(1) of the Equal Opportunity Act allows for discrimination on the basis of disability and physical features when the discrimination is reasonably necessary to protect the health, safety or property of any person. This protection is for the health, safety or property of the person discriminated against, or for the public generally.

Section 86(2) of the Equal Opportunity Act allows discrimination on the basis of pregnancy when it is reasonably necessary to protect the health and safety of any person (including the person discriminated against).

In Hall v Victorian Amateur Football Association [1999] VICCAT 333 (Hall) Mr Hall was excluded by the Victorian Amateur Football Association (VAFA) from participating in amateur football because he was HIV positive. VAFA said the exclusion of Mr Hall was 'reasonably necessary' in the circumstances, and was permitted under section 80(1) of the 1995 Act (the predecessor to section 86(1) of the Equal Opportunity Act).

In considering the arguments put forward by VAFA, VCAT noted players and officials with whom Mr Hall may come into contact during the game were at risk of infection. While this risk was thought to be low, VCAT held the banning of Mr Hall was not unlawful in light of that risk. VCAT set out factors that should be balanced against each other to determine whether the action is reasonably necessary to protect health and safety. These factors include considering whose health and safety is to be protected by the action, the risks and consequences of action (or inaction), current measures, any non-discriminatory alternatives, and the belief of the respondent.

In Hall, VCAT went on to consider VAFA’s Infectious Diseases Policy, which detailed methods for dealing with people and property contaminated by blood and containing hygiene
in team areas. VCAT said VAFA had not rigorously and consistently applied this policy but, if VAFA had done so, the risk of infections such as HIV would be reduced. Most notably, because VCAT reasoned applying the policy would better protect the players and officials at risk than simply banning the complainant (which still left open the risk of infection from other HIV sufferers), it found banning Mr Hall was not ‘reasonably necessary’. Proper application of the policy was a non-discriminatory means by which VAFA could reduce the identified risk to health and safety without banning Mr Hall. Mr Hall's claim of discrimination, therefore, was upheld.2

The factors described in Hall were applied by VCAT in Slattery v Manningham City Council [2013] VCAT 1869. The council in that case had imposed a ban on a member of the public seeking to access council premises. It argued any otherwise discriminatory conduct against the complainant was warranted and justified by the council's duty to protect the health and safety of employees and others.

Applying the evidence to the factors from Hall, VCAT found the exception in section 86 did not apply. However, it suggested 'proportionate and tailored strategies that are informed by research and training, that are regularly reviewed and that provide an appropriate and commensurate measure of protection from an identified level of risk' might not be unreasonable [136].

As discussed above, this exception was also raised in Butterworth v Independence Australia Services [2015] VCAT 2056. In this case, VCAT found an employer did not unlawfully discriminate when it required an employee to undergo a medical assessment after she had disclosed health conditions. The conduct would have been exempted as reasonably necessary to protect Ms Butterworth's health in compliance with the employer's duty to protect the health or safety of any person under section 60 of the 1995 Act.

Exception for special needs

Scope of the exception

The special needs exception under section 88 of the Equal Opportunity Act allows a person to establish services, benefits or facilities to meet the 'special needs' of people with a particular attribute. Further, eligibility for such services may be limited to people with the particular attribute.

The section 88 of the Equal Opportunity Act includes the following example of conduct that would fall within the special needs exception: ‘[a] community organisation establishes a support group for single fathers in response to research that shows that single fathers have a need for targeted counselling and support’. This example would fit within the special needs exception because there is a demonstrated need for the service, whether or not single fathers are a disadvantaged group within the community.

The special needs exception also specifically covers:

- rights or benefits granted to women in relation to pregnancy or childbirth (section 88(3)(a))

- the provision or restriction of holiday tours to people of a particular age or age group (section 88(3)(b)). See, for example, Morris [2007] VCAT 380, in which VCAT expressed doubt that the special needs exception under the 1995 Act would enable a tour organiser to offer women-only tours. In doing so, VCAT noted the exception applied to holiday tours provided for particular age groups, not to holiday tours provided for people with other attributes.

Section 88 of the Equal Opportunity Act replaces section 82(1)(a) of the 1995 Act. Section 82(1)(b) of the 1995 Act was reframed as the special measures provision in section 12 of the Equal Opportunity Act. See also Interaction between 'special needs' and 'special measures'.

The Equal Opportunity Bill 2010 Explanatory Memorandum indicates a person wanting to rely on this exception must demonstrate, on an objective basis, a need for the services, benefits
or facilities. The person must also demonstrate that the measures put in place are objectively capable of meeting that need (page 45).

However, case law suggests the person's state of mind will be centrally relevant to determining whether the services, benefits or facilities were 'designed' for the lawful reason of meeting a group's special needs. VCAT reviewed this authority in *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)* [2009] VCAT 1869 in relation to section 82(1) of the 1995 Act:

> Whether the purpose of a special measure under section 82(1) of the Equal Opportunity Act was to be ascertained subjectively or objectively was considered in *Colyer v State of Victoria* [Colyer]. Justice Kenny (Justice Brooking and Justice Callaway agreeing) held the exception applied where the service-provider genuinely believed the services would meet those purposes. Her Honour held s 82(1) 'requires the relevant decision-maker to be satisfied that the genuine and not-colourable intention of the service-provider' was to achieve the beneficial purpose. According to her Honour, this belief is ascertained as a fact from the evidence, including inferences to be drawn from 'the nature of the services to be provided and the identity of the recipients of the service'. In summary:

> If upon consideration of all relevant matters, the decision-maker is satisfied that the genuine and not colourable intention of the service-provider is to provide the special services for the ends identified in paragraphs (a) or (b) of s. 82(1), then it follows that the services are 'designed' to meet those needs. If the decision-maker is not so satisfied, then it follows that the services are not so designed. That is, if it were to appear that the relevant intention was not held or not genuinely held by the service-provider, then s. 82(1) would not apply [246]–[247].

*Colyer* was followed by the Full Court of the Federal Court of Australia in *Richardson v ACT Health and Community Care Service* [2000] FCA 654. Justice Finkelstein (Justice Miles and Justice Heerey agreeing) held the 'purpose' (not 'design') element of the exception in section 27 of the Discrimination Act 1991 (ACT) refers to 'the actual intention of the decision-maker or actor'. But that intention must still be established:

> To determine whether the decision-maker holds the requisite state of mind, it will be permissible to enquire whether the conduct in question was capable of achieving equal opportunity (section 27(a)) or meeting special needs (section 27(b)). That enquiry may be necessary for the purpose of establishing that the claimed intention is one that is likely to have been held by the decision-maker. It is not, however, to substitute for an enquiry into the subjective state of mind of the decision-maker an objective criterion. It is merely one of the means by which a claimed subjective intention can be established, in cases where there may be doubt [26].

**Interaction between 'special needs' and 'special measures'**

The special needs exception complements the promotion of 'special measures' under section 12 of the Equal Opportunity Act. Section 12 provides that taking measures to promote or realise substantive equality for members of a group with a particular attribute is not discrimination. However, as the *Equal Opportunity Bill 2010 Explanatory Memorandum* makes clear, unlike the special measures provision the 'special needs' provision operates as an exception to discrimination. It may apply regardless of whether the beneficiaries of the services, benefits or facilities experience a particular disadvantage (page 45).

In *Georgina Martina Inc [2012] VCAT 1384* (*Georgina Martina*) in relation to the special measures provision, Member Dea explained:

> In order to consider whether conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, it is necessary to identify the inequality which is being sought to be remedied and its cause and then consider how the proposed measure promotes or realises substantive equality [41].
In contrast, the special needs exception enables the establishment of special services, benefits or facilities that meet the special needs of people with a particular attribute, regardless of whether they are disadvantaged. Section 88 requires only ‘the special services, benefits or facilities to be identified and for them to be shown to meet the special needs of the relevant group identified by the attribute’ (Georgina Martina [57]).

In Georgina Martina VCAT found the special needs exception applied in relation to services provided by a high-security women's refuge to women fleeing family violence (including emergency accommodation and case management). However, VCAT was not satisfied the services could be properly characterised as a special measure, noting:

> On the evidence before me, the current application is not concerned with the creation of a service to meet the needs of women, which are not met by services currently available to men and women, in order to achieve equality between men and women. It is a response to the needs of some women, not for reasons based on inequality in the existing options available to all, but because they have a particular need arising from the violence of some men.

Unlike the counselling example [set out in section 12 of the Equal Opportunity Act], this is not a case where there are family violence services available to men and women which better serve the needs of men. Rather than adjusting or improving on an existing service for the purpose of promoting or realising equality for women, on the evidence this and other refuge services were created as a new initiative because there were no other services available [47]–[48].

For further discussion of this decision (in relation to VCAT’s decision to grant a temporary exemption permitting the refuge to employ women only), see Discrimination in welfare services employment and Welfare measures of accommodation.

In Pines Community Men's Shed [2013] VCAT 1878 declaration the complainant applied for an exemption to allow it to exclude women from becoming members or part of its committee of management. Men's sheds aim to address issues of men's health, isolation, loneliness and depression, and promote men's social inclusion, including disadvantaged and isolated men, men with disabilities, and men experiencing major life changes. VCAT was satisfied the Men's Shed program is a special service established to meet the special needs of men and, therefore, is within the exception in section 88 of the Equal Opportunity Act.

Similarly, in Anglicare Victoria [2015] VCAT 79 VCAT was satisfied a refuge providing secure accommodation to women experiencing family violence and trauma caused by sexual assault was within the exception in section 88, because the refuge was established to meet the special needs of women. Accommodation and other services in the circumstances could be provided to women only without the need for an exemption.

In 2015 several cases raised questions about the application of the section 89 exemptions and section 12 special measures. These cases appeared to widen the application of section 12 by making special measures declarations about conduct that directly benefited groups not experiencing substantive inequality. The decisions appeared to suggest section 12 does not have to achieve substantive equality for members more generally of a group with an attribute.

In Trafalgar High School [2015] VCAT 1647 a school applied for an exemption under section 89 of the Equal Opportunity Act to employ a male to provide one-on-one support to a male student with paraplegia. The role would include assistance with access to the toilet and other self-care needs. The school argued a male employee was needed for reasons of the strength required to provide physical assistance, and the student's cultural and religious beliefs. VCAT held the application was 'misconceived' and declared the school's conduct a 'special measure' under section 12(1) of the Equal Opportunity Act.

In Yooralla [2015] VCAT 1647 a non-profit disability service organisation applied for an exemption to enable it to advertise for and employ age and sex specific people for Disability Support Worker roles that would be deployed in response to client requests. VCAT made a special measures declaration and held the conduct promoted and, in many cases, realised substantive equality for clients, preserving their dignity.
In *Plenty Valley Community Health* [2015] VCAT 1647 the complainant (a provider of primary health care services) applied for an exemption to advertise for and employ a woman in the role of Arabic/Persian interpreter. The complainant was concerned if it failed to provide female interpreters, that female clients would have impeded access to its services. VCAT found the conduct promoted equality for clients wishing to access this service, and accounted for the religious and cultural practices of the clients. The conduct did not require an exemption under section 89 of the Equal Opportunity Act because it was a ‘special measure’ under section 12(1).

The decision of *Waite Group* [2015] VCAT 1647 (discussed in Requirements for a special measure) addressed these issues and provides detailed guidance on the requirements for a special measure and the type of evidence that might be relevant to an assessment for a special measure.

### Specific exceptions to discrimination

**Exception for age benefits and concessions**

Under section 87 of the Equal Opportunity Act, it is permissible to discriminate in providing benefits to a person based on age. This exception includes, for example, providing concessionary tickets to an event.

**Exceptions relating to superannuation and pensions**

**Discrimination by retaining an existing discriminatory superannuation fund condition**

Section 78 of the Equal Opportunity Act allows a person to discriminate by retaining an existing discriminatory superannuation fund condition for a person who was a member of the fund at 1 January 1996 or who became a member of that fund within a period of 12 months after that date.

The courts have not yet tested the Equal Opportunity Act provisions relating to superannuation exceptions. However, they may take the approach demonstrated by the decision of the Queensland Anti-Discrimination Tribunal in *Lundbergs v Q Super* [2004] QADT 12. In that case, Lundbergs – a former police officer who suffered from a major depressive disorder and other drug-induced disorders – alleged the Queensland Government Superannuation Office (Q Super) discriminated against him on the basis of his impairment by paying his superannuation payment as a lump sum to the Public Trustee (rather than him) after he was dismissed from the police force. Q Super argued Lundbergs was not capable of accepting responsibility for handling a large financial payment. It acknowledged it had discriminated against Lundbergs by requiring the payment be made to the trustee, but said it was exempted by the *Anti-Discrimination Act 1991* (Qld). Section 63 of that Act provides it was not unlawful to discriminate on the basis of an impairment by imposing a condition that is reasonable given any other factors. In this case, the superannuation fund's trust deed gave the trustees discretion to determine how benefits would be paid in cases of a fund member's mental ill health or incapacity. The Tribunal held the provision's wording did not impose a specific condition within the meaning of that Act, so Q Super could not rely on the Act to exempt its actions. That is, it was not 'reasonable' for Q Super to rely on the exemption because the provisions of the trust deed were too broad and did not define types of ill health or incapacity, distinguish between degrees of ill health or incapacity, or set out clear circumstances for the exemption's use (*Lundbergs v Q Super* [2004] QADT 12 [66]).

Accordingly, the Tribunal held unlawful discrimination had occurred in this case. While findings on exceptions depend on the facts of each case, this case demonstrated that this exception does not constitute a blanket exception. The courts are likely to consider the particular terms of the superannuation scheme.

**Discrimination on the basis of age in superannuation**

Under section 79 of the Equal Opportunity Act, a person is permitted to discriminate against another on the basis of age by imposing superannuation fund conditions in a number of
circumstances. This clause closely resembles section 73 of the 1995 Act, except for paragraphs 79(1)(c) and 79(1)(d), which were amended to bring the allowed circumstances for discrimination into line with those in the Age Discrimination Act 2004 (Cth).

Section 79(1) of the Equal Opportunity Act now permits discrimination on the basis of age by imposing conditions in relation to superannuation if:

(c) the discrimination is—

(i) based on actuarial or statistical data on which it is reasonable for the person to rely; and

(ii) reasonable having regard to that data and any other relevant factors; or

(d) in the case where no actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

The person relying on the exception has the burden of demonstrating the basis of exception.

Exception for pensions

Section 77 of the Equal Opportunity Act provides that the Part 4 provisions relating to discrimination do not affect discriminatory provisions relating to pensions. It re-enacts section 71 of the 1995 Act.

Exceptions for competitive sporting activities

Exclusion on the basis of sex and gender identity

The Equal Opportunity Act contains exceptions that permit sporting competitions to operate on a single-sex or single-gender basis for competitors over 12 years of age, if certain criteria are met.

Under section 72(1) the first exception applies to only competitive sporting activities for which ‘strength, stamina or physique of the competitors’ is relevant. VCAT found, for example, that strength, stamina and physique are relevant to participation in competitive calisthenics. In McQueen v Callisthenics Victoria Inc [2010] VCAT 1736 VCAT held it was lawful to exclude Mr McQueen (a 33-year-old man) from callisthenics competitions that were open to women over 14 years of age. In that case, Vice President Lacava said:

I am satisfied the respondent has proved to the appropriate standard there are differences between the sexes in strength, stamina and physique which can affect participation of females in the sport of callisthenics which has developed as a sport participated in by women only above the age of 14 years. In its execution, competitive callisthenics requires skill, endurance, strength and coordination. It requires a high degree of physical dexterity. It is designed entirely around the female form. The introduction of males into the sport would be such as to materially change the way the sport is conducted and thus have a significant effect upon the roles of those who participate in it [58].

VCAT determined the question of the relevance of strength, stamina or physique by considering whether ‘if both sexes were to compete against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors’ (see South v Royal Victorian Bowls Association [2001] VCAT 207 [35]). Lawn bowls has been found to be a sport in which strength, stamina or physique is not relevant in this sense. See, for example, Royal Victorian Bowls Association Inc [2008] VCAT 2415. In later cases involving lawn bowling, exemptions were granted under the 1995 Act’s equivalent to section 89 of the Equal Opportunity Act because certain events were part of the elite pathway leading to national and international championships.

In section 72(1A) a second exception applies to permit the exclusion of persons of a particular sex from a competitive sporting activity where the exclusion is necessary for progression to an elite, national or international competition or level of competition.
Third, a permanent exception under section 72(1B) applies for the exclusion or restriction of persons of a particular sex to facilitate participation by people of the non-excluded sex. However, the exclusion must be reasonable, regarding:

- the nature and purpose of the activity
- the consequences of the exclusion or restriction for people of the excluded or restricted sex
- whether people of the excluded or restricted sex have other opportunities to participate in the activity.

The second and third exceptions noted above were introduced into the Equal Opportunity Act by an amendment in 2011. According to the Explanatory Memorandum to the amending Bill, the new exceptions are intended to apply beneficially – for example, the participation exception is intended to be available only when the exclusion or restriction is designed to encourage stronger participation in sport by a particular sex when participation has been a problem (page 7).

The Second Reading Speech highlighted, as a reason for the new exception, concerns about dwindling numbers in some competitive sports (such as lawn bowls) in which single-sex competitions were not automatically lawful. According to the Second Reading Speech, ‘the needs of those who want to play with members of their own sex’ were not being adequately addressed, which had led to participants leaving the sport.3

**Age and ability**

Section 72(2) of the Equal Opportunity Act also allows competitive sporting activities to be restricted to people who can effectively compete, people of a specified age or age group, or people with a general or particular disability.

**Exceptions on the basis of religion**

The Equal Opportunity Act contains a broad range of exceptions that apply to the activities of religious bodies. These exceptions relate to who may become members of a religious order, the activities of religious schools, and other conduct that is reasonably necessary to comply with a person's religious doctrines, beliefs or principles.

**What is a religious body?**

For these exceptions, section 81 of the Equal Opportunity Act defines 'religious body' to mean:

(a) a body established for a religious purpose; or
(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

**Religious officials**

Section 82 of the Equal Opportunity Act provides that religious bodies may, on the basis of any protected attribute, discriminate in:

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
(b) the training or education of people seeking ordination, or appointment of priests, ministers of religion or members of a religious order; or
(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

'Religious order' is not defined in the Equal Opportunity Act. In *Tassone v Hickey [2001]* VCAT 47 VCAT considered the exception is not confined to the selection or appointment of a parish priest, or the selection by a parish priest of some parishioners and not others to participate in a religious observance or practice. Rather, it considered the exception also
covers a decision by a parish priest that no-one in the parish is to participate in a particular religious observance or practice [42].

**Religious schools**

Section 83 of the Equal Opportunity Act authorises some types of discrimination in relation to religious schools. This exception is slightly different from the religious schools exception that applies under section 76 of the 1995 Act.

The religious schools exception under section 83(1) applies to 'a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles'.

The exception covers conduct 'in the course of establishing, directing, controlling or administering the educational institution', so long as the conduct:

(a) conforms with the doctrines, beliefs or principles of the religion
(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

This exception does not apply in relation to all attributes. It is limited to discrimination on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

**Religious beliefs or principles**

The Equal Opportunity Act also contains a broad exception in section 82(2) that permits discrimination by religious bodies on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity, so long as the conduct:

(a) conforms with the doctrines, beliefs or principles of the religion
(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

This broad exception applies only to religious bodies. It does not extend to discrimination on the basis of all attributes. That is, it does not permit discrimination on the basis of age, employment activity, disability, industrial activity, breastfeeding, pregnancy, physical features, political belief/activity or race.

There is also a broad exception for discrimination by any person (including but not limited to a religious body) whose conduct is 'reasonably necessary' for them 'to comply with the doctrines, beliefs, or principles of their religion'. This exception also applies to discrimination only on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

The term 'reasonably necessary' requires an objective assessment of whether the discrimination is necessary to conform with the doctrines, beliefs or principles of the person's religion.

Although decided under the 1995 Act, *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 (Cobaw v CYC) provides guidance on the way in which some of these concepts are likely to be applied.4

This case concerned a refusal by the Phillip Island Adventure Resort to accept a booking by the Cobaw Health Service (Cobaw). Operated by Cobaw, the WayOut project is a youth suicide prevention initiative that targets same sex attracted young people in rural Victoria.

In June 2007 Cobaw contacted Phillip Island Adventure Resort to make a booking for a two-day youth forum. Cobaw claimed the resort rejected its booking because of the sexual orientation of the proposed attendees. It lodged a complaint that this refusal contravened the 1995 Act.
The resort's operator, Christian Youth Camps (CYC), denied it had discriminated against Cobaw. It argued, if it had discriminated, this conduct was permitted by religious exemptions under the 1995 Act. The Christian Brethren Trust own the resort and CYC.

CYC sought to rely on the exemptions in section 75 of the 1995 Act – namely, that CYC was a 'body established for religious purposes' and that its refusal of Cobaw's booking was:

- in conformity with the doctrines of its religion
- necessary to avoid injury to the religious sensitivities of people of its religion.

CYC also sought to rely on the exemption under section 77 of the 1995 Act – namely, that the refusal of Cobaw's booking was necessary for CYC to comply with genuine religious beliefs or principles.

Justice Hampel found CYC discriminated against Cobaw in refusing to accept its accommodation booking on the basis of the sexual orientation of the proposed guests.

Justice Hampel found CYC was not a body established for religious purposes so could not rely on the exemptions in section 75 of the 1995 Act. She considered it relevant that CYC provided camping facilities to both secular and religious groups, and that CYC's marketing materials did not mention the Christian Brethren religion or Christian Brethren Trust [254].

Justice Hampel did not need to consider whether the booking refusal was conduct that conformed with religious doctrine or was necessary to avoid injury to religious sensitivities. Given the extent to which these matters were argued before her at hearing, however, her Honour set out her findings on those matters.

**What 'doctrines of the religion' means**

In determining that the 'relevant religion' was the Christian Brethren denomination of Christianity, Justice Hampel followed the case of *OV and OW v Members of the Board of the Wesley Mission Council* (2010) NSWCA 155.

In establishing what were doctrines of the Christian Brethren's religion, Justice Hampel relied on the creeds, the declarations of faith, and a statement of fundamental beliefs and doctrines set out in the Christian Brethren's 1921 Trust Deed.

Justice Hampel found beliefs about marriage, sexual relationships and homosexuality did not constitute a doctrine of the religion of the Christian Brethren. In making this finding, her Honour found compelling:

> [T]he absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith. (*Cobaw v CYC* [305])

**What 'conforms with the doctrines of the religion' means**

Justice Hampel was not satisfied the booking refusal conformed with the doctrines of the religion, even if (1) CYC was a body established for religious purposes, and (2) beliefs about marriage, sexual relationships and homosexuality amounted to a doctrine of the Christian Brethren religion [308].

Her Honour noted conformity with their beliefs about sex and marriage requires the Christian Brethren to restrict their own sexual activity to sex within marriage. She found, however, no evidence that such conformity requires the Christian Brethren to avoid contact with people who are not of their faith and who do not subscribe to their beliefs about God's will in respect of sex and marriage.

The concept of 'conforming' suggests the doctrine requires, obliges or dictates the person to act in a particular way. In this way, it requires a clear causal connection between the action and the doctrine [315].

In finding CYC failed to establish the booking refusal conformed with the doctrines of the religion, Justice Hampel referred to the decision of *McFarlane v Relate Avon Limited* [2010]
EWCA Civ B1, in which Lord Justice Laws held the right to freedom of religious belief does not confer a right on members of a religion to impose their beliefs on a secular society (Cobaw v CYC [309]).

**Actions to avoid injury to the religious sensitivities of people of the religion**

In this case, Justice Hampel found the relevant sensitivities are not the subjective sensitivities of one person, but the sensitivities common to adherents of the religion. Her Honour said these sensitivities are the common religious sensitivities, which are to be contrasted with the adherents' social or cultural sensitivities, for example [329].

Her Honour found it compelling that CYC had not taken steps to prevent non-married people who engaged in sexual activity from staying or engaging in sexual activity at the resort. Justice Hampel found the logical conclusion of CYC’s failure to take such steps was that 'it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage, to refuse bookings to same-sex attracted people, or people who engaged in sexual activity outside marriage' [344].

To avoid injury to the religious sensitivities of the Christian Brethren, if it was not necessary to exclude from the resort other same sex attracted people, or people who had engaged or might engage in sex outside marriage, then it was not necessary to exclude the WayOut group on that ground.

**Genuine religious beliefs or principles**

In determining the applicability of the exemption under section 77 of the 1995 Act, her Honour found the relevant question was 'whether the refusal was necessary to comply with the genuine religious beliefs or principles' of CYC.

Justice Hampel found CYC personnel's genuinely-held beliefs about marriage, sexual activity and sexual orientation were based on their beliefs as members of the Christian Brethren, and that these beliefs were (for the purposes of section 77 of the 1995 Act) genuinely held. However, CYC had not claimed an exception under this section, for the reasons identified in above, including the manner in which the adventure resort is operated and marketed to secular and religious groups. Her Honour declared CYC had committed discrimination in breach of the 1995 Act and ordered CYC to pay compensation of $5000 for the hurt and distress caused.

On appeal to the Supreme Court of Appeal, Cobaw Community Health Service v Christian Youth Camps Ltd [2014] VSCA 75, President Maxwell held it was open to VCAT to find CYC was not a body established for religious purposes. Material advertising CYC’s resort stated it could accommodate a full range of educational camps, conferences and seminars, not indicating any overt Christian connection. The resort was run as a commercial venture, with most of its business being secular [214]–[217]. If a body is to satisfy this statutory exception, then each of its purposes (or at least its purposes taken as a whole) must be religious purposes. In other words, its purpose(s) must have an essentially religious character [230].

The Court of Appeal also found it was open to VCAT to find the booking refusal was not necessary 'to avoid injury to the religious sensitivities' of Christian Brethren people [304]. Further, the evidence showed the religious beliefs held by the staff member who refused the booking and the CYC did not make it necessary to refuse the booking. None of the conduct of CYC’s resort business reflected a 'doctrine' prohibiting the affirmation of same sex attraction in rules and procedures or advice in booking information [290].

**Exceptions relating to employment**

**Reasonable adjustments for a person or employee with a disability**

Under section 20 an employer may discriminate against a person or an employee on the basis of their disability if adjustments are needed for the person to perform the genuine and reasonable requirements of the employment, and if either:
the adjustments are not reasonable, given the facts and circumstances set out in section 20(3) of the Equal Opportunity Act, or

the person or employee cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made, given the facts and circumstances set out in section 20(4) of the Equal Opportunity Act.

To determine whether an adjustment is reasonable, all relevant facts and circumstances must be considered. The Equal Opportunity Act outlines the following factors in section 20(3):

- the person's or employee's circumstances, including the nature of his or her disability
- the nature of the employee's role or the role
- the nature of the adjustment required
- the financial circumstances, size and nature of the employer
- the consequences and effect of making the adjustment on the workplace and the employer's business.

The Equal Opportunity Act includes these examples of reasonable adjustments:

- providing a ramp for access to the workplace, or a particular software package for computers
- modifying work instructions or reference manuals
- allowing the person or employee to be absent during work hours for rehabilitation, assessment or treatment
- allowing the person or employee to take more frequent breaks.

Under section 20(4), to determine whether a person or employee can adequately perform the genuine and reasonable requirements of the employment, all the relevant facts and circumstances must be considered. These factors may include:

- the person's or employee's training, qualifications and experience
- the person's or employee's current performance in the employment.

Reasonable adjustments for people with a disability discusses these factors (see Dziurbas v Mondelez Australia Pty Ltd [2015] VCAT 1432).

**Discrimination in domestic or personal services**

A person may discriminate in relation to employment involving domestic and personal services, including childcare services, in their own home.

This permanent exception extends beyond an individual who employs somebody to work in their own home. It also covers employers, such as employment agencies, who provide staff to perform home-based domestic or personal care services when the client makes a particular request. Section 24 of the Equal Opportunity Act sets out the following example:

An agency employs people to provide personal care services. A woman contacts the agency and requests that it provide a carer to assist her with personal care in her home. The woman tells the agency that the carer must be female. The agency may discriminate in determining who should be employed to provide personal care to the woman as the services will be provided in the woman's home, and she has specifically asked for a female carer.

**Discrimination in the care of children**

Section 25 of the Equal Opportunity Act provides a permanent exception for employment that involves the care, instruction or supervision of children, if the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.
This exception extends to the prohibitions on discriminating against employees and job applicants (section 16 and section 18 of the Equal Opportunity Act). However, it does not extend to post-secondary education providers.

VCAT considered the exception (as it appeared in the 1995 Act) in an application by the American Institute for Foreign Study (AIFS). In American Institute for Foreign Study [2000] VCAT 432 AIFS sought a temporary exemption from the 1995 Act to enable it to discriminate against Australian candidates for positions as 'au pairs', or nannies, in the United States. Due to US visa requirements, candidates had to be of a certain age and physical fitness, and had to disclose other personal characteristics (such as their nationality and place of birth) because these factors were relevant to the visa fees payable.

VCAT said neither the permanent exception relating to domestic or personal services, nor the one relating to the care of children entirely covered the AIFS proposal. It considered, however, the proposal was 'within the spirit' of these exceptions. On that basis, VCAT decided to grant AIFS a temporary exemption to discriminate on the terms sought.

**Discrimination for genuine occupational requirements**

Section 26 of the Equal Opportunity Act allows employers to limit the offer of employment to people of one sex if that sex is a genuine occupational requirement or is necessary for authenticity or credibility in art or performance. This permanent exception applies to only certain protected characteristics, in certain circumstances. It does not apply generally, or in relation to all characteristics that are protected by law.

Section 26(2) provides examples of circumstances when it may be a 'genuine occupational requirement' for a person to be of a particular sex, including when the employment:

- can be performed only by a person with particular physical characteristics other than strength or stamina
- needs to be performed by a person of a particular sex to preserve decency or privacy
- includes searching the clothing or bodies of people of that sex (for example, security staff required to conduct physical searches)
- includes entering a lavatory ordinarily used by people of that sex while it is in use by people of that sex (for example, some cleaners)
- includes entering areas ordinarily used only by people of that sex while those people are in a state of undress (for example, a sales assistant working in a women's lingerie department).

The threshold test for 'genuine occupational requirements' under section 26 of the Equal Opportunity Act differs from the test for 'inherent requirements of the job' under the Disability Discrimination Act 1992 (Cth), which is not defined. Accordingly, federal case law on the 'inherent requirements' has limited relevance to section 26 and should be used cautiously. In Davies v State of Victoria (Victoria Police) [2000] VCAT 819 federal cases involving significantly different Disability Discrimination Act provisions could not be applied to the case.

Further, for a dramatic or artistic performance, entertainment, photographic or modelling work, or any other employment, section 26(3) allows employers to limit the offering of employment to people of a particular age, sex or race, or to people with or without a particular disability, if the discrimination is necessary for 'authenticity or credibility'.

An example of employment other than dramatic or artistic related work that may require discrimination 'for authenticity' is the employment of an Indigenous person to provide educational information about Indigenous culture at a cultural centre, as outlined in the Equal Opportunity Bill 2010 Explanatory Memorandum.

For a dramatic or artistic performance, photographic or modelling work, or any similar employment, section 26(4) allows employers to discriminate on the basis of physical features in the offering of employment. The term 'similar employment' in this subsection limits the
exception to dramatic or artistic related work for which a person's physical features are relevant, as explained in the Bill's Explanatory Memorandum (page 24).

Cases do not provide definitive guidance on how much of a job needs to fall within the relevant exception for the exception to apply. Even situations envisaged by the Equal Opportunity Act, such as fitting of clothes as a genuine occupation requirement under subsection 26(2)(b), are likely to involve other activities such as stock maintenance or cash register sales. Further case law is needed to clarify the scope of these provisions.

**Discrimination in political employment**

Section 27 of the Equal Opportunity Act allows discrimination on the grounds of political belief or activity in the offering of employment to a person as a ministerial adviser, member of staff of a political party, or member of the electorate staff, or any similar employment. According to the Explanatory Memorandum of the Equal Opportunity Bill, this exception is intended to apply only to employment for which a person's political belief or activity is relevant, and employment with the Australian Electoral Commission (page 24).

**Discrimination in welfare services employment**

Section 28 of the Equal Opportunity Act allows an employer to limit an offer of employment to people with a particular attribute when the employment is to provide services that:

- are special measures under section 12 of the Equal Opportunity Act
- meet the special needs of people with a particular attribute under section 88 of the Equal Opportunity Act, if people with that attribute can most effectively provide those services.

According to the Equal Opportunity Bill 2010 Explanatory Memorandum, section 28 does not define the circumstances in which a service 'can be provided most effectively' by a person with the same attribute as the target group because there can be range of circumstances. Perhaps only a person from the target group has insight into the group's particular issues, or it may not be culturally appropriate to have someone not from the target group provide the services, or the target group may have a fear or mistrust of anyone who is not a group member (page 25). However, this discrimination should be based on more than a personal preference or prejudice.

In *Georgina Martina Inc [2012] VCAT 1384* (*Georgina Martin*) the complainant – a high security 24-hour women's refuge – requested a temporary exemption to employ only women, to offer services only to women and their children, to provide accommodation only to women and their children, and to advertise these matters. The complainant indicated to VCAT that it intended to appoint only women to all roles within the organisation, rather than just as counsellors or other frontline staff.

Before granting the temporary exemption, VCAT had to consider whether such a temporary exemption was necessary, or whether the Equal Opportunity Act already authorised the proposed discrimination as a special measure or as one of the permanent exemptions, including section 28. The Victorian Equal Opportunity and Human Rights Commission (the Commission) intervened to provide assistance to VCAT on the scope of and interaction between section 12 (special measures), section 60 (welfare measures) and section 88 (special needs).

Member Dea considered the proposed discrimination in providing accommodation and services was covered by permanent exceptions to discrimination, particularly section 60 (welfare measures) and section 88 (special needs) of the Equal Opportunity Act. She concluded, however, that the permanent exception under section 28 did not permit the organisation to restrict employment to women across all areas of its operations, because that conduct would go beyond what was necessary to 'most effectively' provide services to the organisation's clients. Member Dea said:

Arguably, the available material does not sufficiently prove that the services can be provided most effectively by women rather than men. While the arguments put by the applicant and the Commission appear fair and
reasonable, they are not supported by objective evidence about the effectiveness of service delivery by women as compared with men. That evidence could take the form of a survey which shows that clients would not wish to have any interactions with any men irrespective of their role. Evidence that men had been employed and had been less effective in their roles than women might be sufficient. Georgina Martin [66]

In considering whether the proposed conduct was covered by section 28, Member Dea said:

The front line roles whose focus is assisting women who seek refuge in a state of distress and on accessing supports and services in the aftermath of violence would most likely fall within section 28. However, the material before me does not allow me to conclude that all roles within the applicant organisation can be provided most effectively by women and so I am not persuaded that section 28 would operate with the effect that the employment of women only throughout the organisation could not be found to involve prohibited discrimination. In another case, evidence may be available such that the exception is proven to clearly apply to all roles. Georgina Martin [69]–[70]

VCAT was not convinced the proposal to restrict employment to women fell within the exception in section 28. It decided, however, to grant the organisation a temporary exemption to allow this discrimination, in accordance with its powers under section 89 of the Equal Opportunity Act. In doing so, VCAT considered the granting of the exemption was consistent with the Charter of Human Rights and Responsibilities (the Charter) and amounted to a reasonable limitation on the right to equality. Temporary exemptions by VCAT deals with VCAT's power to grant temporary exemptions.

In Domestic Violence Victoria (Anti-Discrimination Exemption) VCAT granted an exemption for Domestic Violence Victoria Inc to advertise for and employ only women. In granting the exemption, VCAT noted a determinative factor was that any staff member could be the first point of contact for women seeking direct assistance in relation to family violence. Also an important consideration, the complainant was involved in projects requiring its staff to liaise closely with victims of family violence, and believed clients would not use its services if male employees were present. Further, VCAT considered the limit imposed by this exemption was reasonable and justified under the Charter.

In Anglicare Victoria [2015] VCAT 79 VCAT was satisfied no exemption was required in a women's refuge's application to employ only women in case management and support worker roles requiring direct contact with clients who had suffered trauma from family violence and sexual assault. Because the discriminating conduct was a welfare service, it fell within the exception in section 28 of the Equal Opportunity Act.

Discrimination in youth wages

Section 28A of the Equal Opportunity Act provides for an exception that enables an employer to discriminate on the basis of age when paying an employee under the age of 21 years. It authorises the payment of junior rates of pay under certain instruments (for example, in a modern award).

According to the Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011, the exception intends to clarify that the aged based payment of an employee under the age of 21 years does not amount to unlawful discrimination (page 4).

Discrimination in early retirement schemes

Under section 29 of the Equal Opportunity Act, an employer is not unlawfully discriminating if they consider the age of an employee, together with that employee's eligibility to receive a superannuation retirement benefit, when deciding the terms on which to offer the employee an incentive to resign or retire.

Reasonable terms of an occupational qualification
Under section 37 of the Equal Opportunity Act, a qualifying body is not unlawfully discriminating if they set reasonable terms for an occupational requirement, or make reasonable variations to those terms, when a person cannot meet the terms or requirements of an occupational qualification because of an impairment. In this case, the discrimination means the person can then practise the profession, carry on the trade or business, or engage in the occupation or employment to which the qualification relates.

Exceptions relating to education

Educational institutions for particular groups

Section 39 of the Equal Opportunity Act allows an educational institution that operates a school for students of a particular belief, sex, race, age or disability to exclude students who are not of that particular group. The party who seeks to rely on this exception has the onus of establishing that the exception applies.

In Arora v Melton Christian College, the complainant, a Sikh boy, alleged the Melton Christian College discriminated against him by preventing him from wearing a patka to school. Melton Christian College relied on the exemption under section 39. While Melton Christian College is a Christian school, it has an open enrolment policy, which means it accepts enrolments from students of other faiths (a little over 50 per cent of the school community were non-Christian). VCAT held the school could not rely on section 39 because, even if the school operates mainly for the benefit of students from one religious belief, this section does not allow the school to exclude people with some religious beliefs but not others, or to exclude people who have particular religious beliefs (in this case, Sikhs who wear patkas).

Standards of dress and behaviour

An educational authority is permitted under section 42 of the Equal Opportunity Act to set and enforce reasonable standards of dress, appearance and behaviour for students.

In assessing whether the standard is reasonable, section 42(2) provides that the views of the school community are a relevant but not determinative factor.

According to the Equal Opportunity Bill 2010 Explanatory Memorandum, section 42 is not intended to allow schools to apply standards in a way that unreasonably restricts the rights of students and teachers to adhere to religious dress codes, for example, by wearing a turban or hijab (page 30).

International treaties and case law have been significant in the development of this and similar exceptions. See, for example, Begum, R (on the application of) v Denbeigh High School [2006] UKHL 15 (the Begum case). In this case, the House of Lords found the school did not interfere with a pupil's right to manifest her religion by refusing her to wear a jilbab to school because 'Article 9 [of the European Convention on Human Rights on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'. The majority decision turned on the fact that the claimant chose to attend a school that did not allow a jilbab to be worn, when three other schools in the area did allow for the jilbab in their dress code. This case was followed by the case of R (on application of X) v Head teachers of Y school and Governors of Y School [2007] EWHC 298.

In Arora v Melton Christian College [2017] VCAT 1507 the complainant was excluded from Melton Christian College due to the school's uniform policy. The complainant's religious beliefs and practices prevented from him from being able to comply with the school's uniform policy, which prohibited the wearing of religious headwear. VCAT held the school could not rely on section 42 – which allows educational authorities to set and enforce reasonable standards of dress, appearance and behaviour for students – because this section does not allow educational authorities to exclude from schools a person seeking to be admitted as a student when that person cannot comply with a uniform policy due to their religious belief or activity.
Age-based admission schemes and age quotas

Under section 43 of the Equal Opportunity Act, educational authorities are allowed to select students for a program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas for students of different age groups. According to the Equal Opportunity Bill 2010 Explanatory Memorandum, this exception is intended to enable educational authorities to ensure schools cater for the different developmental and learning needs of students of different ages (pages 30–31).

Exceptions relating to the provision of goods and services, and the disposal of land

Goods and services: insurance

Section 47 of the Equal Opportunity Act sets out limited circumstances in which insurers may discriminate against a person by refusing to provide an insurance policy.

Circumstances in which an insurer can discriminate in providing insurance include when the discrimination is:

- based on actuarial or statistical data on which it is reasonable for the insurer to rely
- reasonable having regard to that data and any other relevant factors
- reasonable in terms of other relevant factors when no actuarial or statistical data is available or can reasonably be obtained.

In Ingram v QBE Insurance (Australia) Ltd [2015] VCAT 1936 QBE Insurance denied Ms Ingram's claim for cancellation costs after she cancelled a trip due to experiencing a first episode of a serious mental illness. QBE relied on the section 47 exception, arguing it could exclude people with a mental illness from being able to claim under its travel insurance policies. QBE said the exclusion was based on statistical data on which it was reasonable to rely, that it had considered statistical data as a basis for maintaining the exclusion in the travel policy, and statistics showed a high risk of cancellation because of mental illness. QBE also observed the Disability Discrimination Act 1992 (Cth) permitted discrimination to avoid unjustifiable hardship.

QBE did not produce evidence that the statistical data on which it relied existed when the policy terms were formulated. VCAT also found the information provided by QBE did not demonstrate it was reasonable for the insurer to exclude mental health illnesses. VCAT said, when determining whether a hardship that would be imposed is ‘unjustifiable’, it is necessary to account for all relevant circumstances. These circumstances include those set out in section 11(1) of the Disability Discrimination Act 1992 (Cth) – for example:

- the nature of the benefit or detriment likely to accrue to, or to be suffered by, a person (including, for example, the benefit or detriment likely for the community), or
- the financial circumstances, and the estimated amount of expenditure required.

VCAT found QBE provided insufficient evidence for VCAT to determine whether QBE would face an unjustifiable hardship from being unable to rely on the mental illness exclusion. Evidence that QBE could have provided includes calculations of the scope of premium increases required to cover claims or projected losses to the company.

Goods and services: credit providers

Section 48 of the Equal Opportunity Act allows credit providers to discriminate against people applying for credit on the basis of age. The section is consistent with the Age Discrimination Act 2004 (Cth).

The exception provides that:
(1) A credit provider may discriminate against an applicant for credit on the basis of age by refusing to provide credit, or in the terms on which credit is provided, if—

(a) the criteria for refusal or the terms imposed—

(i) are based on actuarial or statistical data on which it is reasonable for the credit provider to rely; and

(ii) are reasonable having regard to that data and any other relevant factors; or

(b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained, the criteria for refusal or the terms imposed are reasonable having regard to any other relevant factors.

Goods and services: supervision of children

Under section 49 of the Equal Opportunity Act the provider of goods and services to a child is allowed to require the child be accompanied or supervised by an adult if there is a reasonable risk that the child may cause a disruption or endanger themselves or another person. This exception is intended to protect the health and safety of children and the general public.

Disposal of land: disposal by will or gift

Under section 51 of the Equal Opportunity Act it is not unlawful for a person to discriminate, in the disposal of land by will or gift, against any person on the basis of any attribute.

Exceptions relating to the provision of accommodation and access to public premises

Accommodation unsuitable for children

Under section 58A of the Equal Opportunity Act a person may refuse to provide accommodation to a child or a person with a child if the premises are unsuitable or inappropriate for occupation by a child because of their design or location.

According to the Explanatory Memorandum of the Equal Opportunity Amendment Bill 2011 the exception does not allow a person to refuse to provide accommodation if the premises are considered unsuitable for other reasons, such as the amenity of other guests.

Shared accommodation

Under section 59 of the Equal Opportunity Act a person can discriminate in deciding who is to occupy residential accommodation if the provider of accommodation or a near relative resides in the premises, and the accommodation will accommodate no more than three people (excluding the provider or near relatives). ‘Near relative’ includes a parent or grandparent, child or grandchild, spouse or domestic partner.

Welfare measures of accommodation

Section 60 of the Equal Opportunity Act provides that hostels or similar institutions that are run wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief may refuse accommodation to people who do not have the particular attribute.

The Explanatory Memorandum of the Equal Opportunity Bill 2010 provides the example of an aged-care facility, targeted at the Greek community, that refuses to accept non-Greek people. Such discrimination would fall under this exception.

In Georgina Martina Inc [2012] VCAT 1384 VCAT found the welfare measures exception applied to a refuge established for the welfare of women (and their children) fleeing domestic violence. As a result, it was lawful for the refuge, in providing accommodation, to discriminate against males over the age of 18 years.
Similarly, in *Anglicare Victoria [2015] VCAT 79* VCAT was satisfied a refuge providing secure accommodation to women experiencing family violence and trauma caused by sexual assault was a welfare measure.

**Accommodation for students**

The exception in section 61 of the Equal Opportunity Act allows educational authorities that operate an educational institution (including schools, colleges, universities or other education or training institutions) wholly or mainly for students of a particular sex, race, religious belief, age or age group, or for students with a general or particular impairment (as allowed by the exception in section 39) to provide accommodation wholly or mainly for students with that particular attribute.

The Explanatory Memorandum of the Equal Opportunity Bill 2010 states the exception is not intended to allow discrimination in the allocation of accommodation to people who have been accepted into the accommodation by the educational authority.

**Accommodation for commercial sexual services**

Section 62 of the Equal Opportunity Act provides that a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis, such as a licensed brothel.

**Access to or use of public premises not reasonable**

The Equal Opportunity Act has a specific exception for discrimination in accessing public premises. Section 58(1) allows discrimination in relation to the access or use of public premises when the discrimination cannot reasonably be avoided or the discrimination is permitted by a disability standard under the *Disability Discrimination Act 1992 (Cth)* or by a determination under the *Building Act 1993 (Vic)*. For determining whether the discrimination can be reasonably avoided, all relevant facts and circumstances must be considered, including:

- the circumstances of the person with the disability, including the nature of their disability (section 58(2)(a)).
- the nature of the measures required to provide or allow access to, or use of, the premises or facilities in the premises (section 58(2)(b)).
- the person's financial circumstances (section 58(2)(c)).
- the consequences for the person of avoiding the discrimination (section 58(2)(d)).
- the consequences for the person with the disability of the person not avoiding the discrimination. See *Lifestyle Communities Pty Ltd [No 3] [2009] VCAT 1869* [30].

Specifically, under section 58(3)(a) of the Equal Opportunity Act, discrimination is permitted when the premises or facilities comply with, or are exempt from compliance with, a disability standard under the *Disability Discrimination Act*. Under that Act, statutory disability standards can be made to deal with reasonable adjustments, unjustifiable hardship and exemptions from the standards. Discrimination is also permitted when a determination made under section 160B of the *Building Act 1993 (Vic)* exempts a person from having to comply with disability standards under the *Disability Discrimination Act* that relate to the building or land on which the relevant premises or facilities are situated.

**Exceptions relating to clubs**

**Clubs for minority cultures**

A club that operates principally to preserve a minority culture may exclude a person from membership if that person is not a member of the group for whom the club was established.

**Clubs for political purposes**
Section 66A of the Equal Opportunity Act provides an exception for clubs that were established principally for a political purpose. The exemption allows those clubs to exclude from membership a person on the basis of political belief or activity.

The section was inserted in 2011, immediately before the Equal Opportunity Act commenced. According to the Explanatory Memorandum of the Equal Opportunity Amendment Bill 2011 the exception was introduced to protect the operation of political clubs that now fall within the new definition of ‘clubs’. Under the 1995 Act, the definition of ‘club’ did not capture a political club.

Club benefits for particular age groups

Section 67 of the Equal Opportunity Act permits clubs established for people of a particular age group to exclude people from membership who are outside that age group. The exclusion must be reasonable in the circumstances.

Single sex clubs

Section 68 of the Equal Opportunity Act permits clubs to exclude a person from membership on the basis of that person’s sex, if membership of the club is available to only persons of the opposite sex.

Section 68(2) obliges a club relying on the exception to make its membership eligibility rules publicly available, without charge.

Separate access to club benefits for men and women

Under section 69 of the Equal Opportunity Act clubs are allowed to limit, on the basis of sex, a member’s access to club benefits if it is not practicable for men and women to enjoy the same benefit together. In this case, clubs must provide separate access to the same or an equivalent benefit for men and women, or allow men and women a reasonably equivalent opportunity to enjoy the benefit.

Section 69(2) sets out five matters for determining whether the exception is valid, including:

- the purposes for which the club was established
- the membership of the club
- the nature of the benefits provided
- the opportunities for men and women to use and enjoy those benefits
- any other relevant circumstances.

The Explanatory Memorandum of the Equal Opportunity Bill 2010 uses the following example of this exception:

This exception may apply to allow clubs to limit access to facilities to members of one sex at certain times if the facilities only have change rooms suitable for use by members of one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of the opposite sex in order to attract the protection of the exception.

Exceptions relating to local government

Local government: political belief or activity

Section 74 of the Equal Opportunity Act provides an exception to the section 73 prohibition on councillors discriminating against fellow councillors and council committee members in the performance of their public functions.

The exception means a councillor of a municipal council may discriminate against another councillor or member of a council committee on the grounds of their political belief or activity. It allows councillors to form political alliances within municipal councils and to act on the basis of the political parties to which councillors belong.
Enactment includes rules, regulations, by-laws, local laws, orders, Order in Council, proclamations or other instruments of legislative character: Equal Opportunity Act s 4; Interpretation of Legislation Act 1984 (Vic) s 38; Dulhunty v Guild Insurance Limited (Anti-Discrimination) [2012] VCAT 1651 [16]–[33].

2 Compare to NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of Matthews v Queensland Corrective Services Commission [1997] QADT 22; (1998) EOC 92–940, where the Queensland Anti-Discrimination Tribunal found the respondent could not rely on the health and safety exception to exclude prisoners with HIV status in accommodation and activities, due to a paucity of evidence.

3 Victoria, Parliamentary Debates, Legislative Assembly, 5 May 2011, 1363–1367 (Robert Clark, Attorney-General).

4 The case was appealed to the Supreme Court of Appeal: Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors (2014) 50 VR 256. The High Court refused special leave to appeal: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] HCATrans 289.

5 In Trkulja v Dobrijevic [2013] VCAT 925 [53]–[54] VCAT followed this reasoning, noting the sensitivities that must be considered are not the subjective sensitivities of one person, but the sensitivities common to adherents of the religion.


7 [2017] VCAT 1507.
Temporary exemptions by VCAT

Section 89 of the Equal Opportunity Act provides for the Victorian Civil and Administrative Tribunal (VCAT) to grant, renew or revoke exemptions to unlawful discrimination. Under this section, VCAT can 'exercise a broad discretion' in exercising these powers (as determined in Georgina Martina Inc [2012] VCAT 1384):

(1) The Tribunal, by notice published in the Government Gazette, may grant an exemption—

(a) from any of the provisions of this Act in relation to—

(i) a person or class of people; or

(ii) an activity or class of activities; or

(b) from any of the provisions of this Act in any other circumstances specified by the Tribunal.

(2) An exemption remains in force for the period, not exceeding 5 years, that is specified in the notice.

Factors that VCAT must consider

Section 90 of the Equal Opportunity Act lists the following factors that VCAT must consider when assessing applications for the grant, renewal or revocation of an exemption:

(a) whether the proposed exemption is unnecessary because—

(i) an exemption or exception already applies to the conduct; or

(ii) the conduct would not amount to prohibited discrimination (such as is a special measure); and

(b) whether the proposed conduct is a reasonable limitation on the right to equality in the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter); and

(c) all the relevant circumstances of the case.

These factors were determined to reflect VCAT's approach (at the time of drafting the Equal Opportunity Act) to considering exemption applications. See the Explanatory Memorandum of the Equal Opportunity Bill 2010.

In drafting section 90 of the Equal Opportunity Act, the Parliament aimed to provide a framework for the consistency of VCAT's exemption decisions. It also aimed to guide applicants about when exemption applications are required, and the information required to support an application.

Under section 90(a), conduct will not amount to discrimination if it is a special measure under section 12 of the Equal Opportunity Act. See the discussion in Special measures.

Compatibility with the Charter

In exercising its powers to grant, renew or revoke exemptions from the Equal Opportunity Act, VCAT acts in its capacity as a public authority, so it is bound by obligations under the Charter.

As such, VCAT must consider whether the exercise of its powers limits any relevant Charter rights in a manner that is consistent with section 7(2) of the Charter. In this sense, VCAT must undertake a 'balancing act', weighing up:

- the nature of the right
- the importance, purpose, nature and extent of the proposed limitation
- whether the proposed limitation is reasonably likely to achieve its purpose
- whether any less restrictive means are available to achieve that purpose. See, for example, Lifestyle Communities Pty Ltd [No 3] [2009] VCAT 1869.
VCAT must also exercise the exemption power consistently with the purpose and objectives of the Equal Opportunity Act.

As stated by Justice Bell in *Lifestyle Communities Pty Ltd [No 3] [2009] VCAT 1869* in relation to the exemption power under section 83 of the 1995 Act:

> [O]n my reading of the exemption provisions and in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights [30].

In *Whitehorse Community Health Centre Exemption [2014] VCAT 1040* VCAT clarified its approach to applications. In this matter, a Community Health Centre sought to advertise for and employ a Chinese woman in the role of Chinese Community Engagement Officer. VCAT accepted the application raised the *section 28* welfare services exception because the role could involve providing a service for special needs under *section 88*. VCAT considered, however, an exemption was necessary. Although the application related to assistance to the broader Chinese community and women at risk of violence, it did not clearly set out the nature of the inequality. It is necessary to take a cautious approach when an exemption applicant provides only limited evidence. Importantly, VCAT clarified its approach to exemption applications:

- If VCAT is satisfied the conduct is a special measure or falls within an exception, it will make a declaration to that effect.
- If there is insufficient material to allow VCAT to be satisfied an exception is not necessary, it will grant an exemption in appropriate cases.

**Examples of exemptions granted by VCAT**

In *Judo Victoria Incorporated [2016] VCAT 535* Judo Victoria applied to VCAT for an exemption under *section 89* of the Equal Opportunity Act. The application sought to allow Judo Victoria to discriminate on the basis of age in its black belt ('Dan') gradings policy. VCAT granted an exemption for Judo Victoria to exclude under-17-year-olds from eligibility for black belt grading, and found an exemption was not required for a grading condition that was reasonable and did not discriminate.

VCAT has granted exemptions to co-educational schools to permit them to discriminate based on sex in education and services to work towards gender balance. See, for example, *Ivanhoe Grammar School [2016] VCAT 1337* and *Caulfield Grammar School [2013] VCAT 178*. The exemptions have permitted the schools to advertise to prospective students, offer scholarships and bursary assistance, and structure waiting and enrolment lists to target prospective students of either sex.

VCAT granted an exemption to BAE Systems Australia Defence Pty Ltd (BAE), *BAE Systems Australia Defence Pty Ltd [2015] VCAT 230*, to allow it to discriminate on the grounds of race. BAE was required to comply with statutory and contractual obligations in controlling access to specified technology or technical data for defence related projects. It sought to be permitted to refuse employment applications by people from specified countries. BAE was granted the exemption on strict terms, which included the requirement to report on its anti-discrimination actions and its reliance on the exemption.
Special measures

People can take positive steps known as 'special measures' to help disadvantaged groups. The concept of 'special measures' is well established under international human rights law, and Australian federal, state and territory anti-discrimination laws. See, for example, Sex Discrimination Act 1984 (Cth) s 7D; Racial Discrimination Act 1975 (Cth) s 8(1); Disability Discrimination Act 1992 (Cth) s 45.

Broadly, a special measure aims to overcome disadvantage in a group of people with a particular attribute who have faced discrimination in the past. Special measures are sometimes referred to as 'positive discrimination' or 'affirmative action'.

'Special measures' are set out in section 12 of the Equal Opportunity Act. The test for special measures in the Equal Opportunity Act operates as a positive tool for promoting substantive equality. In other words, special measures are now 'an expression of equality, rather than an exception to it'.

Duty holders are explicitly permitted to afford different treatment to a group of people on the basis of a protected attribute, provided the treatment constitutes a 'special measure'. Specifically, section 12(2) states that 'a person does not discriminate against another by taking a special measure'.

Definition of a special measure

Section 12(1) of the Equal Opportunity Act describes a special measure as action taken 'for the purpose of promoting or realising substantive equality for members of a group with a particular attribute'. Section 12(4) states that this may be the sole purpose or one of multiple purposes for the action.

Under section 12(3) a special measure must be:

- undertaken in good faith for achieving the purpose of promoting or realising substantive equality for members of a group with a particular attribute
- reasonably likely to achieve that purpose
- a proportionate means of achieving the purpose
- justified because the members of the group have a particular need for advancement or assistance.

According to the Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic), 'these factors reflect the intention that the purpose of a special measure must be necessary, genuine, objective, and justifiable' (page 15). Further, the measure itself must be 'proportionate' and 'reasonably likely' to achieve its purpose. And under section 12(7) a measure will also cease to be a 'special measure' once it has achieved its purpose.

Section 12(1) of the Equal Opportunity Act also includes some examples of special measures as follows:

1. A company operates in an industry in which Aboriginal and Torres Strait Islanders are underrepresented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.
2. A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.
3. A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

Requirements for a special measure
Waite Group, specialists in board and director appointments, applied to the Victorian Civil and Administrative Tribunal (VCAT) for an exemption under the Equal Opportunity Act, Waite Group [2016] VCAT 1258 (Waite Group). It wished to use its business name 'Women's Search' to advertise for and recommend women as candidates for specific roles to help clients meet their diversity goals. Waite Group had promoted initiatives to increase women’s representation in leadership roles. It was concerned its conduct could discriminate based on sex, and breach prohibitions on seeking discriminatory information and advertising. VCAT found the conduct was a special measure and an exemption was unnecessary.

In its decision, VCAT set out each of the requirements for a special measure. It also considered questions that can be asked to assess whether proposed conduct will satisfy each of the requirements for a special measure. These are discussed further below.

**Conduct directed to group with a particular attribute**

To qualify as a special measure, it is necessary to first identify the group with the attribute. There may be more than one attribute that is relevant. Special measures must be directed to members of a group with a particular attribute listed at section 6 of the Equal Opportunity Act – age, race, disability or sex, for example. See the chapter on Protected attributes for more information.

**The purpose of promoting or realising substantive equality**

**Identify the purpose**

An action or program must be undertaken in good faith to promote or achieve substantive equality. This means the purpose of a special measure must be promoting equality for a group, rather than another purpose such as promoting commercial interests.

In some cases, a measure can have two purposes, one of which is the remedial purpose of addressing discrimination and promoting equality for a group. In this case, it is important to consider what elements of the program or measure are for a remedial purpose, and how you could explain what the measure does for the protected group.

**Identify the inequality and its causes**

A special measure is intended to address inequality. A person or organisation must be satisfied they have identified an inequality. It is also important to identify the cause of the inequality so action can be tailored to address both the inequality and its cause.

**Conduct that is in good faith, fit for purpose, proportionate and justified**

**Conduct is in good faith**

VCAT noted the information or evidence of the relevant organisation and its representatives about the conduct will be relied upon. It observed ‘where a program is established or designed to achieve the purpose, good faith will usually be readily apparent’ (Waite Group [51]).

**Conduct is reasonably likely to achieve the purpose**

The measure must also be 'reasonably likely' to achieve its remedial purpose. In Waite Group, VCAT accepted the Victorian Equal Opportunity and Human Rights Commission's submission that this requires consideration of:

- the reason for the measure
- how the conduct will address the inequality
- whether the conduct is appropriately tailored to achieve a remedial purpose
- whether the applicant is capable of undertaking the conduct.

**Proposed measure is proportionate**

As VCAT found in Waite Group, to be a proportionate means of realising substantive equality for the group members, the proposed measure must demonstrate a reasonable relationship between
the real purpose and the means sought to achieve it. The proposed conduct must match the purpose and should go no further than necessary to achieve that purpose (Waite Group [63]).

Conduct is justified
To qualify as a special measure, a person must be satisfied the conduct is justified because the group needs assistance or advancement. While it is not necessary for the whole group to be disadvantaged, it does require that the overwhelming majority are disadvantaged.

Is consultation required?
Evidence of consultation with or the involvement of the group toward whom the special measure is directed – the beneficiaries – may not be necessary. It is important, however, that the beneficiaries wish for the measure to be taken. In Gerhardy v Brown [1985] HCA 119 Justice Brennan said:

> The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement [37].

This authority was cited in Waite Group, with Member Dea noting 'it is imperative that the proposed conduct is something sought or wished by the group' [52].

Conduct that is claimed to be a special measure, but that is unwanted or not welcomed by the beneficiaries, may not meet the test for a 'special measure' under the Equal Opportunity Act.

Effect of special measures
Where a special measure exists, a duty holder does not need to rely on a permanent exception or obtain a temporary exemption under the Equal Opportunity Act (discussed further below).

Special measures cease to be special measures
Under section 12(7), once the purpose of promoting or realising substantive equality has been achieved, the measure ceases to be a special measure. This reflects the role of special measures as a balancing mechanism designed to facilitate equality rather than unfairly advance one group over another.

Reasonable restrictions on eligibility for special measures
Special measures do not need to apply to all people with a particular attribute. Section 12(5) of the Equal Opportunity Act permits the imposition of 'reasonable restrictions on eligibility'. According to the Explanatory Memorandum of the Equal Opportunity Bill 2010, 'this recognises that the person may be subject to budgetary or other constraints and allows the eligibility for special measures to be limited to a subset of the target group, such as people in the target group who are of a particular age' (page 15).

Special measures and exemptions
Where a measure or action is a special measure it will not constitute discrimination. There is no need to apply for an exemption under section 89 of the Equal Opportunity Act to exempt it from the operation of the Act.

Instead, a person must consider whether the proposed actions meet the test for a special measure, and whether everything they propose to do falls within this test. Organisations should be prepared to give sound reasons to explain how and why conduct is a special measure.

Under section 12 (6) if unlawful discrimination is alleged, a respondent may raise special measures as a defence. The onus is on the respondent to prove the conduct complained of was a special measure within the meaning of the Equal Opportunity Act.
In a number of cases, VCAT has made orders that certain measures were special measures under the Equal Opportunity Act, dismissing the applications for an exemption to be granted.

- Darebin City Council Youth Services sought an exemption to host two women-only events. The events targeted young women within the Darebin community who, for cultural and religious reasons, could not otherwise attend the events. The council also sought an exemption to employ only women during the events. VCAT declared the proposed conduct was a special measure for the purposes of section 12 and dismissed the application for an exemption. See *Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission* [2011] VCAT 1693.

- Cummeragunja Housing and Development Aboriginal Corporation sought to advertise for and employ Indigenous people in its mental health worker, health worker, trainee and administration roles. The Corporation aimed to provide employment opportunities for Indigenous applicants and culturally appropriate health services to local Aboriginal people. Ninety five per cent of people using the services were Aboriginal. VCAT found these actions were special measures. See *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237 [37]–[40].

- The University of Melbourne School of Engineering sought to advertise and employ only women in up to 20 academic roles within the Melbourne School of Engineering over a period of five years. It aimed to increase the number of women to 25 per cent of its workforce. VCAT was satisfied the conduct met the requirements of a special measure and was substantiated by the evidence. VCAT took into account the low representation of women in the school's academic workforce, the slow increase in the number of women and the modest aim of increasing that representation to 25 per cent. See *The University of Melbourne (Melbourne School of Engineering)* [2014] VCAT 887.

VCAT came to the same conclusion in a number of other exemption matters:

- An employer sought to advertise and employ Aboriginal staff only to care for Wurundjeri country. See *Parks Victoria* [2011] VCAT 2238.

- A training organisation wished to advertise for and employ only Aboriginal candidates to address under-employment of the group. See *NECA Education and Careers Limited* [2015] VCAT 838.

- The Ian Potter Museum of Art sought to advertise and employ an Indigenous person in the role of Vizard Foundation assistant curator. See *The Ian Potter Museum of Art* [2011] VCAT 2236 [21], [31], [34].

In all these cases, VCAT was satisfied the proposed conduct would be undertaken in good faith and was reasonably likely to achieve the various purposes.

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Sexual harassment

Part 6 of the Equal Opportunity Act deals with sexual harassment.

Section 92(1) of the Equal Opportunity Act defines sexual harassment as follows:

(1) For the purpose of this Act, a person sexually harasses another person if he or she—

(a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or

(b) engages in any other unwelcome conduct of a sexual nature in relation to the other person—

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the other person would be offended, humiliated or intimidated.

(2) In subsection (1) conduct of a sexual nature includes—

(a) subjecting a person to any act of physical intimacy;

(b) making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence;

(c) making any gesture, action or comment of a sexual nature in a person's presence.

In essence, the Equal Opportunity Act prohibits a person from engaging in conduct of a sexual nature that a person would anticipate could be expected to offend, humiliate or intimidate a person.

Where sexual harassment is prohibited

Part 6 of the Equal Opportunity Act prohibit sexual harassment in the following areas:

- by employers and employees (section 93 and section 27)
- in common workplaces (section 94)\(^1\)
- by partners in firms (section 95)\(^2\)
- in industrial organisations (section 96)\(^3\)
- by members of qualifying bodies (section 97)\(^4\)
- in educational institutions (section 98)\(^5\)
- in the provision of goods and services (section 99 and section 125)\(^6\)
- in the provision of accommodation (section 100)\(^7\)
- in clubs (section 101)\(^8\)
- in local government (section 102).

Protection of volunteers in 'employment'

The Equal Opportunity Act defines the employment relationship to include a person who performs work for another on a voluntary or unpaid basis for the purposes of the prohibitions against sexual harassment in Part 6. Volunteers, therefore, are protected against sexual harassment when they provide their services. They do not otherwise derive the same protection available to employees under the Equal Opportunity Act.

The reasons for limiting the protection afforded to volunteers in this way were not explicitly stated during the consultation process for the Equal Opportunity Act. The Second Reading Speech
clarified the extension of the Equal Opportunity Act to protect unpaid workers and volunteers was to recognise that, ‘a person can experience discrimination or sexual harassment in the workplace even if they are not paid a wage’.9

It was recognised, however, that this change would present challenges to some organisations. In particular, organisations in the community and not-for-profit sector with limited resources that will need to understand and prepare for the change may be impacted. This is the most likely reason that only acts of sexual harassment are currently within the scope of this additional protection.

The Second Reading Speech recognised unpaid workers and volunteers can be subjected to all types of discrimination, and not just to sexual harassment. This may indicate the definition will be extended in the future.

Volunteers may, however, be protected from discrimination in the context of the provision of goods and services, as discussed in Volunteers who receive and provide services.

The practical implications of extending the definition of employee as it is used in Part 6 are:

- An employer must not sexually harass a person who works for them as an unpaid worker or volunteer, or a person seeking to work with them as an unpaid worker or volunteer. In addition, an unpaid worker or volunteer must not sexually harass their employer, other employees or people seeking to work with their employer (whether as unpaid workers, volunteers or otherwise).

- A person must not sexually harass another person (including an unpaid worker or volunteer) at a place that is a workplace of both of them.

- A member of an industrial organisation must not sexually harass a person who works for that organisation as an unpaid worker or volunteer. An unpaid worker or volunteer also must not sexually harass a person seeking to become a member of an industrial organisation or a member of that organisation.

- A member of a qualifying body must not sexually harass a person who works for that body as an unpaid worker or volunteer. An unpaid worker or volunteer also must not sexually harass a person seeking action in connection with an occupational qualification or a member of that qualifying body.

- A person who works as an unpaid worker or volunteer for an educational institution must not sexually harass a person seeking admission to that institution as a student, or a student of that institution. A student also must not sexually harass a person who works as an unpaid worker or volunteer for the club.

- A member of a club, including a member of the management committee or other governing body of the club, must not sexually harass a person who works as an unpaid worker or volunteer for the club.

'Out of work' conduct and common workplaces

Sexual harassment in employment can occur outside a standard workplace environment and normal working hours. Sexual harassment has a strong link to employment at social functions sponsored and paid for by the employer, at after-parties to such events (regardless of their location), and in hotels paid for by the employer. Sexual harassment can also occur at work premises outside working hours or while employees are not performing their duties. The 'workplace' is not confined to the physical location used by the employees. It also extends to common areas such as lifts, entrances, reception areas, corridors, kitchens and toilets of the premises. See Ewin v Vergara [No 3] [2013] FCA 1311 [43].

The Equal Opportunity Act also states that a person, including an employer, must not sexually harass a person in a common workplace. A common workplace is any place where a person attends for the purpose of carrying out functions in relation to their employment, occupation, business, trade or profession.
Under similar, but not identical, provisions in the *Sex Discrimination Act 1984 (Cth)*, a contractor was found to have sexually harassed an employee who worked in the same office as him. He made sexual advances and comments to her over a number of days and at various locations on site and off site, culminating in an unwanted sexual incident. These included at her desk during the day and after hours, after work at various bars, at a work meeting off site, at a work function after hours, and after the function in a corridor of the common workplace. See *Vergara v Ewin [2014] FCAFC 100*.

**Criteria for sexual harassment**

To constitute sexual harassment, the conduct complained of must satisfy a number of criteria. First, the conduct complained of must be of a sexual nature. Second, the conduct must be unwelcome to the recipient. This is a particularly important element as conduct based on mutual attraction between consenting adults is clearly outside the scope of the sexual harassment provisions and would not be unlawful.

Under section 92 of the Equal Opportunity Act the conduct complained of must also occur in circumstances in which a reasonable person with knowledge of all the surrounding circumstances would have anticipated the subject of the conduct would be 'offended, humiliated or intimidated'.

As with other provisions under the Equal Opportunity Act, section 10 states that intention or motive is not required to prove a claim of sexual harassment.

**Conduct of a sexual nature**

The conduct complained of must be of a sexual nature to constitute sexual harassment. This includes a sexual advance or request for sexual favours or other conduct of a sexual nature. A request for sexual favours is relatively self explanatory. The case law contains many cases where an employer, for example, propositions an employee and requests sex in circumstances that have been held to constitute sexual harassment. See, for example, *Delaney v Pasunica Pty Ltd [2001] VCAT 1870*.


In *Sammut v Distinctive Options Limited [2010] VCAT 1735* Mr Sammut pursued a claim of sexual harassment against his employer on the basis that Ms Joy, a fellow employee, had sexually harassed him. One allegation was that Ms Joy had told Mr Sammut in graphic detail about an incident in which she had sex in a car. The Victorian Civil and Administrative Tribunal (VCAT) held the story was, 'clearly, not in the nature of a sexual advance or a request for sexual favours'. However, the fact that it was an explicit statement about a sexual experience meant that it was a 'comment of a sexual nature' and was, therefore, sufficient to fall within the definition of 'conduct of a sexual nature' [54].

Mr Sammut also alleged Ms Joy had subjected him to 'conduct of a sexual nature' by hugging him. The respondent tried unsuccessfully to argue this was not conduct of a sexual nature given that the workplace was a 'huggy' one, in which staff members often gave others 'supportive hugs'. VCAT did not accept that the workplace was 'universally huggy'. It also found the hugs were 'intimate' and were 'more than a comforting or supportive pat on the shoulder'.

The respondent also submitted 'that no reasonable person would view the alleged conduct as being offensive, and that the sexual harassment legislation is not designed to address such trivialities nor to sterilise the workplace from harmless displays of care and respect between colleagues' [69]. VCAT rejected those submissions:

I do not accept that the conduct was trivial, or that it was a harmless display of care and respect. Mr Sammut did not like to be touched and was given a nickname to that effect. Ms Joy gave him physically intimate hugs with both arms around him. He asked her on a number of occasions to stop. She respected his wishes only after he had objected in front of two colleagues. I accept his evidence that he was concerned that her behaviour would jeopardise his relationship with his partner. I
find that the circumstances were such that a reasonable person, having regard to all the other circumstances, would have anticipated that Mr Sammut would be offended or humiliated by Ms Joy's conduct. I am therefore satisfied that the hugs constituted sexual harassment within the meaning of section 85, and a contravention of section 86(2)(a) of the [Equal Opportunity Act]. [69]–[71].

In some cases, the context may be crucial in determining whether the conduct is found to be of a 'sexual nature' and, therefore, constitute sexual harassment. In State of Victoria v McKenna [1999] VSC 310, for example, three alleged acts of sexual harassment were complained of by Ms McKenna, a former police officer. Two of the incidents in the series were clearly conduct of a sexual nature. They involved Mansfield, another police officer, first, pulling Ms McKenna onto his lap and, second, saying to her 'how about a head job?' The third incident involved Ms McKenna being grabbed and pulled towards a holding cell, followed by an attempt to lock her in the cell. The Victorian Supreme Court rejected the argument that the third incident should be classed as assault, rather than sexual conduct. The argument was rejected on the basis that the incident occurred as part of a series, the other incidents being sexual. The Court found this act had the necessary sexual element to render it a sexual assault and, therefore, to amount to sexual harassment. If this third incident had occurred in isolation, it may not have had the necessary sexual element [219]–[223].

In a contrasting case, AGO v Monash University [2016] VCAT 886, a psychologist asked a client who had been the subject of a stalking claim and intervention orders about his relationships and behaviour towards women. This was not found to be 'conduct of a sexual nature' [38] [45].

Where the conduct complained of falls short of constituting a request for sexual favours or a sexual advance, it may still constitute sexual harassment if it constitutes conduct of a sexual nature. Section 92(2) provides an inclusive, rather than exhaustive, list of what constitutes conduct of a sexual nature. Other conduct not expressly referred to in section 92(2) may fall within the ordinary meaning of conduct of a sexual nature.

In Te Papa v Woolworths Ltd trading as Safeway [2006] VCAT 1222 Justice S Davis commented on the predecessor to section 92(2), which was in the same terms:

> While section 85(2) defines conduct of a sexual nature inclusively and not exhaustively, it is clear from the terms of the section that it is confined to acts or statements of a sexual nature related to sexual matters or which can be characterised as sexual or sexually related. The term relates to matters which have to do with sexual activity or attraction or relationships [See also Cassandra Evans v Total Food Management [1997] VCAT 213 [9]]. Within this broad category, the term may refer to many things, including: requests for sexual intercourse, love letters, invitations to date, comments about parts of the body which are generally regarded as having a sexual function or about a person’s sex life, physical contact such as patting, pinching or touching in a sexual way, indecent exposure, offensive telephone calls, offensive hand or body gestures [7].

Whether conduct or a statement is 'sexual' may depend on the circumstances including where and when and how the conduct occurred, and the understanding of the participants at the time.

In Johanson v Michael Blackledge Meats [2001] FMCA 6 a customer had been sold a bone at a butcher's shop. The bone had been deliberately made into the shape of a penis and disguised among the bones for sale by an employee. Although the sale of the bone to that particular customer was unintentional, the transaction was sufficient to constitute sexual harassment. The employee had engaged in conduct that exposed the customer to the risk of obtaining an object from the shop that caused her serious offence [90].

The test of whether conduct is of a sexual nature is an objective one and the motivation or understanding of the perpetrator is irrelevant. See Frith v The Exchange Hotel [2005] FMCA 402.

A single incident or a series of incidents can constitute sexual harassment. In Hall v A. & A. Sheiban Pty Ltd [1989] FCA 72 Justice Lockhart said the definition of sexual harassment 'clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct' [40]. In the same case, Justice French also held sexual harassment need not involve repetition. He stated 'circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs' [53]. See also Sammut v
Further illustrating this point, in *Tan v Xenos* [2008] VCAT 1273 damages of $100,000 were awarded in relation to a single incident of sexual harassment. This act involved serious unwelcome sexual conduct by Mr Xenos, a neurosurgeon, towards his trainee. The incident was considered to have been exacerbated by the fact that Mr Xenos took advantage of his position of seniority and control.

In *Kerkofs v Abdallah* [2019] VCAT 259 Judge Harbison separated the sexual harassment into two categories: a general campaign of harassment in the workplace, as well as a single serious assault that occurred at Ms Kerkofs' home after she fell ill at work. In that case, it was clear that, if any of the conduct described by Ms Kerkofs had occurred, it would amount to sexual harassment under the Equal Opportunity Act. The case turned on which of the witness accounts were credible. Judge Harbison ultimately found in favour of Ms Kerkof and awarded $150,000 in damages. The substantial award took into account the fact that the respondent had been in a position of authority and his 'extremely predatory behaviour' in taking advantage of the applicant's illness [261]. The award also reflected Ms Kerkof's ongoing psychiatric injury that was attributed to the harassment.

Section 92(2)(a) refers to conduct that subjects a person to an act of physical intimacy. The extent to which acts of physical intimacy constitute sexual harassment was considered in *Pana Andropoulos v Peppers Delgany Portsea* [1999] VCAT 645. The complainant made a complaint of sexual harassment in the provision of goods and services and accommodation. The complainant had a massage at a hotel where she was staying. She alleged during the massage, Mr McKinlay, the masseur, unhooked her bra, began massaging her back, and 'without warning' pulled the towel to below her buttocks, pulled down her underwear and massaged her buttocks. The complainant made no comment to Mr McKinlay until after the massage had finished.

VCAT considered whether this constituted conduct of a sexual nature for the purposes of the 1995 Act. VCAT recognised the conduct occurred in circumstances 'where the complainant had subjected herself voluntarily to treatment that was to include the massage of muscles and tissue in various parts of her body, including her back' [5]. This was relevant to VCAT's consideration of whether there had been an act of 'sexual physical intimacy', which would be necessary for the complaint of sexual harassment to be upheld. In such circumstances, there can still be sexual harassment if:

> [T]here was unusual other conduct or obsessive behaviour or where the treatment was accompanied by remarks, gestures or other actions that gave an indication that the nature of the treatment had turned from normal therapeutic manipulation to 'sexual' physical intimacy.

In this case, the complainant's main concern was that Mr McKinlay had 'exposed' her buttocks, rather than the fact that he had massaged them. There was nothing in the complainant's evidence to suggest Mr McKinlay had changed the treatment to make it conduct that could constitute 'sexual physical intimacy'. VCAT found there had been no sexual harassment in this instance.

The Peppers Delgany Portsea case shows that where there has been physical contact, the context in which that contact occurred will be important in determining whether it meets the test of 'sexual harassment'. Similarly, in *Burgiss v Clisby Pty Ltd* [2004] VCAT 1817 there was agreement that Mr Grech, an employee of the respondent, hit the complainant on the 'backside with a newspaper'. The context in which this happened was disputed. Deputy President Davis said:

> It was submitted on behalf of the respondents that if Mr Grech slapped Mrs Burgiss in anger, the conduct was not of a sexual nature. However, Mr Grech said he was not angry with Mrs Burgiss at the time of the slap. I consider that the slap to the backside subjected Mrs Burgiss to an act of physical intimacy and thereby constitutes unwelcome conduct of a sexual nature [29].

**Unwelcome conduct**

As noted above, to constitute sexual harassment for the purposes of the Equal Opportunity Act, conduct of a sexual nature must also be 'unwelcome'. In *GLS v PLP* [2013] VCAT 221 VCAT
President Justice Garde adopted the test in *Aldridge v Booth* [1988] FCA 170 (cited in *GLS v PLP* [2013] VCAT 221 [33]). In that case Justice Spender held for conduct to be ‘unwelcome’ meant it was not solicited or invited by the employee, and that the employee regarded the conduct as undesirable or offensive. Justice Garde further held the question of whether behaviour is unwelcome is subjective, based on the state of mind of the complainant.\(^1\)

This means that the conduct must not only be uninvited or unsolicited, it must also be unwelcome. The notion that the sexual conduct is unwelcome is at the core of the concept of what constitutes sexual harassment.

In the decision of *Styles v Murray Meats Pty Ltd* [2005] VCAT 2142 Deputy President McKenzie also held whether the conduct is unwelcome is a subjective test:

> The conduct must be, and be seen to be, unwelcome to the recipient. A comment would not be unwelcome if the recipient by conduct or comment condones it. For example, by replying with comments of a similar nature or by otherwise showing in actions or words that the conduct is found to be amusing.

> The fact that a recipient of a comment or a gesture is silent does not automatically mean that the comment is welcome. Again, the fact that the maker of the comment or gesture has not been told in advance by the potential recipient, does not automatically make the comment welcome.

> The maker of the comment might beforehand know or suspect that the recipient would find the comment unwelcome. Whether or not a comment is welcome must be determined having regard to all the circumstances [14]–[16].

This does not mean, however, the respondent has to know the conduct is unwelcome. As noted by Deputy President McKenzie in *Kaldawi v Smiley* [2002] VCAT 1754:

> [U]nwelcome conduct must mean conduct unwelcome to the recipient but does it also mean that the person who engages in the conduct must know that it is unwelcome to the recipient? In effect the Doctor and Ms Smiley rely on different meanings of this phrase. Ms Smiley does not deny that it was not till September 2001 that she told the Doctor the e-mails were unwelcome. The Doctor says that at the time he sent the e-mails he did not know, and had no reason to know, that they were unwelcome conduct.

> The proper interpretation of this phrase was not fully argued before me. For the purpose of determining this application, I'm not satisfied that the phrase so clearly requires some knowledge of the unwelcomeness of the conduct by the person who engages in it that the conduct is incapable of constituting unwelcome conduct for the purposes of the definition of sexual harassment. Even if the phrase is interpreted as requiring some outward manifestation by the recipient of the conduct that the conduct is unwelcome, it may well be that the failure to respond in kind to such e-mails or to actively encourage more to be sent may be enough [46]–[47]. (This decision was given in the context of an interlocutory application to strike out the complaint and should be read accordingly.)

A similar issue arose in *Howard v Geradin Pty Ltd T/A Harvard Securities* [2004] VCAT 1518. Deputy President Davis said:

> The Complainant needs to establish that the conduct complained of was unwelcome. A finding that the complainant willingly participated in exchanging sexually explicit text messages by mobile telephone with her colleagues in the workplace would necessarily undermine such a conclusion [50].

'Ambivalence' towards a person’s conduct is not sufficient to defeat a claim of sexual harassment. In *Aldridge v Booth* [1986] HREOCA 1 the then federal Human Rights and Equal Opportunity Commission found the complainant had tolerated the behaviour due to her young age (17) and lack of sophistication. The acts complained of were significant, including several acts of sexual intercourse. The complainant was afraid her employment would be terminated if she had made it
clear the conduct was unwelcome. That the acts were 'largely unwelcome' was sufficient to meet
the requirements of the Sex Discrimination Act 1984 (Cth), even though the complainant had
endured the conduct and not openly objected.

It may not always be apparent that the sexual conduct was unwelcome. In Hardy v Kelly (1991)
EOC 92–369 (Kelly) allegations of sexual harassment against Mr Kelly were made by his
secretary, Ms Hardy. VCAT found Ms Hardy and Mr Kelly had a 'close friendship' at the time when
the relevant incidents occurred. Ms Hardy had also actively participated in out-of-hours
conversations with Mr Kelly, including allowing him to visit her at home on a number of occasions.
On that basis, VCAT found the conduct was not unwelcome, and so could not constitute sexual
harassment. Ms Hardy's evidence that when Mr Kelly attempted to hug her on one occasion, she
had 'repelled him' and told him to go home, did not assist her claim when considered in the context
of their relationship at that time.

The emphasis placed on the close friendship between the parties in determining that there had
been no sexual harassment in Kelly, contrasts with the decision of the Federal Court in Leslie v
Graham [2002] FCA 32. The complainant was employed by Roger Graham and Associates, a
family business, and had become a personal friend of the family. Mr L Graham, who ran Roger
Graham and Associates with his father, and the complainant went to a work-related weekend
conference, where they shared an apartment. The complainant alleged she had woken in the night
to find Mr L Graham on top of her and fled the apartment. The Court upheld the complainant's
allegation of sexual harassment. It found the complainant did not fear that Mr L Graham would
rape her, but did not consider it a mitigating factor that a friendship existed between Mr L Graham
and the complainant. The nature of the conduct alleged may also have been relevant factors in the
above cases.

The finding in Kelly also contrasts with the more recent decision in GLS v PLP [2013] VCAT 221. In
this case, Ms GLS was a mature-aged graduate legal student undertaking professional legal
placement with Mr PLP and his firm. The complainant Ms GLS and respondent Mr PLP had been
close friends before Mr PLP agreed she could undertake a professional legal service placement at
his firm. She complained Mr PLP sexually harassed her on a daily basis throughout her placement.
The harassment included repeated requests for sex, inappropriate touching, viewing pornography
in the workplace and inappropriate comments.

VCAT upheld 11 out of 14 instances of sexual harassment alleged by Ms GLS, despite finding
there was a close friendship of admiration and affection between Ms GLS and Mr PLP. Ms GLS
and Mr PLP socialised together outside work and with each other's families, visited each other's
homes, and there was evidence of conversations between the two containing 'sexual innuendo or
banter, teasing and provocation that passed between them virtually on a daily basis' [151]–[152].

Justice Garde considered whether the context of the parties' relationship affected whether Mr
PLP's conduct was sexual harassment, and whether his sexual advances and requests for sexual
intercourse were welcome. Justice Garde held:

Allegations of sexual harassment are not assessed in a vacuum, but must be
assessed in the context of the relationship and friendship between the parties. This
relationship is evidenced by the numerous texts, emails and letters that passed
between them, and by video evidence.

However, there were limits and boundaries to the friendship and relationship
between Ms GLS, Mr PLP and his partner. Whilst there was much sexual banter,
teasing, provocation, jesting and much shared personal information and
commentary about mutual friends, Ms GLS did not at any time desire or agree to
sexual intercourse or indeed to any sexual relationship with Mr PLP. This was a
clear boundary for her.

I am satisfied that Ms GLS did not at any time welcome Mr PLP's sexual advances
or requests for sexual intercourse with her. She did not seek out any such
approaches, and she was offended, diminished, and insulted by them. She
considered that it was improper for Mr PLP to be making approaches for sexual
intercourse and other sexual favours given his relationship with his partner and his obligation to his partner [153]–[155].

The close and affectionate relationship between Ms GLS and Mr PLP did not preclude Mr PLP’s conduct amounting to sexual harassment.

**Conduct anticipated to offend, humiliate or intimidate**

To constitute sexual harassment, section 92(1) of the Equal Opportunity Act states it is necessary that a reasonable person with knowledge of the circumstances would have anticipated the subject of the conduct would be offended, humiliated or intimidated.


As VCAT noted in Styles v Murray Meats Pty Ltd [2005] VCAT 914:

> The test of whether the comment could reasonably be anticipated to offend, humiliate or intimidate is not to be judged from the subjective point of view of either the actor, or the recipient. For this reason I disagree with the respondent's submission that I must ask whether a person of the same age and background of Mr Ujvari one of the people alleged to have made a number of comments in question would have anticipated that his comments would offend humiliate or intimidate Ms Styles. The matter is to be judged from the stand point of a reasonable person with knowledge of all the circumstances and this is in my view consistent with the objects of the Act [16].

Similarly, in Mohican v Chandler McLeod Ltd T/A Forstaff Australia [2009] VCAT 1529, VCAT noted:

> Sexual harassment is defined in section 85 of the Act as an unwelcome sexual advance or request for sexual favours or any other conduct of a sexual nature if a reasonable person would have anticipated that the conduct would offend, humiliate or intimidate the other person ... This means that Mr Mohican must prove both that the conduct in fact occurred and that a reasonable person would have found the proven conduct offensive [13].

**Other considerations**

**Failing to ‘flee’ or strongly reject harassment**

Failing to flee or strongly reject harassing behaviour will not affect a complaint of sexual harassment, in particular whether the conduct was welcome or not. VCAT made clear it is not appropriate to criticise a complainant for the way they handle the sexual harassment in GLS v PLP [2013] VCAT 221. It is enough that the respondent's conduct meets the test for sexual harassment under the Equal Opportunity Act [228].

In that case, Ms GLS rejected Mr PLP's advances, but Mr PLP's counsel argued her body language contradicted her words [220], [222]. Mr PLP's counsel criticised Ms GLS for not escaping from Mr PLP's embraces, and not acting more strongly or at an earlier time to reject his advances. Defence counsel argued Ms GLS could have spoken her mind more directly or forcibly removed herself from his grasp and presence. Furthermore, Ms GLS 'could have declined to engage in a conversation with him that involved so many sexual requests and references' [226]–[227].

Justice Garde was not persuaded by this criticism. Justice Garde held such comments were inappropriate considering the obligation is on the employer to refrain from sexually harassing employees and to eliminate sexual harassment as far as possible:

> None of the conduct or behaviour referred to by counsel for Mr PLP should be taken as meaning that Mr PLP's conduct was in any way welcome, or not
unwelcome to Ms GLS. She sought to manage an unwanted situation. She did not want to upset Mr PLP or lose his support.

He was her employer and the principal of the firm for which she worked. He was in a position of authority and superiority. He was her supervisor and was responsible for her placement.

She certainly did not want to lose or fail to complete her placement which she had to complete to gain admission to practice. She was an older age student, and placements were not all that easy to come by, despite her network of contacts. In addition to the position of authority held by Mr PLP, he and his partner were considered by Ms GLS to be her friends. She was reluctant to do anything that might upset the friendship that she had with Mr PLP and his partner. She wanted to save the friendship and complete the placement.

If an employer does engage in the sexual harassment of an employee, it is not appropriate to criticise the employee on the basis that she should have handled the sexual harassment better or should have stormed out of the room or escaped from the harasser earlier. It is enough if the respondent's conduct constitutes sexual harassment under the Act [228]–[230].

In Collins v Smith [2015] VCAT 1029 VCAT affirmed Justice Garde’s observation, and noted 'caution must be exercised when examining the conduct of the [complainant] for the purpose of reflecting upon whether she could have handled the situation better or differently' [378].

Similarly, in Delaney v Pasunica Pty Ltd [2001] VCAT 1870 it was alleged Mr Daley approached Ms Delaney in the storeroom of the shop where they worked, grabbed her breasts and bottom, kissed her neck and touched her all over, among other things. The fact that Ms Delaney did not 'flee' from the workplace in response to this advance 'because she was frightened of losing her job and did not know what to do' did not affect her claim of sexual harassment being upheld.

**Sexual harassment and out-of-work conduct**

A further element to consider in respect of sexual harassment is how far the scope of 'employment' extends. This is also relevant to the issue of vicarious liability discussed in the chapter on Vicarious Liability.

Whether a person's private or out-of-work conduct bears a relevant connection to the workplace is not clear. The answer will turn on the particular facts in each case. Cases that have addressed this issue can provide guidance. Section 93 of the Equal Opportunity Act does not require a connection with the workplace beyond an employment (or potential employment) relationship between the parties. Only when an employer's vicarious liability is being considered under section 109 of the Equal Opportunity Act is there a requirement to consider if an act was 'in the course of employment' and, therefore, whether there was a connection to the workplace.

In South Pacific Resort Hotels Pty Ltd v Trainor [2005] FCAFC 130, for example, sexual harassment occurred at staff accommodation provided by the respondent as part of its hotel complex, even though the harassment occurred while the complainant and co-worker were off duty. The respondent argued this case should be distinguished from other cases where incidents of sexual harassment had occurred, for example, in a hotel room paid for by the employer after a work event, because in this case, the employees involved were both living on the premises. The court did not consider that this removed the conduct from the scope of 'employment'. A key consideration was that only employees were allowed on site. The respondent was held to be vicariously liable for the harassment because the employees' rooms were close to each other and accessible. This created the opportunity for the conduct to occur 'within the course of employment' at any time. The Court found the respondent had taken insufficient steps to prevent a 'foreseeable' possibility of harassment.

In A v K Ltd & Z [2008] VCAT 261 A alleged he was sexually harassed by co-worker Z in a number of different incidents. The first incident was alleged to have occurred at a private party organised by a colleague. While there were employees from K Ltd at the party, it was not organised or
authorised by the company. A number of the people attending the party were not employees of the company. The party was also held on a Saturday, which was not a work day.

The second allegation related to events over a Friday–Saturday period. Both A and Z were required to attend a work-related function. The employer paid for Z's accommodation for the Friday evening as he had come down from Sydney. After the function a number of employees and clients and guests of the company went to a bar. The company authorised and paid for the supply of alcohol at the bar.

A alleged Z subjected him to an act of physical intimacy that he did not or could not consent to because of his alcohol affected state. Those circumstances included:

- A felt intimidated in Z's presence and reluctant to say or do anything that might anger or upset him by virtue of Z's position in the company
- A was visibly affected by alcohol
- the physical intimacy followed the first incident which had already disturbed A and caused him to be apprehensive of Z.

A alleged further that Z, by his actions, created an opportunity for A to be alone with him, and that at no time during the course of the evening did A knowingly tell Z or intimate to him that he would participate in any sexual activity. There was a significant dispute between A and Z as to what happened that evening.

Z denied anything of a sexual nature occurred at any time during either of the alleged incidents.

This case arose in the context of a strike out application. In that context, VCAT held the first incident was misconceived and should be struck out on the basis there was insufficient connection with the employment to properly found a claim against the employer. The incident clearly occurred in a situation that was a private function where the employees were not acting as employees. VCAT was not satisfied that in the second incident there was an insufficient link to the employment relationship such that the claim was bound to fail. On this basis, VCAT refused to strike out the second incident.

In Lee v Smith [2007] FMCA 59 (Lee v Smith) the Australian Defence Force was held vicariously liable for unlawful sexual harassment and victimisation in breach of the Sex Discrimination Act 1984 (Cth). That unlawful conduct included a rape, which occurred following after-work drinks at the home of one of Ms Lee’s colleagues. Central to the Court's finding that the Australian Defence Force was vicariously liable was its conclusion that the rape 'arose out of a work situation' and 'was the culmination of a series of sexual harassments that took place in the workplace' (Lee v Smith [203]).

In Anthony Tichy v Department of Justice – Corrections Victoria [2005] AIRC 136 and A Tichy v Department of Justice [2005] AIRC 592 an incident of serious sexual harassment by a colleague was held not to have been in the course of employment for the purposes of allegations of misconduct. The incident took place while the employees were away for work purposes. The significant distinction was that the event had not been authorised or sanctioned by management. It had been organised by the employees at their own initiative. The employees were not required to be in such close proximity to each other because of work. This was the critical factor in finding that the incident was outside the scope of the workplace. This case related to misconduct, not an allegation of sexual harassment in breach of section 93 of the Equal Opportunity Act. It is possible sexual harassment may have been found in the same circumstances if it was heard under the Equal Opportunity Act.

The scope of employment has been expanded over recent years as electronic communication and social media have infiltrated the workplace. The courts have clarified behaviour engaged in via social media sites and electronic communication can still have a sufficient nexus to the workplace to bring it within the scope of employment. See, for example, Cooper v Western Area Local Health Network [2012] NSWADT 39.

In Kerkofs v Abdallah [2019] VCAT 259 there were two separate categories of sexual harassment identified by Judge Harbison: general harassment in the workplace and a single sexual assault that
occurred at Ms Kerkofs’s home. The respondents submitted that the assault at the private residence fell outside the scope of employment. However, this argument was rejected on the basis that the Ms Kerkofs’s supervisor had instructed Mr Abdallah to drive Ms Kerkofs’s home after she fell sick at work.

These cases show the case law on sexual harassment can be circumstantial. The relationship between those involved and the context of the incident are as important as where the incident took place.

**Sexual harassment and sex or gender identity**

Sexual harassment is not limited to conduct by a male towards a female. Sexual harassment can occur in respect of conduct involving people of any sex or gender identity. In Thomas v Alexiou [2008] VCAT 2264 VCAT found Mr Alexiou, a director of a small business, sexually harassed Mr Thomas, an apprentice, over a three-and-a-half-year period. The conduct included repeatedly propositioning him to share a shower, making unwelcome sexual advances by touching his genitals and, in a number of incidents, physically restraining him to do so. In Sammut v Distinctive Options Limited [2010] VCAT 1735 a female colleague sexually harassed Mr Sammut by repeatedly putting both arms around him to hug him despite him requesting her not to do so on more than one occasion.

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1 Section 94(3) defines ‘workplace’ for the purposes of a common workplace as ‘a place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business or trade’. See, for example, Ionescu v John Blair Motor Sales [2011] VCAT 706.

2 Section 4 of this Act confirms that partnership, for the purposes of the Act, has the same meaning as in Partnership Act 1958 (Vic), namely ‘the relation which subsists between persons carrying on a business in common with a view of profit’.

3 Section 4 also defines ‘industrial organisation’, including in relation to acts of sexual harassment.

4 Section 4 defines ‘qualifying body’ as ‘a person or body that is empowered to confer, renew or extend an occupational qualification’.

5 Turner v Department of Education and Training [2007] VCAT 873 confirmed ‘educational institution’ includes ‘a school at which education is provided’.

6 By way of example, massage therapy was held to be the provision of a service in the context of which it is possible for an individual to be sexually harassed in Andropoulos Pana v Peppers Delgany Portsea [1999] VCAT 645. (Note that in this case there was no finding of sexual harassment for other reasons).

7 In Ross v Loock [2000] HREOCA 6 a landlord, his female tenant, and other tenants were socialising together. The landlord asked the female tenant to stay behind after others had left. He then made sexual advances on her, and soon after, terminated the tenancy. The Human Rights and Equal Opportunities Commission found the landlord, as the accommodation provider, had sexually harassed the female tenant in the course of providing her accommodation.

8 See section 4 for further discussion of the definition of ‘clubs’ for the purposes of the Equal Opportunity Act. Also see Discrimination in clubs in this resource.

9 Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 115–121 (Rob Hulls, Attorney-General).


11 GLS v PLP [2013] VCAT 221 [30], [32] relying on Kraus v Menzie [2012] FCAFC 144. The Full Federal Court was considering the construction of section 28A of the Sex Discrimination Act 1984 (Cth) which is in a very similar form to section 85(1) of the 1995 Act, which was under consideration by Justice Garde in GLS v PLP [2013] VCAT 221.
Other prohibited conduct

The Equal Opportunity Act also makes unlawful a number of actions related to discrimination. Other prohibited conduct includes victimising someone who raises a discrimination concern, discriminatory advertising and discriminatory request for information. The Equal Opportunity Act also makes authorising or assisting discrimination unlawful. These topics are discussed below.

Victimisation

Section 103 of the Equal Opportunity Act prohibits victimisation. Victimisation is defined in section 104 of the Equal Opportunity Act as follows:

(1) A person victimises another person if the person subjects or threatens to subject the other person to any detriment because the other person, or a person associated with the other person—

(a) has brought a dispute to the Commission for dispute resolution; or
(b) has made a complaint against any person under the old Act; or
(c) has brought any other proceedings under this Act or the old Act against any person; or
(d) has given evidence or information, or produced a document, in connection with—

(i) any proceedings under this Act or the old Act; or
(ii) any investigation conducted by the Commission; or
(e) has attended a compulsory conference or mediation at the Tribunal in any proceedings under this Act or the old Act; or
(f) has otherwise done anything in accordance with this Act or the old Act in relation to any person; or
(g) has alleged that any person has contravened a provision of Part 4 or 6 or this Part, or Part 3, 5 or 6 of the old Act, unless the allegation is false and was not made in good faith; or
(h) has refused to do anything that—

(i) would contravene a provision of Part 4 or 6 or this Part; or
(ii) would have contravened a provision of Part 3, 5 or 6 of the old Act—

or because the person believes that the other person or the associate has done or intends to do any of those things.

(2) It is sufficient for subsection (1)(g) that the allegation states the act or omission that would constitute the contravention without actually stating that this Act, or a provision of this Act, has been contravened.

(3) In determining whether a person victimises another person it is irrelevant—

(a) whether or not a factor in subsection (1) is the only or dominant reason for the treatment or threatened treatment provided that it is a substantial reason;
(b) whether the person acts alone or in association with any other person.

Deputy President McKenzie in the matter of Tan v McArdle [2010] VCAT 248 noted to establish victimisation under section 104, a complainant must establish the following:

- that the alleged victimiser has subjected the complainant to conduct which constitutes a detriment
• that the conduct which constitutes the detriment must be directed at and affect the complainant
• the alleged victimiser must engage in the conduct complained of for one or more of the proscribed reasons set out in section 104 [26]–[28].

Unlike discrimination and sexual harassment, the prohibition on victimisation is not tied to any particular area of public life or relationship.

Detriment

Detriment is defined in section 4 of the Equal Opportunity Act to include 'humiliation and denigration'. It otherwise is to be given its ordinary meaning. Detriment is defined in the Macquarie Dictionary to mean 'loss, damage or injury'.

Taken together, and given the beneficial nature of the Equal Opportunity Act, it is likely that the term detriment is to be interpreted in a broad sense. In Kistler v R E Laing Training and Robert Laing (2000) EOC 93–064 VCAT stated:

Detriment within the meaning of the 1995 Act has a broad meaning and includes every kind of disadvantage. By reason of section 4 of the Act, 'detriment' includes humiliation and denigration.

The following have been held to constitute a 'detriment' in the context of a victimisation claim by VCAT:

• The delay and eventual withdrawal of services. See Fratas v Drake International Limited (2000) EOC 93-038

• Subjecting an employee who had made a complaint of sexual harassment to the following:
  – shaking a packet of Ratsak (rat poison) in her face and saying words to the effect of that he would 'get a rat' before putting it away in the cupboard
  – requiring her to be accompanied to an external training session when this had not ever been required before
  – issuing a direction that she not be in the general office area unless absolutely necessary
  – omitting the employee from a list of professional development activities as was usual for other staff
  – avoiding and/or refusing to process a WorkCover claim in a timely manner.
  See Gray v State of Victoria (1999) EOC 92–996

• banning a person from membership of an organisation. See Parr v Steamrail Victoria [2012] VCAT 678.

In Besley v National Aikido Association Inc [2005] VCAT 245 President McKenzie noted an alleged flaw in an investigation process into allegations of discrimination or harassment is unlikely to amount to victimisation or a detriment:

But in my view a flaw in the complaint handling process, without more, and except in very unusual circumstances, will not be capable of constituting victimisation. This is so for two reasons.

First, it will be impossible to show that the allegation made by the complainant is a substantial reason for the flaws in the complaint handling process. That complaint handling process would not have occurred but for the making of the complaint or the allegation. But this is not the same thing as showing that the flaw in the process is directly attributable to the making of the allegation or that […] the allegation is a substantial reason for the flaw (sic). Generally, the reasons for the flaw will be a matter of inference. An equally or more probable explanation for the flaw will often be misunderstanding, ignorance, inefficiency or incompetence. In
my view such an explanation is clearly available here even on Ms Besley's own version of events.

Second, in most cases, the flaw cannot be characterised as detriment. It is the conduct the subject of the original allegation which usually will be the detriment. The complaint handling process itself will almost always result in tension and stress, whether or not that process is flawed. In other words the attention or stress comes from the process not from particular flaws in it.

However, there can be detriment where something occurs beyond the process itself, and that something occurs substantially because of the making of the allegation [52].

Similarly, in *Lazos v Australian Workers Union* [1999] VCAT 635 VCAT stated:

Under the Act, victimisation means subjecting a person to a detriment because the person has alleged a contravention of the Act. Applying this provision to the claim and trying to characterise it, it would mean that the claimant says that the respondents were inactive in supporting Mr Lazos's complaint of race discrimination because he alleged that he had been discriminated against. It simply makes no sense to try to characterise the claim in this way, and it seems to me that to this extent the claim of victimisation should be struck out.

**Substantial reason**

To prove a claim of victimisation, the complainant must demonstrate that one of the factors listed in sections 104(1)(a)–(h) was a substantial reason for the alleged victimisation. It does not need to be the only or even the dominant reason, provided it is a substantial reason. For more information, refer to the discussion of *Stern v Depilation & Skincare Pty Ltd* [2009] VCAT 2725 in Treatment 'because of' a protected attribute. That case makes clear that it must be 'a reason of substance for that conduct' [8]. The complainant must establish a causal nexus between the alleged detriment suffered and the action taken under section 104(1).

In *G v Victoria Legal Aid* (2000) EOC 93-060, in finding that a claim of victimisation was not made out under the 1995 Act, VCAT stated:

The complainant must prove a clear causal link between subjecting a person to a detriment, and that person's having earlier taken action of the kind set out in section 97(1) to (g). Clear evidence of a causal link has not been adduced, nor is there evidence from which it would be safe to draw an inference of a causal link. In these circumstances, the complainant's case of victimisation fails.

A similar conclusion was reached in the decision of *Parr v Steamrail Victoria* [2012] VCAT 678. Mr Parr complained he had been victimised because Steamrail Victoria banned him from its organisation indefinitely. Mr Parr alleged this was because he had gone to the police with three teenage boys who alleged to the police that a member of Steamrail Victoria had sexually assaulted them. After further discussions between Mr Parr and the new Chairman of Steamrail Victoria, the question of Mr Parr's membership was put to a general vote. Members voted against Mr Parr's membership. Mr Parr claimed he had been subjected to a detriment because, through him, the teenagers had made a complaint of sexual harassment. Steamrail submitted this had not been the reason for Mr Parr's treatment. There was no direct evidence of the reason why Mr Parr had been banned. The new Chairman of Steamrail Victoria said members told him that they voted against Mr Parr's membership because 'of Mr Parr's abusive and aggressive behaviour toward them … (and) that many members told him that, if Mr Parr's membership were reinstated, they would leave the Steamrail organisation' [37].

Mr Parr's claim failed. Senior Member McKenzie found the claim of victimisation was not proven and stated:

I am not satisfied that the allegation was a substantial reason for the decision made at the meeting of members to continue Mr Parr's ban. The only evidence
about the reasoning of the members is general and is that Mr Parr's abusive
behaviour was a factor in the decision. There is no evidence about how many of
the members voting at that meeting had that reason in mind. There is no evidence
at all that they had in mind any other reason, such as the allegation made. It
would need to be a matter of inference. I am not prepared to draw that inference
because there is insufficient evidence to do so. Moreover, it would need to be
established that a majority of the members voting at the meeting had that reason
as a substantial reason for voting in a particular way. There is no evidence on
which I could base such a finding [65].

In *Collins v Smith [2015] VCAT 1029* VCAT found no evidence of victimisation. The complainant
was compelled to offer her resignation due to ongoing sexual harassment. VCAT was not satisfied,
however, that the respondent's vindictive behaviour of cancelling shifts, threatening to terminate
her employment or refusing to write a reference was due to her complaining. There were other
plausible explanations for this conduct. The respondent had received an ultimatum from his wife
(who was a business partner) that he not work with the complainant and evidence of an intention to
restructure the business [395]–[396].

In *A’Vard v Deakin University [2015] VCAT 1245* a student alleged victimisation by a university.
The student could not prove a connection between her complaint of sexual harassment and her
exclusion from her course, which the university linked to her alleged poor results. VCAT observed:

> [I]n claims of victimisation, the word ‘because’ is important as the person making
> the claim must prove there is a causal link between the step they took and the
detrimental treatment they claim occurred. The person making a claim does not
need to prove that the sole or dominant reason for the detrimental treatment was
them exercising their rights, but they must prove it was a substantial reason [4].

Whether there is the necessary causal nexus is a factual issue for VCAT to determine on the basis
of the evidence. See, for example, *Grah v RMIT [2011] VCAT 2184*. VCAT held the detriment
claimed was ultimately the result of the complainant's own conduct, not the claimed attribute
necessary to prove a claim of victimisation.

**Knowledge and other matters**

A related question is the extent to which the respondent has knowledge of the action under section
104(1), upon which the victimisation claim is based. That is, if a complainant claims they have
been victimised because of an earlier complaint made under the Equal Opportunity Act, to what
extent is it necessary for the complainant to provide evidence the respondent had knowledge of the
earlier complaint? This issue was addressed in the case of *Gabriel v Council of Box Hill Institute of
TAFE [2002] VCAT 302*. VCAT said:

> To be an actuating basis for victimisation the Institute, its council or its employee
or officer must have known about the complaint. Ms Gabriel doesn't explain in the
particulars when, how and who from the Institute came to know about this letter of
complaint [40].

See, for example, *State of Victoria v McKenna [1999] VSC 310*.

Importantly, it is possible to prove a claim of victimisation even where the underlying claim of
discrimination or harassment is ultimately not successful. In *Kistler v RE Laing Training & Robert
Laing* (2000) EOC 93-064 VCAT found the claim made by Ms Kistler of sexual harassment was not
proven and did not accept her evidence. VCAT found, however, the respondent engaged in
victimisation within the meaning of the Equal Opportunity Act, substantially because Ms Kistler had
made a complaint. The alleged victimisation took the form of intimidating comments and conduct
including threats.

Although VCAT did not accept the evidence given by the complainant in relation to the allegations
of sexual harassment, it concluded the complaint was made in good faith. A finding that the
complaint had not been made in good faith would have precluded a finding of victimisation, under
section 104(1)(g) of the Equal Opportunity Act. See also Zareski v Hannanprint [2011] NSWADT 283.

**Duty to eliminate victimisation**

Section 15(2) of the Equal Opportunity Act imposes a requirement on duty holders to take reasonable and proportionate measures to eliminate victimisation as far as possible.

**Authorising and assisting discrimination and sexual harassment**

Section 105 and section 106 of the Equal Opportunity Act together regulate the extent to which individuals and organisations can be held liable for secondary liability. This is sometimes referred to as 'authorising or assisting'.

Section 105 states that 'a person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 4 or 6 or this Part'. It creates liability for those who do not discriminate personally but who take steps to authorise, assist or encourage discrimination.

This section also prohibits a person from requesting, instructing, inducing, encouraging, authorising or assisting another to engage in unlawful discrimination or sexual harassment in breach of the Equal Opportunity Act. This means a person must not ask, instruct or encourage anyone else to take actions that may unlawfully discriminate or sexually harass. A person who has authorised and assisted unlawful acts can be liable even if they did not personally engage in the conduct.

Section 106 states:

If, as a result of a person doing any of the things specified in section 105, the other person contravenes a provision of Part 4 or 6 or this Part, a person may—

(a) bring a dispute to the Commissioner for dispute resolution; or

(b) make an application to the Tribunal—

against either the person who authorises or assists or the person who contravenes a provision of Part 4 or 6 or this Part or both of those persons.

This means a person can complain about either an 'authoriser' of discrimination or the person whose conduct discriminates, or both of them.

Part 4 of the Equal Opportunity Act deals with discrimination and Part 6 with sexual harassment. 'This Part' refers to Part 7 which includes the prohibition on victimisation.

A person can bring a dispute to the Commission in respect of an alleged breach of section 105 as stand-alone contravention of the Equal Opportunity Act. However, it is first necessary to prove discrimination or sexual harassment (a contravention of Part 4 or Part 6) has occurred.

In *Weber v Deakin University* [2014] VCAT 1440 VCAT rejected the complainant's contention that section 105 does not require a contravention to be proven as it is based on acts by a third party. VCAT found 'a contravention of the Equal Opportunity Act must be established before there is any basis for liability, where a third person assists that contravention'. VCAT found the complainant failed to establish that there was a breach and dismissed his claim [231]–[234].

This statement contrasts with comments in *Besley v National Aikido Association Inc* [2005] VCAT 245 where VCAT said of an equivalent provision, 'Of course it would cover encouraging, assisting, et cetera, a person to breach the Act even if no breach occurs' [59]. This case followed *Brooks v State of Victoria* [1997] VADT 13 where VCAT said:

Section 98 is itself a prohibition. A person contravenes the section if he or she engages in the conduct prohibited by it. A complaint about that contravention may be lodged with the Commission … It is not a requirement of s98 that a contravention by the person who is assisted, encouraged or authorised to contravene the Act must occur. It is enough if a person gives encouragement, authority or assistance to another to contravene the Act.¹
Timing of conduct

As noted in Besley v National Aikido Association Inc [2005] VCAT 245 above, where a claim is brought under section 106, it must be shown that the authorising or assisting conduct occurred prior to any actual unlawful discrimination or sexual harassment. However, organisations will need to be careful about the implications of this. Failure to properly investigate claims, for example, may be found to be authorising and assisting where there is ongoing conduct, and in some circumstances it could amount to discrimination.

Degree of knowledge required

The level of knowledge a person must have before they can be held liable for authorising, assisting or encouraging another to breach the Equal Opportunity Act is a relevant consideration.

In Kogoi v East Bentleigh Child Care Centre [1996] VADT 27 VCAT considered a provision similar to section 106, which existed in section 35 of the Equal Opportunity Act 1984 (Vic):

Where a person (hereinafter called 'the first person') counsels, requests, demands or procures another person (hereinafter called 'the other person') to act in contravention of this Act—

(a) if the other person so acts, both those persons shall be jointly and severally liable under this Act in respect of the contravention;

(b) if the other person refuses to so act and the first person so acts and that first person's action causes the other person to suffer any detriment as a result of such refusal, such action shall constitute unlawful discrimination under this Act.

In Kogoi v East Bentleigh Child Care Centre [1996] VADT 27, considering the construction to be applied to this clause, VCAT relevantly said:

(2) A person will not be liable as a secondary party under this section unless he or she knows all the essential facts necessary to constitute a contravention of the Act, and counsels, requests, demands or procures another person to commit that contravention. Knowledge may be inferred from the fact that a person has deliberately shut his eyes to the consequences of particular conduct.

(3) If the secondary party has knowledge of all the essential facts necessary to constitute a contravention of the Act, he or she does not need to know that those facts will constitute unlawful conduct.

Section 105 and section 106 are worded in slightly different terms to the provision under the Equal Opportunity Act 1984 (Vic). Nevertheless, the Commission considers that the comments relating to the knowledge required remain applicable.

In Roulston v Temp Team Pty Ltd [2001] VCAT 2036, for example, Mr Roulston was assigned to work for Orange by Temp Team, an employment agency. At the request of Orange, Temp Team removed Mr Roulston from that assignment. Mr Roulston submitted Temp Team had authorised and assisted Orange to discriminate against him, alleging the removal was because of his psychiatric impairment. Temp Team was told by Orange that the request for removal was made on performance-based grounds. VCAT found:

Temp Team cannot be regarded as assisting Orange to discriminate in breach of the [1995] Act if Temp Team did not know that the request for removal was made substantially because of Mr Roulston's impairment and had no reason to believe or suspect that this was the case and had no reason to be put on enquiry as to whether the request for removal might be discriminatory.

[...]
There is no previous complaint or situation that might have made [the alleged authoriser] aware that [another person] was at real risk of impairment discrimination [36]-[37].

This can be compared to the situation in *Elliott v Nanda & Commonwealth* [2001] FCA 418. The Federal Court held the Commonwealth Employment Service (CES), as the employment agency, had sufficient knowledge to be liable for having authorised or assisted the sexual harassment alleged by Ms Elliott under the *Sex Discrimination Act 1984* (Cth). The Court found the CES had been informed several young women working with Dr Nanda had complained about having been sexually harassed by him in a way that would constitute sex discrimination. While none of the previous complaints were investigated, the CES did not seek to acquire sufficient knowledge to determine whether these complaints were of any substance. The CES was held liable for having authorised and assisted the acts of sexual harassment. That the CES caseworker who facilitated Ms Elliott's employment did not know about the history of complaints against Dr Nanda did not prevent the finding that the CES had authorised or assisted the discrimination. The Federal Court clarified a person can permit another to discriminate if:

> Before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a situation where there is a real, and something more than a remote, possibility that the unlawful conduct will occur [163].

This suggests to prove a claim under what is now *section 106*, a complainant needs to show either:

- the secondary person knew that the proposed conduct was because of a prohibited reason
- there was a reasonable basis for a belief or suspicion to that effect
  or
- there was a reasonable basis upon which that person ought to have made enquiries as to the basis for the proposed conduct.

The case of *Tomasevic v Strauss* [2002] VCAT 395 illustrates this point. Mr Tomasevic argued Dr Strauss breached section 98 of the 1995 Act. The complainant alleged Dr Strauss authorised or assisted the Department of Education to discriminate against him. Mr Tomasevic argued the department, his employer, used Dr Strauss's report as the basis of its decision to continue to suspend him from teaching duties. In dealing with this part of the claim, VCAT said:

> Assuming for the purpose of this application only, that the conduct of the department and or Principal Van Halen, would be capable of constituting a breach of Part 3, there is nothing in the material before me, which is direct evidence or on the basis of which it will be open to VCAT at hearing, to infer that Dr Strauss authorised or assisted that breach.

> Some direct knowledge of the action that the employer proposes, after receiving the medical report, to take in relation to Mr Tomasevic is necessary before Dr Strauss could be said to have authorised or assisted that action. On the material before me, the most that can be said is that the employer has chosen to use Dr Strauss' report in a particular way. There is nothing to link this choice with Dr Strauss [23]-[24].

**Inaction and secondary liability**

Cases on this issue in different jurisdictions need to be considered with care. Variations in the wording of provisions may have a significant impact on how the provision operates.

*Section 105* and *section 106* of the Equal Opportunity Act use the words ‘request, instruct, induce, encourage, authorise or assist’.

Legislation in other jurisdictions sometimes uses the word ‘permit’ in equivalent provisions. *Section 160* of the *Equal Opportunity Act 1984 (WA)* (WA Act), for example, states:
A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act.

In *Horne v Press Clough Joint Venture* (1994) EOC 92-59 the Western Australian Equal Opportunity Tribunal found the union failed to take any action to have sexually oriented posters removed from the workplace, failed to take any action to prevent the sexual harassment and failed to act in any real way on the complainant's objections. On that basis, the Tribunal held the union had 'aided and permitted' discrimination.

The use of the word 'permit' in the WA Act distinguishes that provision from the provision in the Equal Opportunity Act. It may provide a stronger basis from which to argue that the WA Act covers inaction as well as action on the part of the secondary offender.

However, some cases decided under the predecessor to section 105 and section 106 of the Equal Opportunity Act have also suggested inaction in certain circumstances could give rise to secondary liability.

In *Lazos Leslie v Australian Workers Union* [1999] VCAT 635 VCAT said it would only be in unusual circumstances that inaction could fall within the prohibition in the predecessor section 105 or section 106, such as where there was a reasonable expectation that a person would take some action. Similar views were expressed in *Kafantaris v City of Yarra* [2005] VCAT 2591, where it was observed 'it may well be that s 98 contemplates omission as well as commission, at least where it can be said that there was a duty or legitimate expectation that the relevant person would act' [23]. Any person failing to act on complaints of ongoing sexual harassment of an employee by a supervisor could be an example of this, because the person could be 'authorising' the behaviour.

Similarly, in *Mitchell v Clayton Utz [No 3]* [2010] NSWADT 100 (*Mitchell v Clayton Utz*) the NSW Anti-Discrimination Tribunal considered whether liability arose under section 52 of the Anti-Discrimination Act 1977 (NSW) which says '[i]t is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act'. That section, unlike the Victorian section, also contains the word 'permit'. The Tribunal said:

> The effect of s 52 is that a person who contributes to an act of unlawful discrimination becomes jointly liable for the conduct. The provision has seldom been used. It has most commonly been applied, not to the actions of employees, but to the actions of third parties such as unions (*Horne v Press Clough Joint Venture* (1994) EOC 92–556), employment agencies (*Elliott v Nanda* (2001) 11 FCR 240) and companies other than the employer (*Molony v Golden Ponds Corporation Pty Ltd* (1995) EOC 92–674) (*Mitchell v Clayton Utz* [13])²

The issue was whether two individuals 'permitted' others to sexually harass Mr Mitchell. This case involved an application by Mr Mitchell to amend his complaint to include the aiding and abetting allegations. The Tribunal decided against Mr Mitchell and refused to allow the amendment sought. In the course of its decision, however, it commented on the requirements necessary to prove a claim of secondary liability under section 52. In particular, the Tribunal noted:

> The second element of contributory liability has four aspects:

1. the person alleged to have contributed to the act knew or had reason to suspect that the principal wrongdoer was going to engage in an act of unlawful discrimination;

2. the person had power to prevent that act;

3. the person defaulted in some duty of control or capacity to interfere with the conduct of the principal wrongdoer; and

In Walgama v Toyota Motor Corporation [2007] VCAT 1318 VCAT rejected this view and found section 98 of the 1995 Act did not permit a claim based on inaction. VCAT pointed to the absence of the word ‘permit’ in section 98 (continued in the current provisions) as the basis for this view. VCAT found:

Section 98 of the statute prohibits the person from requesting, instructing, inducing, encouraging, authorising or assisting another person to contravene the provisions of Part 3, 5 or 6 of the statute. Part 3 deals with discrimination, Part 5 deals with sexual harassment and Part 6 deals with victimisation. The persons alleged to have authorised encouraged or assisted the alleged wrongful act are Messrs Nikolovski, Adelwohrer, Atsiaris and Ms McCarthy. The first three are supervisors with line responsibility for Mr Walgama and Ms McCarthy is a member of the Human Resources Group. In all cases the complaint seems to be of inaction rather than that any of these individuals took affirmative steps. Section 98 of the Victorian Act, which I paraphrased above, stands in contrast to a number of other State and Federal pieces of anti-discrimination legislation which prohibit not only the encouragement of unlawful discriminatory activity but also prohibit persons from ‘permitting’ that conduct. The absence of such a reference in the Victorian statute means that mere inaction, such as alleged here, cannot constitute a breach of Section 98. This part of the complaint fails [93].

Different legislation is considered and different views expressed in these cases. Clarification is thus needed of whether, and if so under what circumstances, inaction can give rise to secondary liability under section 105 and section 106 of the Equal Opportunity Act.

**Discriminatory advertising**

Section 182 of the Equal Opportunity Act makes it a criminal offence to publish, display or authorise the publication or display of an advertisement that could be reasonably understood as indicating that any person intends to engage in any conduct that would amount to discrimination, sexual harassment or victimisation. An employer, recruiter and publisher, for example, may be criminally liable for posting a discriminatory job advertisement seeking people of a particular race, age or sex for a position, without being able to rely on an exception or exemption.

Under section 183 it is a defence to a charge of discriminatory advertising that a person took reasonable precautions and exercised due diligence to prevent the publication and display.

Proceedings may be brought by the Commission, a member of the police force, or any other authorised person as detailed in section 180.

**Discriminatory requests for information**

Section 107 of the Equal Opportunity Act states:

(1) A person must not request or require another person to supply information that could be used by the first person to form the basis of discrimination against the other person.

(2) For the purpose of subsection (1), it is irrelevant whether the request or requirement is made orally, in writing, in an application form or otherwise.

Section 108 provides an exception to these requests if the information requested is reasonably required for a purpose that does not involve prohibited discrimination. The person who requests or requires another to supply information has the burden of proving the information is required for the purpose that does not involve discrimination. They must also not disclose or communicate this information to another person unless it is necessary to do so, and must destroy or identify the information when it is no longer required.

Section 107 and section 108 are not limited to any particular area of public life covered by the Equal Opportunity Act, such as work, education, accommodation. However, case law has shown the particular application of these sections in the employment context. Employers asking for medical information need to be mindful of their duty under section 107 of the Equal Opportunity Act.
to not request or require another person to supply information that could be used by the first
person to form the basis of discrimination against the other person.

In *Harrison v Department of Education and Training [2017] VCAT 1128* the complainant alleged
her employer directly discriminated against her when it requested a report from the complainant's
doctor about her conditions. She argued this was unfavourable treatment because of her disability
and also in breach of section 107. Senior Member Burdon-Smith stated to succeed in this latter
claim, the complainant must establish that the respondent requested medical reports from her
doctor and this was unfavourable to her, and that the requests were made for the purpose of
discriminating against her [197]. In addition the complainant ‘bears the burden of proving that the
information sought could have been used to treat her unfavourably or impose unreasonable
requirements on her’ [207].

VCAT found the report was sought by the respondent when the complainant was seeking to return
to work after an illness, and that the purpose was 'to have a full and comprehensive report in order
to properly understand the nature of the applicant's [complainant's] current medical concerns and
how to properly accommodate them' [211]. The complainant did not satisfy VCAT that the medical
report was to be used to discriminate against the complainant directly or indirectly.

1 Compare this with the position in NSW where the relevant provision is in slight different terms. In the decision of the
New South Wales Anti-Discrimination Tribunal in *Mitchell v Clayton Utz [No 3] [2010] NSWADT 100* [24] it was held 'the
first element in establishing what is known as 'contributory' liability under s 52 is to establish that there was an unlawful
contravention of the Act. It is this contravention which triggers the liability of third parties'. See also *Dixon v RNJ Sicame Pty Ltd; Sims v RNJ Sicame [2002] NSWADT 154* [42] and *Cooper v Human Rights & Equal Opportunity Commission [1999] FCA 180* [27].

2 See also Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (Federation Press, 2008)

3 The penalty is 60 units for a person and 300 penalty units for a body corporate, detailed in *section 184* of the Equal
Opportunity Act.
Vicarious liability

Employers can be held legally responsible for acts of discrimination or harassment that occur in the workplace or in connection with a person's employment. This is known as vicarious liability.

In order to minimise their liability, employers need to demonstrate they have taken all reasonable steps to prevent discrimination or harassment from occurring in the workplace and they have responded appropriately to resolve incidents of discrimination and harassment.

Section 109 of the Equal Opportunity Act provides:

**Vicarious liability of employers and principals**

If a person in the course of employment or while acting as an agent—

(a) contravenes a provision of Part 4 or 6 or this Part; or

(b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of Part 4 or 6 or this Part—

both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commissioner for dispute resolution or make an application to the [Victorian Civil and Administrative] Tribunal against either or both of them.

Section 110 goes on to provide a defence against vicarious liability. It relevantly provides:

**Exception to vicarious liability**

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

In proving a claim of vicarious liability, therefore, both the following need to be established:

- the conduct complained of must have occurred in the course of employment or while acting as an agent for another

- the employer or principal has not taken reasonable precautions to prevent the employee or agent from contravening the Equal Opportunity Act.

**In the course of employment**

Various cases have tested how far reaching the concept of 'in the course of employment' can be.

In *Coyne v P & O Ports* [2000] VCAT 657 (*Coyne v P & O Ports*) the Victorian Civil and Administrative Tribunal (VCAT) considered whether the employer was vicariously liable for the conduct (in this case, sexual harassment) of its employee, Mr Buttigieg.

The employer argued the conduct did not occur 'in the course of employment'. The claim related to an act of inappropriate sexual contact by Mr Buttigieg with the complainant, Ms Coyne. The employer's position was that Mr Buttigieg's conduct was not in the course of his employment as it was 'plainly tortious (and) the wording of section 102 of the Act, read ordinarily, does not cover a plainly tortious conduct of its employees'. The employer sought to rely on the principles of vicarious liability under the 1995 Act with common law notions of vicarious liability. VCAT summarised the employer's position as follows:

Before an employee's conduct may be said to have been 'in the course of employment' the injury caused must have occurred whilst the employee is 'doing something which is part of his service to his employer or master or incidental to the employment': *South Maitland Railways Pty Ltd v James* [1943] HCA 5 (per Starke J). Alternatively, the employee's conduct may also be within 'the course of employment' if expressly or impliedly authorised by the employer.
On this basis, it was submitted that Mr Buttigieg's conduct in exposing himself and grabbing the Complainant's vagina was not merely an improper mode or means of carrying out his authorised tasks but it was also a criminal sexual assault. As such, it was contended Mr Buttigieg's conduct did not occur in the course of his employment. It was said to be in no way related or incidental to, or consequent upon, anything required of him in his role as an employee in the canteen area where his job was to collect rubbish, clear tables and clean the canteen.

By contrast, the complainant argued the term 'in the course of employment' ought to be given a wide interpretation and that this was consistent with past decisions. Reference was made to *Hopper v Mt Isa Mines Ltd [1997] QADT 3; Tran v Swinburne University [2000] VCAT 1083; McKenna v State of Victoria [1998] VADT 83; Gray v State of Victoria [2000] VCAT 1281 and Greenhalgh v National Australia Bank [1997] HREOCA 2.*

VCAT concluded common law concepts of what amounts to 'in the course of employment' ought not to be applied to the interpretation of section 102 of the *1995 Act*. It came to this view for the following reasons:

- applying the common law concepts would not further the objects of the Act
- the 1995 Act is beneficial and remedial legislation and, therefore, 'should be given a “fair, large and liberal” interpretation' and ought to be given an interpretation that as far as possible aids the elimination of sexual harassment (citing **IW v City of Perth (1997) 191 CLR 1**)
- the concept of 'in the course of employment' in the 1995 Act ought to be construed by reference to 'the intention of the legislature underlying the Act … the Act is an example of legislation protecting human rights and dignity'. (Reference was also made to the comments of Justice Dawson and Justice Gaudron in **IW v City of Perth (1997) 191 CLR 1** in which they stressed ‘there is special responsibility to take account of and give effect to the purpose of legislation designed to protect basic human rights and dignity’)
- the mere fact that Parliament used words that had a common law meaning did not necessarily evidence that it intended that meaning to be attributed to those words in this instance
- section 102 must contemplate that an employer may be held vicariously liable for conduct that it had not expressly authorised, otherwise section 102 (which establishes the defence to vicarious liability would be unnecessary).

VCAT sought guidance from cases in the workers' compensation jurisdiction in interpreting the term 'in the course of employment'. In reviewing the case law on this point, VCAT noted the courts' approach to this issue has moved to a fairly flexible one. At page 12 (of **Coyne v P & O Ports**), VCAT summarised the interpretation given in the workers' compensation context as follows:

> [A]n injury might be said to have arisen 'out of or in the course of employment' if sustained in an interval or interlude and occurring within an overall period or episode of work. That would be so if the employer had, expressly or impliedly, induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way.

VCAT went on to say:

In our view, even at this infancy stage of its jurisprudence, a restricted approach to the phrase 'in the course of employment' ought not to be adopted in sexual harassment situations as regulated by the Act. That could tend to defeat the objectives of the Act … it is not unlikely that the prohibition of sexual harassment in the workplace may be at serious risk of being frustrated if a narrow approach were adopted. That could be so, for instance, if the words 'in the course of employment' were taken to cover only conduct that related to anything required of the employee by his employer. One effect of that could be that employers may not
be held vicariously responsible for a wide variety of conduct constituting sexual harassment in the workplace. This is particularly in so far as, strictly speaking, sexual harassment of a fellow employee cannot be said to be incidental to the purposes for which the discriminator-employee is engaged by the employer. Such a result cannot have been intended by the legislature when enacting the Act.

The words 'in connection with' mean no more than that the relevant acts were done during the course of the person's employment or whilst he or she was ostensibly performing duties of an agent.

Applying these principles to the facts in this case, VCAT considered Mr Buttigieg's conduct occurred in the course of his employment for the purpose of the vicarious liability provisions of the 1995 Act.

An employer may, therefore, be held liable for conduct that occurs even where that conduct occurs outside normal working hours and even at times where that conduct occurs outside work premises. See, for example, South Pacific Resorts Hotels Pty Ltd v Trainor [2005] FCAFC 130; Cooper v Western Area Local Health Network and Locke [2012] NSWADT 39

**Reasonable precautions defence**

If a complainant can establish an employee or agent engaged in conduct that, if engaged in by the employer or principal, would constitute a breach of the Equal Opportunity Act, then both the employee/agent and the employer/principal will be held liable. The exception is when the employer/principal can show they took all reasonable precautions to prevent the discrimination, sexual harassment or victimisation.

The steps that need to be taken to avoid liability under section 110 are not specified in the legislation. The definition of what is a 'reasonable precaution' will vary, depending on factors such as:

- the size of the business or operation
- the nature and circumstances of the business or operation
- available resources
- business and operation priorities
- practicability and costs of the measures.

However, some of the steps that employers/principals may be expected to take include:

- identifying potential areas of non-compliance
- developing a compliance strategy, such as undertaking training or developing policies
- reviewing or improving compliance policies or strategies where relevant.

The Victorian courts have considered what practical steps are required of a duty holder to discharge this burden. In Howard v Geradin Pty Ltd t/a Harvard Securities [2004] VCAT 1518 for example, the employer avoided being held vicariously liable for claims of sexual harassment. It had in place a sexual harassment policy, informed all employees of it, implemented it and provided regular informal feedback about sexual harassment. While it was held the steps taken had not been 'ideal', or of the highest possible standard, they were sufficient to provide a successful defence.

A similar interpretation of the 1995 Act was offered in Walgama v Toyota Motor Corporation Australia Ltd [2007] VCAT 1318 in which Mr Walgama claimed he had been discriminated against because of his race and that he had been subjected to several instances of sexual harassment.

In considering whether Toyota had taken 'all reasonable precautions', VCAT considered the following steps taken by Toyota were sufficient to discharge the burden:
• rolling out a workplace policy to all employees, which had been done three years prior to the incident in question
• meeting with all employees to discuss the policy
• issuing all employees with a booklet explaining the policy.

In discussing what is reasonable for the purposes of avoiding vicarious liability, VCAT noted the criteria for duty holders is 'not very high or very exacting'. VCAT went on to say 'management cannot be expected to supervise every word that comes out of the mouth of a worker' [98].

VCAT's focus in each of these cases was on the relevant policies that the respective duty holders had in place, the implementation of these policies, and that employees had been trained on these policies. These steps were crucial in establishing successful defences to the allegations of discrimination, without the policies, implementation or training having to be of optimum standards.

The importance of an employer having effectively communicated its policies to its employees was emphasised in State of Victoria v McKenna [1999] VSC 310 (discussed in Inferring a reason for the treatment). In this case, Victoria Police had distributed a folder on sexual harassment obligations to senior officers. It also made the training a prerequisite for promotion. However, none of the key players in that case had received any training. The materials distributed had been aimed principally at managers, supervisors and contact officers of the police force. A copy had been kept at the office of the officer in charge of each station. On this basis, VCAT held the burden on the employer to take all reasonable precautions had not been discharged.

In a sexual harassment complaint, the New South Wales Administrative Decisions Tribunal, in Cooper v Western Area Local Health Network [2012] NSWADT 39 (Cooper v Western Area Local Health Network) found the employer had discharged its obligations by requiring employees to:

• commit to abiding by the company's code of conduct (which explicitly prohibited sexual harassment)
• attend training on sexual harassment and bullying at the time of employment and again when the employee was promoted.

In considering whether the employer had taken all reasonable steps to prevent the employee from contravening the Anti-Discrimination Act 1977 (NSW), the Tribunal noted:

> It is not enough for an employer merely to institute policies; the policies need to be implemented and brought to the attention of the employees in a meaningful way. By failing to do so the employer may be found to have authorised the conduct (Cooper v Western Area Local Health Network [83]).

In this case, the steps taken by the employer were considered sufficient to meet the defence. The Tribunal found it had taken all steps it could have to ensure its employees were aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they did not do so. As a result, the employer was not found to be vicariously liable for the sexual harassment that had occurred.

Zareski v Hannanprint Pty Ltd [No 2] [2012] NSWADT 65 provides an example of the level of training required for employers to avoid liability for discrimination claims.

Mr Zareski brought a number of complaints of race, disability and carer's discrimination against Hannanprint. These complaints were not upheld, but the Tribunal found that Mr Zareski's team leader had victimised him by mocking him for bringing the discrimination complaints.

As a consequence, the Tribunal ordered further training that Hannanprint must provide to its human resources specialists, managers and supervisors.

Hannanprint proposed to the Tribunal that several training sessions would be provided by an external law firm. Each session would be attended by a maximum of 12 people. The sessions would cover areas such as complaint handling procedures, processes for conducting formal investigations, and recording interviews. The Tribunal approved this proposal. Though no finding of
liability was made regarding the allegations of discrimination, bullying and harassment, the Tribunal also said that refresher training in these areas must be provided.

The New South Wales legislation regarding vicarious liability in discrimination matters and the ‘all reasonable steps’ defence does not differ significantly from the Victorian legislation. The decisions discussed above indicate the standard expected of employers to demonstrate that all reasonable precautions were taken to prevent the alleged act(s) has not been set high. See *Howard v Geradin Pty Ltd [2004] VCAT 1518*. Where there is a finding of vicarious liability, specific and detailed orders can be made for future training requirements with which the duty holder must comply.

**Multiple respondents**

In the matter of *Chopra v Department of Education & Training [2016] VCAT 1452* VCAT made the following observations about multiple parties in cases of vicarious liability:

- here vicarious liability exists, the person who commits a wrongful act and the one who is held vicariously liable are jointly liable. Each person is liable for the entire loss. If one person satisfies the loss, the liability of the others is discharged.

- it is unnecessary to name individual employees as respondents to establish an employer's vicarious liability. A complainant may choose to sue one or all the possible respondent.

- if the first respondent does not propose to call a person the complainant wishes to obtain evidence from, the complainant may seek to have that person summoned to attend under section 104 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) [16]–[21].
Racial and religious vilification

The *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) makes racial and religious vilification unlawful in Victoria.

The RRTA commenced operation on 1 January 2002. Until then, Victoria and the Northern Territory were the only Australian states and territories without legislation prohibiting racial vilification.¹

Under section 7 and section 8 of the RRTA, racial and religious vilification is the incitement of hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons on the grounds of their race or religious belief or activity.

The RRTA also criminalises serious racial and religious vilification in section 24 and section 25.

Section 18C of the federal *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) prohibits racial hatred, rather than racial vilification. It makes unlawful acts that are reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people because of their race, colour or national or ethnic origin. The Racial Discrimination Act does not criminalise racial hatred.² Complaints under the Racial Discrimination Act can be made to the Australian Human Rights Commission.

Tests for racial and religious vilification differ between jurisdictions, but there are many common principles. Legal protections are also founded in Australia’s obligations in relation to racial and religious hatred under international conventions including the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Unlike discrimination laws, the RRTA is not limited to conduct in specific areas of public life, such as at work, at school, or in the provision of goods and services. Rather, it applies to any vilifying conduct that happens in public. Vilifying conduct in the street, at a community event or in the media, for instance, is covered by the RRTA.

This chapter discusses the application of the RRTA and other relevant anti-vilification laws. It does not consider the intersection between anti-discrimination laws and behaviour constituting racial and religious vilification.

**Purpose and objects of the Racial and Religious Tolerance Act**

The purposes of the RRTA, outlined in section 1 are:

(a) to promote racial and religious tolerance by prohibiting certain conduct involving racial or religious vilification;

(b) to provide a means of redress for the victims of racial and religious vilification.

The objects of the RRTA, set out in section 4(1), are:

(a) to promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy;


(b) to maintain the right of all Victorians to engage in robust
discussion of any matter of public interest or to engage in, or
comment on, any form of artistic expression, discussion of
religious issues or academic debate where such discussion,
expression, debate or comment does not vilify or marginalise any
person or class of persons;

(c) promote dispute resolution and resolve tensions between
persons who (as a result of their ignorance of the attributes of
others and the effect that their conduct may have on others) vilify
others on the ground of race or religious belief or activity and
those who are vilified.

In Victoria, the right to freedom of expression is protected by the Charter of Human Rights
and Responsibilities, which is modelled on article 19 of the International Covenant on Civil
and Political Rights, as outlined in the Explanatory Memorandum (pages13–14). Section
15(2) of the Charter provides that every person has the right to freedom of expression, which
includes the freedom to seek, receive and impart information and ideas of all kinds.

However, under section 15(2) of the Charter, the right may be subject to lawful restrictions if
it is reasonably necessary to protect the rights and reputation of other persons, or to protect
national security, public order, public health or public morality. It can only be limited if the
limitation is lawful, reasonable and proportionate, as detailed at section 7(2).

The preamble to the RRTA acknowledges 'the importance of freedom of expression, the
democratic value of the equal participation of all citizens in society, and the desire of
Parliament to support racial and religious tolerance'. It also highlights that racial and religious
vilification diminishes dignity and sense of self-worth and belonging to the community.
Vilification also reduces the ability for people to contribute to, or fully participate in, all social,
political, economic and cultural aspects of society as equals. The RRTA attempts to balance
the right to freedom of expression with racial and religious tolerance.

To this end, the RRTA contains provisions that:

- make racial vilification (section 7) and religious vilification (section 8) unlawful
- make conduct that is engaged in 'reasonably and in good faith' in an artistic performance,
in the public interest, in fair and accurate reporting, or for a genuine academic, artistic,
religious or scientific purpose (section 11), and private conduct (section 12) exempt from
the definition of unlawful vilification.

Like the Equal Opportunity Act does for discrimination, the RRTA also:

- makes victimisation of a person who makes a complaint of racial or religious vilification or
takes specified action under the RRTA unlawful (section 13)
- makes authorising or assisting vilification or victimisation unlawful (section 15)
- makes an employer or principal vicariously liable for the conduct of an employee or agent
who breaches the RRTA (subject to an exception that the employer or principal took
'reasonable precautions' to prevent the breach) (section 17 and section 18)
- provides for dispute resolution by the Victorian Equal Opportunity and Human Rights
Commission (the Commission) (under the existing mechanisms for conciliation of
complaints under the Equal Opportunity Act) and direct applications to the Victorian Civil
and Administrative Tribunal (VCAT) (Part 3).

In addition, the RRTA provides for civil remedies for a breach of the RRTA (section 23C) and
criminalises serious racial and religious vilification (section 24 and section 25).

**Unlawful racial and religious vilification**

The legal test for vilification under the RRTA is different from the ordinary dictionary definition
of vilification – to 'speak evil of, defame, traduce'. Rather, the RRTA prohibits public conduct
that *incites* hatred against, serious contempt for, revulsion or severe ridicule of a person or
class of persons on the ground of their race or religious belief or activity.\textsuperscript{3} The RRTA is
directed at action that moves the emotions of a third party.

**Section 7** of the RRTA sets out the prohibition on racial vilification:

1. A person must not, on the ground of the race of another person or
class of persons, engage in conduct that incites hatred against,
serious contempt for, or revulsion or severe ridicule of, that other
person or class of persons.

2. For the purposes of subsection (1), conduct—
   a) may be constituted by a single occasion or by a number of
   occasions over a period of time; and
   b) may occur in or outside Victoria.

**Note**

"Engage in conduct" includes use of the internet or e-mail to publish or
transmit statements or other material.

**Section 7** and **section 8** of the RRTA are drafted in effectively the same terms, except that
**section 7(1)** refers to 'race' whereas **section 8(1)** refers to 'religious belief or activity'. Cases
considering either section is helpful in interpreting the other. Cases discussing these
provisions are set out below.

**Meaning of 'race'**

The term 'race' is broadly defined in **section 3** of the RRTA to include:

1. colour;
2. descent or ancestry;
3. nationality or national origin;
4. ethnicity or ethnic origin;
5. if 2 or more distinct races are collectively referred to as a
   race—
   i) each of those distinct races;
   ii) that collective race.

As outlined in the **Explanatory Memorandum** (page 3), this definition replicates the definition
of 'race' in **section 4** of the Equal Opportunity Act. To date, the definition of 'race' has not
been in dispute in any of the cases under the RRTA.

The definition of 'race' distinguishes 'nationality' and 'national origin'. Courts have established
national origin is acquired and fixed at birth and incapable of change. Nationality is a matter
of citizenship, and a person may acquire a number of different nationalities over the course
of a lifetime. See **Australian Medical Council v Wilson** [1996] FCA 1618, 75; (1996) 68 FCR
46; see also **Miller v Mieson** (1991) EOC 92–341.

Courts considering comparable legislation around the world have established 'ethnic origin'
includes:

- Jews in New Zealand. See **King-Ansell v Police** [1979] 2 NZLR 531.
- Sikhs in the United Kingdom. See **Mandla (Sewa Singh) v Dowell Lee** [1983] 2 AC 548.

\textsuperscript{3} **Racial and Religious Tolerance Act 2001** (Vic) ss 7, 8.

\textsuperscript{4} The court found the group of people were criticised not because of their Jewish ethnicity but because of their
Court found non-Orthodox Jews were not a race for the purposes of the **Equal Opportunity Act 1984** (WA)).

Meaning of 'religious belief or activity'
The term 'religious belief or activity' is defined in section 3 of the RRTA as:

(a) holding or not holding a lawful religious belief or view;
(b) engaging in, not engaging in or refusing to engage in a lawful religious activity.

As outlined in the Explanatory Memorandum (page 3), this definition replicates the definition of 'religious belief or activity' in section 4 of the Equal Opportunity Act, which also refers to a 'lawful religious belief' (that is, a religious belief or activity that is not contrary to the law).

In Fletcher v Salvation Army [2005] VCAT 1523 VCAT referred to Sir John Latham's observation in the context of section 116 of the Commonwealth Constitution:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance [9].

The term 'religion' is not defined in the RRTA and no single legal definition of the term has been developed. However, in Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120 (Scientology Case), Chief Justice Mason and Justice Brennan held for the purposes of the law, the criteria for religion are twofold:

First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief … Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice [133].

Justices Wilson and Deane considered there was 'no single characteristic' that constituted a 'formalized legal criterion, whether of inclusion or exclusion, of whether a particular system of ideas and practices constitutes a religion' [17]. Their Honours considered the following factors helpful but not determinative of whether a collection of ideas or practices should be characterised as a 'religion':

One of the more important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has a 'religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas

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5 Tantum religio potuit suadere malorum is a quotation from the Roman poet Lucretius (96BC–55BC) and has been translated to mean 'So potent was religion in persuading to evil deeds'.
are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying the beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth and perhaps more controversial, indicium (compare Malnak v Yogi (1979) 592 F (2d) 197) is that the adherents themselves see the collection of ideas and/or practices as constituting a religion [173].

In the Scientology Case, the High Court held the beliefs, practices and observances of the Church of Scientology constituted a religion for the purposes of the Pay-Roll Tax Act 1971 (Vic).

This case has been followed in a number of other cases in relation to the interpretation of anti-discrimination and migration legislation. See, for example, OV v QZ [No 2] [2008] NSWADT 115 (Anti-Discrimination Act 1977 (NSW) s 56); Dixon v Anti-discrimination Commissioner of Queensland [2004] QSC 58 (Anti-Discrimination Act 1991 (Qld) s 7(1)); NAVZ v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 13 (Migration Act 1958 (Cth)).

**Meaning of 'incite' and 'vilification'**

The test for unlawful vilification under the RRTA focuses exclusively on the effect of conduct on the particular audience that was exposed to it – that is, whether a third party was incited to hatred or other relevant emotions. It is irrelevant what motivated the respondent to engage in the conduct or whether the conduct was offensive.

As explained by Justice of Appeal Nettle in the leading Victorian RRTA case, Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284 (Catch the Fire Ministries):

> [T]he question under section 8 is not whether the conduct offends a group of persons but whether it incites hatred or other relevant emotion of or towards that group of persons. Things might well be said of a group of persons which would be deeply offensive to those persons and yet do nothing to encourage hatred or other relevant emotion of or towards those persons [67].

The court accepted the word 'incites' should be interpreted in accordance with its plain and ordinary meaning – to urge, spur on, stir up, animate or stimulate (Nettle JA [14], Neave JA [159]).

The court also confirmed the threshold for contravening the RRTA is high – the alleged conduct must incite 'extreme responses' [34], [173]. Conduct that is merely critical, offensive or insulting will not amount to unlawful vilification.

In Fletcher v Salvation Army [2005] VCAT 1523 VCAT interpreted the word 'incites' to include conduct that 'inflames' or 'sets alight' [5]. It noted:

> The key word is 'incites'. In its context, this does not mean 'causes'. Rather it carries the connotation of 'inflame' or 'set alight'. The section is not concerned with conduct that provokes thought; it is directed at conduct that is likely to generate strong and negative passions in the ordinary person. An example of such passions would be where persons are so moved that violence might result.

> It is clear the test to be applied is an objective one. The outcome does not depend upon the reaction of the person making the complaint. Nor does it depend upon whether the conduct was intended to incite hatred [9]–[6].

**Assessing conduct 'as a whole'**

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To determine whether conduct ‘incites’ for the purposes of the RRTA, the conduct must be assessed ‘as a whole’. *Catch the Fire Ministries* centred around statements made by a pastor about Muslim people, their beliefs and practices. Justice of Appeal Nettle found it was relevant to consider whether the pastor’s encouragement to his audience to love and to ‘witness to’ Muslims would have prevented the seminar as a whole from inciting hatred by non-Muslims towards Muslims. His Honour stated the correct test was whether the seminar or statements ‘as a whole’ incited hatred of Muslims based on their religious beliefs [79]. Justice Neave also considered the seminar audience was likely to be affected by the overall impression created by the presentation, rather than having the opportunity to undertake a detailed textual analysis' of it [191]–[192]. Justice Ashley agreed the meaning of a publication (including orally) should be determined by 'consideration of its entirety rather than by discrete examination of its component parts' [132].

**The balance and accuracy of statements**

In *Catch the Fire Ministries*, the majority of the Supreme Court of Appeal found the balance and accuracy of statements does not determine whether those statements were likely to incite hatred or other relevant emotions. Justice Nettle explained:

> Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. As the same time, statements about the religious beliefs of a group of persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. In any event, who is to say what is accurate or balanced about religious beliefs? [36]

In *Australian Macedonian Advisory Council Inc v LIVV Pty Ltd t/a Australian Macedonian Weekly* [2011] VCAT 1647 ([Australian Macedonian Advisory Council]) VCAT found it 'is not for this Tribunal to determine whether the acts complained of in the article are an accurate recounting of history; the truth or otherwise of what might be seen as extreme allegations is of little relevance' [63].

**The relevant audience**

In determining whether conduct ‘incites’ hatred or other relevant emotions for the purposes of the RRTA, the nature of the relevant audience must be considered [45].

Justice Nettle observed in *Catch the Fire Ministries* that:

> Evidently, there can be no incitement in the absence of an audience. It is not a contravention of s 8 to utter extortions to religious hatred in the isolation of an empty room. If conduct is to incite a reaction, it must reach the mind of the audience … Of course, where statements are published generally as they might be in a book or newspaper or by posting on a web site, one may need to have regard to all manner of persons who are likely to see them and absorb them [16].

The Court of Appeal adopted a different approach. Justice of Appeal Neave (Justice Ashley agreeing) said it is necessary to ‘consider the effect of the words or conduct on an ‘ordinary’ member of the class to which it is directed, taking into account the circumstances in which the conduct occurs’ [158]. This is because it may be inappropriate to import an element of reasonableness when assessing vilifying conduct. Justice Nettle, on the other hand, considered the test should be applied with reference to the 'perception of a reasonable member of the class of persons to whom conduct is directed' (emphasis added).

The ‘ordinary member’ test set out by Justice Neave in *Catch the Fire Ministries* has been adopted in a number of later cases, including by the New South Wales Court of Appeal in

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7 Ibid [36] (Nettle J), [178]–[179] (Neave J). Ashley J, at [132], left open the question of whether VCAT's consideration of balance in the seminar presentation led it into error.

8 Citing *Judeh v Jewish National Fund of Australia* [2003] VCAT 1254 [38]; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [14]–[16], [132], [161].
In *Bennett v Dingle* [2013] VCAT 1945 VCAT considered the nature of the relevant audience in relation to a complaint of religious vilification. The respondent made comments to the Jewish complainant while they were each walking their dogs at a local park. Applying the 'ordinary member' test, VCAT noted the complainant might be seen as the entire audience because the words were directed to him (despite the comments also being overheard by his friend). If the friend constituted the entire audience, it is unlikely that he would have been 'incited' because of his 'particular characteristic as a friend' of the complainant [42]. VCAT assumed the relevant audience was 'the ordinary member of the class of persons being non-Jewish members of the public present in the park when the words were uttered' [43]. Given the possible breadth of this class, VCAT noted 'consideration might be given to how any ordinary (not necessarily reasonable) person might perceive the words uttered' [43]. VCAT concluded even on a generous interpretation of who comprised the audience (that is, anyone in the park), it was doubtful that 'the ordinary non-Jewish person would perceive the words as going beyond venting' between the parties (particularly when the words were directed to the complainant) [45].

In *Australian Macedonian Advisory Council*, an article was published in the Australian Macedonian Weekly titled 'Who in this celestial world gave the Greeks the right to take away the Macedonian language'. VCAT found the article was incapable of inciting hatred because it was 'preaching to the converted' [68]. VCAT emphasised even though the article was published on the respondent's website, it was unlikely to be accessed by the public at large or by people who did not read the Macedonian language. VCAT concluded:

> For the average Macedonian reader, this article is probably just 'preaching to the converted' and is not likely to stir up such raw emotion as to breach the Act. I suspect that the average non-Macedonian reader who might stumble across the article on the website or who might flick through it at the local shop would just wonder what it was all about without being incited to any extreme emotion about Greeks [68].

Although VCAT found the article was an 'intemperate and (in many parts) hyperbolical rant' [62], it was not persuaded it breached the RRTA. This approach, however, was not followed in later decisions under the RRTA.

Other standards applied by courts and tribunals (but not necessarily followed) include the:

- 'ordinary reasonable reader'.
  See *National Italian Australian Foundation v Herald and Weekly Times and Andrew Bolt* [2005] VCAT 2704, approving the standard set out in *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77. The standard is borrowed from defamation law, where an ordinary reasonable reader is a 'person of fair intelligence who is not perverse, morbid, suspicious of mind or avid for scandal'. However, the application of this standard in the context of anti-vilification legislation was rejected in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 and *Sunol v Collier [No 2]* [2012] NSWCA 44

- 'ordinary and reasonable member of the public'.
  See *Sunol v Collier [No 2]* [2012] NSWCA 44 [61] (Allsop J)

- 'ordinary person'.
  See *Kahlil v Sturgess* [2005] VCAT 2446; *Fletcher v Salvation Army* [2005] VCAT 1523

- 'reasonable and objective recipient'.

**Proof of a breach**

In *Catch the Fire Ministries*, Justices' Nettle and Neave agreed conduct can be found to 'incite' hatred or other relevant emotions without proof that hatred against, serious contempt
for, or revulsion or severe ridicule of, that person or class of persons actually occurred [14], [154], [160].

In other words, the inciting conduct does not have to 'succeed' in provoking a particular response for there to be a breach of section 8 [154]. Rather, a breach may occur if the words or conduct are 'capable of causing' that response or have the 'tendency to incite' that response [160] (approved in Australian Macedonian Advisory Council Inc v LIVV Pty Limited [2011] VCAT 1647 [65]).

This view has been followed in later cases including Sunol v Collier [No 2] [2012] NSWCA 44 [29] and Australian Macedonian Advisory Council [2011] VCAT 1647 [65].

In Unthank v Watchtower Bible and Tract Society of Australia [2013] VCAT 1810 a former Jehovah's Witness made a complaint about an article published in Watchtower that stated 'apostates are mentally diseased'. Although VCAT noted a casual reader might regard the language as 'hateful' or 'spiteful', the application was dismissed on the basis that there was no evidentiary basis for a finding of incitement (Deputy President, McKenzie [24]).

**Motive and the meaning of 'on the ground of'**

Under the RRTA, the court or tribunal must be satisfied the respondent engaged in conduct that incited hatred or other relevant emotion 'on the ground of' the race or religious belief or activity of a person or a group of persons. Section 9(1) of the RRTA confirms that in determining this, the respondent's motive for engaging in conduct is irrelevant. In Judeh v Jewish National Fund of Australia [2003] VCAT 1254 VCAT held the words 'on the ground of' require that race be 'an actuating or moving factor in the mind of the person who engages in the conduct' [38]. However, this position has not been reflected in later cases.

In Catch the Fire Ministries, the Victorian Court of Appeal found the words 'on the ground of' focus on whether the audience was incited to hatred or other relevant emotion based on religious belief or activity. Justice Nettle found for the purposes of section 8, conduct must incite hatred or other relevant emotion towards a person or group of persons that is based on their religious beliefs. It is irrelevant what moves or actuates the conduct [24]. In doing so, Justice Nettle approved the majority reasoning in Waters v Public Transport Corporation (1991) 173 CLR 349, that reading in a causal link would impede the attainment of the objects in section 17(1) of the Equal Opportunity Act 1984.

Although Justices' Neave and Ashley both agreed with the approach set out by Justice Nettle, both had doubts based on the tension between sections 9(1) and 9(2). These sections provide it is irrelevant whether or not the race or religious belief or activity of a person is the only or dominant ground for the conduct, so long as it is the substantial ground.

Justice Neave noted requiring religious belief or activity to be at least a 'substantial ground' for an inciter's conduct, supports a construction of section 8 that requires a link between religious belief and the motivation of the inciter (Catch the Fire Ministries [149]). It also mirrors anti-discrimination legislation that prohibits discrimination based on particular characteristics and are intended to provide a remedy for people discriminated against on a prohibited ground, even if the discrimination was not based solely on that ground.

Justice Ashley stated section 9(2) 'read naturally' requires race or religious belief to be associated with the 'ground for the conduct'. However, his Honour preferred to follow section 9(1), which clearly states a person's motivation for engaging in conduct is irrelevant [131].

Justice Nettle's approach in Catch the Fire Ministries was followed by VCAT in Australian Macedonian Advisory Council [2011] VCAT 1647. VCAT agreed the phrase 'on the ground of race' does not refer to the ground that caused the alleged inciter to act. It considered it refers to the ground on which people exposed to the alleged inciter's words were incited to hatred or other relevant emotion against another person or group [65].

**Conduct that breaches the RRTA**

There have only been two successful cases of vilification under the RRTA.
1. In _Khalil v Sturgess [2005] VCAT 2446_ VCAT found the complainants had been racially vilified when they were subjected to repeated racial abuse from their neighbours: They were inciting anyone who heard their comments to behave in the same way. Their comments by their nature incite serious contempt, severe ridicule and hatred against the Khalils. I am satisfied that the comments were made because of the Khalils' colour and Arabic origin. This applies not only to those comments which were expressly racial in nature, but also to the obscenities, sexual references and other abuse which the respondents directed to the Khalils. The comments were made in a location and loudly enough that I am satisfied that they were intended to be heard not just by the Khalils but by any neighbour or member of the public in the vicinity [51]–[53].

2. In _Ordo Templi Orientis v Legg [2007] VCAT 1484_ VCAT found a website, produced and maintained by the respondents, vilified the complainants on the ground of their religious belief. The website claimed the Ordo Templi Orientis was a protected paedophile group and linked the Ordo Templi Orientis to alleged satanic and/or organised ritual sexual abuse of children. The website demanded readers take action.

**Conduct found not to breach the RRTA**

Conduct found not to breach the RRTA includes:

- an article in a Jehovah's Witness publication that stated 'apostates are mentally diseased'. See _Unthank v Watchtower Bible and Tract Society [2013] VCAT 1810_
- a comment made at a public park that the complainant was a 'big fat Jewish slob' and 'Hitler was right about you bastards’. See _Bennett v Dingle [2013] VCAT 1945_
- a newspaper advertisement with a map of Israel that did not refer to Palestine. See _Judeh v Jewish National Fund of Australia [2003] VCAT 1254 [44]_
- an article criticising the Italian government that stated 'the Italian Government did what we imagine Italians do and panicked'. _National Italian Australian Foundation v Herald and Weekly Times Pty Ltd [2005] VCAT 2704 [25]_
- an article on the front page of a newspaper stating 'Islam must change'. See _Sisalem v The Herald & Weekly Times Ltd [2016] VCAT 1197_
- an article in a Slav-Macedonian newspaper titled 'Who in this celestial world gave the Greeks the rights to take away the Macedonian language?' See _Australian Macedonian Advisory Council Inc v LIVV Pty Limited [2011] VCAT 1647_
- statements made during a prison course on Christianity that offended a man who claimed to be a traditionalist witch and a Wiccan. See _Fletcher v Salvation Army [2005] VCAT 1523_.
- a t-shirt with the words 'Tony Abbott – get your rosaries off my ovaries'. See _Francis v YWCA Australia [2006] VCAT 2456_.

Ultimately, whether conduct breaches the RRTA depends on all the circumstances of the case.

**Exceptions to racial and religious vilification**

As outlined on page 6 of the _Explanatory Memorandum_ the RRTA includes exceptions that are designed to strike a balance between freedom of speech and freedom from racial and religious vilification. The exceptions apply to private conduct and to certain public conduct engaged in 'reasonably and in good faith'. These exceptions are discussed below.

**Public conduct exceptions**

The public conduct exceptions are contained in section 11 of the RRTA:
(1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest; or

(c) in making or publishing a fair and accurate report of any event or matter of public interest.

(2) For the purpose of section (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.

Section 11(2) was added to the RRTA after the decision in Fletcher v Salvation Army [2005] VCAT 152. In that case, VCAT found a genuine religious purpose may include asserting that a particular religion or no religion was the 'true way' and any other way is false [9].

Reasonably and in good faith

In Catch the Fire Ministries, the Court of Appeal considered the meaning of the words 'reasonably and in good faith' for the purposes of section 11(1) of the RRTA.

Justice Nettle found whether conduct was engaged in 'reasonably' must be assessed according to the objective standard of a reasonable person who is a member of an open and just multicultural society (that is, a 'moderately intelligent' and 'tolerant' society). His Honour noted this assessment is not always easy:

A society which consists of varied cultural groups necessarily has the benefit, and bears the burden, of a plurality of standards. Hence, in this society, to speak of persons in general is to speak of persons who in large part have different standards. And to speak of what is reasonable among them it is to invoke an idea which as between them is to a considerable extent informed by different standards. Nevertheless, experience has taught us that reasonable members of an open and just multicultural society are inclined to agree on the basics [95]–[96].

Justice Nettle also commented:

[T]he standards of an open and just multicultural society allow for different views about religions. They acknowledge that there will be differences in views about other peoples’ religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion … It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable [98].

In relation to the 'reasonableness' requirement, Justice Neave noted the RRTA 'reflects the policy judgment that those who derive benefits from living in a society in which they can express their own views about religion must also accept some limits on that freedom' [197].

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Justice Nettle also found whether conduct was 'in good faith' will depend on whether the respondent's subjective honest belief was that the conduct was necessary or desirable to achieve a genuine academic, artistic, religious or scientific purpose [92].

**Artistic work**

The courts are yet to consider the provision of the RRTA relating to artistic work in section 11(1)(a).

Section 11(1)(a) is identical to section 18D of the Racial Discrimination Act, which was considered in *Bropho v Homan Right and Equal Opportunity Commission* [2004] FCAFC 16. In that case, a cartoon appearing in the Western Australian newspaper portrayed the recovery of the head of a Western Australian Aboriginal leader who was said to have died at the hands of young colonial settlers. The cartoon suggested an unseemly desire on the part of some of them to take advantage of public funding to travel to England. The Federal Court held the cartoon fell within the exception in section 18D [104], [111]. Justice French and Justice Carr (Justice Lee dissenting) held rather than being read as an exception to section 18C (which was in effect an exception to the right to free speech), section 18D should be considered as limiting the proscription of section 18C and as such, should be read broadly [72]–[73] (French J).

The Federal Court's reasoning in *Bropho* was followed by the Federal Magistrates Court in *Kelly-Country v Beers* [2004] FMCA 336. The magistrate found the respondent's stand-up comedy performances in the character of a fictional Aboriginal person constituted 'artistic work' within the meaning of section 18D of the Racial Discrimination Act. He found they had come about as the result of a 'creative process' and 'the application of Mr Beers' imagination' [121] (Brown FM). The Magistrate also noted the Explanatory Memorandum specifically refers to 'comedy acts' as an artistic work.

**Genuine academic, artistic, religious or scientific purpose**

Section 11(1)(b) of the RRTA was considered by the Court of Appeal in *Catch the Fire Ministries*. In that case, Justice Nettle stated the question to be asked is whether a person's conduct was engaged in reasonably and in good faith, for a genuine academic, artistic, religious or scientific purpose [89].

Justice Nettle set out (in [89]–[96], [197]) the following test for section 11(1)(b):

- identify the respondent's purpose for engaging in the conduct. If there was more than one purpose, what was the dominant purpose?
- determine whether the dominant purpose was an academic, artistic, religious or scientific purpose (the relevant purpose)
- if yes, determine whether the relevant purpose was a genuine academic, artistic, religious or scientific purpose (that is, whether the relevant purpose was 'truly' the purpose for engaging in the conduct)
- if yes, determine whether the respondent engaged in the conduct 'reasonably and in good faith' for a genuine relevant purpose. [92]

**Fair and accurate report of any event or matter of public interest**

Section 11(1)(c) of the RRTA is identical to section 18D(c)(i) of the Racial Discrimination Act. Cases under the federal law help interpret the application of section 11(1)(c).

In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 the Federal Court considered defamation law provides useful guidance on the meaning of a 'fair and accurate report' for the purposes of section 18D(c) of the Racial Discrimination Act:

[Section 18D], by the Explanatory Memoranda, is said to balance the right to free speech and the protection of individuals. The section has borrowed words found in defamation law ... For a comment to be 'fair' in defamation law it would need to be based upon true facts and I take that
to be the meaning subscribed to in the section. What is saved from a requirement of accuracy is the comment, which is tested according to whether a fair-minded person hold that view and that it is genuinely held [360].

The courts have looked at whether the specific facts relied on as the basis of a comment are true, to assess whether the exception can be relied on. See *Eatock v Bolt* (2011) 197 FCR 261.

**Private conduct exception**

Section 12 of the RRTA includes the following exception for private conduct:

1. A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

2. Subsection (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

As outlined in the *Explanatory Memorandum*, the onus is on the person who claims the exception to prove the exception applies.

In *Bennett v Dingle* [2013] VCAT 1945 VCAT found the exception did not apply to a ‘heated exchange’ between the parties while they were walking their dogs. This was because ‘the words were said in a public park … there were other people in the vicinity, although they may not have been very close by’ [34].

In *Khalil v Sturgess* [2005] VCAT 2446 although not expressly discussed in the context of section 12, VCAT found the vilifying comments were made ‘in a location and loudly enough that … they were intended to be heard not just by the Khalils but by any neighbour or member of the public in the vicinity’ [51].

See also *Rae v Commissioner of Police, New South Wales Police Force [No 2]* [2010] NSWADT 36 [51]. In that case, the vilifying comments were made while the parties were in their respective gardens, driveways, and on the lake at the back of their properties.

Cases under the Racial Discrimination Act also provide useful guidance on the type of conduct that is likely to amount to ‘private’ conduct under the RRTA.

Section 18C of the Racial Discrimination Act prohibits certain behaviour done 'otherwise than in private'. Section 18C(2) provides that an act is taken not to be done in private if it is done in a public place, if it is done in the sight or hearing of people who are in a public place, or if it causes words, sounds, images or writing to be communicated to the public. The Act also defines a ‘public place’.

In *McLeod v Power* [2003] FMCA 2 Federal Magistrate Brown found to establish that an act was done 'otherwise than in private', the complainant must do more than establish that an act occurred in a public place [50]. As noted by the Magistrate, a 'private conversation does not become a public one merely because it takes place in a public street or in a place to which members of the public have a right to admission or access'.

Similarly, in *Gibbs v Wanganeen* [2001] FMCA 14 Federal Magistrate Driver considered the quality of a conversation between a prisoner and a prison guard:

Given the peculiar characteristics of a prison, I find that exchanges between prisoners and their guards will frequently be private conversations but they may not be. In the present case I find that the exchange was intended by the respondent to be a private one. He clearly wanted to confront the [complainant] over the issue of immediate
concern to him. He appears to have expressed himself off the cuff, and he appears not to have been intending by those statements to make a public complaint [18] (Driver FM).

Gibbs v Wanganeen is sometimes cited for what is described as a 'within earshot' test. A similar test was applied in McMahon v Bowman [2000] FMCA 3 in which the Federal Magistrates' Court found:

[T]here is no evidence that the persons who were present in the street at the time of the incident heard what occurred but given that the words were shouted between one house and the next it would be reasonable to conclude that they were spoken in such a way that they were capable of being heard by some person in the street if that person was attending to what was taking place [26].

The 'within earshot' test is yet to be interpreted by VCAT in the context of the RRTA. However, as discussed above, VCAT has found the private conduct exception did not apply in circumstances where the words were spoken in a 'clearly audible voice' in a public park (Bennett v Dingle [2013] VCAT 1945) or in a location and loudly enough that they were intended to be heard by any neighbour or member of the public in the vicinity (Khalil v Sturgess [2005] VCAT 2446).

Disputes under the RRTA

The dispute resolution procedures under the Equal Opportunity Act apply to complaints under the RRTA. The Explanatory Memorandum of the Racial and Religious Tolerance Bill includes modifications to ensure the mechanisms for complaints resolution under the Equal Opportunity Act are appropriate for vilification complaints (page 7).

Dispute resolution under the Equal Opportunity Act is discussed in more detail in Resolving disputes.

Bringing a dispute to the Commission

Under section 19(1), where there is an alleged breach of the RRTA, the following persons may bring a dispute to the Commission for dispute resolution:

- a person who claims that another person has unlawfully vilified them
- if that person is unable to bring a dispute because of a disability (as defined in the Equal Opportunity Act) – a person who is authorised to do so on his or her behalf, or if that person is unable to authorise another person, any other person
- if that person is a child – the child, a parent, or (if the Commission is satisfied the child or a parent consents), any other person.

Under section 19(5) the alleged breach does not have to relate exclusively to the person bringing the dispute.

Disputes can be brought against individuals of any age, corporations and unincorporated associations (except in relation to serious vilification offences), as outlined in section 3 (definition of ‘person’) and section 21.

Representative bodies

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However, the court found it was ultimately unnecessary to decide the point.

11 Racial and Religious Tolerance Act 2001 (Vic) s 22. In particular, Division 1 of Part 8 (Dispute resolution by the Commission), Division 3 of Part 11 (The Commissioner), Division 1 of Part 12 (Proceedings for offences) Division 3 of Part 12 ((Other offences), and s 189 of the Equal Opportunity Act 2010 (Vic) (Protection of people giving evidence and information) apply to disputes under the RRTA.
Section 20(1) of the RRTA provides that a representative body may bring a dispute to the Commission on behalf of a named person or persons if the Commission is satisfied:

- each person is entitled to bring a dispute under section 19(1)(a)
- each person has consented to the dispute being brought by the body on the person’s behalf
- if the dispute is brought on behalf of more than one person, the alleged breach arises out of the same conduct.

As outlined in section 20(2), the representative body must also have a ‘sufficient interest’ in the dispute. That is, the conduct in question must be a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.

Examples of when a representative body has had sufficient interest under the RRTA include:

- a religious organisation, see Ordo Templi Orientis v Legg [2007] VCAT 1484 [15]
- an organisation based on nationality, see Australian Macedonian Advisory Council Inc v LIVV Pty [2011] VCAT 1647 [37].

Conciliated complaints at the Commission

The Commission conducts dispute resolution for complaints brought under the RRTA. Examples of conciliated outcomes at the Commission include the following:

- The complainant alleged comments made on a television show were religious vilification. The television network and the production company were named as respondents. The respondents, without admitting liability, provided the complainant with a written apology.

- The complainant alleged racial and religious vilification by a newspaper that allegedly published statements that were sensitive to the Jewish community and were disparaging towards Jewish business or community figures. The matter was resolved, without admission of liability, with an apology.

- The complainant alleged his neighbour racially vilified him for being of Middle Eastern descent by verbally abusing his family on a daily basis. The complainant feared for his family’s safety. The matter was resolved through an undertaking by the respondent to cease the behaviour.

- The complainant, a man of Indian descent, was involved in a minor car accident. He alleged when he asked for the other driver’s details, the driver refused and threatened to kill him and crack his head open. The matter was resolved, without admission of liability, with a written apology and compensation.

- The complainant alleged he was racially vilified at work when co-workers referred to him as a ‘gook’, 'slopehead' and 'rice eater'. He complained to management that he did not like being spoken to in this way and was laughed at and the vilification continued. The matter was resolved, without admission of liability, for compensation.

- The complainant, of Sudanese descent, alleged his adult neighbour had for a number of years called out to his family that they were dirty pigs, animals and stupid. This lead to the neighbour’s children disrespecting his family in a similar manner. The complainant felt his life and that of his family became one of fear, discomfort and distress. The matter was resolved by the parties agreeing to refrain from engaging in negative behaviour toward each other and to treat each other in a civil and respectful manner.

Examples of complaints that have settled under the racial hatred provisions of the federal Racial Discrimination Act can be found on the Australian Commission’s conciliation register.
Applications to VCAT

Under section 23 a person may apply directly to VCAT alleging a breach of Part 2 of the RRTA (Unlawful conduct), whether or not that person has attempted dispute resolution at the Commission.

The same persons and representative bodies can bring an application to VCAT as those permitted to bring a dispute to the Commission – namely, those persons who are alleging racial or religious vilification against themselves or on behalf of another person or group of persons (see section 23A and section 23B).

Civil remedies

Under section 23C if VCAT finds a person has breached the RRTA, it can make one or more of the following orders:

- an order that the person refrain from committing any further breaches of the RRTA
- an order that the person pay to the complainant, within a specified period, an amount VCAT thinks fit to compensate the complainant for loss, damage or injury suffered in consequence of the breach
- an order that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the breach.

If a person fails to comply with an order of VCAT, under section 23D the Commission may apply to enforce the order on behalf of the complainant.

Civil remedies under the RRTA are the same as the remedies available under the Equal Opportunity Act section 125(a). Remedies and costs are discussed in more detail in Remedies for discrimination.

Examples of remedies awarded under section 18C of the Racial Discrimination Act include:

- In Khalil v Sturgess [2005] VCAT 2446 VCAT ordered the respondents to publish a formal apology in the Herald Sun and pay the complainants compensation totalling $7,000 for loss, damage or injury suffered. In doing so, VCAT took into account 'the very serious and persistent nature of the respondents' abuse, the need not to trivialise what has happened, the objectives of the Act including to promote participation in a multicultural society, and the great disruption and humiliation caused to the complainants by the conduct of the respondents' [58].

- In Ordo Templi Orientis v Legg [2007] VCAT 1484 VCAT ordered the respondents to remove the offensive material from their website and to refrain from making, publishing or distributing similar statements in Victoria. The respondents were later sentenced to nine months' imprisonment for failing to do so, see Ordo Templi Orientis Inc v Devine [2007] VCAT 2470.

- In Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VSCA 284, although the Court of Appeal ordered the matter be returned to VCAT for reconsideration, it found VCAT did not act outside its jurisdiction by ordering the respondents to place advertisements in two daily newspapers. VCAT noted this type of remedy 'is likely to go a long way to redressing the sense of hurt and therefore injury suffered by those against whom hatred or other relevant emotion has been incited'.

Examples of remedies under federal discrimination law

Given the limited case law under the RRTA, cases under the racial hatred provisions of the Racial Discrimination Act provide some guidance on the types of remedy that could be awarded for unlawful vilification under the RRTA.

Examples of remedies awarded under section 18C of the Racial Discrimination Act include:
- In *Kanapathy v In De Braekt* [No 4] [2013] FCCA 1368 a legal practitioner abused a security officer by calling him a 'Singaporean prick' and telling him to go back to where he had come from. The abuse occurred when the officer asked the respondent to undergo a security search at a court building. The Federal Circuit Court awarded the complainant $12,500 – $10,500 general damages for the offensive conduct and $2000 special damages for medical expenses.

- In *Barnes v Northern Territory Police* [2013] FCCA 30 a police officer shouted offensive words at the complainant because of his race while driving past his home. The Federal Circuit Court awarded the complainant $3500.

- In *Sidhu v Raptis* [2012] FMCA 338 the complainant was called a 'coconut' and 'nigger' in public. The Federal Magistrates Court awarded the complainant $2000.

- In *Campbell v Kirstenfeldt* [2008] FMCA 1356 the complainant's neighbour abused the complainant and her family by calling them names including 'niggers', 'coons', 'black mole' and 'black bastards'. The Federal Magistrates Court awarded the complainant $7500 and ordered the respondent to make a written apology.

- In *Silberberg v The Builders Collective of Australia Inc* [2007] FCA 1512 the second respondent posted messages to an internet discussion forum that offended the complainant because of his Jewish race and ethnicity. The Federal Court of Australia made an order restraining the second respondent from publishing the offending messages or any similar material on the internet or elsewhere.

- In *Jones v Toben* [2002] FCA 1150 the director of the Adelaide Institute published material on its website casting doubt about whether the Holocaust occurred. The Federal Court of Australia ordered the respondent to remove the offending material from its website, and not to publish or republish the same or similar material. An appeal to the Full Court of the Federal Court was dismissed.

### Serious vilification

The RRTA criminalises serious racial and religious vilification, under *section 24* and *section 25*. As outlined in the *Explanatory Memorandum* the criminal offences only apply to the most 'extreme behaviour' and can be investigated by Victoria Police (page 3).

Serious racial and religious vilification under the RRTA refers to intentional conduct, on the ground of race or religious belief or activity, that the offender knows is likely to:

- incite hatred against a person or group, and to threaten (or incite others to threaten) physical harm to the person or group or their property (*section 24(1)* and *section 25(1)*) or

- incite serious contempt for, or revulsion or severe ridicule of, a person or group (*section 24(2)* and *section 25(2)*).

The offence of 'serious racial vilification' is set out in *section 24* of the RRTA:

(1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely –

(a) to incite hatred against that other person or class of persons; and

(b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.

**Note**

"Engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.
Penalty: In the case of a body corporate, 300 penalty units;  
In any other case, imprisonment for 6 months or 60 penalty units or both.

(2) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Note

"Engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.

Penalty: In the case of a body corporate, 300 penalty units;  
In any other case, imprisonment for 6 months or 60 penalty units or both.

(3) For the purposes of subsections (1) and (2), conduct –

(a) may be constituted by a single occasion or by a number of occasions over a period of time; and

(b) may occur in or outside Victoria.

(4) A prosecution for an offence against subsection (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions.

Section 25 is framed in similar terms to section 24 of the RRTA, except that it relates to conduct done on the ground of the religious belief or activity of another person or class or persons.

The Explanatory Memorandum explains:

These offences refer to the extreme forms of conduct which promote and urge the strongest forms of dislike towards a person or group because of the race of the person or group. The offender must intend the conduct in the knowledge that the promotion of these feelings of extreme dislike will be the likely result of the conduct. This conduct may include communications using the internet (page 8).

According to section 26, in determining whether a person has committed an offence under section 24 or section 25, it is irrelevant whether the person made an incorrect assumption about the race or religious belief or activity of another person or group at the time of the alleged offence. The Explanatory Memorandum notes, for example, that a person will not escape liability if the person vilifies a group of persons in the mistaken belief that they are of a particular racial origin (page 8).

Section 24 and section 25 are strict liability offences, which means prosecution is not required to prove fault. Unlike the unlawful vilification provisions in section 7 and section 8 of the RRTA, there are no defences or exceptions for serious racial and religious vilification. However, a criminal standard of proof applies to these offences that must be proved 'beyond reasonable doubt', as outlined in section 141 of the Evidence Act 2008 (Vic).

There has been one successful criminal prosecution of the RRTA. Three men were charged with the offence of serious religious vilification (section 25) after they filmed the beheading of a mannequin with a toy sword outside council offices in 2015. The defendants' argued their video, which was released on an activist group Facebook page, was an act of free speech that focused on a specific tenant of Islam. Magistrate Hardy disagreed and found the video was clearly intended to create serious contempt for or ridicule of Muslims. Each defendant
was each found guilty, sentenced to a fine of $2,000 and a conviction was recorded. At the time of publication, one defendant had appealed the conviction.\footnote{Rohan Smith, ‘Far-right nationalist behind mock beheading appealing his conviction’ news.com.au (4 April 2018) http://www.news.com.au/national/victoria/courts-law/farright-nationalist-behind-mock-beheading-appealing-his-conviction/news-story/8168681 accessed 30 April 2018.}

**Prosecution and penalties**

In Victoria a prosecution for the offence of serious racial or religious vilification cannot be started without the written consent of the Director of Public Prosecutions, as outlined under section 24(4), and section 25(4).

The maximum penalty for an offence under section 24 or section 25 of the RRTA is 300 penalty units for a body corporate, or 6 months’ imprisonment and/or 60 penalty units for an individual. A penalty unit is currently $158.57 (as at 1 July 2017).
Resolving disputes

Part 8 of the *Equal Opportunity Act 2010* sets out the process for resolving disputes about discrimination, sexual harassment and victimisation.

A dispute means 'a dispute about compliance with this Act', outlined in section 4. This broad definition means the Victorian Equal Opportunity and Human Rights Commission (the Commission) has the power to deal with any issue where a party alleges the other party has breached the Equal Opportunity Act or *Racial and Religious Tolerance Act 2001* (Vic) (RRTA). An actual breach need not have occurred, and the Commission has no role in determining whether there has been a breach of either Act.

The dispute resolution procedures under the Equal Opportunity Act also apply to disputes under the RRTA, outlined in section 22 of that Act. However, the RRTA includes some provisions that are specific to disputes under that Act. The chapter on Racial and religious vilification includes further information about disputes under the RRTA (including examples of conciliated complaints).

**Dispute resolution at the Commission**

The Equal Opportunity Act enables the Commission to offer services designed to facilitate resolution of disputes. This can be through the provision of general information and education to duty holders and people with disputes at the initial stages, or through the process of dispute resolution at the Commission. It also allows people with disputes to go directly to the Victorian Civil and Administrative Tribunal (VCAT) to have their matter determined, without first going through the Commission’s dispute resolution process. If a dispute does not resolve at the Commission, a party may still withdraw from dispute resolution and apply to have the matter heard by VCAT.

The Commission offers flexible, independent and confidential services to help parties resolve disputes. The Equal Opportunity Act gives the Commission the discretion to use a wide variety of methods to resolve the dispute that are appropriate to the nature of the dispute. Dispute resolution methods used range from informal discussions and providing education and information about the Equal Opportunity Act and the RRTA, through to conciliation. Conciliation can take place in a face-to-face meeting, by telephone conference or by contact through the conciliator.

Under the Equal Opportunity Act, a party to a dispute may withdraw from the Commission’s process at any stage and may take the dispute to VCAT for determination. Parties to a dispute do not need to request the Commission refer their matter to VCAT. For matters taken to VCAT, VCAT has the power to order compulsory conferences and mediation, and to strike out claims in certain circumstances.

**Bringing a dispute to the Commission**

Under section 113 any of the following people may bring a dispute under the Equal Opportunity Act to the Commission for dispute resolution:

- a person who claims another person has discriminated, sexually harassed or victimised them
- if that person cannot bring a dispute because of a disability – a person who is authorised to do so on his or her behalf or (if that person is unable to authorise another person) any other person
- if that person is a child – the child, a parent on the child's behalf, or (if the Commission is satisfied the child consents) any other person.

The chapter on Racial and religious vilification outlines who can bring a dispute to the Commission for an alleged breach of the RRTA.
Dispute resolution process

The process for dispute resolution can be summarised as follows:

- a person may bring a dispute to the Commission alleging unlawful discrimination, sexual harassment or victimisation under the Equal Opportunity Act, or racial or religious vilification under the RRTA. Complaints are lodged in writing – either online or by mail. The Commission can help persons who are not able to submit their complaint in writing
- dispute resolution starts when the person bringing the dispute informs the Commission that he or she wishes to proceed with dispute resolution (section 115(1))
- dispute resolution ends when the earliest of the following occurs:
  - the Commission declines to provide or continue to provide dispute resolution under section 116
  - a party withdraws from dispute resolution under section 118 by providing the Commission with written notice
  - the parties to the dispute reach agreement about the dispute (section 115(2))
- a party may make an application to VCAT about a breach of the Equal Opportunity Act or RRTA whether or not the person has brought a dispute to the Commission (section 122).

Representative complaints to the Commission

Section 114(1)(a) of the Equal Opportunity Act provides that a representative body may bring a dispute to the Commission on behalf of a named person or persons if the Commission is satisfied:

- each person is entitled to bring a dispute to the Commission under section 113(1)(a) as a person who claims that another person has contravened a provision in Part 4, 6 or 7 of the Equal Opportunity Act in relation to them
- each person has consented to the dispute being brought by the body on the person’s behalf.

The representative body must have a sufficient interest in the dispute (section 114(1)(b)); and if the dispute is brought on behalf of more than one person, the alleged contravention must arise out of the same conduct (section 114(1)(c)). An example of a representative complaint is a disability service bringing a complaint on behalf of a client who has experienced discrimination.

Section 114 is based on sections 104(1B) and (1C) of the 1995 Act and is intended to work in the same way as those provisions did under the 1995 Act, according to the Explanatory Memorandum of the Equal Opportunity Bill 2010 (page 52). Representative complaints were introduced into the 1995 Act in 2006 with a view to replicating the representative complaints mechanism in the RRTA, as outlined in the Explanatory Memorandum of the Justice Legislation (Further Amendment) Bill 2006 (page 10)

Representative complaints and who can be a representative body are discussed further below.

The chapter on Racial and religious vilification discusses representative complaints under the RRTA in more detail.

Discretion to decline to provide or continue to provide dispute resolution

Section 116 provides the Commission with discretion to decline to provide or continue to provide dispute resolution for any of the following reasons:
• the alleged contravention occurred more than 12 months before the dispute was lodged with the Commission
• the matter has been adequately dealt with by another court or tribunal
• the matter involves a subject matter that would be more appropriately dealt with by a court or tribunal (for example sexual assault)
• the person has started proceedings in another forum (for example the Australian Human Rights Commission or Fair Work Commission)
• having regard to all the circumstances, it is not appropriate to provide or continue to provide dispute resolution.

Factors that may be relevant to consideration of ‘all the circumstances’ in section 116(e) include whether:
• the Commission has previously provided dispute resolution services in relation to the allegations
• the Commission has previously declined to provide dispute resolution services in relation to the allegations
• the respondent is unable to engage with, or respond to, the complaint (for example the organisation or respondent has moved or cannot be contacted, or there is no evidence to support the claim)
• contact has been lost with the parties
• attempts to conciliate have been unsuccessful.

If the Commission declines to offer dispute resolution, it must provide all parties to the dispute with sufficient reasons for its decision.

**Withdrawing from a dispute**

Under section 112(d) dispute resolution at the Commission is voluntary and parties may withdraw from the process at any time by informing the Commission in writing, as outlined in section 118(1). Under section 118 withdrawal from dispute resolution does not prevent a person from applying to VCAT under the Equal Opportunity Act or commencing proceedings in another jurisdiction. However, as at February 2012, a person cannot lodge a complaint with the Australian Human Rights Commission about a matter that is the subject of dispute resolution under the Equal Opportunity Act.

**Secrecy**

Under It is unlawful for any employee or board member of the Commission, or the Commissioner, to disclose, communicate or make a record of any information that concerns the affairs of any person, where that information was provided to the Commission for a purpose under the Equal Opportunity Act. To do so is an offence under section 176(3) of the Equal Opportunity Act.

This provision aims to ensure information provided to the Commission is kept confidential, with a view to achieving outcomes in difficult and complex cases where confidentiality is important.

Some limited exceptions to the secrecy provision are set out in section 176A and section 177 of the Equal Opportunity Act. Broadly speaking, these exceptions allow a Commission staff member to disclose information where:
• it is necessary to do so when carrying out another function under the Act
• where information relates to disputes, complaints or investigations and is made for educative purposes or is otherwise consistent with the Commissions obligations. The
Commission may use statistics about complaints to inform the public about the prevalence of discrimination, for example (section 177)

- parties consent to certain information being released (section 176A(2))
- disclosure of information is required by a Court in a criminal proceeding – for example a sexual assault (section 176A(1)).

Admissibility of dispute resolution information

Evidence of anything said or done in the course of dispute resolution is inadmissible in proceedings before VCAT, or any other legal proceedings, as outlined at section 117.

The dispute resolution process starts when a person informs the Commission that they wish to proceed with dispute resolution. In practice, this will be when the Commission receives either a signed letter or a completed online form from a person lodging a complaint. This means settlement offers and negotiations during dispute resolution process will be inadmissible.

The question of what documents or information will be inadmissible in a proceeding is a matter for determination by the court or tribunal hearing the matter.

Applications to VCAT

A person may apply directly to VCAT in relation to a complaint of discrimination, sexual harassment, victimisation or racial and religious vilification, whether or not that person has attempted dispute resolution at the Commission. See section 122 of the Equal Opportunity Act and section 23 of the RRTA. It is necessary to identify the correct respondent to a complaint, whether it is an individual or an organisation.

Who can apply to VCAT?

The following persons may make an application to VCAT under section 123 of the Equal Opportunity Act:

- a person who claims that another person has discriminated, sexually harassed or victimised them
- if that person cannot bring a dispute because of a disability – a person who is authorised to do so on his or her behalf or (if that person is unable to authorise another person) any other person
- if that person is a child – the child, a parent on the child's behalf, or (if the Commission is satisfied the child consents) any other person.

The same persons and representative bodies can bring an application to VCAT under the RRTA as those permitted to bring a dispute to the Commission – namely, those persons who are alleging racial or religious vilification against themselves or on behalf of another person or group of persons. See section 23(A) and 23(B).

Representative complaints to VCAT

A representative body may also make a direct application to VCAT under section 124 of the Equal Opportunity Act. Section 124(1)(a) provides that a representative body may make an application to VCAT on behalf of a named person or persons if VCAT is satisfied:

- each person is entitled to bring a dispute to VCAT under section 123(1)(a) as a person who claims that another person has contravened a provision in Part 4, 6 or 7 of the Equal Opportunity Act in relation to them
- each person has consented to the dispute being brought by the body on the person’s behalf.
As with representative complaints to the Commission, the representative body must have a sufficient interest in the dispute (section 124(1)(b)), and if the dispute is brought on behalf of more than one person, the alleged contravention must arise out of the same conduct (section 124(1)(c)).

**Criteria for a 'representative body'**

The term 'representative body' is not defined in the Equal Opportunity Act. However, as noted above, the representative body must have a sufficient interest in the application. Section 114(2) and section 124(2) each provide:

A representative has a sufficient interest in an application if the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

In *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 (*Cobaw*) VCAT considered whether Cobaw Community Health Services (Cobaw) had standing as a representative body under the equivalent provision of the 1995 Act (sections 104(1B) and (1C)). This decision provides useful guidance on VCAT's approach to the interpretation of the relevant provisions.

Cobaw managed a project called 'WayOut', a state-wide youth suicide prevention project, targeting same sex attracted young people in rural areas. Christian Youth Camps (CYC) was a Christian Brethren organisation that ran the 'Phillip Island Adventure Resort'. A Cobaw staff member contacted CYC to book the resort for a camp for 60 young people and 12 workers. Cobaw alleged CYC refused to accept the booking because of the sexual orientation of the young people attending.

Cobaw brought a complaint of discrimination on the basis of sexual orientation and personal association with a person identified by their sexual orientation, in the area of provision of services, on behalf of 12 named people who intended to attend the camp. The named people included Cobaw workers, workers from other organisations involved in WayOut, and young people involved in WayOut, some of whom were same sex attracted and others who were not.

VCAT considered that, before turning to the merits of the application, it was required to assess each of the criteria the Commission must be satisfied are met for a representative complaint to be made under section 104(1B) of the *Equal Opportunity Act 1995* [51]:

- that the people named in the complaint are entitled to do so under section 104(1)(a)
- that the people named in the complaint consented to Cobaw bringing the complaint on their behalf
- that the contravention arises out of the same conduct for each complainant
- that Cobaw has a sufficient interest in the complaint.

In assessing these matters, VCAT considered it must interpret them consistently with the purposes of the Equal Opportunity Act, and the right to equality and freedom from discrimination in sections 8(2)–8(3) of the Charter of Human Rights and Responsibilities [40]. VCAT noted this approach meant it must interpret section 104(1B) in a manner that would give effect to the right of the people claiming they have been discriminated against to seek and obtain an effective remedy [52].

VCAT concluded giving effect to the 'right to a remedy' meant, in essence, that section 104(1B) should be interpreted in a way that facilitates the making of a complaint [55]. To do otherwise, VCAT considered:

... would be to risk denying people with a genuine complaint, but who, by reason of age, status or circumstance, are less willing or able than the independent, well resourced and strong willed, the means to seek an
effective remedy where they claim they have been subjected to discrimination.

VCAT considered there was a real prospect that without the assistance of a representative body, the individuals represented by Cobaw would be deterred from bringing their complaints [59]. VCAT took into account the power imbalance resulting from the young age and sexual orientation of many of the individuals represented against a large, well-resourced organisation such as CYC. It also considered the effect of the potential intrusion into the private lives of the complainants by bringing the complaint in a public forum.

VCAT concluded Cobaw did meet the first three criteria in section 104(1B) for 10 of the 12 complainants. In considering whether Cobaw had a 'sufficient interest' in the complaint, VCAT referred to section 104(1C) of the 1995 Act:

> A representative has a sufficient interest in an application if the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

VCAT gave the following guidance in interpreting section 104(1C):

- 'conduct that constitutes the alleged contravention' is to be ascertained by reference to the complaint [72]
- 'conduct of that nature' requires consideration of the 'essential features' of the conduct giving rise to the complaint, and 'an application of the facts of the particular case to the provisions of the Equal Opportunity Act said to have been contravened' [73]
- consideration must also take place of:
  - the interests of the representative group
  - the interests and welfare of those they seek to represent
  - whether the contravention was 'a matter of genuine concern' to the group, through an examination of the activities of the representative group [74]–[75].
- the objects of the organisation, and its aims and purposes, are relevant to the 'sufficiency of interest' test, but are not determinative [89]
- the question of whether the organisation has a sufficient interest must be answered by reference to the words of the section, interpreted compatibly with human rights [92].

After significant analysis, VCAT was satisfied Cobaw had a sufficient interest in the complaint to have standing as a complainant.
Remedies for discrimination

This chapter discusses remedies ordered following determinations by the Victorian Civil and Administrative Tribunal (VCAT). Possible outcomes for complaints under the Equal Opportunity Act made to the Victorian Equal Opportunity and Human Rights Commission (the Commission) are considered. The payment of compensation, or damages, at the Commission and VCAT is also discussed.

Outcomes and remedies

When a complaint under the Equal Opportunity Act is successful, there are a number of remedies open to the complainant.

Remedies available at VCAT

Section 125 allows VCAT to make any order it considers will prevent the unlawful conduct continuing, compensate the complainant or address any loss, damage or injury suffered by the complainant.

If VCAT finds a person has breached the Equal Opportunity Act it can make any one or more of the following orders under Section 125(a):

(i) an order that the person refrain from committing any further contravention of this Act;

(ii) an order that the person pay to the [complainant], within a specified period, an amount [VCAT] thinks fit to compensate the [complainant] for loss, damage or injury suffered in consequence of the contravention; or

(iii) an order that the person do anything specified in the order with a view to addressing any loss, damage or injury suffered by the [complainant] as a result of the contravention.

This forms the basis for the remedies available to a complainant. Under section 125b VCAT can also take no further action, even though there was a breach of the Equal Opportunity Act.

Examples of remedies ordered by VCAT include:

- equal opportunity training for staff involved in unlawful conduct. See [Slattery v Manningham City Council [2013] VCAT 1869; Morgan v Dancen Enterprises Pty Ltd [2006] VCAT 2145]

- a written apology. See [Flekac v Australian Cable and Telephony Pty Ltd [2003] VCAT 2012; Styles v Murray Meats Pty Ltd [2005] VCAT 914]

- amending a policy to remove discriminatory clauses. See [South v RVBA [2001] VCAT 207]

- reinstating a job application and removing discriminatory assessment criteria from the application process. See [Davies v State of Victoria (Victoria Police) [2000] VCAT 819]

- reassessing a person’s insurance premium when the original method of calculation was discriminatory. See [Dulhunty v Guild Insurance Limited [2012] VCAT 1651]

- Reinstatement. See [Tobin v Diamond Valley Community Hospital (1985) EOC 92–139. Also see Duma & Mader International Pty Ltd [2007] VCAT 2288 [93] where reinstatement was considered but found not to be appropriate; Ilobuchi Peter v Amcor Flexibles [1999] VCAT 664 (4 June]
1999) and O'Keeffe v Wyndham City Council [2002] VCAT 17 [46]–[48] both relating to interim orders, where VCAT's power to order reinstatement was generally discussed

- a declaration.
  See discussion in Ingram v QBE Insurance Ltd [2015] VCAT 1936 [254]–[255], [260].

These examples are discussed further below.

The remedies that can be ordered by VCAT for a breach of the Racial and Religious Tolerance Act 2001 (Vic) (RRTA) are in similar terms to the remedies available under the Equal Opportunity Act. Remedies under the RRTA are discussed in more detail in the chapter on Racial and religious vilification.

**Conciliated outcomes at the Commission**

The Commission's dispute resolution process enables a complainant and respondent to reach an agreement about resolving the complaint. The types of outcome sought may be guided by what remedies are available at VCAT. However, parties to dispute resolution are not limited to these options. Many complaints are resolved at conciliation and outcomes may include:

- an apology (verbal or written, private or more public)
- financial compensation
- a job reinstatement or reference
- access to a previously denied job opportunity or service
- an agreement to change or stop behaviour
- an agreement to amend or develop policies
- an agreement to undertake human resources and equal opportunity training.

**Examples of conciliated outcomes at the Commission**

**Sex discrimination in the area of goods and services – employee training**

The complainant was advised by a sales person that he was looking in the women’s clothing section of the respondent retail store. When the complainant responded he was aware of this, the sales person asked him to leave as he was embarrassing the other customers. He was also told not to shop there in the future. The complainant felt humiliated and left the store. He considered if his female partner went there to buy male clothes nothing would have been said to her. When notified of the complaint, the respondent agreed to participate in dispute resolution. The parties reached an agreement that the respondent would provide equal opportunity training for all staff.

**Sex discrimination and sexual harassment in the area of employment – compensation**

The complainant alleged her male work colleague would often make comments or act in an inappropriate sexist manner. As she was working in a male-dominated industry, she ignored this behaviour as she felt she could not voice her concerns. She alleged the colleague grabbed her on the bottom and made comments to others about her being loose, humiliating her at a work function. When she told him she was upset about his behaviour he replied it was just a joke. When notified of the complaint the respondent agreed to participate in dispute resolution resulting in an agreement that the respondent pay the complainant $15,000.

**Gender identity discrimination in employment – compensation and employee training**

The complainant worked for the respondent on a short-term contract and applied for a permanent role. She was transitioning from male to female and asked her employer to use
her new legally recognised name. The complainant requested this name change on several occasions however her employer asked her to stop trying to inform people about the name change and let them adjust at their own pace. When she insisted she had a legal right to change her name, the complainant was told perhaps she was not the type of person they wished to employ. Soon after the complainant was informed the permanent position was not going to be offered to her and she could continue on contract for one more month. When notified of the complaint the respondent agreed to participate in dispute resolution. The parties reached an agreement for the respondent to pay the complainant $6000 and provide LGBTI+ training to all staff.

Religious belief/activity in employment – roster changes

The complainant worked shift work for a health provider and alleged he was rostered to work the Sabbath (Saturday). This was against his religious belief/activity, being a Seventh Day Adventist. When notified of the complaint the respondent agreed to participate in dispute resolution. The parties reached an agreement for the respondent to not roster the complainant to work on Saturdays.

Disability discrimination in the area of goods and services – improve physical accessibility

The complainant used a mobility scooter and alleged she had difficulty accessing a shopping centre complex as there were no kerb ramps leading to some shops. She had to travel on her mobility scooter on the road behind cars to access a pedestrian crossing. When notified of the complaint the respondent agreed to participate in dispute resolution. The parties reached an agreement for the respondent to install kerb ramps to permit access to footpaths. The respondent also created increased disability car parks near some shops to increase accessibility.

Race discrimination in employment – compensation

The complainant alleged she was subjected to comments about her race by a work colleague. The comments included they did not like people of her Middle Eastern background and she was not a real Australian as she was not born in Australia. When notified of the complaint the respondent agreed to participate in dispute resolution. The parties reached an agreement for the respondent to pay the complainant $15,000 general damages.

Sex discrimination in sport – new policies and guidance

The complainant’s daughter played in an under 12s mixed football team. He alleged the female players had played half a game at the most and sometimes played less than two minutes on the field. He had complained to the coach who said he did not think boys and girls should play together and he would select whoever he wanted to play. When notified of the complaint the respondent agreed to participate in dispute resolution. The parties reached an agreement for the respondent to review and implement codes of behaviour and conduct for coaches, players and parents. A new position was established to oversee the behaviour of coaches, players and parents. The coach decided to leave the Club.

Age discrimination in the area of employment and discriminatory information request – apology and change to practice

The complainant wished to apply for a position as area manager for a retail chain. The application form asked for a qualification and required him to select the year that he obtained his qualification. The drop down list only went as far back as 1995. The complainant completed his degree in 1976 and was unable to complete the application and was denied the opportunity to apply for the position.

The respondent agreed to dispute resolution. The respondent stated the drop down list was an oversight. The application form had been updated, and the drop down box replaced with a free text entry field. The respondents expressed their sincere apologies to the complainant for any inconvenience caused and invited him to apply for the role. The complainant was satisfied with the action taken by the respondent and the matter was resolved.
Disability discrimination in the area of goods and services – review of practices

The complainant was admitted to a psychiatric ward as an involuntary patient. He alleged staff on the ward did not give him information about his rights, let him make any decisions or let him access his phone or a computer. The respondent stated to the Commission that it followed its set procedures when admitting the complainant while he was an involuntary patient. However, they did agree to participate in dispute resolution to discuss the complainant's admission and its processes. This provided the complainant an opportunity to raise and discuss his concerns with the respondent. As a result, the respondent committed to reviewing some of their practices. The complainant was satisfied he was able to meet with the respondent and considered his complaint resolved.

Marital status in the area of employment – statement of regret and policy change

The complainant was employed in the travel industry. She applied under her employer’s staff travel policy to travel overseas at a reduced cost with her de facto partner. Her employer denied her application on the basis that she was not legally married to her partner. As a result, the complainant had to purchase full fare tickets for her partner.

When contacted about the complaint the respondent agreed to attend a conciliation conference. At the conciliation conference the respondent explained a staff member had misread its staff travel policy which resulted in the complainant's reduced travel application being denied. The respondent acknowledged that the application should have been approved and expressed its regret at the hurt and inconvenience the complainant experienced. The respondent agreed to refund the cost of the ticket purchased by the complainant. In addition, the respondent changed its staff travel policy wording (which had previously stated that staff must be married to be eligible for discounted fares) and extended it to include de facto relationships.

Disability in the area of education – adjustments to school excursion arrangements

The complainant's son has an intellectual disability and wanted to attend school camp. She sought permission from the school to stay near the camp during the day, and for her son to stay overnight with her and be dropped back to the camp the following day. This request was based on her son's integration aide not attending the school camp and her concerns about her son's bedwetting and having unsupervised access to food at night. The respondent denied the complainant's request, stating it felt her son was more than capable of attending the camp independently and that doing so would help his development. The school considered if the complainant collected her son at night this would highlight his disabilities and differences to other children. When notified of the complaint, the respondent agreed to meet the complainant to further discuss her request so that her son could participate in the school camp. Following this meeting, the school agreed to the adjustments sought by the complainant and the matter was resolved.

The examples above highlight the capacity for dispute resolution to achieve tailored and systemic outcomes that can have impacts beyond the parties to a complaint. Some outcomes act as a tool to achieve social change – for example, changes to policies and practices and training. The dispute resolution process can allow a complainant to seek a personalised remedy in a confidential and less adversarial forum. Respondents can explore creative options to resolve matters without the risk of stigma associated with a negative court finding against them.

Additional examples where conciliation resulted in payment of compensation are set out in Table 1: Damages awarded by VCAT under the Equal Opportunity Act 2008–2019.

Damages

Under the Equal Opportunity Act and the RRTA, a person can seek financial compensation (also known as damages) when they have suffered financial or physical (including psychological) loss because of unlawful conduct.
Damages can be ordered by VCAT under section 125(a)(ii) of the Equal Opportunity Act to compensate the complainant for loss, damage or injury suffered as a consequence of the discrimination. Similarly, damages can be ordered under section 23C(ii) of the RRTA to compensate an complainant for loss, damage or injury suffered as a consequence of the vilification.

Importantly, this means there must be a connection between the loss and the unlawful conduct for an award to properly be made. In assessing damages, each case will be determined on its own merit.

In Obudho v Patty Malones Bar Pty Ltd [2017] VSC 28 a nightclub was found to have discriminated against the complainant, a music promoter of African origin, when it cancelled his booking at the venue for an African music themed event. The nightclub had cancelled the event after it learned the event was to be titled 'Africa Fest'. It claimed this meant the nightclub would have to engage additional security to comply with local guidelines for 'culturally specific' events. VCAT rejected this argument and found there was no legal requirement to comply with the guidelines. VCAT issued a declaration of discrimination, but did not award any damages to Mr Obudho because the nightclub had not discriminated against him as the organiser.

On appeal, the Supreme Court clarified what is required by the phrase 'in consequence of the contravention' in section 125(a)(ii). The Court noted the nightclub had contravened section 44 of the Equal Opportunity Act by refusing to provide services when it cancelled the room hire booking because of the race of the prospective patrons, which included each complainant. Applying the ordinary dictionary meaning to the phrase, Justice Emerton found Mr Obudho, was 'a victim of the discriminatory conduct constituted by the cancellation of the booking for the Africa Fest' and was 'entitled to compensation directed to putting him in the position that he would have been in had the booking for the Africa Fest not been cancelled' [37]. It did not matter whether he suffered loss as an event organiser or as a patron – what mattered was that he suffered loss was suffered 'in consequence of' the nightclub’s breach of the Act. For this reason, Mr Obudho was entitled to compensation for his loss of profit on the Africa Fest. He was also entitled to compensation of $6000 for non-economic loss in the form of personal upset and humiliation [51].

The unlawful conduct in question need not be the sole cause of the loss or damage. However, the loss or damage suffered must be as a consequence of the breach of the Equal Opportunity Act. VCAT has indicated it may be possible for damages to be awarded where there have been multiple causes of loss or damage, despite some of those causes being unrelated to breaches of the Equal Opportunity Act. However, this is only if the complainant can demonstrate that the unlawful conduct was a cause of the loss or damage.13

Hall v A. & A. Sheiban Pty Ltd [1989] FCA 72 is considered a leading case in setting out the overarching principles for assessing damages in anti-discrimination claims. In that case, Justice Lockhart noted the closest analogy would be with the principles guiding damages for claims in tort, although:

[It is difficult and would be unwise to prescribe an inflexible measure of damage of cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law.

Generally speaking, the correct way to approach the assessment of damages in cases under s. 81 of the [Sex Discrimination] Act is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the

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13 GLS v PLP [2013] VCAT 211 [275]–[276], citing I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109, 128 [56]–[57].
situation in which he or she was placed by reason of the conduct of the respondent [72]–[73].

In practice, this means a complainant should consider both financial loss and hurt and humiliation they have incurred as a consequence of the conduct. In assessing what might be appropriate as a compensatory amount, a court necessarily considers the general standards prevailing in the community (see Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 [95]). This approach to damages has been followed in federal and Victorian jurisdictions.

Importantly, there is no upper limit on the amount of damages under the Equal Opportunity Act and the RRTA. This contrasts with other jurisdictions, such as unfair dismissal under the Fair Work Act 2009 (Cth) – see sections 392(5)–(6). However, any claim of damages will need to be justified with supporting evidence.

In Collins v Smith [2015] VCAT 1992 VCAT considered what compensation was payable for a proven complaint of sexual harassment in employment. On the question of compensation, the employer argued Victoria's worker's compensation legislation limited the amount of compensation VCAT could award under section 125(a)(ii) of the Equal Opportunity Act. This was because the personal injury suffered by the complainant arose out of, or in the course of, her employment. Justice Jenkins rejected this argument. Justice Jenkins determined the limits imposed by worker's compensation legislation do not apply in an action for damages for physical or mental injury under the Equal Opportunity Act. Further, Justice Jenkins endorsed the complainant's arguments that 'beneficial legislation, such as the Equal Opportunity Act, is to be interpreted beneficially to give effect to its objects' [50]–[51] and that any tension between the two legislative sources was to be resolved in favour of the specific provisions of the Equal Opportunity Act.

Categories of damages

As damages in anti-discrimination complaints are considered by VCAT and courts to be 'entirely compensatory' in nature (see Graeme Innes v Rail Corporation of NSW [No 2] [2013] FMCA 36 [160], citing with approval Qantas Airways v Gama [2008] FCAFC 69 [94]) the two main types of damages are:

- 'special damages', which relate to economic or financial losses (past or future) – for example, loss of wages or out of pocket expenses such as medical expenses
- 'general damages', which relate to non-economic losses (past or future) – for example, compensation for hurt, humiliation and injury to feelings or for diagnosed psychological injury or physical illness that have been caused or exacerbated by the discriminatory treatment. In Burns v Media Options [2013] FCCA 79 [1782], for example, the court found the respondent's discriminatory conduct exacerbated the complainant's pre-existing mental illness.

Other types of damages exist, but are not as commonly awarded. 'Aggravated damages', for example, may be awarded in circumstances where there is clear evidence that the person who committed the discrimination has been 'high handed, malicious or oppressive', and has been 'calculated to increase the hurt suffered by the complainant'. See Hall v A & A Sheiban Pty Ltd [1989] FCA 72 [75], citing Alexander v Home Office [1988] 2 All ER 118.

The Supreme Court observed in Spencer v Dowling [1997] 2 VR 127, [144] that the intention of the Equal Opportunity Act 1984 was to provide a sum of damages to compensate the complainant for loss. The Court thus considered the damages have to be compensatory, as distinct from punitive, in nature. However:

an award of compensation under the Act will often comprehend an award for hurt, humiliation and injured feelings caused by the discriminatory conduct of the respondent, there is little doubt that, contained within the board's power, is a capacity to aggravate such compensation where the conduct, in committing the discriminatory act, has been high handed,
malicious or oppressive and has been calculated to increase the hurt suffered by the Complainant [144]–[145] (citations omitted).

For this reason, VCAT has considered aggravated damages are part of the compensation scheme in the Equal Opportunity Act (see Coyne v P & O Ports [2000] VCAT 657). Section 125 of the Equal Opportunity Act provides that VCAT may order a respondent to pay compensatory damages, 'an amount VCAT thinks fit to compensate the complainant for loss, damage or injury suffered in consequence' of breach. The section does not spell out how damages may be measured.

For example, aggravated damages were claimed in Delaney v Pasunica Pty Ltd [2001] VCAT 1870 (Delany). VCAT refused to order them because the factors raised in support of aggravated damages were factors already taken into account in VCAT's award of general damages. VCAT was not satisfied there had been conduct on the part of the respondent calculated to increase the complainant's hurt and humiliation [51]–[55].

As set out above, damages in anti-discrimination matters are not intended to be punitive. 'Exemplary damages' are designed as a punishment for the party found guilty of unlawful conduct. They are thus generally not available for claims of discrimination, sexual harassment and victimisation. Also see, for example, Hall v Sheiban [1989] FCA 72 [78]–[83] and Phillis v Mandic [2005] FMCA 330 [26].

An award of damages will not include an amount for any legal expenses incurred, which are described as 'costs'. See the section on Costs.

Assessing special damages – financial loss
A number of factors can be considered in calculating an award of special damages to cover specific financial loss of a complainant as a result of the unlawful conduct. Examples include:

- comparing the past earnings of the complainant before the unlawful conduct with the current earnings or future potential earnings of the complainant. Can any difference in income be attributed to the unlawful conduct? In other words, has the earning capacity of the complainant suffered as a result of the unlawful conduct? Is there total or partial incapacity? How long is the incapacity expected to last? See Burns v Media Options Group Pty Ltd [2013] FCCA 79 [1773]

- can any other benefits of the job that the complainant is now unable to access be measured financially – for example, a promotion, rostered overtime, weekend penalty rates, special bonuses, share benefits, use of a mobile phone or car

- has the complainant spent their own money on doctors and medical specialists because they have fallen ill or had a medical condition aggravated as a result of the unlawful conduct?

- does the complainant have copies of their pay slips, receipts, invoices and proof of payment that can be provided as evidence of this loss?

An example of an itemised award of special damages for medical expenses can be found in Gama v Qantas Airways Ltd [No 2] [2006] FMCA 1767 [129]–[130]. Mr Gama was awarded damages to compensate him for breaches of section 9 of the Racial Discrimination Act 1975 (Cth) and section 15(2)(d) of the Disability Discrimination Act 1992 (Cth). Mr Gama claimed damages for attendance at medical appointments, travel to medical appointments and medication costs, for the past and future. Mr Gama was awarded a 20 per cent contribution towards these costs by way of special damages, comprising:

- $1350 for 20 per cent of the cost of the doctor's appointments and $945 for 20 per cent of the cost of travel to date of hearing

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14 Qantas appealed the decision on a number of grounds, including the award of damages. The ground of appeal relating to damages was dismissed by the Full Court: see Qantas Airways Limited v Gama [2008] FCAFC 69 [5], [100]–[104], although the appeal was upheld in part in relation to the disability discrimination aspect at [91].
- $2831 for 20 per cent of medication costs taken to date of hearing
- $3150 for 20 per cent of future doctor's appointments calculated at 15 visits per year for seven years
- $3603 for 20 per cent of future medication costs for seven years
- interest on those amounts (taking into account Mr Gama would have received a Medicare rebate) [129]–[130].

In support of his claim for past and future medical expenses, Mr Gama provided a sworn affidavit setting out how much he had spent on medication to date, and for how long he was required to take the medication in the future. Mr Gama further provided evidence of his travel costs for attending medical appointments, and the expected period he would need to continue to see his doctor. Mr Gama's doctor also provided oral evidence of Mr Gama's attendance at her consultancy [102]–[103].

Mr Gama also received $40,000 as a 20 per cent contribution towards general damages and 9 percent interest on that amount [127], [131]. Also see Qantas Airways Limited v Gama [2008] FCAFC 69 [99].

If a complainant is claiming economic loss for lost or reduced wages, it is relevant whether they are currently receiving any salary/wages, leave payments or insurance payments such as worker's compensation, and the amount they are receiving. Any damages awarded are likely to be offset and, therefore, reduced by any income or payments received or even potentially accrued entitlements. See, for example, Howe v Qantas Airways [2004] FMCA 242 [133] where the Federal Magistrates Court found the complainant was not entitled to the benefit of the sick leave accrued during the period of unpaid maternity leave, as her award of damages was intended to compensate her for not being granted sick leave. The respondent was, therefore, entitled to offset the equivalent amount of salary from the calculation of damages for each day of sick leave accrued during her maternity leave.

Tax may also be payable on any damages awarded as economic loss. See Mayer v Australian Nuclear Science and Technology Organisation [2003] FMCA 209 [92]–[93]. It may be considered taxable income or an 'employment termination payment' under section 82–130(1) of the Income Tax Assessment Act 1997 (Cth) if it is paid as a consequence of termination of employment.

**Mitigation of loss**

Whether a person is currently earning is also relevant to show they have met their legal obligation to 'mitigate their losses'. A complainant has a duty to take steps to improve their situation and make their financial loss less severe. If the person has left their job because of unlawful conduct in breach of the Equal Opportunity Act, or if they were fired unlawfully, for example, whether the person has looked for another job to 'mitigate' their loss of income will still be considered. Where a person has been unable to mitigate their loss – for example because of injury or illness – evidence of that reason must be available for VCAT to consider.

A person may not be working because they have chosen to take unpaid leave such as parental leave. VCAT and courts are unwilling to order damages to cover that period of leave. This is because the loss of earnings of the complainant is not attributable to the conduct of the respondent. See Howe v Qantas Airways [2004] FMCA 242 [366].

**Assessing general damages**

While economic damages can be calculated by reference to money spent or lost as a result of the unlawful conduct, hurt and humiliation is often harder to calculate. The principle VCAT and the courts use to assess hurt and humiliation was summarised in Galea v Hartnett – Blairgowrie Caravan Park [2012] VCAT 1049 by VCAT Member Dea, citing Hall v A & A Sheiban Pty Ltd [1989] FCA 72:

The starting position in relation to awards for prohibited discrimination for injury to feelings (also referred to as non-economic loss), is that the
amount should not be minimal, as that would trivialise or diminish respect for the public policy to which the Equal Opportunity Act gives effect. On the other hand, awards ought not be excessive, as that would also damage respect for that public policy [83].

In *GLS v PLP (Human Rights)* [2013] VCAT 221 Justice Garde held an award of general damages should be made 'as appropriate for the individual case having regard to the facts and circumstances and the contraventions proved' [274].

Importantly, unless there is clear evidence of significant psychological or physical injury, VCAT (and the courts) have been unwilling to make orders for large sums in the hundreds of thousands of dollars as compensation for hurt and humiliation.

However, more recent decisions have shown greater appreciation of the impact of discrimination. Courts have acknowledged the 'community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct'. See *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 [117]. This approach has been adopted in VCAT, and considered to apply to sexual harassment and discrimination cases. In *Collins v Smith* [2015] VCAT 1992 Vice President Justice Jenkins said:

The significance of the decision in Richardson's case can be summarised as follows:

(a) It recognises that community attitudes regarding the impact of sexual harassment has changed, in particular, that the adverse consequences of sexual harassment can extend to loss of employment and career; severe psychological illness; and relationship breakdown;

(b) When determining compensation there is no basis for treating differently the consequences of sexual harassment on the one hand and workplace bullying on the other;

(c) Substantial compensation for sexual harassment is not dependent upon demonstrable incapacity where the evidence otherwise demonstrates a substantial impact upon enjoyment of life;

(d) Provided there is a sufficient connection between an employee's departure from a particular employer and the unlawful conduct, including how the employer deals with that conduct, a court is likely to award compensation for any resulting economic loss; and

(e) The principles applied to sexual discrimination may be equally extended to other forms of discrimination [148].

The amount awarded for hurt and humiliation will depend on the circumstances. The following factors, for example, may influence the amount of damages:

- whether the perpetrator of the unlawful conduct has a position of power and control over the complainant, by reason of their age or job
- if the unlawful conduct occurred in a public place (including a workplace) that resulted in the complainant being humiliated in front of other people
- if there are other factors that have made the hurt and humiliation worse for the person, such as a breach of privacy
- if the unlawful conduct affected the person's health and particularly their mental health, and the level of seriousness of the mental or physical anguish as supported by medical evidence such as a doctor or specialist's report.
In *Ewin v Vergara [No 3] [2013] FCA 1311* the Court awarded $110,000 general damages, which included a punitive component:

In my view the compensatory damages which I propose to award are not inadequate to punish Mr Vergara for the entirety of his unlawful conduct and to deter him and others from engaging in similar conduct [684].

Examples of general damages from VCAT, as well as examples of general damages negotiated in conciliated outcomes, are set out below under Damages awarded by VCAT.

**Tax treatment of general damages**

A complainant seeking compensation for hurt and humiliation may seek advice from a financial advisor about the tax implications of a payment or settlement.

The Australian Taxation Office has previously commented ‘the determination of the character of a compensation payment, and in particular whether it is liable to tax in the hands of an employee, depends upon the nature of the payment’. The Australian Taxation Office ruled a payment made by an employer to an employee as compensation in anti-discrimination matters for injury to feelings is usually considered a capital payment, and is not subject to income tax or capital gains tax.

However, where the payment is made as a consequence of termination of employment, it will be a taxable ‘employment termination payment’ unless the requirements of section 82.135(i) of the *Income Tax Assessment Act 1997* (Cth) are met. To not be an ‘employment termination payment’, an identifiable amount must be paid specifically for, or in respect of, a personal injury, and be a reasonable amount having regard to the nature of the personal injury and its likely effect on the complainant's capacity to derive income from personal exertion.

This was the issue in *An Employee v Federal Commissioner of Taxation [2010] AATA 912 (An Employee v Federal Commissioner of Taxation)*. The complainant claimed his employer had breached the *Age Discrimination Act 2004* (Cth) in requiring his retirement at the age of 65. He also alleged a breach of contract, and bullying and harassment by senior officers. The complainant claimed he had suffered post-traumatic stress disorder as a result. The parties settled the dispute in a settlement agreement for the amount of $395,000. This case considered how the settlement amount should be classified for taxation purposes.

In a private ruling, the Commissioner of Taxation found the payment was made as a consequence of termination and, therefore, the entire payment was an ‘employment termination payment’ under section 82.130(1) of the *Income Tax Assessment Act 1997* (Cth). The complainant appealed that decision, submitting that section 82.135 applied as the payment was made in respect of a personal injury suffered as a result of the age discrimination.

The Administrative Appeals Tribunal (AAT) affirmed the Commissioner's decision, finding the payment was made as a consequence of the appellant's termination and was an ‘employment termination payment’, as the payment would not have been made if not for the termination. Termination need not be the dominant reason, but provided the payment follows as an effect or result of the termination, it will be considered to be a consequence of termination [12]–[17], citing *Reseck v Commissioner of Taxation [1975] HCA 38; McIntosh v Federal Commissioner of Taxation* (1979) 25 ALR 557, 560; *Le Grand v Commissioner of Taxation* [2002] FCA 1258 [63].

The AAT further found section 82.135 did not apply, for two reasons. First, the appellant's compensation payment was 'a single, undissected lump sum with no attribution of any

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16 Ibid.
portion of it to any of the various heads of relief claimed by the taxpayer’ (An Employee v Federal Commissioner of Taxation [20]). Second, the AAT considered even if the hurt and humiliation claimed by the appellant amounted to ‘personal injury’, given the employer had denied liability in the settlement, there had been no agreement that ‘personal injury’ had occurred. As a result, the payment could not genuinely amount to a payment for personal injury under section 82.135 [22], citing Dibb v Commissioner of Taxation [2004] FCAFC 126.

However, in The Public Servant v Commissioner of Taxation [2014] AATA 247, another private ruling, the AAT considered a claim where a public servant and her employer had resolved a claim of discrimination alleged to have occurred through the course of employment. The resolution between the parties included the payment of $15,000 for general damages, which the public servant described as a ‘compensation payment to myself for pain and suffering and the worsening of a pre-existing medical condition I have as a result of the discrimination’ [15]. The AAT stated if it had jurisdiction to do so, it would have found the payment ‘was in its entirety compensation for the … discrimination and the injury she suffered in the course of her employment’ [59]. However, the Commissioner’s ruling that the payment was an employee termination payment could not be challenged because of the limits of the statutory appeal scheme.

### Eggshell skull rule

In assessing damages, a discriminator or wrongdoer must take the complainant as they find them, at the time the unlawful conduct occurs. This is called the ‘eggshell skull’ rule.

However, in applying the rule and considering the complainant's physical and mental state in assessing the appropriate quantum of damages, the courts are unwilling to consider notions of 'normal fortitude' of complainants as a threshold to receiving damages. Nor are notions of 'reasonableness' by reference to a person's psychological make-up considered in relation to the resulting compensation awarded.

In South Pacific Resort Hotels Pty Ltd v Trainor [2005] FCAFC 130 the respondent argued the complainant was precluded from seeking damages for a complaint of sexual harassment, because she was not of 'normal fortitude' and had not previously disclosed a mental condition to the employer. The respondent considered it was unfair to be ordered to pay compensation when the extent of the complainant's mental injury was unforeseeable. It argued the notion of what a reasonable person would anticipate should be carried through into an assessment of damages [44]–[45].

The Magistrates Court at first instance and the Full Federal Court on appeal both rejected this argument. The Full Federal Court considered the argument ignored the separate statutory schemes for defining and finding discrimination on one hand, and the power to order compensation on the other. The Full Federal Court also warned against the inclusion of the notion of 'normal fortitude' into discrimination law [46], [51]–[52] as it was:

> [C]apable of misuse in support of the false idea – perhaps hinted at rather than stated bluntly – that some degree of sexual harassment (or some other form of unlawful discrimination) would and should be accepted by persons of normal fortitude [51].

The Full Federal Court dismissed the appeal, and the Magistrates' award of $17,536.80 to the complainant was upheld. That award was made up of $5000 general damages, $1907.50 for medical treatment, $5000 for past loss of income, $1564.65 for interest and $2500 for future economic loss.

The application of the 'eggshell skull rule' in Victorian anti-discrimination cases was reinforced by Deputy President McKenzie in Styles v Murray Meats Pty Ltd [2005] VCAT 914 (Styles). Styles related to a complaint of sexual harassment and sex discrimination. The complainant had been sexually abused by her father and subjected to physical violence by her mother for a number of years as a child and teenager. Evidence provided to VCAT was that as a result, she suffered from chronic but fluctuating anxiety, depression, chronic pain
disorder, panic disorder and 'a predisposition to react strongly in situations of sexual harassment' [99].

Deputy President McKenzie upheld the sexual harassment complaint and awarded the complainant $8000 in general damages for embarrassment, loss of self-esteem, stress, and aggravation of previous medical conditions. In doing so, Deputy President McKenzie noted:

> I pause here to say that in my view, in cases under the Equal Opportunity Act, one must take the victim as one finds the victim. Loss is still compensable even though the victim may, because of some earlier condition or event, be more than ordinarily sensitive to the particular conduct [100].

Also see *Gordon v Commonwealth of Australia* [2008] FCA 603 [119].

A pre-existing condition that makes a complainant more sensitive, vulnerable or pre-disposes them to developing a psychological injury cannot be held against them in calculating damages for unlawful conduct. Instead, the discriminator is liable for the full extent of their injuries even if the injuries are greater than someone with a 'normal' disposition may have suffered.

**Damages awards by VCAT**

Considering case law examples is useful when assessing what level of damages may be appropriate in a particular case. However, the Federal Court has warned care needs to be taken in making such comparisons. Particular acts should not be 'rated' and the complainant's individual circumstances must be specifically referred to and considered. See *Phillis v Mandic* [2005] FMCA 330 [26].

A complainant can seek damages at conciliation with the Commission. Decisions of VCAT and other jurisdictions can be used to assist with formulating their complaint and negotiating an outcome.

The level of damages awarded by VCAT and its predecessor, the Victorian Anti-Discrimination Tribunal (VADT) has varied significantly over time. However, the cases do show VCAT is more likely to make a higher award of general damages where:

- there is discrimination, sexual harassment or victimisation between persons with an imbalance of power
- there is the ability for the unlawful conduct to influence the person's ability to gain ongoing employment or reputation
- that unlawful conduct results in psychological injury supported by medical evidence.

In 1998, for example, VADT ordered $125,000 in damages in *McKenna v State of Victoria* [1998] VADT 83 for the complainant's exposure to:

> [C]onsiderable pain and suffering, to debilitating physical symptoms, to mental breakdown, to humiliation, loss of self esteem and of self confidence, and to loss of normal enjoyment of her professional and private life [6.1].

VADT noted the award was relatively large for the Victorian anti-discrimination jurisdiction. However, VADT considered the unlawful actions, which included sexual harassment, sex discrimination and victimisation in employment, were very serious in nature and had been 'initiated, supported or endorsed at high levels' of the employing organisation [7]. This outcome was upheld on appeal to the Supreme Court of Victoria in *State of Victoria v McKenna* [1999] VSC 310.

In *Delaney v Pasunica Pty Ltd* [2001] VCAT 1870 VCAT upheld a complaint of sexual harassment and sex discrimination. It ordered $25,000 in general damages, $3617.60 in special damages (loss of earnings) and $871.50 for medical expenses. It also ordered the
respondents pay the complainant's costs for one day's hearing on County Court Scale A to be taxed in default of agreement.

The complainant, Ms Delaney, was 16 years old and in the first weeks of her first job as a sales assistant and kitchen hand at a roast chicken shop. Ms Delaney alleged her 40 year-old employer, Mr Daley, made inappropriate sexual comments about her body, made sexual advances on her, kissed her against her will and requested sexual favours from her. Ms Delaney provided evidence about the effects this conduct had on her from her family doctor, a qualified social worker, a sexual assault counsellor and a consultant psychiatrist. VCAT was satisfied Ms Delaney had suffered an ongoing adjustment disorder, with associated anxiety, hurt and humiliation. It accepted Ms Delaney had been unable to work for periods of time because of this disorder, as a direct result of the conduct. VCAT considered the power imbalance between Ms Delaney and Mr Daley, and Mr Daley's intimidation and oppressive behaviour towards Ms Delaney, was of particular importance [50].

In Tan v Xenos [No 3] [2008] VCAT 584 VCAT awarded $100,000 for hurt and humiliation for a complaint of sexual harassment by a neurosurgeon against a neurosurgeon registrar. The damages awarded took into consideration the way the respondent had defended the claim, which had aggravated the suffering of the complainant (although aggravated damages were not awarded). The seriousness of the treatment of the complainant by the respondent, who was in a position of great power over the complainant in relation to her training and career progression, was also considered. However, no evidence was provided that any loss of income had resulted from the conduct, and so no award of special damages was made.

In contrast, in Duma & Mader International Pty Ltd [2007] VCAT 2288 VCAT upheld a complaint of indirect discrimination in the area of employment on grounds of impairment. It awarded $4000 for hurt and humiliation and $418.26 for lost income (comprising $383.72 for three public holidays at an hourly rate of $16.83 and superannuation contributions for those three days). The complainant had been absent from work on long-term sick leave due to a work-related injury and depression. His employer wrote to him requiring that he notify the company when he would be returning, and authorise it to contact his doctor to obtain information about his condition. VCAT considered the complainant could not comply with this condition because neither he nor his doctor knew when he would recover. VCAT considered the requirement was unreasonable in the circumstances, which included placing his employment in jeopardy after only three months absence where he was certified unfit for all duties due to the seriousness of his injuries [85].

VCAT noted while it was unreasonable for the employer to terminate Mr Duma at the point it did, VCAT was not satisfied he would ever have worked again because of his injury. There would have come a time where it was reasonable for the respondent to terminate. The only lost income Mr Duma was entitled to under the relevant award was three public holidays and superannuation on those days. Mr Duma's chronic pain and depression existed prior to the termination and could not be attributed to it. Nor were his injuries exacerbated by the termination. The level of general damages, therefore, could only reflect the hurt and humiliation arising from the embarrassment and upset of the unlawful termination [94]–[95].

As demonstrated in Collins v Smith [2015] VCAT 1992 [142], VCAT also now accepts the observations of the Full Federal Court in Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 that community standards ‘accord higher value to compensation for pain and suffering and loss of enjoyment of life than before’ [96]. It also accepts there is no established reason for a disparity in the award of damages in other fields and the typical compensatory damages provided to victims of sexual discrimination and harassment [109].

In Kerkofs v Abdallah [2019] VCAT 259 Judge Harbison found Mr Abdallah liable for the sexual harassment of Ms Kerkofs and ordered that Mr Abdallah and his employer, Parker Manufactured Products Pty Ltd, jointly pay $130,000 to Ms Kerkofs for pain and suffering. Her Honour also ordered the employer to pay an additional $20,000 in aggravated damages.

In formulating the general damages award, Judge Harbison took into account Ms Kerkofs' diagnosis of ongoing post-traumatic stress disorder caused by the harassment, 'which will need to be controlled indefinitely by behaviour and medication'[254]. Her Honour also noted
that Mr Abdallah had been in a position of authority with respect to Ms Kerkofs and that his behaviour had been 'extremely predatory' [261]. However, as the employer's insurer had separately accepted Ms Kerkofs' WorkCover claim, Judge Harbison did not take into account lost earnings or earning capacity.

In awarding aggravated damages, Judge Harbison had particular regard to the manner in which the director of the employer had conducted a three day cross-examination of Ms Kerkofs, in a process described by Her Honour as 'very gruelling indeed' [29]. The cross-examination had insinuated that Ms Kerkofs:

- fabricated her complaints for financial reasons
- had mental health issues due to a relationship breakdown, which impacted her credibility and affected the assessment of doctors
- abused drugs
- lied about her employment following the alleged harassment.

Judge Harbison found that none of these allegations were material to the case or supported by the evidence. The following factors were also relevant to awarding of aggravated damages:

- the failure of the employer to remain neutral or conduct an impartial investigation of Ms Kerkofs's allegations even after its own insurance company had approved her claim
- the employer participating in 'witness contamination' by trying to undermine a witness' statement that it knew to be accurate and providing employees with access to the VCAT file of proceedings before they made statements
- the way in which the employer had invaded Ms Kerkofs's privacy by making her submissions available on the company's intranet.

Judge Harbison noted that an award of damages in such a case must reflect the objects of the Equal Opportunity Act [256] and send a clear message that 'this type of behaviour is not acceptable at all in any workplace' [262].

Between August 2008 and February 2018, damages were only been awarded in 16 of the reported VCAT anti-discrimination decisions available on AustLII (summarised in Table 1 below).

These cases show that in each matter, the level of damages will be assessed on the facts and evidence available about the person's individual loss.

To date, VCAT has only awarded damages in one matter under the RRTA, *Khalil v Sturgess [2005] VCAT 2446*, discussed in the chapter on Racial and religious vilification. VCAT ordered the respondents to pay $7000 compensation.
Table 1: Damages awarded by VCAT under the Equal Opportunity Act 2008–2019

<table>
<thead>
<tr>
<th>Name</th>
<th>Date</th>
<th>Summary</th>
<th>Area</th>
<th>Attribute</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kerkofs v Abdallah [2019]</td>
<td>22-2-19</td>
<td>Complaint of sexual harassment</td>
<td>Employment</td>
<td>Not applicable</td>
<td>$130,000 damages for pain and suffering $20,000 aggravated damages</td>
</tr>
<tr>
<td>Black v Owners Corporation OC1-POS539033E[2018] VCAT 2014</td>
<td>20-12-18</td>
<td>Complaint of disability discrimination and failure to make reasonable adjustments was successful.</td>
<td>Provision of services</td>
<td>Disability</td>
<td>Orders to convert manual-operated doors to automatic operated doors to facilitate access to common property areas at an apartment block, including car park. $10,000 compensation.</td>
</tr>
<tr>
<td>Kibet v Empire Club [2018] VCAT 1868</td>
<td>6-12-18</td>
<td>Complaint of race discrimination in the provision of services – refusal of entry to a nightclub</td>
<td>Provision of services</td>
<td>Race</td>
<td>$3000 for hurt and humiliation</td>
</tr>
<tr>
<td>Ferris v Department of Justice and Regulation [2017] VCAT 1771</td>
<td>13-11-17</td>
<td>Complaint of disability discrimination (indirect discrimination) against an employer was successful</td>
<td>Employment</td>
<td>Disability (diabetes)</td>
<td>$0 the complainant was not awarded any damages. The reason given by VCAT was that the loss suffered by the complainant (suspending and terminating his employment) was not a consequence of the indirect discrimination claim.</td>
</tr>
<tr>
<td>Harrison v Department of Education and Training [2017] VCAT 1128</td>
<td>4-09-17</td>
<td>Complaint of disability discrimination and failure to make reasonable adjustment against an employer</td>
<td>Employment</td>
<td></td>
<td>Economic loss – payment equivalent to the wages the complainant would have received from 28.2.2013–14.5.2013 at the rate 0.4 of a full-time level 3 teacher together with any accrued leave benefits and entitlements</td>
</tr>
<tr>
<td>Ingram v QBE Insurance (Australia) Ltd [2015] VCAT 1936</td>
<td>18-12-15</td>
<td>Complaint of disability discrimination against insurance provider who refused to indemnify complainant based on mental illness and maintained a discriminatory exclusion</td>
<td>Goods and services</td>
<td>Disability</td>
<td>$4292.48 for economic loss $15,000 for non-economic loss</td>
</tr>
<tr>
<td>Case Name</td>
<td>Date</td>
<td>Description</td>
<td>Type</td>
<td>Nature</td>
<td>Award</td>
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<tr>
<td>Collins v Smith [2015] VCAT 1992</td>
<td>23-12-15</td>
<td>Sexual harassment by employer to junior staff member and victimisation</td>
<td>Employment</td>
<td>Not applicable</td>
<td>Aggregate sum of $332,280 comprising: $180,000 general damages, $20,000 aggravated damages, $60,000 past loss of net earnings and superannuation, $60,000 future loss of net earnings and superannuation, $12,280 out of pocket expenses.</td>
</tr>
<tr>
<td>Butterworth v Independence Australia Services [2015] VCAT 2056</td>
<td>22-12-15</td>
<td>Complaint of failure to make reasonable adjustments and terminating the complainant's employment</td>
<td>Employment</td>
<td>Disability</td>
<td>$3325.25 for economic loss</td>
</tr>
<tr>
<td>Obudho v Patty Malones Bar Pty Ltd trading as Inflation Nightclub [2015] VCAT 1521</td>
<td>07-10-15</td>
<td>Complaint that Patty Malones Bar cancelled a booking of a club section for an event when the nightclub owner became aware that many of the patrons would be of African descent.</td>
<td>Goods and services</td>
<td>Race</td>
<td>Discrimination claim arising from complainants' planned attendance at the event was proven. Claim regarding cancellation and business losses dismissed. This matter was appealed in the Supreme Court.</td>
</tr>
<tr>
<td>Obudho v Patty Malones Bar Pty Ltd [2017] VSC 28</td>
<td>09-02-17</td>
<td>Appeal of VCAT decision Obudho v Patty Malones Bar Pty Ltd trading as Inflation Nightclub [2015] VCAT 1521</td>
<td>Goods and services</td>
<td>Race</td>
<td>$6000 compensation for economic loss and a further $6000 for non-economic loss</td>
</tr>
<tr>
<td>Dirckze v Holmesglen Institute (Human Rights List) [2015] VCAT 1116</td>
<td>10-07-15</td>
<td>Complaint by a student about being called 'a monkey'</td>
<td>Education</td>
<td>Race</td>
<td>$3000 compensation for instance of proven racial discrimination</td>
</tr>
<tr>
<td>Bevilacqua v Telco Business Solutions (Watergardens) PL No 2 [2015] VCAT 693</td>
<td>11-03-15</td>
<td>Complaint of pregnancy discrimination against employer. Failure to make reasonable adjustments</td>
<td>Employment</td>
<td>Pregnancy</td>
<td>$10,000 general damages for hurt and humiliation for proven claims of direct discrimination in making comments about taking sick leave and taking toilet breaks. Other claims dismissed.</td>
</tr>
<tr>
<td>Dziurbas v Mondelez [2015] VCAT 1432</td>
<td>11-03-15</td>
<td>Complaint of disability discrimination against employer who was not allowed to return to work after injury.</td>
<td>Employment</td>
<td>Disability</td>
<td>$20,000 compensation for injury to feelings.</td>
</tr>
<tr>
<td>Case Title</td>
<td>Date</td>
<td>Description</td>
<td>Category</td>
<td>Discrimination</td>
<td>Damages</td>
</tr>
<tr>
<td>------------------------------------------------</td>
<td>------------</td>
<td>-------------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------</td>
<td>-------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Jemal v ISS Facility Services Pty Ltd [2015] VCAT 103</td>
<td>19-01-15</td>
<td>Complaint of discrimination being told he looked like a gorilla</td>
<td>Employment</td>
<td>Race</td>
<td>$3000 compensation</td>
</tr>
<tr>
<td>Martin v Padua College (Correction) [2014] VCAT 1652</td>
<td>24-11-14</td>
<td>Complaint of being terminated from employment based on having engaged in lawful sexual activity with a former student who was an adult at the time the relationship started.</td>
<td>Employment</td>
<td>Lawful sexual activity</td>
<td>Total damages: $90,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$80,000 for past economic loss.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$10,000 for pain and suffering.</td>
</tr>
<tr>
<td>Slattery v Manningham CC [2014] VCAT 1442</td>
<td>23-10-14</td>
<td>Municipal council engaged in direct discrimination by maintaining a declaration prohibiting complainant from attending any council building</td>
<td>Goods and services</td>
<td>Disability</td>
<td>$14,000 general damages.</td>
</tr>
<tr>
<td>GLS v PLP [2013] VCAT 221</td>
<td>13-3-13</td>
<td>Complaint by a mature aged graduate legal student of 14 instances of serious and sustained sexual harassment by her employer during a legal practice placement</td>
<td>Sexual harassment by employer; sexual harassment in a common workplace</td>
<td>(Not applicable in sexual harassment cases as stand-alone provision)</td>
<td>Tribunal upheld 11 of the 14 complaints and awarded the complainant $100,000 for general damages on the basis of the serious psychological damage caused by the employer's conduct. No special were damages sought or awarded.</td>
</tr>
<tr>
<td>Galea v Hartnett-Blairgowrie Caravan Park [2012] VCAT 1049</td>
<td>18-7-12</td>
<td>Complaint that complainant refused accommodation at caravan park on basis of parental status</td>
<td>Provision of accommodation</td>
<td>Parental status</td>
<td>$1000 for the distress caused by the refusal to provide accommodation and $90 for economic loss relating to travel costs</td>
</tr>
<tr>
<td>Cobaw Community Health Services v Christian Youth Camps Ltd [2010] VCAT 1613</td>
<td>8-10-10</td>
<td>Complaint that Christian adventure resort refused to take booking for youth group based on sexual orientation of attendees</td>
<td>Services and accommodation</td>
<td>Sexual orientation</td>
<td>$5000 for hurt and distress caused by the unlawful discrimination of the respondents. Supreme Court of Appeal confirmed discrimination based on sexual orientation. High Court refused special leave to appeal against this decision.</td>
</tr>
</tbody>
</table>
### Conciliated outcomes at the Commission

A significant proportion of cases are settled at conciliation at the Commission and do not end up at VCAT. In 2016–17 66 per cent of complaints where conciliation was held were resolved. Some examples of the outcomes reached during conciliation at the Commission are summarised below.

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Description</th>
<th>Employment</th>
<th>N/A</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sammut v Distinctive Options Limited [2010] VCAT 1735</td>
<td>14-9-10</td>
<td>Sexual harassment and victimisation complaint</td>
<td>Employment</td>
<td>N/A</td>
<td>Complaint proven in part. $2,000 for humiliation, pain and suffering. VCAT accepted the sexual harassment had a significant impact on the complainant, and that he was humiliated as a result. However, VCAT found there was insufficient evidence to link the sexual harassment with any inability the complainant had to work.</td>
</tr>
<tr>
<td>Laviya v Aitken Greens Pty Ltd [2010] VCAT 1233</td>
<td>3-8-10</td>
<td>Complaint that complainant was dismissed for taking sick leave, requiring complainant to return to work following Kinglake bushfires, and sexual harassment</td>
<td>Employment</td>
<td>Impairment, sexual harassment</td>
<td>$3500 in general damages for extreme distress caused by the unlawful conduct. A further $1,500 general damages were awarded against a person found to have sexually harassed the complainant. Both amounts payable within 14 days. No financial loss was alleged by the complainant. There was insufficient evidence to support any award to compensate for medical expenses, even though the complainant had undergone counselling.</td>
</tr>
<tr>
<td>Stern v Depilation &amp; Skincare Pty Ltd [2009] VCAT 2725</td>
<td>22-12-09</td>
<td>Complaint that employment status changed and employment terminated</td>
<td>Employment</td>
<td>Pregnancy</td>
<td>Complaint proven in part. $6,607.58 total compensation comprising: (a) $3000 for loss arising from the change of her employment status during her employment (b) $2807.58 for loss of earnings (c) $800 for humiliation and emotional distress</td>
</tr>
<tr>
<td>Thomas v Alexiou [2008] VCAT 2264</td>
<td>31-10-08</td>
<td>Complaint of sexual harassment by apprentice against director</td>
<td>Employment</td>
<td>Not applicable</td>
<td>$35,000 in general damages based on the extent of the repetition and duration of that sexual harassment and VCAT’s assessment of its effect on the complainant</td>
</tr>
</tbody>
</table>
Damages awarded during conciliation at the Commission

**Parental/carer discrimination in employment**

The complainant worked as a dental nurse for three years. She had been on 12 months' maternity leave and asked to return to work part time. Her employer refused her request for part-time employment stating she had to return to her substantive position working full-time hours. The complaint was resolved at conciliation for compensation of $15,000 and a letter of apology.

**Disability impairment discrimination in employment**

The complainant was an administrative officer with an impairment. She alleged her manager refused to allow her to work from home or to negotiate timelines for completion of work. When the complainant returned to work from sick leave she was removed from her position and excluded from her team. She became ill again and took sick leave. When she was ready to return to work her employer informed her it was not ready for her return and terminated her employment. The respondent stated the complainant's employment was terminated for failure to meet the inherent requirements of her position. She was provided with the opportunity to improve her performance and this did not occur. The complaint was settled for $17,000.

**Sex discrimination in employment**

The complainant was employed as an engineer with a multinational company. She alleged her employer paid her less and refused her the same benefits of employment as male engineers, such as a company car and corporate card. The complainant was also overlooked for particular projects as males were considered to be more reliable. The complainant resigned from her employment as she felt she could not progress in her field of expertise. The complaint was settled at conciliation for $45,000, a statement of regret and equal opportunity training for the company.

**Disability discrimination in the provision of goods and services**

The complainant has a hearing impairment and was assisted by an assistance dog. He attended a restaurant with his assistance dog. The complainant was refused entry into the restaurant due to his assistance dog and told he could only sit outside the restaurant. The complaint was settled at conciliation for a change of policy permitting assistance animals into the restaurant, signage placed at the entrance to the respondent's premises welcoming assistance animals, a written apology and $500 compensation.

**Age and employment activity discrimination in employment**

The complainant was in her late 60s and worked in car sales. She alleged her manager talked about wanting a younger workforce and asked her several times when she was going to retire. The complainant felt bullied by her manager when she made several enquiries clarifying conflicting information she was receiving about salary increments. At conciliation the complainant informed the respondent she wished to resign from her employment. The respondent agreed, without admission of liability, to pay the complainant $10,000 compensation, transfer ownership of the complainant's company car to her, and provide a written apology and statement of service.

**Disability, parental/carer status and personal association discrimination in the provision of goods and services**

The complainant and her adult daughter, who has Asperger's syndrome, applied for a loan through a finance broker to purchase an investment property. They had an appointment to sign the loan documents. The daughter did not realise she would have to answer questions from the respondent at this meeting. She became overwhelmed with anxiety and could not appropriately respond even though she understood what they were asking. The respondent made the decision that the daughter was incapable of understanding the nature of the loan and business transaction. The purchase of the property did not proceed. The respondent disputed the allegations of discrimination but agreed to attend a conciliation conference.
At the conference, the respondent acknowledged it could have handled the situation better. It has implemented policies to guide its staff where finance applicants have a disability. The respondent offered apologies to the complainant and her daughter. The respondent agreed, without admission of liability, to pay the complainant and her daughter each $3000 in compensation.

Disability discrimination in employment

The complainant suffered a workplace injury and needed to undertake his duties by rotating between standing and sitting. He alleged he was not provided with a chair to facilitate this and was issued with a warning for checking the time (for rotations) on his phone. The complainant considered his employer did not provide him with suitable alternative duties. He alleged he was directed not to return to the workplace until appropriate duties were found, and his employer made no further contact with him. The respondent stated the complainant was assessed for alternative duties and these were implemented. The complainant was provided with a chair. The complainant was given a first and final warning for using his phone while on duty and using inappropriate language. The respondent also stated it had explored several options for alternative duties for the complainant. These were approved by doctors, but the complainant did not want to perform them and walked off the job. The complainant was sent several warnings and there were a number of attempts made to contact him. The complainant's WorkCover claim was terminated. At conciliation, the respondent agreed, without admission of liability, to pay $10,000 compensation and $3900 for counselling services the complainant had undertaken.

Pregnancy and disability discrimination in employment

The complainant is a store manager for a retail company. She was pregnant and developed high blood pressure. Her doctor advised her to take a week's leave to rest. The complainant contacted her manager to advise of her absence and sought information about potentially modifying her hours/role given her health concerns and her progressing pregnancy. When the complainant returned to work, she received 'counselling and corrective' action. This effectively disciplined her for not opening the store when she was on sick leave. The complainant had a heated argument with her manager and resigned, which meant she would not be entitled to paid parental leave. The respondent agreed to attend a conciliation conference. The respondent stated the 'counselling and corrective action' was a tool to implement the change in the complainant's hours/role sought by her due to her pregnancy and ill health. The respondent agreed to provide a written apology to the complainant, pay $800 of lost wages and treat the complainant's employment as continuing. It also withdrew the 'counselling and corrective action' and altered work arrangements to enable the complainant to work four hours per week in a customer service role.

Sexual harassment in employment

The complainant alleged she was sexually harassed over a number of years by the senior manager of her employment organisation. She stated her manager made numerous unwelcome advances including hugging, kissing and neck rubbing and forced her to have a sexual relationship with him. The respondent denied the allegation of sexual harassment claiming they were engaged in a consensual sexual relationship. The matter settled for $50,000.

Sexual harassment in employment

The complainant worked in a warehouse and alleged two co-workers subjected him to verbal and physical conduct of a sexual nature. The employees made comments on a regular basis that referred to the complainant performing sexual acts with them. The harassment was brought to the attention of management on a number of occasions. The respondent agreed to attend a conciliation conference and acknowledged the company had failed to handle the issue appropriately. The respondent deeply regretted the pain and suffering caused by the behaviour of the co-workers, and apologised for the failure to properly assist him to remedy the situation. The respondent agreed to provide the complainant with a written apology and pay $25,000 compensation.
Damages awarded under federal discrimination law

A larger number of cases have been brought under federal discrimination law. Damages awarded under federal law can be a useful reference point for determining damages that may be awarded under the Equal Opportunity Act.

Examples and information about damages awards in the federal courts for complaints under the Sex Discrimination Act, Age Discrimination Act and Racial Discrimination Act can be found in the Australian Human Rights Commission's resource Federal Discrimination Law, available online.

The Australian Human Rights Commission also has a Conciliation register with summaries of complaints that have settled at conciliation under federal law.
Procedures and evidence

In this chapter, the following procedural and evidential issues are discussed:

- choosing a jurisdiction in which to make a complaint
- the burden and standard of proof to prove discrimination
- strike out and dismissal proceedings
- costs.

Choosing where to make a complaint


Some jurisdictions require complainants to choose a jurisdiction prior to lodging a complaint. They may be prevented from changing jurisdictions after proceedings have started.

Factors that may be relevant to choosing a jurisdiction include:

- **time limits and timeframes** – the statutory timeframes for lodging applications vary between jurisdictions. There are strict timeframes for lodging claims under the Fair Work Act 2009 (Cth) relating to unfair dismissal and general protections where employment has been terminated. By contrast, the Equal Opportunity Act provides the Victorian Equal Opportunity and Human Rights Commission (the Commission) and the Victorian Civil and Administrative Tribunal (VCAT) with discretion to decline a matter more than 12 months old.

- **multiple grounds or attributes** – the protection of attributes and areas varies between state and federal jurisdictions. Where an alleged contravention relates to multiple attributes or areas, there may be benefits in using a one-stop-shop statute where all attributes are covered.

- **mixed reasons and motive** – some laws provide that the attribute should be the substantial reason for the treatment, such as section 8 of the Equal Opportunity Act. Others require only that the attribute be one of the reasons for the treatment. Similarly, whether motive or awareness of the discrimination is relevant to discrimination varies between jurisdictions.

- **onus or burden of proof** – the onus of proving the behaviour was for the alleged reason may vary depending on the Act or part of the Act. Under the Fair Work Act 2009 (Cth), for example, the onus of proving the decision to take particular action was not unlawful rests with the respondent. The onus of proving direct discrimination under the Equal Opportunity Act (and other such Acts), on the other hand, is on the complainant. Under the Equal Opportunity Act the respondent has the onus of showing that the requirement condition or practice is reasonable. See Burden of proof under the Equal Opportunity Act for more information.

- **forum shopping** – there are some prohibitions on bringing multiple actions under different laws for the same matter. For example, if a dispute is lodged under the Equal Opportunity Act, it cannot then be brought under federal discrimination laws. And section 116(b) and (d) of the Equal Opportunity Act provide the Commission with the discretion to decline to provide dispute resolution in a matter that has been adequately dealt with by a court or tribunal or where the person has commenced proceedings in another forum. However, the Commission also has the discretion to accept a matter that has been
lodged in the federal jurisdiction. See, for example, *Bashour v Australia & New Zealand Banking Group Ltd final* [2015] VCAT 308.

- **parental/carer issues** – not all jurisdictions have a specific obligation to accommodate the responsibilities of a parent or carer in employment. See, for example, *Equal Opportunity Act 2010* (Vic) ss 17, 19. Compare with the 'inherent requirements' exception under *Fair Work Act 2009* (Cth) s 351(2)(b).

- **disability issues** – the obligation to make an adjustment for a person with a disability (for example, in employment, education and the provision of goods and services) varies between jurisdictions. See, for example, *Equal Opportunity Act 2010* (Vic) s 20 and *Disability Discrimination Act 1992* (Cth) s 5(3).

- **sexual harassment issues** – protection from sexual harassment is explicit in some statutes and implied in others. Sexual harassment is specifically prohibited under the *Equal Opportunity Act 2010* (Vic), for example, but may be covered by the general protections provision under the *Fair Work Act 2009* (Cth). The protections relating to sexual harassment and volunteers also vary between jurisdictions.

- **remedies** – the remedies typically granted and penalties that may arise for unlawful conduct vary markedly between jurisdictions. For example, there is a cap on the compensation that may be awarded in unfair dismissal cases under *Fair Work Act 2009* (Cth) s 392(5). For an example of differing penalties between jurisdictions see section 125 of the Equal Opportunity Act, section 46PO of the Australian Human Rights Commission Act and sections 539 and sections 545–546 of the Fair Work Act.

- **costs** – there are no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Circuit Court and Federal Court. Rather, the Courts have a general discretion to order costs under the provisions of the *Federal Court of Australia Act 1976* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth). At VCAT there is a general presumption that parties each bear their own costs; however, it has the discretion to order costs. See the section on Costs for more discussion.

- **definitions** – differences in definitions between state and federal laws – for example, 'disability', 'gender identity' and 'employee' – may give rise to a complaint in one jurisdiction but not another.

- **related actions** – some allegations give rise to related actions in a particular forum – for example, breach of contract, adverse action because of workplace rights, breach of a National Employment Standard, breach of the *Competition and Consumer Protection Act 2010* (Cth).

### Proving discrimination

To prove a claim of discrimination, the complainant needs to establish, on the balance of probabilities, that they have been discriminated against on the basis of one or more of the attributes sets out in the Equal Opportunity Act, in one or more of the areas of public life.

### Burden of proof under the Equal Opportunity Act

Under the Equal Opportunity Act, the burden (or onus) of proof is on the complainant to prove their claim. See, for example, *GLS v PLP* [2013] VCAT 221 [34]; *Pham v Drakopoulos (Anti-Discrimination)* [2012] VCAT 1198 [23]; *Finch v The Heat Group Pty Ltd* [2010] VCAT 802 [956]. The complainant must provide specific, detailed complaints with sufficient evidence to show the alleged incidents took place and amount to a breach of the Equal

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18 Some of the factors identified in federal discrimination cases as being relevant to the discretion to order costs include where there is a public interest element to the complaint; where the complainant is unrepresented and not in a position to assess the risk of litigation; that the successful party should not lose the benefit of their victory because of the burden of their own legal costs; that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage; and that unmeritorious claims and conduct that unnecessarily prolongs proceedings should be discouraged.
Opportunity Act. This includes evidence that an attribute exists as well as the breach of the Equal Opportunity Act. This means a complainant must be able to set out how they have been discriminated against based on an attribute in an area of public life or other unlawful conduct. See AB v Ballarat Christian College [2013] VCAT 1790 [18].

However, where a respondent seeks to rely on an exception under Part 4 or Part 5 of the Equal Opportunity Act, or an exemption granted by VCAT under section 89, the burden of proof is on them. They must provide sufficient evidence to show how the exception or exemption applies to their conduct, as outlined in section 13(2).

Similarly, to rely on the exception to vicarious liability for unlawful conduct of employees under section 110 of the Equal Opportunity Act, employers and principals have the burden of proof. They must show they took reasonable precautions to prevent their employee or agents from breaching the Equal Opportunity Act.

Where a person is alleged to have breached section 107 of the Equal Opportunity Act (requesting or requiring discriminatory information), the burden of proof is on the person who requests or requires the information. Section 108(2) stipulates that they must prove that the information is reasonably required for a purpose that does not involve prohibited discrimination.

For claims of indirect discrimination, under section 9(2) the person who imposes a requirement, condition or practice (or proposes to impose one) has the burden of proof to show that the requirement, condition or practice is reasonable.

Under section 12(6), where a person or organisation wishes to use a special measure to promote equality for members of a group with a particular attribute, they have the burden of proof to show the measure meets the criteria in section 12 of the Equal Opportunity Act.

**Standard of proof**

A party bearing the burden of proof must meet that burden to the civil standard of proof – the balance of probabilities. See Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170 [2]. Also see Evidence Act 2008 (Vic) s 140. This means VCAT must be satisfied 'overall it is more probable than not that the events occurred as described and that the inferences sought to be drawn can reasonably be drawn from the facts as they have been found'. See Drew v Whitehorse City Council [2010] VCAT 372 [18] relying on Morgan v Austin Health [2007] VCAT 2229 [22] (Harbison J). See also Obudho v Patty Malone's Bar Pty Ltd [2015] VCAT 1521.

The degree of satisfaction required for a finding in favour of the complainant is discussed in Briginshaw v Briginshaw [1938] HCA 34 (Briginshaw v Briginshaw). The following comments made by Dixon J are usually relied upon by courts and tribunals considering the degree of satisfaction required to discharge the burden of proof:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of VCAT. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences (Briginshaw v Briginshaw).

See, for example, Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66 [2], GLS v PLP [2013] VCAT 221 [35]–[36], [44] and Thomas v Alexiou [2008] VCAT 2264 [106]–[107].

This means the seriousness of the allegations must be considered when assessing whether the burden of proof has been discharged by the complainant. See King v Nike Australia Pty Ltd [2007] VCAT 70 [124]. In certain cases where the allegations made have been very serious, VCAT has held 'clear and cogent evidence may be required before there is reasonable satisfaction that the allegations have been made out on the balance of

Strike out and dismissal proceedings

Section 75 of the Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act) gives VCAT discretion to dismiss or strike out a proceeding, whether or not all the evidence has been heard. It can do this if, in VCAT's opinion, all or part of the proceeding is frivolous, vexatious, misconceived or lacking in substance, or is otherwise an abuse of process.

The principles to be followed in these proceedings are set out in Norman v Australian Red Cross Society (1998) 14 VAR 243, where Deputy President McKenzie stated:

VCAT should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

If VCAT is not satisfied these circumstances exist, the matter should go to hearing so the evidence can be heard and tested.

In State Electricity Commission of Victoria v Rabel [1998] 1 VR 102 the Court of Appeal considered the operation of section 44(c) of the Equal Opportunity Act 1984 (Vic). This provision also provided a power of summary dismissal. The Court found a complaint could not be dismissed under section 44(c) unless it was clear beyond doubt the complaint was lacking in substance, and the complainant had no arguable case that should be resolved at a full hearing.

In Forrester v AIMS Corporation [2004] VSC 506 the Supreme Court made clear the onus of establishing a ground for summary termination rests with the party who has made the application.

VCAT has applied these principles in a number of discrimination cases. Some examples are set out in the following paragraphs.

No covered area of public life

VCAT may strike an application out where the complaint does not disclose an area of public life covered by the Equal Opportunity Act (set out in Areas of public life in which discrimination is prohibited) and the claim is manifestly hopeless. In Tarpey v State of Victoria [2009] VCAT 410, for example, a father brought a discrimination claim against the primary school his daughter attended. He claimed the school and the State of Victoria discriminated against him on the basis of sex and physical features in the provision of goods and services. He alleged the respondent failed to communicate with him about his daughter's case and development, in circumstances where the school kept in contact with his daughter's mother. The State of Victoria made an application to dismiss his claim. It stated the claim was misconceived and lacking in substance, as it was not providing any goods or services to him. VCAT found although the complainant possessed the relevant attributes, he could not identify an area of activity in the 1995 Act where the discrimination occurred. VCAT found the school or State of Victoria was not providing goods or services to him and dismissed the claim on the ground that it was misconceived, lacking in substance, and untenable in fact and in law.
However, in some circumstances a school may be found to provide services to a parent. In *Murphy v New South Wales Department of Education* [2000] HREOCA 14, for example, the Australian Human Rights Commission upheld a complaint of discrimination by the parents of a student. The complaint related to the provision of services and facilities by the school. In particular, the complaint alleged the 'services' provided related to the administration of the public education system and the provision of facilities for the education of their child. This case is also discussed in Discrimination in education.

In *Kavanagh v Victorian WorkCover Authority trading as WorkSafe Victoria* [2011] VCAT 2009 VCAT considered a claim of discrimination and victimisation by WorkSafe in the handling of a complaint. VCAT found the alleged services (the power to investigate, the power to issue an improvement notice, the power to charge an offence) were not services within the definition in the 1995 Act. This was because they all require the exercise of a discretion that is quasi-judicial in nature. If exercised, none of the services would confer any benefit, advantage or welfare on the complainant. VCAT also found the complaints of victimisation could not succeed because they were not supported by evidence. VCAT dismissed the complaints.

Importantly, federal case law has established a claim should not be dismissed or struck out simply because the pleadings (or particulars) are deficient. A claim should not be dismissed or struck out by not setting out the area of public life when one may well apply, for example. Rather, the prospects and merits of the case underlying the pleadings should be examined, not the pleadings taken on face value as they may be able to be amended to rectify any deficiency. See *Fortron Automotive Treatments Pty Ltd v Jones [No 2]* [2006] FCA 1401 [19–20].

**Exceptions that clearly apply**

In *Garden v Victorian Institute of Forensic Mental Health* [2008] VCAT 582 VCAT also found there was no 'service' under the 1995 Act. The complainant was a patient at the Victorian Institute of Forensic Mental Health. He made a claim of discrimination against the Institute on the basis of impairment in the provision of a service. The complaints related to reports from his psychiatrist to the Adult Parole Board and requirements that he open his mail in front of his psychiatrist. The Institute applied to have the complaints struck out on the basis they were frivolous, vexatious, misconceived or lacking in substance. VCAT found the complaints relating to the reports from the psychiatrist to the Adult Parole Board were not a service to the patient. VCAT struck out this part of the complaint as manifestly hopeless. VCAT found the requirement that he open his mail in front of his psychiatrist could amount to discrimination. However, this was authorised by an enactment (the Mental Health Act) and the statutory authority exception under the 1995 Act applied. This part of the complaint was also found to be manifestly hopeless and struck out.

VCAT has confirmed if a respondent relied on an exception under the Act as the basis for striking out a claim, the exception must so completely answer the claim that VCAT is satisfied the complaint is undoubtedly hopeless. See *Forrester v AIMS Corporation* [2004] VSC 506 and *Dulhunty v Guild Insurance Ltd* [2011] VCAT 2209.

**Time delay**

The Equal Opportunity Act does not set a strict time limit for commencing dispute resolution at the Commission or making an application to VCAT.

Where the alleged contravention occurred more than 12 months before the application was made:

- **section 116** provides the Commission with the discretion to decline to provide dispute resolution
- **item 18 of Schedule 1, Part 7** of the VCAT Act gives VCAT discretion to make an order under **section 76** summarily dismissing or striking out an application for want of prosecution (inexcusable delay).
Delay in bringing an application may also amount to an abuse of process and, therefore, be a basis for summary dismissal under section 75 of the VCAT Act. In *Burrows v State of Victoria [2002] VCAT 1655* Deputy President McKenzie found factors that bear on whether delay does amount to an abuse of process are:

- whether the delay was inordinate and unreasonable or inexcusable
- any explanation for the delay and its adequacy
- the nature of the proceeding
- whether and to what extent the respondent was responsible for delay
- prejudice to the respondent if the proceeding were to continue
- the public interest
- the effect of the delay on the quality of justice, in particular the ability to conduct a fair hearing [38].

Her Honour stated these factors must be balanced against each other and no single factor is determinative. The primary consideration is the interests of justice.\(^\text{19}\) For instance, VCAT decided not to dismiss an application filed almost three years after the events occurred, after tragic family circumstances caused the complainant to lose focus on legal proceedings. See *McMahon v Green [2015] VCAT 1156 [50] [53]*.

In *Burrows v State of Victoria [2002] VCAT 1655* VCAT dismissed parts of a complaint on the basis that the delay in relation to the claims would prejudice the hearing of the case. In this case, the complainant brought a number of claims of discrimination against the State of Victoria on the basis of impairment in the area of employment. The complainant alleged he had been denied opportunities for promotion, transfer and training, or that they had been limited. A number of the claims related to events that occurred six to 12 years before the complaint was lodged. The State of Victoria applied to strike out or dismiss the complaints on the ground the delay in lodging the complaint amounted to an abuse of process. VCAT held this length of delay would prejudice the case, because there would be problems gathering evidence given the delay. See also *Garcia v Miles [2012] VCAT 262*.

Although some delays may not amount to an abuse of process, such as in *Kramersh v IPD Education Limited [2014] VCAT 1439*, in other cases the lapse of time is fatal to a claim. In *Stewart v City of Yarra [2016] VCAT 1537* VCAT dismissed proceedings relating to events that occurred up to 15 years previously [47], [51], [56]. VCAT found the delay was inordinate and inexcusable. VCAT considered the respondents would suffer prejudice given the quality of evidence deteriorates with the absence of many critical witnesses, destruction or loss of documents and fading memories. Ultimately, the facts of the particular allegations and circumstances will be relevant to VCAT’s determination. See for instance, *Bligh v State of Queensland HREOCA [1996] 28*, where a delay of more than 10 years did not invalidate a complaint.

**Claim being heard in another forum**

In *Moloney v Victoria [2000] VCAT 1089* claims of discrimination on the basis of impairment in employment were made against the State of Victoria. One of the claims raised an issue that was also being considered at the time by the Australian Human Rights Commission under the *Disability Discrimination Act 1992 (Cth)*. The respondent sought to strike out this part of the claim as frivolous, vexatious, misconceived or lacking in substance, or an abuse of process. VCAT found it would be an abuse of process to determine the matter while the complaint was still being considered by the Australian Human Rights Commission. VCAT

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\(^{19}\) *Burrows v State of Victoria [2002] VCAT 1655*; *Garcia v Miles [2012] VCAT 262* [16]. These decisions are consistent with the approach taken to abuse of process because of delay in other settings: See, for example, *Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27*. 

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struck out this part of the complaint. See also *Bashour v Australia & New Zealand Banking Group Ltd final* [2015] VCAT 308 discussed in Choosing a where to make a complaint.

An abuse of process may also be established where a complainant has brought repeated applications or is seeking to again raise issues that have already been determined by VCAT or another body. See *Fernandez v Insulation Solutions Pty Ltd* [2004] VCAT 125 and *Cartledge v Skyway Executive Pty Ltd* [2004] VCAT 2017.

**No prospect of success**

In *Carnegie v Victorian Registration and Qualifications Authority* [2012] VCAT 1952 the Victorian Registration and Qualifications Authority had cancelled the registration of the Carnegie School because it failed to comply with the minimum standards set out in the Education and Training Reform Regulations 2007. Dr Carnegie argued his school catered for emotionally and socially traumatised students. He claimed discrimination in the area of education, based on the attribute of his personal association with others who had a disability. The respondent applied for the matter to be struck out or dismissed because the claim could not possibly succeed. VCAT found the authority is not an educational authority as they are not responsible for making decisions about individual students. It found the minimum standards imposed are those set out in the Regulations, which were determined by Parliament and imposed on all schools. VCAT found there was no prospect of success in this case and dismissed the complaint.

In *Naidu v Causeway Inn Pty Ltd* [2015] VCAT 929 VCAT stated it:

> [I]s required to exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless or unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to, a case where an application can be said to disclose no reasonable cause of action or where a respondent can show a good defence sufficient to warrant the summary termination of the proceeding.

**Application of immunity provisions**

Judicial immunity from civil liability only applies to persons exercising judicial, rather than administrative, functions in a court or tribunal. See *X v State of South Australia [No 3]* [2007] SASC 125 [148]–[159], *Sirros v Moore* [1975] QB 118 [132] and *Mann v O'Neill* [1997] HCA 28; (1997) 191 CLR 204 [212]. This means both the individual and State of Victoria can be sued in relation to administrative functions. Note, however, that in *Towie v State of Victoria* [2002] VCAT 1395 the complainant made allegations the treatment he received during the conduct of a hearing at VCAT was discriminatory. VCAT found it would be a fundamental breach of the rules of natural justice for VCAT to be both a named party and a decision-maker in the matter. It found the matter must be struck out under section 77 of the VCAT Act (because the subject matter of the proceeding would be more appropriately dealt with by another court or tribunal). VCAT also found VCAT members have the same protection as a judge in the performance of his or her duties and that it was inappropriate to name VCAT as a party, as it is not a body capable of being sued.

**Beyond the territorial reach of the Equal Opportunity Act**

In *Gluyas v Google Inc* [2010] VCAT 540 the complainant alleged a blog established by a third person (in the United States) containing offensive material amounted to discrimination against him in the provision of goods and services. Google sought to have the matter dismissed because the conduct occurred entirely outside the State of Victoria. For that reason, Google argued the conduct was not governed by the provisions of the 1995 Act. VCAT found the conduct in question was Google’s assistance in putting the material up and its refusal to take that material down. It found the conduct had occurred outside the jurisdiction. VCAT distinguished this from cases involving those who actively publish the material on the internet. VCAT dismissed the complaint as lacking jurisdiction.
In *Tan v McArdle [2010] VCAT 248* VCAT considered a claim about an employment decision made in Tasmania while the complainant was living and working in New South Wales. The complainant alleged victimisation because of a sexual harassment complaint that had been previously made in Victoria. VCAT found none of the elements of victimisation occurred in Victoria, and thus there was an insufficient connection to Victoria. VCAT dismissed the complaint.

**Vexatious claims**

Courts and tribunals have provided some guidance on when an application will be considered vexatious:

> If it is brought predominantly for a purpose other than obtaining an adjudication of rights under the Equal Opportunity Act, or primarily to annoy, embarrass or place an unfair burden on the respondent, or if it is so untenable as to be manifestly hopeless.


**Costs**

When a complaint of unlawful conduct is made under the Equal Opportunity Act, the parties involved may engage a lawyer or advocate to assist them. Unless the lawyer or advocate is acting on a *pro bono* (free) basis, each party will accumulate costs.

The term ‘costs’ describes legal fees incurred in making a complaint and taking it to a court or tribunal. ‘Costs’ can also include other expenses, charges or ‘disbursements’ that the party’s lawyer incurs in preparing, presenting or defending a case. They can include application fees, barristers’ fees, photocopying, expert witness fees or other costs involved in calling witnesses. When costs are awarded against a party, they must pay the costs of the other party or parties in accordance with the order of the court or tribunal.

Costs are different to damages or financial compensation for loss caused as a result of unlawful conduct. See the section on Damages for more discussion.

**Recovering costs**

At conciliation at the Commission under the Equal Opportunity Act, a complainant can seek costs as part of their negotiated settlement, if they are able to agree this with the other party. There are no rules in the Equal Opportunity Act to restrict a complainant seeking to recover their costs during dispute resolution facilitated by the Commission.

When a complaint is heard before VCAT, the general rule is that each party will bear their own costs in the proceeding. This rule is set out in section 109(1) of the VCAT Act.

However, VCAT has a discretion under section 109(2) of the VCAT Act to order that a party pay all or a specified part of the other party’s costs at any time in the proceeding. It can do so only if satisfied it is fair to do so, having regard to a list of factors set out in section 109(3) of the VCAT Act. These factors are discussed in more detail below.

If VCAT orders costs, usually the successful party has their costs paid by the unsuccessful party. However, because VCAT has a discretion in ordering costs, a successful party may have to pay some or all of the costs of the unsuccessful party if VCAT considers it fair to do so.

**Awarding costs**

At discussed above, VCAT has discretion to order one party to pay another party’s costs. Generally speaking, if VCAT awards costs against a party, it will be on the application of the other party, and in relation to poor conduct during proceedings. Such conduct includes causing delay, lying or leading the other party or VCAT, or bringing a claim with no basis in law or fact.
As VCAT noted in *Tan v Xenos* [2008] VCAT 1273:

Most costs orders appear to have been made against unsuccessful Complainants whose cause of action has been hopeless from the start. Costs orders against Respondents have usually been made where the Respondent has not complied with interlocutory orders, or to take into account the manner in which the Respondent has conducted the defence, or the maintaining of any clearly hopeless defence [7].

In determining whether to award costs, VCAT may consider a number of factors under section 109(3) of the VCAT Act:

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged the other party, including:

(i) failing to comply with VCAT’s directions or orders without reasonable excuse
(ii) failing to comply with the VCAT Act or rules
(iii) asking for an adjournment as a result of failing to comply with directions or rules
(iv) causing an adjournment
(v) attempting to deceive another party or VCAT
(vi) vexatiously conducting the proceeding.

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law

(d) the nature and complexity of the proceeding

(e) any other matter VCAT considers relevant.

VCAT can consider these factors together and determine whether it is fair to make an order for costs. See *Richardson v Casey City Council* [2015] VCAT 235 [28].

Differences in resources will not necessarily be a reason to order costs. In the matter of *Ingram v QBE Insurance Ltd* [2015] VCAT 1936 [302] the complainant was successful in her claim. She was represented by Victoria Legal Aid. VCAT did not consider the fact that the majority of the legal costs would be paid from the public purse was a reason to order costs.

VCAT may also order costs under:

- section 74(2)(b) of the VCAT Act where a party withdraws their application
- section 75(2) of the VCAT Act where VCAT makes an order summarily dismissing or striking out all or part of a proceeding that it considers is frivolous, vexatious, misconceived, lacking in substance or an abuse of proceedings.

In the costs decision *Styles v Murray Meats Pty Ltd* [2005] VCAT 2142 (Styles) Deputy President McKenzie provided some guidance on how section 109 will be interpreted and applied by VCAT:

As the Victoria Court of Appeal pointed out in *Pacific Indemnity Underwriting v Maclaw* [2005] VSCA 165, the position under section 109 of the VCAT Act is different from that applying in the courts. The general rule is that costs lie where they fall unless VCAT considers it fair to award otherwise. Whether it is fair to award otherwise must be determined on a case by case basis. Some of the factors taken into
account may be of a more general nature. Other factors will relate only to the case in question. It is difficult to argue by reference to analogy in other cases. Each case must be considered on its merits and will be different from each other case.

I accept that it is important that the redress provided by the Equal Opportunity Act should not be undermined or made less accessible because potential complainants fear orders for costs against them if they lose. This is a good reason for not applying an automatic rule that costs follow the event. Section 109 does not do this. It requires each case to be considered on its own circumstances [15]–[16].

Deputy President McKenzie further noted a party will not be entitled to costs in every case, simply because they have legal representation or the matter has been 'vigorously contested'. The latter may be a 'decisive factor' in one case, but not in every case. The question will be whether in a particular case it is fair to award costs [17]–[19].

In Styles, the complaint was of sexual harassment and sex discrimination. Only the sexual harassment complaint was successful. In assessing the complainant's costs application, Deputy President McKenzie considered the relative strengths of the parties cases. She found the complainant's sexual harassment case was strong, whereas the respondent's sex discrimination complaint was also strong. Taking this into account, and the fact the complaint was strongly contested, Deputy President McKenzie considered it fair to award 50 per cent costs in favour of the complainant [21]–[24].

**Setting the amount of costs**

In conciliation the amount of costs a complainant might recover will depend on negotiations between the parties. Any amount negotiated should be based on what the party has been charged by their lawyer or advocate.

If VCAT makes an order for costs, it may set the amount of costs itself, such as by reference to an existing court costs scale\(^20\) or by simply setting an amount payable.\(^{21}\) Alternatively, VCAT can order that the Costs Court assess, settle, tax or review the costs of the proceedings (section 111 of the VCAT Act). Taxation of costs may be ordered in the first instance, or can be ordered in default of agreement.

The Costs Court is a specialist court established by section 17C of the *Supreme Court Act 1986* (Vic). If VCAT orders an assessment or taxation of costs by the Costs Court, this will involve filing a detailed bill of costs for the Costs Court to assess whether the costs were reasonably incurred and have been billed at a reasonable rate. The rules contained in Order 63 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) govern this process.

If the matter goes to the Costs Court for assessment, under regulation 63.28 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) costs can be 'taxed' and awarded on two bases:

- 'standard basis', which are all costs reasonably incurred and of reasonable amount (regulation 63.30)
- 'Indemnity basis', which are all costs, except those that were unreasonably incurred or are of an unreasonable amount (regulation 63.30.1).

\(^{20}\) Previous cases have used either Scale B, C or D of the County Court Costs Scale. See, for example, Scale B: *Styles v Murray Meats Pty Ltd* [2005] VCAT 2142; Scale C: *Gonzalves v MAS National Apprenticeship Services Costs* [2007] VCAT 64; Scale D: *Finch v The Heat Group Pty Ltd* (Unreported, Victorian Civil and Administrative Tribunal, Harbison VP; 31 January 2011) noted in costs appeal decisions: *Finch v The Heat Group* [2011] VSCA 100, [1], [10]–[12] and *Finch v The Heat Group Pty Ltd* [2012] VCAT 223 [5].

\(^{21}\) See, for example, *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845 where the complainant was ordered to pay a contribution of $8,000 towards the costs of Chubb Security.
Costs are usually awarded and assessed on a standard basis, whether taxed by the Costs Court or ordered by VCAT.

Parties should retain their tax invoices and receipts so there is an accurate record of costs.

**Rejecting an offer of settlement**

The VCAT Act provides that a party who makes an offer of settlement will be entitled to have their costs reimbursed where the offer is rejected (under sections 112–115 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic)). However, these sections do not apply to complaints under the Equal Opportunity Act (under schedule 1, clause 22 of the VCAT Act).

Instead, in exercising its discretion to order costs under section 109(3) of the VCAT Act, VCAT may take into consideration the fact a party has rejected an offer of settlement or compromise (including a 'Calderbank letter' where the offer is said to be 'without prejudice save as to costs'). This is usually relevant where the party rejecting the offer is the unsuccessful party in the proceedings. See, for example, *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845 [21]–[25].

Rejecting an offer of settlement may, therefore, be relevant to whether costs are awarded. However, VCAT has noted rejecting an offer will not automatically result in an award of costs against an unsuccessful party. See *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845 [21] and *Coomans-Harry v Direct Mobile Conveyancing Pty Ltd* [2012] VCAT 143 [26].

**Costs awarded by VCAT**

Examples of costs awards by VCAT between 2006 and 2018 are set out in Table 2 below. It details the type and amount of costs ordered and the reasons they were ordered. It is not an exhaustive list and does not include cases where costs were sought and refused.
<table>
<thead>
<tr>
<th>Name</th>
<th>Grounds for seeking costs</th>
<th>Outcome and basis for orders</th>
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<tbody>
<tr>
<td><strong>GLS v PLP [2013] VCAT 1367</strong></td>
<td>The complainant sought costs based on section 109 of the VCAT Act based on:</td>
<td><strong>Orders</strong></td>
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<td>* her success in the proceeding regarding her allegations of sexual harassment</td>
<td><strong>Orders</strong></td>
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<td>* the length of the proceeding</td>
<td><strong>Respondent to pay:</strong></td>
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<td>* the manner in which the respondent conducted the proceeding, including the pursuit</td>
<td>• the costs of various hearings and in-chamber orders during the proceeding</td>
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<td>of an unmeritorious and time-wasting interlocutory appeal to the Supreme Court of</td>
<td>• the complainant's costs thrown away due to late filing and service of a witness statement and exhibits</td>
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<td>Victoria, and service of new and significant affidavit material on the first day of the</td>
<td>• the complainant's solicitor and counsel for appearances at hearing.</td>
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<td>final hearing</td>
<td><strong>Reasons</strong></td>
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<td>* the remedial nature of the legislation and the disincentive to complainants to bring</td>
<td>In seeking costs orders, counsel for the complainant principally relied on section 109(3)(a)–(d).</td>
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<td>similar proceedings if they are not to be compensated for reasonable legal costs</td>
<td>The orders address the respondent's conduct where it unnecessarily disadvantaged the complainant, including failing to comply with VCAT's orders and directions, seeking an adjournment, or vexatiously conducting the proceeding and unreasonably prolonging its interlocutory and final stages.</td>
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<td>* the fact that the complainant's legal expenses exceeded the damages recovered, even</td>
<td>However, there was no reason to depart from the prima facie rule set that each party should bear their own costs of the proceeding, given that both parties were represented. Although fourteen allegations of sexual harassment were raised the allegations were not complex and the case required consideration of facts and expert evidence.</td>
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<td>though the compensation awarded was $100,000.</td>
<td>When contemplating the considerations set out in s 109(3)(a)–(e) individually and collectively, VCAT was not satisfied it was fair to make a general costs order or additional costs orders.</td>
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<tr>
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| **Richardson v Casey City Council [2015] VCAT 235** | The respondent sought compensation for costs and expenses unnecessarily incurred taking into consideration the matters set out in section 109(3)(a)–(e) on the basis that the complainant:  
- failed to comply with VCAT’s orders  
- filed evidence that was largely irrelevant and unreasonably prolonged the time taken to complete the proceeding  
- pursued claims that had no tenable basis in fact or law  
- unnecessarily disadvantaged the respondent and caused it to incur costs it would not otherwise have incurred. | **Orders**  
VCAT required the complainant to pay the respondent's costs for one hearing day and standard costs associated with defending one of the discrimination claims. VCAT otherwise dismissed the application for costs.  
**Reasons**  
It was fair and appropriate to address the unnecessary disadvantage caused to the respondent by grossly unreasonable conduct. This included unreasonably prolonging the time taken to complete the hearing.  
However, VCAT also observed as a self-represented litigant, the complainant was seeking to prove conceptually difficult Equal Opportunity Act claims. Discrimination law is a difficult area and even represented parties can have trouble properly enunciating and then proving claims. Not all the complainant's failures to comply with directions or properly organise his material were intentional or due to a lack of effort. |
| **Testart v Phoenix Institute of Australia [2015] VCAT 309** | A respondent applied for costs against a complainant on the basis it considered the complainant brought proceedings before it had made a final decision about the complainant's request for reasonable adjustments to accommodate her disability. | **Orders**  
VCAT ordered the complainant to pay indemnity costs of the proceeding against various individual respondents. It did not order costs to cover the defence presented by the first respondent (a provider of education).  
**Reasons**  
VCAT disagreed the initiation of the application demonstrated the proceeding was conducted vexatiously.  
VCAT was not persuaded the circumstances were sufficient to justify an award of costs regarding the first respondent, an education provider. If an order for costs made where there was a significant factual dispute that needed to be resolved by VCAT would constitute an unacceptable bar to access to this remedial jurisdiction. However, the joining of the individual respondents to the claim was completely unnecessary, unreasonable and an abuse of VCAT's processes. |
| **A’Vard v Deakin University [2015] VCAT 1245** | The respondent applied for an order for all costs it had incurred in the proceeding. It relied in part on the fact VCAT had made a costs order against the complainant in an earlier proceeding. | **Orders**  
VCAT required the complainant to pay the respondent's costs from the time VCAT had been presented with all relevant evidence until the matter was struck out, under the County Court costs scale.  
**Reasons**  
VCAT concluded the circumstances of this case warranted the making of a costs order because:  
- the complainant had previously brought unmeritorious proceedings against the same respondent and was repeatedly warned of the risks of pursuing the matter  
- the previous case should have made the complainant well aware that costs orders could be made to compensate a respondent if she was unsuccessful  
VCAT had strongly recommended the complainant seek legal advice on the strength of her claim. |
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<td><strong>FFF v ZJR [2014] VCAT 741</strong></td>
<td>A respondent sought costs under section 109(1) of the VCAT Act after a complaint of sexual harassment was struck out.</td>
<td><strong>Orders</strong>&lt;br&gt;The complainant was ordered to pay the second respondent $2000. <strong>Reasons</strong>&lt;br&gt;VCAT found the criteria set out in sections 109(2) and 109(3) of the VCAT Act justified a costs order. It observed:  &lt;li&gt;costs are not lightly awarded in the Human Rights Division. VCAT is mindful that members of the public should not be dissuaded from commencing actions for fear that if they are unsuccessful, costs will follow the event&lt;/li&gt;  &lt;li&gt;nonetheless, the case was manifestly hopeless from the outset. Despite the complainant's solicitors being informed the complainant lacked standing and the Equal Opportunity Act did not cover the circumstances set out in her complaint, the complainant continued the matter. This course of conduct put the respondents to considerable expense in circumstances where the difficulties of the case should have been obvious.&lt;/li&gt;</td>
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<td><strong>Singh v RMIT University and Ors [2011] VCAT1890</strong></td>
<td>The respondents sought orders for costs under section 109(3)(b) and (c) of the VCAT Act on the basis that:  &lt;li&gt;the complainant was responsible for unreasonably prolonging the proceeding&lt;/li&gt;  &lt;li&gt;the claim had no tenable basis in fact or law.&lt;/li&gt; The respondents relied on the conduct including the production of significant new material during the hearing and the complainant's manner during cross examination, which was evasive and non-responsive.</td>
<td><strong>Orders</strong>&lt;br&gt;Complainant ordered to pay the respondent's party–party costs on County Court Scale D for five full days of hearing. <strong>Reasons</strong>&lt;br&gt;The specified circumstances set out in section 109(3)(b) and (c) had been made out and, in all the circumstances, VCAT considered it fair that an order for costs be made. While the complainant did not intend to deliberately prolong the hearing, the manner in which she conducted herself (particularly during cross examination and despite warnings about her conduct) resulted in the hearing being delayed. The hearing took nine days. The very serious complaints against the respondent were found to be baseless.</td>
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<td><strong>Finch v The Heat Group Pty Ltd</strong> (Unreported, VCAT, Harbison VP, 31 January (2011))</td>
<td>Not available</td>
<td><strong>Orders</strong>&lt;br&gt;Complainant ordered to pay two-thirds of the respondent's costs, taxed at County Court Scale D. These costs were not to include professional costs otherwise the subject of an order of costs previously made in this proceeding' (As reproduced in later proceedings Finch v The Heat Group Pty Ltd [2012] VCAT 223 [5]). <strong>Reasons</strong>&lt;br&gt;Costs were awarded on the basis that the conduct of the complainant, and her insistence on exploring irrelevant matters, extended the length of the trial and complicated the pre-trial process. The complainant's conduct significantly prolonged the hearing of the proceeding over 20 days when it should have run for five days. Time was lost because of the complainant's conduct, including failure to comply with VCAT orders.</td>
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| **Morros v Chubb Security Personnel Australia [2009] VCAT 1845** | The successful respondent sought costs on the basis that:  
  - the claim had no tenable basis in fact or law  
  - the claim was not one in which the complainant could reasonably have believed she would succeed  
  - the complainant unreasonably rejected offers to settle the complaint.                                                                                                     | Orders  
  Complainant ordered to pay respondent $8000 as a contribution towards its costs  
  Reasons  
  The complainant rejected several offers of settlement and failed to identify an attribute on which her complaint was based. The case was strongly contested.  
  Note that this complaint and costs application was heard at the same time as *Sagris v Chubb Security Australia Ltd [2009] VCAT 1786* (25 August 2009). While Ms Morros had costs awarded against her, VCAT did not consider it fair in the circumstances to award costs against Mr Sagris because he had an arguable case. Ms Morros' case was 'doomed from the start'. |
| **Tan v Xenos [2008] VCAT1273** | The complainant sought costs on the basis of sections 109(3)(b)–(e), which include:  
  - the nature and complexity of proceedings  
  - that the respondent unreasonably prolonged proceedings  
  - whether a party has made a claim that has no basis in fact or law  
  - any other relevant matters. Solicitor–client costs were sought rather than party–party costs.  | Orders  
  Respondent ordered to pay one third of the complainant's party–party costs taxed on County Court Scale D.  
  Reasons  
  Costs were awarded against the respondent on the basis that the respondent had introduced irrelevant evidence that unnecessarily lengthened the hearing.  
  Approximately one-third of the proceedings were affected by this conduct.  
  In making the orders, her Honour Judge Harbison, Vice President noted each application must be judged 'on its merits and in the light of the raison d’être of VCAT, which is to promote affordable and timely access to justice' [10].  
  Judge Harbison noted the proceeding was 15 days long, and was strongly contested with neither side willing to make any concessions to the other [15], citing *Bryce v City Hall Albury Wodonga Pty Ltd [2004] VCAT 2013*. However, her Honour noted a long complex commercial dispute is very different to a long complex anti-discrimination dispute and further considerations apply.  
  Solicitor–client costs were rejected in favour of party–party costs, on the basis that 'gross behaviour' during the case was required to justify an award of solicitor–client costs [41]. |
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| **Mangan v Melbourne Cricket Club (costs) VCAT [2006] 792** | The complainant sought indemnity costs, claiming there was ‘an element of public interest in the proceeding, the absence of personal gain for the complainant, a disparity in the relative means of the two parties, and the respondent's conduct of the proceeding’. | **Orders**<br>Respondent ordered to pay the costs of the complainant, to be assessed by the Principal Registrar on County Court Scale A.  
**Reasons**<br>The matter was serious, but at the lower order of things. It was fair in all the circumstances to award a 'modest' amount of costs.  
VCAT was not satisfied the respondent conducted the proceeding in a manner that was in any way improper or unnecessarily imposed costs on the complainant. Nor was VCAT satisfied the disparity in the means of the parties was a relevant consideration.  
There was no basis for any order for indemnity costs, and VCAT noted indemnity costs are rare. VCAT did not accept the complaint was 'wholly public spirited' as part of the relief sought provided a personal benefit to the complainant. |
| **Beasley v Department of Education and Training [2006] VCAT 2044** | The complainant sought costs in relation to a strike out application by the respondent, and the substantive hearing. For each, the complainant relied on section 109(3)(c)–(e). The arguments focussed primarily on section 109(3)(c) – strengths of the respective cases. | **Orders**<br>Respondent was ordered to pay 80 per cent of the complainant's total costs of and incidental to the respondent's application to strike out or dismiss the complaint. Costs payable on a party–party basis on County Court Scale A.  
Respondent was also ordered to pay seven per cent of the complainant's costs of and incidental to the rest of the substantive proceeding. Costs include disbursements to the advocate for interpreting services. Those costs were on a party–party basis on County Court Scale C.  
**Reasons**<br>The respondent was ‘unsuccessful as to 80 per cent’ of the strike out application, and its arguments in seeking to strike out the complaint were very weak.  
In relation to the substantive proceedings, the parties should bear their own costs except in relation to a small part of the complainant's claim, which Deputy President McKenzie considered equalled seven per cent of the total claim. In that case, the case was extremely weak, and the complaint extremely strong, and so the respondent should pay a proportion of the costs. Otherwise, there was no improper, unreasonable, vexatious or oppressive conduct by the respondent. |
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<tr>
<th>Name</th>
<th>Grounds for seeking costs</th>
<th>Outcome and basis for orders</th>
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| **Kelly v Catholic Education Office [2006] VCAT 2367** | The respondents, in the course of a strike out application, sought costs against the complainant under section 109(3)(b)–(d):  
- the complainant was responsible for unreasonably prolonging the time taken to complete the hearing  
- the claim had no tenable basis in fact or law  
- the nature and complexity of the proceeding warranted costs to be ordered. | Orders  
Complainant ordered to pay the costs of the respondent on County Court Scale D.  
Reasons  
VCAT rejected claim under section 109(3)(b) because, while the complainant spent considerable time addressing VCAT, the hearing still finished within the dates scheduled. However, the claim did not have a tenable basis in fact or law. Given the need for the respondent to thoroughly defend the allegations, and the nature and complexity of the proceedings, costs were ordered. |
| **MacDougall v Kimberly Clark [2006] VCAT 2604** | The respondents sought orders for costs under section 109(3)(c) and (e) of the VCAT Act on the basis that:  
- complaint had no tenable basis in fact or law despite the complainant having legal representation who could give her advice as to merits of her complaint  
- complainant failed to provide sufficient evidence to support case  
- respondent required to raise evidence on particular issues even though the onus was on the complainant to prove those matters  
- the complainant's cross examination of the respondent's expert witness was irrelevant. | Orders  
Complainant ordered to pay respondent's costs:  
- $14,162 for disbursements  
- $5000 towards the respondent's solicitor–client costs regarding the substantive hearing  
Reasons  
VCAT agreed with the reasons for ordering costs put forward by the respondents. VCAT noted the complainant was legally represented and had been on notice of the deficiencies in her case by the member hearing the application, but had taken no steps to address them. |
| **Khalil v Wallace [2006] VCAT 10** | The complainants sought costs on the basis that the respondents had conducted the proceeding in a way that unnecessarily disadvantaged them, by:  
- failing to comply with a direction or order of VCAT without reasonable excuse  
- failing to comply with the Victorian Civil and Administrative Tribunal Rules  
- causing an adjournment  
- prolonging unreasonably the time taken to complete the proceeding. | Orders  
Respondents ordered to pay the complainants’ costs, fixed at $3,334.58  
Reasons  
In VCAT’s view it was fair to order costs as the respondents failed to comply with orders to file or serve particulars of defence and did not advise VCAT of changes to addresses for service, as required by the VCAT Rules. As a result of their conduct, the hearing was adjourned but the respondents continued to disobey VCAT's directions. This 'unnecessarily disadvantaged the complainants and has prolonged unreasonably the time taken to complete this case'.  
Note: this was a complaint under the RRTA. |
Protective costs orders

In a protective costs order, a court orders any costs awarded in a proceeding be capped at a given level. In King v Jetstar Airways Pty Ltd [2012] FCA 413, for example, the Federal Court capped the costs to be awarded against the appellant in the appeal proceedings at $10,000, noting 'the point of this cost-capping order is to avoid the stifling of what is potentially an important appeal' [21].

The issue has been considered by the Victorian Supreme Court of Appeal in the matters of Bare v Small [2013] VSC 204 (Bare) and Khalid v Secretary Department of Transport, Planning and Local Infrastructure [2014] VSCA 115 (Khalid). In these decisions, the following factors were considered relevant to whether a protective costs order should be made:

- the timing of the application
- the complexity of the factual or legal issues raised
- whether the applicant claimed damages or other form of financial compensation
- whether the applicant's claims were arguable and not frivolous or vexatious
- the undesirability of forcing the applicant to abandon the proceedings
- whether there was a public interest element to the case
- the costs likely to be incurred by the parties
- whether the party opposing the making of the order had been uncooperative and/or delayed the proceeding
- the applicant's ability to pay costs
- whether a significant number of members of the public may be affected
- whether the basis of the challenge raises 'significant issues' as to the interpretation and application of statutory provisions
- any other matters that could go towards establishing that there should be a departure from the usual rule that the costs follow the event.

In Bare, the Court of Appeal granted a protective costs order. The appellant's liability to pay costs was limited to a maximum of $5000 in the event that an appeal he had brought was unsuccessful. The application was made at the first opportunity. It would allow a claimant of limited means access to the court to advance a case without fear of an order for substantial costs being made against them. The matter raised complex legal questions of clear public importance, and the appellant was not seeking damages. The Court accepted evidence that if the application failed, the appellant would discontinue his appeal. He was 21 years of age, unemployed and with very limited finances. An adverse costs order would cause him to become bankrupt. Considering the financial resources of the parties, and likely costs to be involved, the Court considered it was fair and just to make the order.

However in Khalid, the Court declined to make a protective costs order. The appellant submitted he could not satisfy an adverse costs order and was likely to discontinue his appeal as he was impecunious. He had an arguable case involving public interest considerations, had reasonably pursued the matter and was represented pro bono. Although he sought damages, the amount was very small and he would consent to the order being mutual. The Court considered the fact that the appellant sought damages, a matter found in other cases to 'suggest strongly against a grant of a protective costs order'. Furthermore, the appellant had no personal interest in the outcome and there was no evidence presented about the number of people that would be affected by a determination. The case did not contain elements of public interest of the magnitude of those raised in Bare.

In Victoria, section 65C(2A) of the Civil Procedure Act 2010 sets out the matters that a court may have regard to when considering whether to make a protective costs order. This section now mirrors the common law criteria for protective costs orders and places it into legislation.
and provides clarity and guidance on the circumstances in which such orders will be considered appropriate.\textsuperscript{22}

\textsuperscript{22} Explanatory Memorandum, Justice Legislation Amendment (Access to Justice) Bill 2018 (Vic) 921.
Compliance powers

The Equal Opportunity Act gives the Victorian Equal Opportunity and Human Rights Commission the function to promote and advance the objectives of the Equal Opportunity Act. Outlined in section 3, these objectives are broad, and include:

- eliminating discrimination, sexual harassment and victimisation (to the greatest possible extent), and identifying and eliminating their systemic causes
- promoting and protecting the right to equality
- promoting and facilitating the progressive realisation of equality.

In addition to the Commission's role in the resolution of disputes, the Equal Opportunity Act gives the Commission specific powers to facilitate compliance and encourage best practice. These powers include:

- issuing practice guidelines relevant to the Equal Opportunity Act. Guidelines are not legally binding, but may be taken into consideration by a court or tribunal in relevant to legal proceedings (section 148)
- conducting a review of an organisation's programs and practices for compliance with the Equal Opportunity Act (on request) (section 151)
- providing advice about preparing and implementing action plans (which specify steps necessary for an organisation to improve compliance) (section 152) and maintaining a register of action plans (section 153)
- conducting investigations on matters:
  - that are serious, relate to a class or group of people, and cannot be reasonably expected to be resolved through dispute resolution and involve a possible contravention of the Equal Opportunity Act
  - where there are reasonable grounds to expect that one or more contraventions of the Equal Opportunity Act have occurred
  - that would advance the objectives of the Equal Opportunity Act (section 127).

This may include investigating a breach of the positive duty
- intervening as a party in proceedings that involve issues of equal opportunity, discrimination, sexual harassment or victimisation (section 159)
- assisting in proceedings as amicus curiae where the intervention would be in the public interest, and where proceedings are likely to affect protection against discrimination (section 160).

The Commission has issued the following practice guidelines under section 148 of the Equal Opportunity Act:

- Guideline: Family violence services and accommodation > Complying with the Equal Opportunity Act 2010
- Guideline: Trans and gender diverse inclusion in sport > Complying with the Equal Opportunity Act 2010
- Guideline: Mental illness > Complying with the Equal Opportunity Act 2010 in employment
- Guideline for General Practices > Complying with the Equal Opportunity Act 2010 when providing services
- Guideline: Transgender people at work > Complying with the Equal Opportunity Act 2010 in employment
- Guideline: Sexual harassment > Complying with the Equal Opportunity Act 2010
Guideline for the recruitment industry and employers > Complying with the Equal Opportunity Act 2010 in recruitment
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[Logo of Victorian Equal Opportunity & Human Rights Commission]