

Chapter 10

> Sexual harassment

545. Part 6 of the Equal Opportunity Act deals with sexual harassment and largely reflects Part 5 of the 1995 Act.

546. [Section 92\(1\)](#) of the Equal Opportunity Act defines sexual harassment as follows.

92 What is sexual harassment?

(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
- 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 that 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.

547. In essence, the Equal Opportunity Act prohibits a person from engaging in conduct of a sexual nature that could reasonably be expected to offend, humiliate or intimidate a person.

Areas of activity in which sexual harassment is prohibited

548. [Sections 93 to 102](#) of the Equal Opportunity Act prohibit sexual harassment in the following areas:
- a. harassment by employers and employees⁴⁸⁹
 - b. harassment in common workplaces⁴⁹⁰
 - c. harassment by partners in firms⁴⁹¹
 - d. harassment in industrial organisations⁴⁹²
 - e. harassment by members of qualifying bodies⁴⁹³
 - f. harassment in educational institutions⁴⁹⁴
 - g. harassment in the provision of goods and services⁴⁹⁵

489 [Equal Opportunity Act 2010 \(Vic\) s 93](#). See also [Equal Opportunity Act 2010 \(Vic\) s 27](#).

490 [Ibid s 94](#). 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 and Anor \[2011\] VCAT 706](#)

491 [Ibid s 95](#). 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'.

492 [Ibid s 96](#). Section 4 of this Act also defines 'industrial organisation', including in relation to acts of sexual harassment.

493 [Equal Opportunity Act 2010 \(Vic\) s 97](#). [Equal Opportunity Act 2010 \(Vic\) s 4](#) defines 'qualifying body' as 'a person or body that is empowered to confer, renew or extend an occupational qualification'.

494 [Equal Opportunity Act 2010 \(Vic\) s 98](#). [Turner v Department of Education and Training \[2007\] VCAT 873](#) confirmed that 'educational institution' includes 'a school at which education is provided'.

495 [Equal Opportunity Act 2010 \(Vic\) ss 99, 125](#). 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).

- h. harassment in the provision of accommodation⁴⁹⁶
- i. harassment in clubs⁴⁹⁷
- j. harassment in local government.⁴⁹⁸

Protection of volunteers in ‘employment’

549. The Equal Opportunity Act defines the employment relationship to include a person who performs work for another on a voluntary or unpaid basis, but only for the purposes of the prohibitions against sexual harassment in Part 6 of the Equal Opportunity Act. As a consequence, volunteers now have protection against sexual harassment to the extent that this occurs in the context in which they provide their voluntary services. They do not otherwise derive the same protection available to employees under the Equal Opportunity Act.
550. The reasons for limiting the protection afforded to volunteers in this way was not explicitly clarified during the consultation process for the Equal Opportunity Act. The Second Reading Speech clarified that 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’.⁴⁹⁹ It was recognised, however, that this change would present challenges to some organisations, especially those in the community and not-for-profit sector that have limited resources, who will have to both understand and prepare for the change. This is most likely the explanation behind only acts of sexual harassment being within the remit of this additional protection at this time.
551. The fact that the Second Reading Speech recognised that unpaid workers and volunteers can be subjected to all types

496 [Equal Opportunity Act 2010 \(Vic\) s 100](#). In [Marlene Ross v Heinz Looock \[2000\] 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 that the landlord, as the accommodation provider, had sexually harassed the female tenant in the course of providing her accommodation.

497 [Equal Opportunity Act 2010 \(Vic\) s 101](#). See [s 4](#) for further discussion of the definition of ‘clubs’ for the purposes of the [Equal Opportunity Act 2010 \(Vic\)](#) and [Chapter 2](#) of this resource.

498 [Equal Opportunity Act 2010 \(Vic\) s 102](#).

499 Victoria, [Parliamentary Debates](#), Legislative Assembly, 10 March 2010, 115-121 (Rob Hulls, Attorney-General).

of discrimination, and not just to sexual harassment, indicates that perhaps the definition will be extended in the future.

552. Volunteers may however be protected from discrimination in the context of the provision of goods and services, as discussed in [paragraph 295](#) of this resource.

Sexual Harassment – some key concepts

553. To constitute sexual harassment, the conduct complained of must satisfy a number of characteristics. In particular, the conduct complained of must have a sexual element to it. Secondly, the conduct must be unwelcomed by the recipient. This is a particularly important element in establishing whether conduct complained of constitutes sexual harassment – as the same conduct in the context of a consensual relationship is clearly outside the scope of the sexual harassment provisions and would not be unlawful. These provisions do not proscribe conduct based on mutual attraction between consenting adults.
554. In addition, the conduct complained of must occur in circumstances in which a reasonable person with knowledge of all the surrounding circumstances would have anticipated that the subject of the conduct would be ‘offended, humiliated or intimidated’.
555. As with other provisions under the Equal Opportunity Act, intention or motive is not required to make out a claim of sexual harassment.⁵⁰⁰
556. Each of these concepts will be explored further below.

Conduct of a sexual nature

557. As stated, to constitute sexual harassment, the conduct complained of must be able to be characterised as conduct of a sexual nature. 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 and the case law is peppered with cases where an employer, for example, propositions an employee and requests sex in circumstances which have been held to constitute sexual harassment.⁵⁰¹

500 [Equal Opportunity Act 2010 \(Vic\) s 10](#).

501 See, for example, [Delaney v Pasunica Pty Ltd \[2001\] VCAT 1870](#).

558. In *Campagnolo v State of Victoria - Department of Environment & Sustainability*⁵⁰² VP Judge Harbison confirmed that an ‘unwelcome sexual advance...connotes some sexual importuning or soliciting’.⁵⁰³
559. In *Sammut v Distinctive Options Limited*,⁵⁰⁴ Mr Sammut pursued a claim of sexual harassment against his employer on the basis that Ms Joy, one of his fellow employees, had sexually harassed him. One of the allegations was that Ms Joy had told Mr Sammut, in graphic detail, about an incident in which she had had sex in a car. The Tribunal held that 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’.⁵⁰⁵
560. Another allegation was that Ms Joy had subjected Mr Sammut to ‘conduct of a sexual nature’ by hugging him. The Respondent tried unsuccessfully to argue that 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’. The Tribunal did not accept that the workplace was ‘universally huggy’ and also found that the hugs were ‘intimate’ and were ‘more than a comforting or supportive pat on the shoulder’.
561. 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’.⁵⁰⁶ The Tribunal 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 EOA.⁵⁰⁷

562. In some cases, the context may be crucial in determining whether or not the conduct is found to be of a ‘sexual nature’ and therefore constitute sexual harassment. For example, in *State of Victoria & Ors v McKenna*,⁵⁰⁸ 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, firstly, pulling Ms McKenna onto his lap and, secondly, 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 Court rejected the argument that the third incident should be classed as assault, rather than sexual conduct. This was rejected on the basis that the incident occurred as part of a series, the other incidents being sexual, and therefore this act had the necessary sexual element to render it a sexual assault and therefore also amount to sexual harassment. Had this incident occurred in isolation, it may not have had the necessary sexual element.⁵⁰⁹

502 [\[2008\] VCAT 1996](#).

503 *Ibid* [23].

504 [\[2010\] VCAT 1735](#).

505 *Ibid* [54].

506 *Ibid* [69].

507 *Ibid* [69]-[71]. Section 85 of the *Equal Opportunity Act 1995* is replicated in [s92](#) of the *Equal Opportunity Act 2010*; Section 86(2)(a) of the *Equal Opportunity Act 1995* is replicated in [s93\(2\)\(a\)](#) of the *Equal Opportunity Act 2010*.

508 [\[1999\] VSC 310](#).

509 *Ibid* [219]-[223].

563. Where the conduct complained of falls short of constituting a request for sexual favours or a sexual advance, it may nonetheless constitute sexual harassment if it constitutes conduct of a sexual nature. As stated above, [section 92\(2\)](#) further assists in the interpretation of what amounts to conduct of a sexual nature. It is important to note, however, that this section is an inclusive not an exhaustive list of what constitutes conduct of a sexual nature. There may be other conduct which would fall within the ordinary meaning of conduct of a sexual nature not expressly referred to in [section 92\(2\)](#).

564. In *Te Papa v Woolworths Ltd trading as Safeway*⁵¹⁰ at paragraph 7, Judge S Davis made the following comment about 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.⁵¹¹ 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.⁵¹² 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.

565. In *Johanson v Michael Blackledge Meats*,⁵¹³ a customer had been sold a bone at a butcher's shop, which had been deliberately made into the shape of a penis by an employee of Michael Blackledge Meats. Although the sale of the bone to that customer was unintentional, the transaction was sufficient to constitute sexual harassment. The reasoning for this was that by making the bone into the shape of a penis and then disguising it amongst the rest of the bones for sale, the employee had engaged in conduct which exposed the customer to the risk of obtaining from the shop, an object which caused her serious offence.⁵¹⁴

566. The test of whether conduct is conduct of a sexual nature is an objective one and the motivation or understanding of the perpetrator is irrelevant.⁵¹⁵ Also note that a single incident may constitute sexual harassment, as can a series of incidents.

567. In *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors*,⁵¹⁶ Justice Lockhart said that 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'.⁵¹⁷ In the same case, Justice French also held that sexual harassment need not involve repetition, stating that, 'circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs'.⁵¹⁸

568. Further exemplifying this point, in *Tan v Xenos*,⁵¹⁹ damages of \$100,000 were awarded in relation to a single incident of sexual harassment. It should be noted that this act involved serious sexual, unwelcomed 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.

513 [2001 FMCA 6](#).

514 *Ibid* [90].

515 *Frith v the Exchange Hotel* [2005] FMCA 402.

516 [1989] FCA 72.

517 *Ibid* [40] per Lockhart J (first judgement).

518 *Ibid* [53] per French J (third judgement). See also *Sammut v Distinctive Options Limited* [2010] VCAT 1735 [51]; *Equal Opportunity Act 2010 (Vic) s 92(2)* which is in substantially the same terms as its predecessor in the 1995 Act.

519 [\[2008\] VCAT 1273](#).

510 [\[2006\] VCAT 1222](#).

511 See also *Cassandra Evans v Total Food Management* [1997] VCAT 213, [9].

512 *Ibid*.

569. [Section 92\(2\)\(a\)](#) refers to conduct which 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*.⁵²⁰ In that case, the complainant made a complaint of sexual harassment in the provision of goods and services and accommodation. The facts, in summary, were that the complainant was having a massage at a hotel where she was staying with her partner. She alleged that during the massage, Mr McKinlay, the masseuse, 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.
570. In determining whether this constituted conduct of a sexual nature for the purposes of the 1995 Act, the Tribunal recognised that the act complained of had 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’.⁵²¹ This was relevant to the Tribunal’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 as these, there can still be an act of sexual harassment if, for instance:
- There 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.
571. 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 that the nature of the treatment that Mr McKinlay was providing, being the massage, had so changed the treatment so as to make it conduct that could constitute ‘sexual physical intimacy’. The Tribunal therefore found that there had been no sexual harassment in this instance.
572. The Peppers Delgany Portsea case illustrates the point that where there has been any physical contact, the context in which that contact has occurred will be very important in determining whether or not it meets the test of ‘sexual harassment’. Similarly, in *Burgiss v Clisby Pty Ltd*,⁵²² for example, there was agreement about the fact that Mr Grech, an employee of the respondent, hit the complainant on the ‘backside with a newspaper’. There was a dispute about the context in which this happened. On this point 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.⁵²³

520 [\[1999\] VCAT 645](#).

521 *Ibid* [5].

522 [\[2004\] VCAT 1817](#).

523 *Ibid* [29].

Unwelcome conduct

573. As stated above, to constitute sexual harassment for the purposes of the Equal Opportunity Act, not only must the conduct be of a sexual nature, but, importantly, it must be 'unwelcome'. In *GLS v PLP*⁵²⁴ the Justice Garde, President of the Tribunal adopted the test in *Aldridge v Booth*,⁵²⁵ where Spender J held that 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 that the question of whether behaviour is unwelcome is subjective, based on the state of mind of the complainant.⁵²⁶
574. This means that not only must the conduct not be invited or solicited, but even where unsolicited or uninvited, it must nonetheless be unwelcomed. The notion that the sexual conduct is unwelcome is at the core of the concept of what constitutes sexual harassment.
575. In the decision of *Styles v Murray Meats Pty Ltd*,⁵²⁷ Deputy President McKenzie also held that 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...⁵²⁸

576. This, however, does not mean that the respondent has to have actual knowledge that the conduct is unwelcome. As noted by Deputy President McKenzie in *Kaldawi v Smiley*.⁵²⁹

... unwelcome 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.⁵³⁰

524 [2013] VCAT 221.

525 [1988] FCA 170; (1988) 80 ALR 1, 5 cited in *GLS v PLP* [2013] VCAT 221, [33].

526 *GLS v PLP* [2013] VCAT 221, [30] and [32] relying on *Kraus v Menzie* [2012] FCAFC 144 (Rares, McKerracher and Murphy JJ). 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*.

527 [2005] VCAT 2142.

528 Ibid [14]-[16].

529 [2002] VCAT 1754.

530 Ibid [46]-[47]. This decision was given in the context of an interlocutory application to strike out the complaint and therefore ought to be read accordingly.

577. A similar issue arose in the case of *Howard v Geradin Pty Ltd T/A Harvard Securities*.⁵³¹ At paragraph 50 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.

578. Ambivalence towards a person's conduct is not sufficient to defeat a claim of sexual harassment. For example, in *Aldridge v Booth & Ors*⁵³² the federal Human Rights and Equal Opportunity Commission, as it then was, found that the age of the complainant, who was 17 at the time, and her lack of sophistication, had caused her to tolerate the behaviour because she was afraid that her employment would be terminated if she had made it clear that the conduct was unwelcome. It is worth noting that the acts complained of in this case were significant, including several acts of sexual intercourse. The fact that the acts were 'largely unwelcome' was sufficient to meet the requirements of the Act, despite the fact that the complainant had endured the conduct and not openly objected.

579. Such examples can be differentiated from instances where it would not at all be apparent that the sexual conduct was unwelcome. The Victorian case of *Hardy v Kelly (Kelly)*⁵³³ concerned allegations of sexual harassment against Mr Kelly by his secretary, Ms Hardy. The Tribunal found that Ms Hardy and Mr Kelly had a 'close friendship' at the time when the relevant incidents occurred. It was found in this case that, because of the close friendship that existed, and the fact that Ms Hardy actively participated in out-of-hours conversations with Mr Kelly, including allowing him to visit her at home on a number of occasions, 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.

580. The finding of the Tribunal in *Kelly*, and the emphasis that was placed on the close friendship between the parties in determining that there had been no sexual harassment, contrasts with the decision of the Federal Court in *Leslie v Graham*.⁵³⁴ In this case, the applicant was employed by Roger Graham and Associates, which was a family business, and she had become a personal friend of the Graham family. Mr L Graham, who ran Roger Graham and Associates with his father, and the applicant went away for the weekend together to a work-related conference, where they shared an apartment. The applicant alleged that she had woken in the night to find Mr L Graham on top of her, and that she then fled from the apartment. The Court upheld the applicant's allegation of sexual harassment. It found that, in reality, the applicant did not fear, when she woke up, 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 applicant. The nature of the conduct alleged may also have been relevant factors in these cases.

581. The finding of the Tribunal in *Kelly* also contrasts with the recent decision in *GLS v PLP*.⁵³⁵ In that case the complainant Ms GLS and respondent Mr PLP had been close friends prior to Mr PLP agreeing that GLS could undertake a professional legal service placement at his firm. The Tribunal upheld 11 out of 14 instances of sexual harassment alleged by GLS despite making a finding that there was a close friendship of admiration and affection between Ms GLS and Mr PLP, involving socialising outside work together and with each other's families, visiting each others' homes, as well as evidence of conversations between the two containing 'sexual innuendo or banter, teasing and provocation that passed between them virtually on a daily basis'.⁵³⁶

531 [2004] VCAT 1518.

532 [1986] HREOCA 1.

533 (1991) EOC 92-369.

534 [2002] FCA 32.

535 [2013] VCAT 221.

536 Ibid [151]-[152].

582. In relation to 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.⁵³⁷

583. Therefore, the close and affectionate relationship between Ms GLS and Mr PLP was not considered a barrier to Mr PLP's conduct amounting to sexual harassment.

Reasonable anticipation that the conduct would offend, humiliate or intimidate

584. The final element which needs to be established to make out a claim of sexual harassment is that the conduct has occurred in circumstances in which it could reasonably have been expected that the conduct would offend, humiliate or intimidate the person to whom the conduct was directed.⁵³⁸

585. This requires an objective, not subjective, assessment of the evidence, namely 'the perspective of a reasonable person in the role of a hypothetical observer'.⁵³⁹

586. As noted in *Styles v Murray Meats Pty Ltd*⁵⁴⁰ at paragraph 16:

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.

587. Similarly in *Mohican v Chandler McLeod Ltd T/A Forstaff Australia*⁵⁴¹ at paragraph 13, the Tribunal 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.

537 Ibid [153]-[155].

538 *Equal Opportunity Act 2010 (Vic) s 92(1)*.

539 *GLS v PLP* [2013] VCAT 221, [30]-[32] relying on *Kraus v Menzie* [2012] FCAFC 144, [7] and *Leslie v Graham* [2002] FCA 32, [70] per Branson J. Also see *Poniatowska v Hickinbotham* [2009] FCA 680, [289].

540 [2005] VCAT 914.

541 [2009] VCAT 1529.

Other considerations

Failing to 'flee' or strongly reject harassment

588. Failing to flee or strongly reject harassing behaviour is not a matter which will affect a complaint of sexual harassment, particularly in relation to whether the conduct was welcome or not. The Tribunal made very clear in its decision *GLS v PLP*⁵⁴² it is not appropriate to criticise a complainant for the way they handle the sexual harassment. It is enough for the case if the respondent's conduct meets the test for sexual harassment under the Equal Opportunity Act.⁵⁴³

589. In that case, the complainant Ms GLS was a mature aged graduate legal student undertaking a professional legal placement with Mr PLP and his firm. She complained that throughout her placement, Mr PLP sexually harassed her on a daily basis including repeated requests for sex, inappropriate touching, viewing pornography in the workplace and inappropriate comments. Ms GLS did reject Mr PLP's advances, but with body language which Mr PLP's counsel argued contradicted her words.⁵⁴⁴ Mr PLP's counsel further criticised Ms GLS for not escaping from Mr PLP's embraces, not acting more strongly or at an earlier time to reject his advances, spoken her mind more directly or forcibly removed herself from his grasp and presence.⁵⁴⁵

590. Justice Garde was not persuaded by this criticism and held that such comments were inappropriate considering the obligation was on the employer to refrain from sexually harassing its employees and 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.⁵⁴⁶

591. Similarly, in *Delaney v Pasonic Pty Ltd*⁵⁴⁷ it was alleged that Mr Daley, amongst other things, 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. 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

592. 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 [Chapter 13](#) of this resource.

593. The question of whether a person's private or out-of-work conduct bears a relevant connection to the workplace is not clear cut. The answer in each case will turn on the particular facts, although guidance can be attained from cases that have addressed this issue. [Section 93](#) of the Equal Opportunity Act does not require on a connection with the workplace over and above the fact there is an employment (or potential employment) relationship between the parties. It is only when the tribunal or court is considering an employer's vicarious liability under [section 109](#) of the Equal Opportunity Act that there is a requirement to consider if an act was done 'in the course of employment', and therefore consider whether there was a connection to the workplace. The answer in each case will turn on the particular facts with guidance from cases that have addressed this issue.

542 [\[2013\] VCAT 221](#).

543 *Ibid* [228].

544 *Ibid* [220], [222].

545 *Ibid* [226]-[227].

546 *Ibid* [229]-[230].

547 [\[2001\] VCAT 1870](#).

594. For example, *South Pacific Resort Hotels Pty Ltd v Trainor*,⁵⁴⁸ an incident of sexual harassment occurred at accommodation that had been paid for by the employer, even though the harassment by the victim's co-worker did not occur while either of them were actually 'working'. The employer argued that 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 in this regard was the fact that only employees were allowed on site. Extending from this, the employer was held to be vicariously liable for the harassment because the employees' rooms were close to each other and accessible, which created the opportunity for the conduct to occur 'within the course of employment' at any time. The employer had taken insufficient steps to prevent a 'foreseeable' possibility of harassment.
595. In *A v K Ltd & Z*,⁵⁴⁹ A alleged that he was sexually harassed by Z. The allegations related to a number of different incidents. The first incident was alleged to have occurred at and following a private party that they both attended organised by a colleague. Both A and Z worked for the same employer. The party however, was conceded to be a private function and whilst there were some employees from K Ltd at the party, it was conceded that the party 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 the course of a Friday/Saturday period. Both A and Z were required to attend a function as part of their job and the employer paid for Z's accommodation for the Friday evening as he had to come down from Sydney. At the end of 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 that in the course of that evening, Z subjected him to an act of physical intimacy that he either did not consent to or could not consent to because of his alcohol affected state.
596. There was a significant dispute between A and Z as to what happened that evening. Z denied that anything of a sexual nature occurred at all. This case arose in the context of a strike out application. In that context, the Tribunal held that the first incident was misconceived and ought to be struck out on the basis that there was not a sufficient connection with the employment as between the employees and the circumstances of the incident, 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. However, in relation to the second incident, the Tribunal was not satisfied that there was not so clearly an absence of a sufficient link to the employment relationship that the claim was bound to fail. On this basis the Tribunal refused to strike out the second incident.
597. In *Lee v Smith & Ors*⁵⁵⁰, the Australian Defence Force (ADF) 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 some after-work drinks at the home of one of Ms Lee's colleagues. Central to the Court's finding that the ADF was vicariously liable was its conclusion that the rape 'arose out of a work situation' and, in fact, 'was the culmination of a series of sexual harassments that took place in the workplace'.⁵⁵¹
598. In contrast to these cases, in *Tichy v Department of Justice – Corrections Victoria*⁵⁵² 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, but, the significant distinction was that the event had not been authorised or sanctioned by management, and had been organised by the employees at their own initiative. The fact that the employees were not required, because of work, to be in such close proximity to each other, was the critical factor in removing the incident harassment from the nexus of the workplace. However, given this was a case regarding misconduct and 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 but in the discrimination jurisdiction.

548 [2005] FCAFC 130.

549 [2008] VCAT 261.

550 [2007] FMCA 59.

551 Ibid [203].

552 [2005] AIRC 136 and [2005] AIRC 592.

599. The scope of employment has been further expanded over recent years because of the way that electronic communication and social media have now infiltrated the workplace. The courts have clarified that 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.⁵⁵³

600. These cases show how circumstantial the case law on sexual harassment can be. The relationship between those involved and the context of the incident are just as important as where the incident took place.

Sexual harassment is not limited to harassment of women by men

601. Finally, it should be noted that sexual harassment is not limited to conduct by a male towards a female but can also occur in respect of conduct by a female towards a male, or male towards a male or female towards a female.⁵⁵⁴

Changes to definitions under the Equal Opportunity Act

602. The Equal Opportunity Act amended the definitions of 'employee', 'employer' and 'employment'.⁵⁵⁵ As noted in [paragraphs 550 to 553](#) of this resource, the effect of the revised definitions is that the protections afforded under Part 6 of the Equal Opportunity Act for sexual harassment now extend to unpaid workers or volunteers. The practical implications of this are as follows:

- a. An employer must not sexually harass a person who works for that employer as an unpaid worker or volunteer, or a person seeking to work with that employer as an unpaid worker or volunteer. In addition, an unpaid worker or volunteer must not sexually harass their employer, other employees (whether unpaid workers, volunteers or otherwise) or people seeking to work with their employer (whether as unpaid workers, volunteers or otherwise).

- b. 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.
- c. A member of an industrial organisation must not sexually harass a person who works for that organisation as an unpaid worker or volunteer, and an unpaid worker or volunteer must not sexually harass a person seeking to become a member of an industrial organisation or a member of that organisation.
- d. A member of a qualifying body must not sexually harass a person who works for that body as an unpaid worker or volunteer, and an unpaid worker or volunteer must not sexually harass a person seeking action in connection with an occupational qualification or a member of that qualifying body.
- e. 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, and a student must not sexually harass a person who works as an unpaid worker or volunteer for that institution.
- f. 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.

553 See, for example, [Cooper v Western Area Local Health Network \[2012\] NSWADT 39](#).

554 See, for example, [Thomas v Alexiou \[2008\] VCAT 2264](#) and [Sammut v Distinctive Options Limited \[2010\] VCAT 1735](#).

555 [Equal Opportunity Act 2010 \(Vic\) s 4](#).

Chapter 11

> Victimisation

What is victimisation?

603. [Section 103](#) of the Equal Opportunity Act prohibits victimisation. Victimisation, for the purposes of section 103, is defined under [section 104](#) of the Equal Opportunity Act, as follows:

104 What is victimisation?

(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 Commissioner for dispute resolution
- b. has made a complaint against any person under the old Act
- c. has brought any other proceedings under this Act or the old Act against any person
- d. has given evidence or information, or produced a document, in connection with –
 - i. any proceedings under this Act or the old Act
 - ii. any investigation or public inquiry conducted by the Commission
- e. has attended a compulsory conference or mediation at the Tribunal in any proceedings under this Act or the old Act
- f. has otherwise done anything in accordance with this Act or the old Act in relation to any person
- 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

h. has refused to do anything that –

- i. would contravene a provision of Part 4 or 6 or this Part
- 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.

604. To establish victimisation within the statutory definition in [section 104](#), a complainant must establish the following:

- a. that the alleged victimiser has subjected the complainant to conduct which constitutes a detriment
- b. that the conduct which constitutes the detriment must be directed at and affect the complainant
- c. the alleged victimiser must engage in the conduct complained of for one or more of the proscribed reasons set out in [section 104](#).⁵⁵⁶

556 *Tan v McArdle & Anor* [2010] VCAT 248.

605. Unlike discrimination and sexual harassment, the prohibition on victimisation is not tied to any particularly area of public life or relationship.

Detriment

606. Detriment is defined in 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'.

607. 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*,⁵⁵⁷ the Tribunal 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.

608. The following have been held to constitute a 'detriment' in the context of a victimisation claim by VCAT:

- a. the delay and eventual withdrawal of services⁵⁵⁸
- b. subjecting an employee who had made a complaint of sexual harassment to the following:
 - i. 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
 - ii. requiring her to be accompanied to an external training session when this had not ever been required before
 - iii. issuing a direction that she not be in the general office area unless absolutely necessary
 - iv. omitting the employee from a list of professional development activities as was usual for other staff
 - v. avoiding and/or refusing to process a WorkCover claim in a timely manner⁵⁵⁹
 - vi. banning a person from membership of an organisation.⁵⁶⁰

609. In *Besley v National Aikido Association Inc*,⁵⁶¹ President McKenzie noted that an alleged flaw in an investigation process into allegations of discrimination or harassment is unlikely to amount to victimisation or a detriment. At paragraph 52 she said as follows:

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 of 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.

557 (2000) EOC 93-064.

558 *Fratras v Drake International Limited t/as Drake Jobseek* (2000) EOC 93-038.

559 *Gray v State of Victoria & Anor* [2000] VCAT 1281.

560 *Parr v Steamrail Victoria* [2012] VCAT 678.

561 [2005] VCAT 245.

610. Similarly, in *Lazos v Australian Workers Union & Anor*,⁵⁶² the Tribunal 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

611. To make out a claim of victimisation, the complainant must demonstrate that one of the factors listed in [sections 104\(1\)\(a\) to \(h\)](#) was a substantial reason for the alleged victimisation. It does not need to be the only or even the dominant reason, provided that it is a substantial reason.⁵⁶³ That is, that it is 'a reason of substance for that conduct'.⁵⁶⁴ The complainant must establish a causal nexus between the alleged detriment suffered and the action taken under section 104(1) relied upon.

612. In *G v Victoria Legal Aid*⁵⁶⁵, in finding that a claim of victimisation was not made out under the 1995 Act, the Tribunal said:

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.

562 [\[1999\] VCAT 635](#).

563 *Equal Opportunity Act 2010 (Vic) s 104(3)(a)*. For more information, refer to the discussion of *Stern v Depilation & Skincare Pty Ltd* [\[2009\] VCAT 2725](#) in [Chapter 2](#) of this resource.

564 *Stern v Depilation & Skincare Pty Ltd* [\[2009\] VCAT 2725](#), [8].

565 (2000) EOC 93-060.

613. A similar conclusion was reached in the more recent decision of *Parr v Steamrail Victoria*.⁵⁶⁶ In that case, Mr Parr complained that he had been victimised because Steamrail Victoria banned him from its organisation indefinitely, after it became aware that 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. Some time later, after some 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. The claim under the Equal Opportunity Act, was that Mr Parr had been subjected to a detriment because, through him, the teenagers had made a complaint of sexual harassment. Steamrail submitted that 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. Rather the new Chairman of Steamrail Victoria said that 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.'

614. Mr Parr's claim failed. The Tribunal member 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.⁵⁶⁷

566 [\[2012\] VCAT 678](#).

567 [Ibid](#) [65].

615. The Tribunal therefore found that the claim of victimisation was not made out.
616. Ultimately, whether there is the necessary causal nexus will be a factual issue for the Tribunal to determine on the basis of the evidence.⁵⁶⁸

Knowledge and other matters

617. A related question is the extent to which the alleged victimiser has knowledge of the action under [section 104\(1\)](#), upon which the victimisation claim is based. That is, if a complainant claims that 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 lead evidence of the fact that the alleged victimiser had knowledge of the earlier complaint. This issue was addressed in the case of *Gabriel v Council of Box Hill Institute of TAFE*.⁵⁶⁹ In that case, 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. She may reinstate this paragraph in the amended particulars if she can particularise how the complaint came to the knowledge of the council or its officers or employees.⁵⁷⁰

618. It is also important to note that it is possible to make out a claim of victimisation even in circumstances where the underlying claim of discrimination or harassment is ultimately not successful. In *Kistler v RE Laing Training & Robert Laing*⁵⁷¹, the Tribunal found that the claim made by Ms Kistler of sexual harassment was not made out and did not accept her evidence. Notwithstanding this, it went on to find that the respondent did nonetheless engage in victimisation within the meaning of the Act substantially because she had made a complaint. The alleged victimisation took the form of intimidating comments and conduct including threats to the complainant.

619. Although the Tribunal did not accept the evidence given by the complainant in relation to the allegations of sexual harassment, it concluded that the complaint was nonetheless made in good faith. A finding that the complaint had been made other than in good faith would have precluded a finding of victimisation⁵⁷² where complaints of discrimination on the grounds of race, disability and carer's responsibilities were dismissed, but the complaint of victimisation on the basis of these complaints upheld.

Duty to eliminate victimisation

620. The Equal Opportunity Act imposes a requirement on duty holders to take reasonable and proportionate measures to eliminate victimisation as far as possible.⁵⁷³

568 See, for example, *Grah v RMIT* [2011] VCAT 2184 in which it was held that the detriment claimed was ultimately the result of the complainant's own conduct not the claimed attribute necessary to make out a claim of victimisation.

569 [2002] VCAT 302.

570 Ibid [40]. See, for example, *State of Victoria v McKenna* [1999] VSC 310.

571 (2000) EOC 93-064.

572 *Equal Opportunity Act 2010 (Vic) s 104(1)(g)*. See also *Zareski v Hannanprint* [2011] NSWADT 283.

573 *Equal Opportunity Act 2010 (Vic) s 15*.

Chapter 12

> Authorising and assisting discrimination and sexual harassment

621. [Section 105](#) and [section 106](#) of the Equal Opportunity Act together regulate the extent to which individuals and an organisation can be held liable for secondary liability, sometimes referred to as ‘authorising or assisting’.
622. [Section 105](#) states ‘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.’
623. [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:
- bring a dispute to the Commissioner for dispute resolution
 - 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.
624. Part 4 deals with discrimination and Part 6 with sexual harassment. ‘This Part’ refers to Part 7 which includes the prohibition on victimisation.
625. [Section 105](#) 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. It does not require an actual contravention but rather comes into play by the mere act of the first person.
626. [Section 106](#) goes on to provide that where there has been an actual contravention, then the complainant can effectively initiate proceedings against either or both the ‘assistant’ and the ‘principal protagonist’.
627. 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 without other unlawful conduct actually taking place. For example, on its face, section 105 could be breached by the first person making a request or giving an instruction, without the second person actually acting on that and engaging in unlawful discrimination or sexual harassment.
628. This is consistent with the reasoning in [Besley v National Aikido Association Inc](#),⁵⁷⁴ (*Besley*) which considered the predecessor provisions to sections 105 and 106. At paragraph 57 of that decision, the Tribunal said:
- In her particulars of complaint, Ms Besley claims the Association has breached s 98 of the Equal Opportunity Act. On a reading of her particulars and the complaints as a whole, the claim is that by mishandling the process of investigating her complaint about her alleged sexual harassment by Mr Watson, the Association condoned the sexual harassment, or condoned Mr Savage’s conduct during his mishandling of the complaints process.

574 [2005] VCAT 245.

The respondents submit that even if Ms Besley can prove that the complaint handling process was flawed, the conduct is incapable of constituting a breach of s.98. I agree. Apart from the word 'encourage' s.98 uses the words 'request, instruct, induce, authorise or assist' in relation to a breach of the Act by another person. Section 99 provides that: 'If as a result of a person doing any of the things specified in s.98' another person breaches the Act, then either or both are taken to be liable and the complaint may be lodged against either or both of them. (sic)

Given the wording of s.98 and s.99 which deals with liability where as a result of conduct in s.98 another person breaches the Act, I conclude that s.98 looks at something occurring before what I might call the substantive breach. In other words the instruction, authorisation, encouragement, inducement or assistance to the other person to breach the Act, must occur before that other person commits the breach. On Ms Besley's material the complaint handling process occurred after the alleged sexual harassment. Section 98 is, in my view, not directed to condoning a breach of the Act after the event. Of course it would cover encouraging, assisting, et cetera, a person to breach the Act even if no breach occurs. But this is not the claim here.

629. This view is consistent with the view expressed by the Tribunal in *Brooks v State of Victoria*⁵⁷⁵ where the Tribunal 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.⁵⁷⁶

Timing of conduct

630. As is evident from the decision in *Besley* referred to 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.⁵⁷⁷ But organisations will need to be careful about the implications of this. For example, failure to properly investigate claims referred to in the example above may be found to be authorising and assisting where there is ongoing conduct, and in some circumstances it could amount to discrimination or a breach of the positive duty in section 15 of the Equal Opportunity Act.

Degree of knowledge required

631. What level of knowledge must a person have before they can be held liable for authorising, assisting or encouraging another to breach the Equal Opportunity Act in breach of either section 105 or 106 of the Equal Opportunity Act?

575 [1997] VADT 13.

576 Ibid. 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 it was held at [24] '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 & Anor; Sims v RNJ Sicame & Anor* [2002] NSWADT 154 [42] and *Cooper v Human Rights & Equal Opportunity Commission* [1999] FCA 180 [27] (Madgwick J).

577 [2005] VCAT 245.

632. In *Kogoi v East Bentleigh Child Care Centre*⁵⁷⁸, the Tribunal considered a provision similar, although not identical to, [section 106](#), which existed in the *Equal Opportunity Act 1984* (Vic) in the following terms:

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.⁵⁷⁹
633. In considering the construction to be applied to this clause, the Tribunal 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 maybe (sic) 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.

634. Although the wording of [sections 105](#) and [106](#) are in slightly different terms to the former provision under the *Equal Opportunity Act 1984* (Vic), the Commission considers that the comments in relation to the requisite knowledge required remains equally applicable.

635. For example, in *Roulston v Temp Team Pty Ltd*,⁵⁸⁰ 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 that Temp Team had authorised and assisted Orange to discriminate against him, alleging that 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. The Tribunal 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.

...[t]here is no previous complaint or situation that might have made [the alleged authoriser] aware that [another person] was at real risk of impairment discrimination...⁵⁸¹

636. This can be compared to the situation in *Elliott v Nanda & Commonwealth*,⁵⁸² where the Federal Court held that the Commonwealth Employment Service (CES), as the employment agency, did have sufficient knowledge to be liable for having authorised or assisted the sexual harassment alleged by Ms Elliott under the *Sex Discrimination Act 1984* (Cth). In that case, the Court found that the CES had been informed that several young women placed in employment with Dr Nanda had complained about having been sexually harassed by him in a way that would constitute sex discrimination. The CES did not seek to acquire sufficient knowledge to determine whether these complaints were of any substance. There was no record of any communication from the CES to Dr Nanda requiring him to take any action, nor requesting that he demonstrate that he had satisfied any of the 'safeguard' steps that he had been asked to take by CES in response to the complaints.

578 [\[1996\] VADT 27](#).

579 *Equal Opportunity Act 1984* (Vic) s 35.

580 [\[2001\] VCAT 2036](#).

581 *Ibid* [36]-[37].

582 [\[2001\] FCA 418](#).

637. The CES was held liable for having authorised and assisted the acts of sexual harassment. The fact that the CES caseworker who facilitated Ms Elliott's employment did not know about the history of the complaints against Dr Nanda did not prevent the finding that the CES had authorised or assisted the discrimination. The Federal Court clarified that 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.

638. This suggests that in order to make out a claim under what is now [section 106](#), a complainant needs to show that the secondary person either:

- a. knew that the proposed conduct was because of a prohibited reason
- b. there was a reasonable basis for a belief or suspicion to that effect
- c. there was a reasonable basis upon which that person ought to have made enquiries as to the basis for the proposed conduct.

639. The more recent case of *Tomasevic v Strauss*⁵⁸³ offered some further clarification on this point. In that case, Mr Tomasevic argued that Dr Strauss breached section 98 of the 1995 Act in that he authorised or assisted the Department of Education to discriminate against him (Mr Tomasevic). In particular, Mr Tomasevic argued that his employer, the Department, 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, the Tribunal 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 the Tribunal 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.⁵⁸⁴

Will inaction be enough to make out a claim of secondary liability?

640. The cases on this issue need to be considered with care. In particular, where cases arise in jurisdictions other than Victoria, the statutory provisions vary from that in the Equal Opportunity Act. The slight variation in the wording of the provisions may have a significant impact on how the provision operates.

641. [Sections 105](#) and [106](#) of the Equal Opportunity Act use the words 'request, instruct, induce, encourage, authorise or assist'.

642. By comparison, legislation in other jurisdictions sometimes uses the word 'permit' in equivalent provisions. For example in Western Australia [section 160](#) of the *Equal Opportunity Act 1984 (WA)* (WA Act) 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.

643. In *Horne & Anor v Press Clough Joint Venture & Anor*⁵⁸⁵ a decision of the Western Australian Equal Opportunity Tribunal, it was held that the union had 'aided and permitted' discrimination by, among other things, failing to take any action to have sexually oriented posters removed from the workplace, by failing to take any action to prevent the sexual harassment and by failing to act in any real way on the complainant's objections.

644. The use of the word 'permit' in the WA Act may distinguish that provision from the Victorian Act and 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.

583 [\[2002\] VCAT 395](#).

584 *Ibid* [23]-[24].

585 (1994) EOC 92-59.

645. However, there have been some cases decided under the predecessor to [sections 105](#) and [106](#) which have also suggested that inaction in certain circumstances could also give rise to secondary liability.

646. In *Lazos Leslie v Australian Workers Union & Anor*⁵⁸⁶ the Tribunal said that it would only be in unusual circumstances that inaction could fall within the prohibition in the predecessor [sections 105](#) or [106](#). For example, where there was a reasonable expectation that a person would take some action. Similar views were also expressed in *Kafantaris v City of Yarra*,⁵⁸⁷ where it was held that, ‘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’. An employer failing to act on complaints in a situation of ongoing sexual harassment by a supervisor of one of its employees could be an example of this, because the employer is in effect ‘authorising’ the behaviour.

647. Similarly, in *Mitchell v Clayton Utz (No 3)*,⁵⁸⁸ the NSW Anti Discrimination Tribunal had to consider 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’. In Mitchell’s case, 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*).⁵⁸⁹

648. The issue was whether two individuals ‘permitted’ others to sexually harass him. This case involved an application by Mr Mitchell to amend his complaint to include the aiding and abetting allegations. Although ultimately the Tribunal decided against Mr Mitchell and refused to allow the amendment sought, in the course of its decision, it did make the following comments about the requirements necessary to make out a claim of secondary liability under [section 52](#). In particular the Tribunal said:

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
4. that person’s default resulted in a failure to prevent the unlawful discrimination: *Elliott v Nanda & Commonwealth [2001] FCA 418* at [\[161\]](#).⁵⁹⁰

649. By comparison, in *Walgama v Toyota Motor Corporation*⁵⁹¹ the Victorian Tribunal seemed to move away from this view and suggest quite clearly that [section 98](#) of the 1995 Act does not permit a claim based on inaction. It points to the absence of the word ‘permit’ in [section 98](#) (continued in the current provisions) as the basis for this view. At paragraph 93, the Tribunal said:

586 [\[1999\] VCAT 635](#).

587 [\[2005\] VCAT 2591](#).

588 [\[2010\] NSWADT 100](#).

589 Ibid [13]. See also Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law*, (Federation Press, 2008), 10.8.32–10.8.40.

590 Ibid [25].

591 [\[2007\] VCAT 1318](#).

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.⁵⁹²

650. In light of the different views expressed in these cases, and the slightly different wording used in the Equal Opportunity Act as compared to other jurisdictions, there will need to be further clarification of whether and if so when, inaction by a person can itself give rise to secondary liability under [section 105](#) and [106](#). In interpreting section 105 and 106, regard would also now need to be had to the requirements under [section 32](#) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to interpret legislation compatibly with human rights.

592 See also [Campagnolo v Bonnie Doon Football Club Inc \[2009\] VCAT 97](#) in which the following comment was made at [35]: 'As Deputy President Macnamara concluded in that matter, the complaint was one of inaction and for that reason, it failed. Mr Campagnolo's case is that the League sat by and failed to offer him support or assistance in what he saw as the discriminatory behaviour of the Club. Were he to make a claim under section 98 against the League, it would certainly fail.'

Chapter 13

> Vicarious liability

651. [Section 109](#) of the Equal Opportunity Act provides:

109 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
- 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 Tribunal against either or both of them.

652. [Section 110](#) goes on to provide a defence against vicarious liability. It relevantly provides:

110 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.

653. In making out a claim of vicarious liability, therefore, the following needs to be established:

- a. the conduct complained of has to have occurred in the course of employment or while acting as an agent for another
- b. 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

654. Various cases have tested how far-reaching the concept of 'in the course of employment' can be.

655. In *Coyne v P & O Ports*,⁵⁹³ the Tribunal had to determine whether the employer was vicariously liable for conduct of one of its employees. The issue in this case was whether the employer ought to be held vicariously liable for the sexual harassment carried out by its employee.

656. The employer argued that the conduct did not occur 'in the course of employment'. The claim related to an act of inappropriate sexual contact by Mr Buttigieg of 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'.⁵⁹⁴ The employer sought to import into the interpretation of the vicarious liability provision under the 1995 Act, common law notions of vicarious liability. The Tribunal summarised the employer's position as follows:

593 [\[2000\] VCAT 657](#).

594 *Ibid.*

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.⁵⁹⁵

657. By contrast, the complainant argued that the term 'in the course of employment' ought to be given a wide interpretation and that this was consistent with decisions of this and similar tribunals in the past.⁵⁹⁶

658. Ultimately, the Tribunal concluded that analogous common law concepts of what amounts to 'in the course of employment' ought not be applied to the interpretation of section 102 of the 1995 Act. It came to this view for the following reasons:

- a. applying the common law concepts would not further the objects of the Act
- b. the 1995 Act is beneficial and remedial legislation and therefore ought to be given a 'fair, large and liberal' interpretation and ought to be given an interpretation that as far as possible aides the elimination of sexual harassment

- c. 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'⁵⁹⁷
- d. the Tribunal rejected the argument that the mere fact that Parliament used words which had a common law meaning necessarily evidenced that it intended that meaning to be attributed to those words in this instance
- e. 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).

659. Having concluded that the common law notion of the term 'in the course of employment' ought not be relied upon in interpreting the 1995 Act, the Tribunal concluded that in interpreting this term, guidance ought to be taken from cases in the workers' compensation jurisdiction. In reviewing the case law on this point, the Tribunal noted that the court's approach to this issue has moved to a fairly flexible one. At page 12, the Tribunal summarised the interpretation given in the workers' compensation context as follows:

...an 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.⁵⁹⁸

595 Ibid.

596 Reference was made to *Hopper v Mt Isa Mines Ltd* [1997] QADT 3; *Tran v Swinburne University & Ors* 18 October 1999 Unreported; *McKenna v State of Victoria & Ors* No 17 of 1997 & No 180 of 1997, Unreported; *Gray v State of Victoria & Anor* [2000] VCAT 1281 and *Greenhalgh v National Australia Bank* [1997] HREOCA 2.

597 Reference was also made to the comments of Dawson and Gaudron JJ in *IW v City of Perth* (1997) 191 CLR 1 in which they stressed that 'there is special responsibility to take account of and give effect to the purpose of legislation designed to protect basic human rights and dignity'.

598 *Coyne v P & O Ports* [2000] VCAT 657.

660. The Tribunal went on to say:

[I]n 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.⁵⁹⁹

661. Applying these principles to the facts in this case then, the Tribunal considered that Mr Buttigieg’s conduct occurred in the course of his employment for the purpose of the vicarious liability provisions of the 1995 Act.
662. Applying this test, therefore, an employer may be held liable for conduct which occurs even where that conduct occurs outside of normal working hours and even at times where that conduct occurs outside of work premises.⁶⁰⁰

Reasonable precautions defence

663. Where a complainant can establish that an employee or agent engaged in conduct which, 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 unless the employer/principal can show that they took all reasonable precautions to prevent the discrimination, sexual harassment or victimisation.
664. The steps that will need to be taken in order 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.
665. 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.
666. The Victorian courts have given consideration to what practical steps are required of a duty holder to discharge this burden. For example, in [Howard v Geradin Pty Ltd t/a Harvard Securities](#)⁶⁰¹ the employer was able to avoid being held vicariously liable for claims of sexual harassment because it had in place a sexual harassment policy, informed all employees of it, implemented it and provided regular informal feedback about sexual harassment. Whilst it was held that the steps taken had not been ‘ideal’, or of the highest possible standard, this did not prevent them from being sufficient to provide a successful defence.

599 Ibid.

600 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.

601 [\[2004\] VCAT 1518](#).

667. A similar interpretation of the 1995 Act was offered in *Walgama v Toyota Motor Corporation Australia Ltd*,⁶⁰² in which Mr Walgama claimed that he had been discriminated against because of his race and that he had been subjected to several instances of sexual harassment.
668. In considering whether Toyota had taken 'all reasonable precautions', so as to avoid liability under the 1995 Act, the Tribunal considered the following steps, taken by Toyota, sufficient to discharge the burden:
- a. rolling out a workplace policy to all employees. This had been done three years prior to the incident in question
 - b. meeting with all employees to discuss the policy
 - c. issuing all employees with a booklet explaining the policy.
669. In discussing what is reasonable for the purposes of avoiding vicarious liability, the Tribunal noted that the criteria for duty holders is 'not very high or very exacting'. In that case, the Tribunal went on to say that management can, 'not be expected to supervise every word that comes out of the mouth of a worker'.⁶⁰³
670. The focus of the Tribunal in each of these cases was on the relevant policies that the respective duty holders had in place, the implementation of these policies, and the fact that employees had been trained on these policies. These steps were crucial in determining that the employer had successful defences to the allegations of discrimination, without the policies, implementation or training having to be of optimum standards.
671. The importance of an employer having effectively communicated its policies to its employees was emphasised in *State of Victoria & Ors v McKenna*,⁶⁰⁴ the facts of which are discussed in [Chapter Four](#). In this case, the Victorian police had distributed a folder on sexual harassment obligations to senior officers. It also made the subject a pre-requisite for promotion within the Force. 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 Force. A copy had been kept at the office of the Officer in charge of each station. On this basis, the Tribunal held that the burden on the employer to take all reasonable precautions had not been discharged.
672. A more recent decision of the New South Wales Tribunal, *Cooper v Western Area Local Health Network*,⁶⁰⁵ found in relation to a sexual harassment complaint, that the employer had discharged its obligations by:
- a. requiring its employee to commit to abiding by the company's code of conduct (which explicitly prohibited sexual harassment)
 - b. attend training on sexual harassment and bullying
 - c. both at the time of employment and again when the employee was promoted.
673. The Tribunal noted in relation to the defence to vicarious liability that an employer has taken all reasonable steps to prevent the employee from contravening the *Anti-Discrimination Act 1977 (NSW)*:
- 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.⁶⁰⁶

602 [2007] VCAT 1318.

603 Ibid [98].

604 [1999] VSC 310.

605 [2012] NSWADT 39.

606 Ibid [83].

674. However, the Tribunal did not find this was the case with the employer in question. Rather, the above steps taken by the employer were considered to be sufficient to meet the defence, in that 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.
675. In *Zareski v Hannanprint Pty Ltd (No 2)*,⁶⁰⁷ useful insight was given by the New South Wales Tribunal into the level of training that can be required for employers to avoid liability for discrimination claims.
676. Mr Zareski brought a number of complaints of race, disability and carer's discrimination against Hannanprint. These complaints were not upheld, but the Tribunal did find that Mr Zareski's team leader had victimised him by mocking him for bringing the discrimination complaints.
677. In consequence of the victimisation finding, the Tribunal made orders as to the further training that Hannanprint must provide to its HR specialists, managers and supervisors.
678. Hannanprint proposed to the Tribunal that several training sessions would be provided by an external law firm, each of which would be attended by a maximum of 12 people. The Tribunal approved this proposal, on the basis that the sessions would cover areas such as complaint handling procedures, processes for conducting formal investigations, and recording interviews. Despite no finding of liability having been made in relation to the allegations of discrimination, bullying and harassment, the Tribunal also said that refresher training in these areas must be provided.
679. The New South Wales legislation, in so far as it deals with vicarious liability in relation to discrimination and the 'all reasonable steps' defence, does not differ significantly from the Victorian legislation. These decisions therefore indicate that, while the standard expected of employers to demonstrate that all reasonable precautions were taken to prevent the alleged act(s) has not been set especially high,⁶⁰⁸ where any finding of vicarious liability is made out against the duty holder, specific and detailed orders can be made in terms of future training requirements with which the duty holder must comply.

607 [2012] NSWADT 65.

608 *Howard v Geradin Pty Ltd t/a Harvard Securities* [2004] VCAT 1518.

Chapter 14

> The positive duty

Duty to eliminate discrimination, sexual harassment and victimisation

680. Where a person has an obligation not to discriminate, then [section 15\(2\)](#) imposes a positive duty upon that person to avoid engaging in discrimination, sexual harassment and victimisation and, as far as possible, to take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment or victimisation. This requires a person to be proactive about discrimination and take steps to prevent discriminatory practices before they occur.
681. Whilst this duty was arguably in the 1995 Act, it is now explicitly stated. It also requires similar steps to those employers may take to reduce their risk of vicarious liability.

Reasonable and proportionate measures

682. This duty requires people and organisations to take steps that are reasonable, and so requires an assessment of whether measures are reasonable and proportionate, with regard to factors such as the nature of the organisation, its resources and its business and operational priorities.⁶⁰⁹ The Act recognises that what may be possible for one duty holder, may not be possible for another, and also allows for the progressive implementation of policies or procedures where appropriate.

683. [Section 15\(6\)](#) provides some guidance on the question of 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.
684. 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 a good complaint-handling or grievance procedure, and mechanisms for reviewing and improving compliance where appropriate.⁶¹⁰

609 See [Equal Opportunity Act 2010 \(Vic\) s 15\(6\)](#) for the specific considerations that are relevant in this assessment.

610 For more information on meeting the positive duty, see the Commission's [Organisational Evaluation Tool](#).

685. Examples of the steps that may need to be taken for a duty holder to comply with the requirement to eliminate discrimination, sexual harassment and victimisation are as follows:
- a. making staff aware of a 'zero tolerance' of discrimination, sexual harassment and victimisation
 - b. having policies on discrimination, sexual harassment and bullying and training staff
 - c. developing an action plan setting out proposed reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation, and a timeframe for implementation. This could include introducing policies and training on discrimination, sexual harassment and victimisation
 - d. conducting a baseline assessment or audit of existing policies and practices to identify actual or potential discrimination, sexual harassment and victimisation. This could involve monitoring the handling and outcomes of complaints – both internal and external – including aspects such as dismissal, resignations and absenteeism
 - e. monitoring and publicising baseline assessments and annual progress in the elimination of discrimination, sexual harassment and victimisation.
686. 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.

Chapter 15

> Special measures

Special measures are not unlawful discrimination

687. As part of its emphasis on substantive equality, the Equal Opportunity Act now explicitly permits duty-holders to afford different treatment to a group of people on the basis of a protected attribute, provided that the treatment constitutes a 'special measure'.⁶¹¹ Broadly, a special measure is something which is designed to alleviate disadvantage suffered by a group of people with a particular attribute. Special measures are sometimes referred to colloquially as 'positive discrimination' or 'affirmative action'. The definition of a 'special measure' is discussed in more detail below.
688. The special measures provisions were new in the Victorian context from 1 August 2011, although the concept of 'special measures' is well-established under international human rights law as well as other state, territory and federal anti-discrimination laws.⁶¹²
689. While the 1995 Act contained a general exception from discrimination for 'welfare measures and special needs', which was somewhat similar, the new special measures provision in the Equal Opportunity Act contains an updated test, which is more in line with international legal standards, and which 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'.⁶¹³ Specifically, [section 12\(2\)](#) states that 'a person does not discriminate against another by taking a special measure'.

611 [Equal Opportunity Act 2010 \(Vic\)](#), s 12.

612 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.

613 Second Reading Speech to the [Equal Opportunity Bill 2010 \(Vic\)](#) Hansard, Legislative Assembly, 10 March 2010, 786 (Attorney General Robert Hulls).

Definition of a special measure

690. [Section 12\(1\)](#) of the Equal Opportunity Act describes a special measure as action which is taken 'for the purpose of promoting or realising substantive equality for members of a group with a particular attribute'.⁶¹⁴ This may be the sole purpose or one of multiple purposes for the action.⁶¹⁵
691. Under the Equal Opportunity Act, in order to meet the test of a special measure the conduct must also satisfy the criteria set out in [section 12\(3\)](#), namely it 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.⁶¹⁶
692. According to the Explanatory Memorandum, 'these factors reflect the intention that the purpose of a special measure must be necessary, genuine, objective, and justifiable'.⁶¹⁷ Further, the measure itself must be proportionate and 'reasonably likely' to achieve its purpose. A measure will cease to be a 'special measure' once it has achieved its purpose.⁶¹⁸

614 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(1).

615 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(4).

616 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(3).

617 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), s 15.

618 [Equal Opportunity Act 2010 \(Vic\)](#), s 13(7).

Is consultation required?

693. There is some authority to suggest that the group of people toward whom the special measure is directed – the beneficiaries – ought to be consulted about, and agree to, the special measure. At the very least there needs to be some basis upon which it can be determined that the measure taken is actually for the purpose of addressing prior disadvantage as determined by the very people who have suffered the disadvantage. For example, in *Gerhardy v Brown*,⁶¹⁹ 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.⁶²⁰

694. The issue of consultation was considered in the context of the obligations under the Equal Opportunity Act in the Explanatory Memorandum which clarifies that the criteria for special measures contained in [section 12\(3\)](#):

...do not specifically require consultation with the group that is to be assisted or advanced by the measure in question. However, in practice, evidence of some consultation with the group to be assisted or advanced is likely to be necessary. It is not intended that special measures under clause 12 authorise conduct that is not wanted and not welcome by the target group.⁶²¹

695. Therefore, conduct which is claimed to be a special measure, but which 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

696. Where a special measure exists, a duty holder does not need to rely on a permanent exception or obtain a temporary exemption.

697. If faced with an allegation of unlawful discrimination, a respondent may raise special measures as a defence. In those circumstances, the respondent bears the onus of proving that the conduct complained of was a special measure within the meaning of the Equal Opportunity Act.⁶²²

Reasonable restrictions on eligibility for special measures

698. 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, '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.'⁶²³

Examples of special measures

699. The Equal Opportunity Act includes some examples of special measures as follows:

- a. A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.
- b. 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.
- c. 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.

619 [\[1985\] HCA 11](#), (1985) 159 CLR 70.

620 *Ibid* [37].

621 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), s 12.

622 [Equal Opportunity Act 2010 \(Vic\)](#), s 12(6).

623 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 15.

700. In *Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission*,⁶²⁴ VCAT held that a proposal by council to host a series of women's-only events (one to mark the end of Ramadan and the other a music festival) constituted a special measure within the meaning of the Equal Opportunity Act. The proposed events were aimed at young women within the community, who, due to their cultural and religious backgrounds, could not attend events that were also attended by men and who suffered isolation and disadvantage as a result.
701. VCAT has also recently struck-out a number of applications for temporary exemptions on the basis that the proposed course of conduct constituted a special measure (so no exemption was necessary). These applications have concerned proposals to advertise for and employ Indigenous persons for particular roles.⁶²⁵

624 [2011] VCAT 1693.

625 See, for example, *Parks Victoria* [2011] VCAT 2238; *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237; *Stawell Regional Health* [2011] VCAT 2423; *The Ian Potter Museum of Art* [2011] VCAT 2236.

Chapter 16

> Compliance powers

702. The Equal Opportunity Act gives the Commission powers to facilitate compliance and encourage good practice. These powers include:

- a. issuing practice guidelines relevant to the Equal Opportunity Act.⁶²⁶ Guidelines are not legally binding, but may be taken into consideration by a court or tribunal in relevant to legal proceedings⁶²⁷
- b. conducting a review of an organisation's programs and practices for compliance with the Equal Opportunity Act (on request)⁶²⁸
- c. providing advice about preparing and implementing action plans (which specify steps necessary for an organisation to improve compliance)⁶²⁹ and maintaining a register of action plans⁶³⁰
- d. conducting investigations on matters:
 - i. 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
 - ii. where there are reasonable grounds to expect that one or more contraventions of the Equal Opportunity Act have occurred
 - iii. that would advance the objectives of the Equal Opportunity Act.⁶³¹
- e. intervening as a party in proceedings that involve issues of equal opportunity, discrimination, sexual harassment or victimisation⁶³²
- f. 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.⁶³³

This may include investigating a breach of the positive duty.

626 *Equal Opportunity Act 2010 (Vic)*, s 148.

627 *Equal Opportunity Act 2010 (Vic)*, s 149.

628 *Equal Opportunity Act 2010 (Vic)*, s 151.

629 *Equal Opportunity Act 2010 (Vic)*, s 152.

630 *Equal Opportunity Act 2010 (Vic)*, s 153.

631 *Equal Opportunity Act 2010 (Vic)*, s 127.

632 *Equal Opportunity Act 2010 (Vic)*, s 159.

633 *Equal Opportunity Act 2010 (Vic)*, s 160.

Chapter 17

> Disputes

Background

703. Part 8 of the Equal Opportunity Act sets out the process for resolving disputes about discrimination, sexual harassment and victimisation. Part 8 replaces the complaint-handling process in Part 7 of the 1995 Act with a new model that allows a greater range of dispute resolution options for parties to a dispute. The Equal Opportunity Act refers to 'disputes' rather than 'complaints'. The dispute resolution procedures provided by the Equal Opportunity Act also apply to disputes under the *Racial and Religious Tolerance Act 2001* (RRTA).⁶³⁴
704. A dispute means 'a dispute about compliance with this Act'.⁶³⁵ This broad definition means that the Commission has the power to deal with any issue where a party is alleging that the other party has breached the Equal Opportunity Act or RRTA, whether or not an actual breach has occurred. The Commission has no role in determining whether there has been a breach of either Act.

Dispute resolution at the Commission

705. The Equal Opportunity Act requires the Commission to offer services designed to facilitate resolution of disputes, whether 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 Tribunal to have their matter determined, without first having to go 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 the Tribunal.⁶³⁶

634 *Racial and Religious Tolerance Act 2001* (Vic) s 22.

635 *Equal Opportunity Act 2010* (Vic) s 4.

636 *Equal Opportunity Act 2010* (Vic) s 122.

706. The Commission offers flexible, independent and confidential services to help parties to resolve their disputes. The Equal Opportunity Act gives the Commission the discretion to use a wide variety of methods to resolve the dispute. The type of dispute resolution offered will be appropriate to the nature of the dispute. Once the person with the dispute informs the Commission that they want to proceed with dispute resolution, the Commission may make contact with the person or organisation being complained about. The methods the Commission may use range from informal discussions and providing education and information about the Equal Opportunity Act, through to conciliation. Conciliation can take place in a face-to-face meeting, by telephone conference or by contact through the conciliator.
707. 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 the Tribunal for determination. This means that parties to a dispute do not need to request that the Commission refer their matter to the Tribunal. For matters taken to the Tribunal, the Tribunal will continue to have the power to order compulsory conferences and mediation, and to strike out claims in certain circumstances.

Who may bring a dispute to the Commission?

708. The following persons may bring a dispute to the Commission for dispute resolution:
- 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

- c. if that person is a child – the child, a parent on the child’s behalf, or (if the Commission is satisfied that the child consents) any other person.⁶³⁷

Representative complaints

Representative complaints to the Commission

709. [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 that:
- a. 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
 - b. each person has consented to the dispute being brought by the body on the person’s behalf.
710. 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\(1\)\(c\)](#).
711. 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.⁶³⁸ Representative complaints were introduced into the 1995 Act in 2006 with a view to replicating the representative complaints mechanism in the RRTA.⁶³⁹
712. Representative complaints and who can be a representative body are discussed further below commencing at [paragraph 694](#).

Dispute resolution procedures

713. The process for dispute resolution can be summarised as follows:
- a. 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. The Commission requires that complaints must be submitted in writing – either online or by mail. The Commission can help persons who are not able to submit their complaint in writing

- b. dispute resolution starts when the person bringing the dispute informs the Commission that he or she wishes to proceed with dispute resolution⁶⁴⁰
- c. dispute resolution ends when the earliest of the following occurs:
 - i. the Commission declines to provide or continue to provide dispute resolution under section 116
 - ii. a party withdraws from dispute resolution under section 118 by providing the Commission with written notice
 - iii. the parties to the dispute reach agreement about the dispute⁶⁴¹
 - iv. the Commission decline to provide or continue to provide dispute resolution in accordance with section 116.
- d. a party may make an application to the Tribunal about a breach of the Equal Opportunity Act or RRTA whether or not the person has brought a dispute to the Commission.⁶⁴²

Discretion to decline to provide or continue to provide dispute resolution

714. Section 116 provides the Commission with the discretion to decline to provide or continue to provide dispute resolution for any of the following reasons:
- a. the alleged contravention occurred more than 12 months before the dispute was lodged with the Commission
 - b. the matter has been adequately dealt with by another court of tribunal
 - c. the matter involves a subject matter that would be more appropriately dealt with by a court or tribunal (for example sexual assault)
 - d. the person has started proceedings in another forum (for example Australian Human Rights Commission or Fair Work Commission)
 - e. having regard to all the circumstances, it is not appropriate to provide or continue to provide dispute resolution.⁶⁴³

637 [Equal Opportunity Act 2010 \(Vic\) s 113](#).

638 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 52.

639 [Explanatory Memorandum to the Justice Legislation \(Further Amendment\) Bill 2006](#), 10.

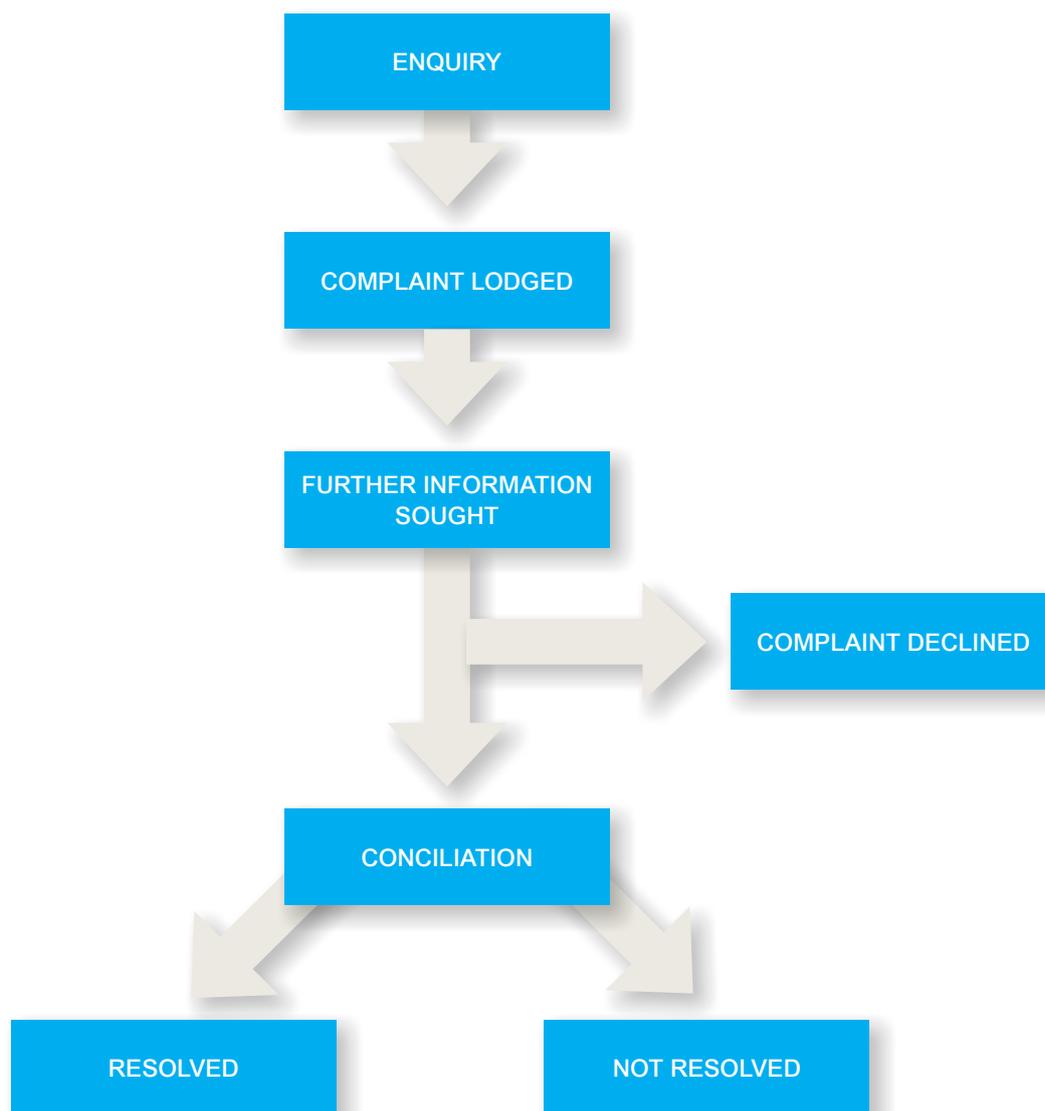
640 [Equal Opportunity Act 2010 \(Vic\) s 115\(1\)](#).

641 [Equal Opportunity Act 2010 \(Vic\) s 115\(2\)](#).

642 [Equal Opportunity Act 2010 \(Vic\) s 122](#).

643 [Equal Opportunity Act 2010 \(Vic\) s 116](#).

Complaint resolution process



715. Factors that may be relevant to consideration of 'all the circumstances' in [section 116\(e\)](#) include whether:

- a. the Commission has previously provided dispute resolution services in relation to the allegations
- b. the Commission has previously declined to provide dispute resolution services in relation to the allegations
- c. the allegations are misconceived due to:
 - i. a misunderstanding of legal principle
 - ii. a lack of jurisdiction (such as the allegations are not covered by the Equal Opportunity Act, for example, the alleged breach did not occur in an area of public life)
 - iii. the absence of unfavourable treatment or the absence of a connection between the conduct and the protected attribute

iv. the Commission does not have jurisdiction due to an inconsistency between state and federal laws.⁶⁴⁴

- d. 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)
- e. contact has been lost with the parties
- f. attempts to conciliate have been unsuccessful.

716. If the Commission decides to decline to offer dispute resolution, it must provide all parties to the dispute with sufficient reasons for its decision.

⁶⁴⁴ For more information on misconceived complaints, see *Cocks Macnish & Anor v Biundo* [2004] WASCA 194 (26 August 2004).

Withdrawing from a dispute

717. Dispute resolution at the Commission is voluntary⁶⁴⁵ and parties may withdraw from the process at any time by informing the Commission in writing.⁶⁴⁶ Withdrawal from dispute resolution does not prevent a person from applying to the Tribunal under the Equal Opportunity Act, or commencing proceedings in another jurisdiction.⁶⁴⁷

Applications to the Tribunal

718. A person may apply directly to the Tribunal in relation to a complaint of discrimination, sexual harassment or victimisation, whether or not that person has attempted dispute resolution at the Commission.⁶⁴⁸

Who may apply to the Tribunal?

719. The following persons may make an application to the Tribunal under [section 122](#) of the Equal Opportunity Act:

- a. a person who claims that another person has discriminated, sexually harassed or victimised them
- b. 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
- c. if that person is a child – the child, a parent on the child's behalf, or (if the Commission is satisfied that the child consents) any other person.

Representative complaints to the Tribunal

720. A representative body may also make a direct application to the Tribunal under [section 124](#) of the Equal Opportunity Act. Section 124(1)(a) provides that a representative body may make an application to the Tribunal on behalf of a named person or persons if the Tribunal is satisfied that:

- a. each person is entitled to bring a dispute to the Tribunal 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
- b. each person has consented to the dispute being brought by the body on the person's behalf.

721. 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)).

722. Section 124 of the Equal Opportunity Act is a new provision. Parliament intended for it to mirror [section 114](#) of the Equal Opportunity Act so that the same representative bodies that can bring a complaint to the Commission can apply directly to the Tribunal.⁶⁴⁹

723. Previously, under section 134 of the 1995 Act, the Tribunal could hear complaints referred to it from the Commission, which included representative complaints. This meant that a representative body was required to seek referral of its case to the Tribunal, if the body and those it represented wished to take their complaint further. However, there was no equivalent provision to section 124 in the 1995 Act, whereby the Tribunal must be satisfied that the complainants were entitled to bring the complaints and the representative body had sufficient standing as an interested party to bring the complaint on behalf of those named persons.

724. Instead, the Tribunal performed that assessment as part of their role in hearing and determining a complaint referred by the Commission, by determining whether the complainant (such as the representative body) was the proper party, with the necessary connection with the conduct of the complaint to bring the complaint.⁶⁵⁰ In other words, the Tribunal conducted the same assessment now contained in [section 124](#) despite there being no specific obligation to do so in the legislation.

645 [Equal Opportunity Act 2010 \(Vic\) s 112\(d\)](#).

646 [Equal Opportunity Act 2010 \(Vic\) s 118\(1\)](#).

647 [Equal Opportunity Act 2010 \(Vic\) s 118](#). Note however that as at February 2012, a person cannot lodge a complaint with the Australian Human Rights Commission about a matter the subject of dispute resolution under the Equal Opportunity Act.

648 [Equal Opportunity Act 2010 \(Vic\) s 122](#).

649 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 56.

650 [Cobaw Community Health Services v Christian Youth Camps Ltd and Anor \(Anti-Discrimination\)](#) [2010] VCAT 1613 (8 October 2010) [48]-[50].

725. By including section 124 of the Equal Opportunity Act, Parliament has clarified that it expects the Tribunal to conduct this assessment before considering a complaint by a representative body.

Who can be a 'representative body'?

726. The term 'representative body' is not specifically defined in the Equal Opportunity Act. However, as noted above, the representative body must have a sufficient interest in the application. Sections 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.

727. In *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)*,⁶⁵¹ the Tribunal considered the issue of whether Cobaw Community Health Services (Cobaw) had standing as a representative body under the equivalent provision of the Act 1995 (sections 104(1B) and (1C)). The decision in *Cobaw* provides useful guidance on the Tribunal's approach to the interpretation of the relevant provisions.⁶⁵²

728. 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, which ran the 'Phillip Island Adventure Resort'. Cobaw alleged that one of their staff members (the WayOut coordinator) had contacted CYC and sought to book the resort for a camp for 60 young people and 12 workers. However, Cobaw alleged that CYC refused to accept the booking because of the sexual orientation of the young people attending.

729. 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. Some of the named people were Cobaw workers or workers from organisations involved in WayOut, some were same sex attracted young people involved in WayOut, and some were not same sex attracted but were involved in the WayOut programme.

730. The Tribunal considered that before turning to the merits of the application, it was required to assess each of the criteria the Commission must be satisfied of, for a representative complaint to be made under section 104(1B) of the Equal Opportunity Act 1995:⁶⁵³

- a. that the people named in the complaint are entitled to do so under section 104(1)(a)
- b. that the people named in the complaint consented to Cobaw bringing the complaint on their behalf
- c. that the contravention arises out of the same conduct for each complainant
- d. that Cobaw has a sufficient interest in the complaint.

731. In assessing these matters, the Tribunal considered it must interpret them consistently with the purposes of the Equal Opportunity Act, and the right to equality and freedom from discrimination in the Charter.⁶⁵⁴ The Tribunal noted that this approach meant it must interpret section 104(1B) in a manner which would give effect to the right of the people claiming they have been discriminated against to seek and obtain an effective remedy.⁶⁵⁵

651 [2010] VCAT 1613 (8 October 2010).

652 Note that this case is currently on appeal to the Supreme Court. However, the parts of the decision relating to the standing of Cobaw to bring the complaint were not challenged in the appeal.

653 *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) [51].

654 Ibid [40]; *Charter of Human Rights and Responsibilities Act 2006*, s8(2) and s8(3).

655 *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) [52].

732. The Tribunal concluded that 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.⁶⁵⁶ To do so otherwise, the Tribunal 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.⁶⁵⁷

733. In the case of those represented by Cobaw, the Tribunal considered there was a real prospect that without the assistance of a representative body, that the individuals would be deterred from bringing their complaints.⁶⁵⁸ In coming to this decision, the Tribunal took into account the power imbalance resulting from the young age and sexual orientation of many of the individuals represented as against a large, well-resourced organisation such as CYC, and the effect of the potential intrusion into the private lives of the complainants by virtue of bringing the complaint in a public forum.

734. Ultimately the Tribunal concluded that Cobaw did meet the first three criteria in section 104(1B) in relation to 10 of the 12 complainants. In relation to whether Cobaw had a 'sufficient interest' in the complaint, the Tribunal 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.

735. In interpreting section 104(1C) the Tribunal gave the following guidance:

- a. 'conduct that constitutes the alleged contravention' is to be ascertained by reference to the complaint⁶⁵⁹
- b. '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'⁶⁶⁰
- c. consideration must also take place of:
 - i. the interests of the representative group
 - ii. the interests and welfare of those they seek to represent
 - iii. whether the contravention was 'a matter of genuine concern' to the group, through an examination of the activities of the representative group.⁶⁶¹
- d. the objects of the organisation, and its aims and purposes, are relevant to the 'sufficiency of interest' test, but are not determinative⁶⁶²
- e. 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.⁶⁶³

736. After undertaking this significant analysis, the Tribunal was satisfied that Cobaw had a sufficient interest in the complaint to have standing as an applicant.

656 Ibid [55].

657 Ibid [55].

658 Ibid [59].

659 Ibid [72].

660 Ibid [73].

661 Ibid [74]-[75].

662 Ibid [89].

663 Ibid [92].