

Chapter 3

> Protected attributes

Which attributes are protected?

116. [Section 6](#) of the Equal Opportunity Act sets out the 'attributes' on the basis of which discrimination is prohibited in the areas of activity in Part 4 of the Equal Opportunity Act. Those attributes are:
- age
 - breastfeeding
 - employment activity
 - gender identity
 - disability
 - industrial activity
 - lawful sexual activity
 - marital status
 - parental status or status as a carer
 - physical features
 - political belief or activity
 - pregnancy
 - race
 - religious belief or activity
 - sex
 - sexual orientation
 - personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.¹⁰¹
117. Many of the protected attributes are relatively self explanatory, for example, age, breastfeeding and sex. For others, the Equal Opportunity Act itself contains more detailed definitions. Some of the more complex attributes are set out and explored further.

Extensions of protected attributes

118. Importantly, [section 7\(2\)](#) provides that discrimination on the basis of an attribute includes discrimination on the basis:
- that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination
 - of a characteristic that a person with that attribute generally has
 - of a characteristic that is generally imputed to a person with that attribute
 - that a person is presumed to have that attribute or to have had it at any time.¹⁰²
119. The Equal Opportunity Act also now makes it clear that the use of an assistance aid, such as an assistance dog, by somebody with a disability will be treated as a 'characteristic' generally pertaining to people with the relevant disability, as discussed further below.
120. It is evident from these provisions that, in determining whether discrimination occurs on the basis of a protected attribute, the inquiry is much broader than simply whether the complainant actually has the protected attribute and whether there is a causal nexus between that attribute and the alleged discriminatory conduct.

101 [Ibid s 6.](#)

102 [Ibid s 7\(2\).](#)

Presumed attribute

121. In *Daniels v Hunter Water Board*,¹⁰³ Mr Daniels alleged that he was harassed and discriminated against by the Respondent over a number of years on the grounds of his presumed homosexuality, even though he did not identify himself as being homosexual.
122. The alleged conduct began after Mr Daniels adopted a 'trendy' haircut and an earring in his left ear. He also took up jazz, ballet, drama and modelling. At this time, his co-workers started to call him a 'weirdo' and to allege that he must be 'gay'. After Mr Daniels removed a poster of a naked woman from his workplace because it had offended a female colleague, the frequency of derogatory comments made towards him, on the basis of him being 'gay', increased.
123. Mr Daniels' claim on the basis of his presumed homosexuality was upheld. While this decision was made in New South Wales, the wording of [section 7\(2\)](#) Equal Opportunity Act suggests that the same principles would apply in Victoria under the Equal Opportunity Act.

Imputed characteristic

124. In *Waterhouse v Bell*,¹⁰⁴ the complainant was refused registration as a racehorse trainer because she was married to a person who had been 'warned off' all racecourses as a result of his involvement in a horse substitution scandal. The New South Wales Court of Appeal found that the refusal to grant the licence to the complainant was because of a characteristic imputed to married women, namely, that all wives are liable to be corrupted or influenced to do wrong by their husbands. On that basis, the Court held that the refusal constituted discrimination against the complainant on the ground of marital status.

Comparison with protected attributes under Commonwealth anti-discrimination laws

125. The majority of the attributes in the Equal Opportunity Act overlap with protected attributes under federal anti-discrimination legislation and industrial legislation such as the [Fair Work Act 2009 \(Cth\)](#). There are however, a number of protected attributes which remain peculiar to Victoria and only a few other states, in the following paragraphs.

Discussion of protected attributes

Employment activity as a protected attribute

126. 'Employment activity' is defined in [section 4](#) of the Equal Opportunity Act to mean an employee in his or her individual capacity:
 - a. making a reasonable request to his or her employer, orally or in writing, for information regarding his or her employment entitlements
 - b. communicating to his or her employer, orally or in writing, the employee's concern that he or she has not been, is not being or will not be, given some or all of his or her employment entitlements.¹⁰⁵
127. 'Employment entitlements' are broadly defined in [section 4](#) of the Equal Opportunity Act to include in relation to an employee, the employee's rights and entitlements under an applicable:
 - a. contract of service
 - b. federal agreement or award
 - c. minimum wage order under the [Fair Work Act 2009 \(Cth\)](#)
 - d. contract for services (such as independent contractor)
 - e. Act or enactment
 - f. law of the Commonwealth.¹⁰⁶
128. These definitions are carried over from the 1995 Act where they were inserted, by an amendment, in 2007. The Explanatory Memorandum to the amending Bill stated that the amendment sought to:

[...] provide further protection to Victorian employees where, in their individual capacity, they make a reasonable request to their employer for information about their employment entitlements or communicate concerns to their employer about whether they have been, are being or will be given their employment entitlements.¹⁰⁷

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

106 *Ibid.*

107 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2007 \(Vic\)](#), 1.

103 (1994) EOC 92-626.

104 (1991) 25 NSWLR 99.

129. The [Explanatory Memorandum](#) to the 2007 amending Bill provides extensive guidance about the interpretation of 'employment activity':

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

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

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

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

This may cover concerns such as:

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

It is not intended, however, that the attribute provide a mechanism for enforcing employment entitlements or for negotiating a pay rise or other terms and conditions of employment more generous or different than those to which an employee is currently entitled.¹⁰⁸

Gender identity as a protected attribute

130. As noted above, the Equal Opportunity Act protects against discrimination on the basis of a person's 'gender identity'. This covers a range of expressions of gender, from the way that a person dresses or speaks, to gender reassignment surgery.

131. 'Gender identity' is defined in [section 4](#) to mean:
- a. the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognized as such):
 - i. by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise
 - ii. by living, or seeking to live, as a member of the other sex
 - b. the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
 - i. by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise
 - ii. by living, or seeking to live, as a member of the other sex.¹⁰⁹

108 [Ibid 2-4](#); [Loevski v Jacobson \[2010\] VCAT 1428](#).

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

132. This definition is consistent with the definition of 'gender identity' that was introduced into the 1995 Act in 2000. The gender identity characteristic was included to extend protection against discrimination to those whose gender identity does not match their physical sex at birth, ranging from people who occasionally dress in a style that is usually associated with the opposite sex, to persons undergoing gender reassignment surgery.¹¹⁰
133. However, the definition of 'gender identity' under the Equal Opportunity Act does not extend to people who do not identify as either 'male' or 'female' gender, for example people who identify as of 'indeterminate sex' (often due to their mixed or indeterminate sex characteristics). Note: people can be protected from discrimination because they are physically intersex, on the basis of the 'sex' protected attribute.
134. Gender identity is only protected in Victoria, Queensland, and Tasmania, though very similar protections are afforded in some other States, such as 'chosen gender' in South Australia and the slightly more ambiguous 'gender history' in Western Australia. There is currently no protection for gender identity under federal anti-discrimination legislation or federal industrial legislation although it has been included as a new attribute in the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* consolidating federal anti-discrimination law.
- ii. a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder
- e. malformation or disfigurement of a part of the body –
...and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.¹¹¹
136. The broadening of the definition to include behaviour that is a symptom or manifestation of a disability clarified in the legislation issues that had been raised in the High Court of Australia's decision in *Purvis v New South Wales (Department of Education) (Purvis)*.¹¹²
137. The *Purvis* case concerned the treatment of a high school student, Daniel Hoggan, who suffered from a number of disabilities as the result of a brain injury acquired when he was a baby. Daniel's disabilities manifested in certain behaviours, including violent behaviour and swearing. Daniel was suspended several times and, later, expelled from South Grafton High School on the basis of his violent and disruptive behaviour. Daniel's foster parents brought a claim of discrimination under the *Disability Discrimination Act 1992 (Cth)* on his behalf. The case went to the High Court of Australia on appeal. One of the issues before the High Court was whether Daniel's behaviour – which was described as a 'symptom' or 'manifestation' of his disability – fell within the meaning of 'disability' under the *Disability Discrimination Act 1992 (Cth)*.

Disability as a protected attribute

135. The Equal Opportunity Act sees a shift from the term 'impairment' previously used in the 1995 Act to the more commonly used term of 'disability'. 'Disability' is defined in [section four](#) of the Equal Opportunity Act to mean:
- a. total or partial loss of a bodily function
 - b. the presence in the body of organisms that may cause disease
 - c. total or partial loss of a part of the body
 - d. malfunction of a part of the body, including:
 - i. a mental or psychological disease or disorder
138. When the case was first decided, Commissioner Innes had not drawn a clear distinction between Daniel's disabilities and the manifestation of those disabilities.¹¹³ In the Federal Court of Australia, however, Emmett J applied a narrow interpretation of 'disability', stating that 'it is the disorder or malfunction, or the disorder, illness or disease that is the disability. It is not the symptom of that condition that is the disability.'¹¹⁴

110 Victoria, *Parliamentary Debates*, Equal Opportunity (Gender Identity and Sexual Orientation) Bill, 13 April 2000, 1014–1015.

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

112 [2003] HCA 62.

113 *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC 93-117.

114 *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 77 (Emmett J).

139. A majority of the High Court disagreed with Emmett J's narrow interpretation of the term 'disability'. The High Court in *Purvis* concluded that the definition of disability does include behaviour resulting from the disability.¹¹⁵ In reaching the conclusion to apply this broader interpretation of 'disability', the majority looked at the purpose and objectives of the *Disability Discrimination Act 1992 (Cth)* which, as McHugh and Kirby JJ said, was intended to be 'beneficial and remedial in nature'.¹¹⁶
140. Due to the characteristics extension, discussed above, it is also unlawful to discriminate against a person on the basis of a characteristic generally appertaining or imputed to a person with a disability.
141. The use of an assistance aid, including an assistance dog, is deemed to be a characteristic generally pertaining to somebody with the relevant disability for the purposes of the Equal Opportunity Act. Sections 7(2) and (3) of the Equal Opportunity Act make this position clear. This means that discrimination on the basis of the assistance aid – including an assistance dog – will be unlawful (unless a defence or exception applies).
142. The express provisions contained in sections 7(2) and (3) of the Equal Opportunity Act were inserted to deal with the situation which arose in *Walker v State of New South Wales (Walker)*.¹¹⁷ In *Walker*, the applicant used a walking stick and an aluminium scooter as mobility aids to cope with a back injury. On several occasions he tried to access the Parramatta Court complex but was initially denied entry with his stick or scooter until the court staff were able to ascertain that these items were assistance aids. Once the court staff were satisfied that Mr Walker used his stick and scooter to cope with a disability, he was granted special dispensation to use these items within the court complex. Mr Walker said that he should not be required to obtain special dispensation to enter the court complex for a matter in which he was personally involved.

115 *Purvis v New South Wales* [2003] HCA 62 [27], [80] (McHugh and Kirby JJ), [209]-[212] (Gummow, Hayne and Heydon JJ); 217 CLR 92; 202 ALR 133; 78 ALJR 1.

116 Ibid [80]. Note: Although the High Court accepted the broader meaning of 'disability', it adopted a narrow approach to the comparator test which meant that the discrimination claim ultimately failed. This aspect of the case is no longer directly relevant to the *Equal Opportunity Act 2010 (Vic)* due to the recent changes which remove the comparator test from the definition of 'direct discrimination'.

117 [2003] NSWADT 13.

143. One of the issues that the New South Wales Administrative Decisions Tribunal had to consider was whether the use of a scooter or stick as a mobility aid was a characteristic which appertains generally to, or is generally imputed to, people with back injury. Mr Walker, who was unrepresented, had not led any evidence on this point. In the absence of evidence, the Tribunal said it was not open to it to make such a finding. In other words, it was not 'common knowledge' that the use of a walking stick or scooter are characteristics generally appertaining to or imputed to a person with a back injury. The Tribunal noted that the *Disability Discrimination Act 1992 (Cth)*, unlike the NSW legislation they were dealing with, dealt expressly with palliative or therapeutic devices or auxiliary aids.
144. The insertion of sections 7(2) and 7(3) brings the Equal Opportunity Act more closely into line with the *Disability Discrimination Act 1992 (Cth)* and means that complainants do not need to lead evidence to prove that the use of an assistance aid, including an assistance dog, is a characteristic generally appertaining or imputed to somebody with a disability.
145. In circumstances that fall outside sections 7(2) and 7(3) of the Equal Opportunity Act, the complainant will still need to identify the particular characteristic and satisfy the Tribunal that it is a characteristic that a person with a disability generally has, or is generally imputed to have. For example, in *O'Connor v State of Victoria (Dept of Education and Training)*, VCAT did not accept that the taking of sick leave is a characteristic generally pertaining to persons who have a disability.¹¹⁸

Industrial activity as a protected attribute

146. The Equal Opportunity Act protects against discrimination on the basis of a person's industrial activity.
147. The definition of 'industrial activity' in the Equal Opportunity Act continues that which existed in the 1995 Act, as amended in 2006. In 2006, the definition of 'industrial activity' was amended to include the setting-up of an industrial organisation or association, organising or promoting, encouraging, assisting or participating in, or not participating in a lawful activity, organised by an industrial organisation or association, or representing or advancing the views, claims or interests of an industrial organisation or association.

118 [2004] VCAT 1188.

148. These amendments were designed to more explicitly reflect various decisions of VCAT in relation to the interpretation of 'industrial activity'. For example, in *Dickenson v Shire of Yarra Ranges*,¹¹⁹ Deputy President McKenzie stated that 'industrial activity' includes action taken by groups of employees acting or expressing themselves in a collective way, or action to promote compliance with relevant awards or workplace regulations, or to improve workplace conditions where a union, or group of staff acting collectively, is also involved in that activity, or encourages, assists or supports that activity.
149. Similarly, in *Aylett v Australian Paper & Purdy*,¹²⁰ the applicant's level of participation in occupational health and safety issues with the support and/or sanction of a union was defined as industrial activity.
150. In *Hendrickson v Victorian Association of State Secondary Principals & Anor*,¹²¹ not joining or not being a member of the Australian Principals Federation (APF) was held to be industrial activity as defined in the 1995 Act. In circumstances where the applicant was charged a higher subscription fee to join only the Victorian Association of State Secondary Principals (VASSP), than the fee charged to individuals who wished to join both VASSP and the APF, VCAT held that the applicant had been discriminated against because of his industrial activity.
151. More recently, in *Dulhunty v Guild Insurance Limited*,¹²² VCAT held that Guild Insurance Limited had discriminated against a chiropractor on the basis of his 'industrial activity' by charging him a higher premium as a non-member of the Chiropractor's Association of Australia (Association), than the premium charged to members of the Association. In doing so, VCAT found that not being a member of the Association was an 'industrial activity' within the meaning of the Equal Opportunity Act.
152. 'Industrial association' is defined to mean a group of employees or employers, formed formally or informally to represent or advance the views, claims or interests of the employees or employers in a particular industry, trade, profession, business or employment, not including an industrial organisation.
153. The definition was originally inserted into the 1995 Act in 2006 to reflect decisions of VCAT, which established that while a collective dimension is required to constitute an industrial organisation, a formal link with a union is not required.¹²³
154. 'Industrial organisation' is defined to mean one of the following organisations that is registered or recognised under a State or Commonwealth Act or enactment:
- an organisation of employees
 - an organisation of employers
 - any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment.¹²⁴
155. This definition was also amended in 2006 to stipulate that an industrial organisation must be registered or recognised under a State or Commonwealth enactment. This is intended to distinguish an industrial organisation from an industrial association.

Lawful sexual activity as a protected attribute

156. Lawful sexual activity means:
- engaging in
 - not engaging in
 - refusing to engage in any form of sexual activity not prohibited by Victorian law.
157. This definition applies to homosexuals, lesbians, bisexuals and heterosexuals, legal prostitution and people perceived to fall into one of these groups.
158. The attribute of 'lawful sexual activity' has been raised where a person has been treated unfavourably because of extra-marital affairs or sexual relationships between co-workers. For example, in *Rowley v Goodyear Tyres Pty Ltd and Ors*,¹²⁵ the respondent's application to strike out a complaint of discrimination in employment on the ground of lawful sexual activity was denied. In that case, the complainant was terminated on the basis of his alleged extra-marital sexual relationship with another member of the executive leadership team. The Tribunal refused to strike out the application on the basis that the question of whether the attribute extends to relationships (as opposed to actually engaging in lawful sexual activity) needs further consideration.

119 [2000] VCAT 1093.

120 [2004] TASADT 4.

121 [2007] VCAT 1193.

122 [2012] VCAT 1651.

123 *Schou v State of Victoria* [1999] VCAT 632; *Moloney v State of Victoria* [2000] VCAT 1089.

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

125 [2011] VCAT 1536.

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

Marital status as a protected attribute

160. The Equal Opportunity Act protects against discrimination on the basis of a person's marital status, which includes being single, married (whether living separately or apart from one's spouse), in a domestic partnership, divorced, or widowed.¹²⁶
161. Protections against discrimination on the basis of a person's 'marital status' do not necessarily extend to circumstances where the discrimination occurs because of the identity or situation of a person's spouse – as opposed to the relationship itself – unless the personal association discrimination applies.
162. For example, in *Tebby v Davies & Ors*¹²⁷ (*Tebby*) Deputy President Coghlan applied an earlier New South Wales case *Boehringer Ingelheim Pty Ltd v Reddrop*¹²⁸ and found that the prohibition against discrimination on the basis of a person's 'marital status' does not 'extend to characteristics of the particular spouse or partner'.¹²⁹ In that case, the Deputy President dismissed a complaint by an employee about the termination of their employment due to their spouse working for a competitor.
163. The outcome would be different under the Equal Opportunity Act if the discrimination occurred because of a person's 'personal association' with another – including a spouse – who has a protected attribute. For example, it would be unlawful for an employer to refuse to employ a candidate on the basis that he or she is married to a union official or a person of a particular religion. Such conduct would constitute unlawful discrimination against the candidate on the basis of his or her personal association with somebody who had engaged in industrial activity in the first example, or on the basis of religion in the second.

164. An exception to the rule may also exist where discrimination in relation to the identity or situation of a person's spouse is based on an assumption about a characteristic generally imputed to marital status, as in *Waterhouse v Bell*.¹³⁰ In that case, the New South Wales Court of Appeal considered a complaint of discrimination brought by horse trainer Gai Waterhouse. Ms Waterhouse had applied to the Australian Jockey Club for a trainer's licence but her application was rejected on the basis that her husband had been involved in betting fraud. The Court of Appeal found that, in circumstances where there was no suggestion that Ms Waterhouse had a relevant character deficiency, the reason for the refusal to grant her a licence was the respondent's belief that 'all wives are liable to be corrupted by their husband', which was held to be a characteristic attributed or imputed to married women.

Physical features as a protected attribute

165. Victoria is the only Australian jurisdiction which protects against discrimination on the basis of a person's physical features.
166. The definition of 'physical features' remains unchanged from the 1995 Act. 'Physical features' is defined to mean a person's height, weight, size or other bodily characteristics. The term 'bodily characteristics' has been interpreted widely and has been found to include tattoos¹³¹ and the styling, colour and location of hair.¹³² However, personal hygiene (such as body odour), not wearing underwear and overeating are not 'physical features'.¹³³ Transsexualism is also not a 'physical feature', however, it has been held to constitute an impairment.¹³⁴ (Note that this decision took place before 'gender identity' was a protected attribute in Victoria).

126 *Equal Opportunity Act 2010 (Vic)* s 4.
127 [2002] VCAT 1023.
128 [1984] 2 NSWLR 13.
129 Ibid 45.

130 (1991) 25 NSWLR 99.
131 In *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849, the Tribunal assumed without deciding that tattoos are physical features.
132 *Fratras v Drake International Ltd t/as Drake Jobseek* (1998) EOC 93-038 VCAT.
133 *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.
134 *Menzies v Waycott & Anor* [2001] VCAT 415.

167. In *Ruddell v DHS*¹³⁵, the Tribunal considered whether the applicant's loud voice fell within the meaning of a 'physical feature'. The Tribunal did not rule-out the possibility that a 'physical feature' may include 'not only visible bodily characteristics like height or weight but any other bodily characteristics with an external manifestation such as voice which is audible'. However, the Tribunal found that the loudness of Mr Ruddell's voice – which he could control at his own will – was not within the meaning of a 'physical feature'.¹³⁶

Personal association as a protected attribute

168. The Equal Opportunity Act also protects against discrimination of a person on the basis that the complainant has a 'personal association' (whether as a relative or otherwise), with somebody who is identified by reference to another protected attribute. The complainant must prove the association – whether with a relative, friend or otherwise – and that the person associated with, has one of the protected attributes.¹³⁷
169. This protection was introduced with the 1995 Act. In the second reading speech for the Bill, which later became the 1995 Act, the Honourable Haddon Storey said:
- Discrimination based on the attribute of personal association is prohibited under the Bill. This ground of prohibited discrimination is intended to protect people who are discriminated against because of the association, whether as relatives or otherwise with a person who has had any of the [protected attributes]... For instance, relatives, friends and helpers of disabled persons often suffer discrimination when attempting to gain access to accommodation and also services. Such people are provided with an avenue of redress under this Bill.¹³⁸
170. In *Lund v Eyrie Common Equity*,¹³⁹ Mr Lund claimed that his landlord, in giving him a notice to vacate, had directly discriminated against him because of his 'personal association' with another person,

Mr Milsom. Mr Lund lived with and cared for Mr Milsom, who had a psychological impairment. The Tribunal referred to the second reading speech (cited at paragraph 169 above) regarding the purpose and scope of the personal association protections. In that case, the Tribunal accepted that the personal association attribute applied, but the claim did not succeed because the Tribunal was not satisfied that it was the reason for issuing the notice to vacate. Rather, the Tribunal accepted that the reason for issuing the notice was to resolve a long-running dispute between tenants.

Political belief or activity as a protected attribute

171. Political belief or activity means:
- a. holding or not holding a lawful political belief or view
 - b. engaging in, not engaging in or refusing to engage in a lawful political activity.¹⁴⁰
172. Political belief or activity has been interpreted more narrowly by courts and tribunals in Victoria than in other jurisdictions.¹⁴¹ In Victoria, 'political' has been interpreted as a matter or activity which involves the state and 'bears on government'.¹⁴² A belief is not political where 'it has no bearing on the form, role, structure, feature, purpose, obligations, duties or some other aspect of government'.¹⁴³ 'Political belief' has been distinguished from beliefs basic to the structure of society such as honesty¹⁴⁴ and must be related to the 'mores of society'.¹⁴⁵ Public expression by a teacher of views about the age of consent may be 'political'.¹⁴⁶

¹³⁵ [2001] VCAT 1510 (20 June 2001).

¹³⁶ Ibid [55]–[56].

¹³⁷ See, for example, *Lund v Eyrie Common Equity Rental Housing Cooperative Ltd* [1999] VCAT 617; *Johnson v Berwick City Soccer Club* [2010] VCAT 1093.

¹³⁸ Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1251 (Jan Wade, Attorney-General).

¹³⁹ [1999] VCAT 617.

¹⁴⁰ *Equal Opportunity Act 2010 (Vic)*, s 4.

¹⁴¹ See, for example, *Croatian Brotherhood Union of WA (Inc) v Yugoslav Clubs & Community Assns of WA Inc* (1987) EOC 92-190, EOT(WA).

¹⁴² *Hein v Jacques Ltd* (1987) EOC 92-188; followed in this respect *Nestle Australia Ltd v Equal Opportunity Board* [1990] VR 805; (1990) EOC 92-281; *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,290.

¹⁴³ *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107.

¹⁴⁴ *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,290.

¹⁴⁵ *Jolly v Director-General of Corrections (Vic)* (1985) EOC 92-124.

¹⁴⁶ *Thorne v R* (1986) EOC 92-182.

173. 'Political activity' means more than 'capable of being political',¹⁴⁷ but can relate to deeply held political views manifested in refusal to support certain union action of a political nature.¹⁴⁸ Dismissal of a builder's labourer after rejoining a deregistered union was found not to be discrimination on the ground of 'political activity' because there was no evidence that the employer had the employee dismissed for engaging in political activity as defined, or that his failure to present a financial clear card was political.¹⁴⁹ In the provision of goods and services, failure to allow a municipal hall to be used by protesters against a United States base, when it had been made available to supporters, was held to be discriminatory on grounds of political belief and activity.¹⁵⁰

Race as a protected attribute

174. Race includes:

- a. colour
- b. descent or ancestry
- c. nationality or national origin
- d. ethnicity or ethnic origin
- e. if 2 or more distinct races are collectively referred to as race:
 - i. each of those distinct races
 - ii. that collective race.¹⁵¹

175. Courts have generally taken the view that 'race' as described in anti-discrimination legislation is a broad term and should be understood in the popular sense.¹⁵² The meaning of 'race' was considered in the context of disputes between Aboriginal people in *Williams v Tandanya Cultural Centre*,¹⁵³ where Driver FM held:

The word 'race' is a broad term. Also, in addition to race, the *Racial Discrimination Act 1975* (Cth.) (RDA) proscribes discrimination based upon national or ethnic origins or descent. It will be apparent to anyone with even a rudimentary understanding of Aboriginal culture and history that the Australian Aborigines are not a single people but a great number of peoples who are collectively referred to as Aborigines. This is clear from language and other cultural distinctions between Aboriginal peoples. It is, in my view, clear that the RDA provides relief, not simply against discrimination against 'Aboriginals' but also discrimination against particular Aboriginal peoples.¹⁵⁴

176. 'Decent or ancestry' was considered in *Australian Macedonian Human Rights Committee (Inc) v State of Victoria*¹⁵⁵ where it was found that:

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

177. There is a distinction between discrimination on grounds of national origin and discrimination on grounds of nationality. National origin is normally a status acquired and fixed at birth and incapable of change, whereas a person may acquire a number of different nationalities over the course of a lifetime.¹⁵⁶ In *Australian Medical Council v Wilson*,¹⁵⁷ Sackville J held 'national origin' does not simply mean citizenship.

147 *CPS Management Pty Ltd v President and Members of the Equal Opportunity Board* [1991] 2 VR 107; (1991) EOC 92-332 at 78,291.

148 *Hein v Jacques Ltd* (1987) EOC 92-188; BC8900498.

149 *Duggan v South Yarra Constructions Pty Ltd* (1988) EOC 92-220; 25 IR 367.

150 *Williams v Council of the Shire of Exmouth* (1990) EOC 92-296.

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

152 *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362.

153 [2001] FMCA 46 (23 July 2001); (2001) 163 FLR 203.

154 *Ibid* [21].

155 [2000] HREOCA 52.

156 See *Australian Medical Council v Wilson* [1996] FCA 1618; (1996) 68 FCR 46 at 75; 137 ALR 653; *Macabenta v Minister for Immigration and Multicultural Affairs* [1998] FCA 385; (1998) 90 FCR 202 at 211, 212; 159 ALR 465; 52 ALD 8.

157 [1996] FCA 1618; (1996) 68 FCR 46 at 75; 137 ALR 653.

178. The distinction between national origin and ethnic origin was considered in *Australian Macedonian Human Rights Committee v State of Victoria*:¹⁵⁸

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

179. 'Ethnic origin' has been interpreted broadly in a number of jurisdictions to include Jewish¹⁵⁹ and Sikh people. The Court in *King-Ansell* held that Jewish people in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971* (NZ). Richardson J stated that:

...a group is identifiable in terms of ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.¹⁶⁰

180. Similarly, in *Mandla v Dowell Lee*¹⁶¹ the House of Lords held that for a group (such as Sikh people) to constitute an ethnic group for the purposes of the legislation in question, it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.

Religious belief or activity as a protected attribute

181. Religious belief or activity means:

- holding or not holding a lawful religious belief or view
- engaging in, not engaging in or refusing to engage in lawful religious activity.¹⁶²

182. 'Religious belief or activity' has been interpreted broadly, and includes atheism.¹⁶³ 'Religious belief' has been extended to a union member who refused to make a welfare payment on account of his religious belief that charitable works and welfare support was the sole province of the church and was not a function of union members.¹⁶⁴ Discrimination on the basis of religious belief or activity has been found in not providing fresh Halal meat to a Muslim prisoner who requested it.¹⁶⁵

158 [2000] HREOCA 52.

159 *Miller v Wertheim* [2002] FCAFC 156, [14]. See also *Jones v Scully* [2002] FCA 1080; (2002) 120 FCR 243, 271-273 [110]-[113], *Jones v Toben* [2002] FCA 1150, [101], *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21] and *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22] where it was found that Jews in Australia are a group of people with a common 'ethnic origin' under the *Racial Discrimination Act 1975* (Cth).

160 *King-Ansell* [1979] 2 NZLR 531, 543.

161 [1983] 2 AC 548, [1983] 1 All ER 1062, [1983] 2 WLR 620, [1983] IC R 385, [1983] IRLR 209, (46 MLR 759, 100 LQR 120, [1984] CLJ 219)

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

163 *Aitken & Ors v The State of Victoria - Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547.

164 *Marett v Petroleum Refineries (Aust) Pty Ltd* (1987) EOC 92-206; 24 IR 101, EOB(VIC); *Petroleum Refineries (Australia) Pty Ltd v Marett* [1989] VicRp 69; [1989] VR 789 (16 September 1988); (1988) EOC 92-237, SC(VIC).

165 *Queensland v Mahommed* (2007) EOC 93-452; [2007] QSC 018.

Chapter 4

> Areas of public life in which discrimination is prohibited

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

Employment and related areas

184. [Part 4, Division 1](#) of the Equal Opportunity Act makes it unlawful to discriminate in employment, while [Part 4, Division 2](#) of the Equal Opportunity Act prohibits discrimination in employment-related areas.
185. The protection against discrimination in employment extends beyond the traditional employer-employee relationship to include independent contractors and people whose remuneration is commission based.
186. Subject to the relevant exceptions, these Divisions of the Equal Opportunity Act prohibit discrimination against:
- job applicants¹⁶⁶
 - employees¹⁶⁷
 - contract workers¹⁶⁸
 - partners (including prospective partners) of firms comprising five or more partners¹⁶⁹
 - members of industrial associations (including prospective members)¹⁷⁰
 - members of professional qualifying bodies (including prospective members).¹⁷¹

166 [Equal Opportunity Act 2010 \(Vic\) s 16.](#)

167 [Ibid s 18.](#) Also see the discussion in [GLS v PLP \(Human Rights\) \[2013\] VCAT 221 at \[47\]-\[53\]](#) in relation to the approach of the Tribunal where there is a question of whether the complainant is an employee for the purposes of the Equal Opportunity Act.

168 [Ibid s 21.](#)

169 [Ibid ss 32-33.](#)

170 [Ibid s 35.](#)

171 [Ibid s 36.](#)

187. The Equal Opportunity Act also describes, broadly, how discrimination may occur in employment and employment-related contexts. In summary, this includes discrimination:
- in deciding who should be offered employment, membership of an industrial association or a professional qualifying body
 - in the terms or conditions of work
 - by denying access to benefits such as ongoing education, training or opportunities for promotion
 - by subjecting the complainant to a 'detriment'.
188. There are some differences in the way in which discrimination is described in relation to applicants, employees, contract workers, partners, members of industrial associations and members of professional qualifying bodies. Persons bringing or responding to complaints should refer to the applicable sections within Division 1 of the Equal Opportunity Act for clarification on this issue.

Offers of employment

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

190. In offering employment to a person with a disability, an employer also must take into account any 'reasonable adjustments' necessary for accommodating the person's special needs (provided the candidate could 'adequately perform the genuine and reasonable requirements' of the job once those reasonable adjustments were made). This is because [section 20](#) of the Equal Opportunity Act specifically requires that an employer must make reasonable adjustments for a person with a disability who is offered employment. [Chapter Five](#) of this resource considers the requirement to make reasonable adjustments in more detail.
191. Similar issues were considered under the 1995 Act in [Davies v State of Victoria \(Victoria Police\)](#).¹⁷² In that case, the Tribunal found that Victoria Police directly discriminated against the complainant by rejecting his application to join the police force because he failed a colour vision test. Ultimately, the Tribunal was not satisfied that the results of the colour vision test proved whether the complainant either was, or was not, able to perform the genuine and reasonable requirements of employment as a Constable. Those requirements included motor vehicle pursuits and identifying people and things. The Tribunal ordered Victoria Police to undertake more rigorous testing before it made a decision.

Terms on which employment is offered

192. The Equal Opportunity Act specifically prohibits discrimination against prospective employees 'in the terms' on which employment is offered. This may encompass things such as the basis of the employment, salary package arrangements, working hours and work-related benefits such as vehicle allowances.
193. For example, if female candidates were offered part-time or casual work, whereas male candidates were offered full-time permanent work, and the reason for the distinction was because of the candidates' sex, this would constitute unlawful discrimination in the terms on which the employment is offered.

Access to 'benefit' including opportunities for promotion, training, transfer, guidance etc

194. The Equal Opportunity Act also prohibits discrimination in relation to advancement opportunities such as promotions and further training. This is important because opportunities for training and promotion often lead to further benefits within the workplace, such as greater seniority and better remuneration.¹⁷³

Employment-related medical testing

195. An employer may investigate issues in relation to job applicants if the employer can establish that the information sought relates to the inherent requirements of the job. The inherent requirements of employment must be determined having regard to the circumstances in which the employment is carried on and the dangers to which an employee may be exposed or may expose others.¹⁷⁴
196. In [Davies v State of Victoria \(Victoria Police\)](#),¹⁷⁵ VCAT considered that these matters were also relevant in determining the 'genuine and reasonable requirements of employment' for the purposes of [section 22](#) and [section 23](#) of the 1995 Act (relating to specific exceptions to discrimination).¹⁷⁶
197. In that case, VCAT found that Victoria Police had directly discriminated against the applicant by rejecting his employment application because he failed a colour vision test. VCAT held that the inability to perform the inherent requirements of the role must be assessed in a practical way that enables the employer to conclude that it is more probable than not that the person will not be able to perform adequately the requirements of the employment. A decision needs to be genuinely made and based on information capable of supporting that decision:

An assumption based on no information or on scant information, will not be enough.¹⁷⁷

173 See, for example, [Keenan v The Age Company Limited \[2004\] VCAT 2535](#) regarding failure to provide a vehicle.

174 [X v The Commonwealth \[1999\] HCA 63](#); 200 CLR 177; 167 ALR 529; 74 ALJR 176.

175 [\[2000\] VCAT 819](#).

176 Note that these exceptions have been removed from the Equal Opportunity Act.

177 [Davies v State of Victoria \(Victoria Police\) \[2000\] VCAT 819](#).

172 [\[2000\] VCAT 819 \(5 January 2000\)](#).

198. In *Vickers v The Ambulance Service of NSW*,¹⁷⁸ the complainant applied for a job as a trainee ambulance officer with the Ambulance Service of NSW (Ambulance Service). The complainant was required to undergo a pre-employment medical assessment, in the course of which he disclosed that he had Type 1 insulin-dependent diabetes. Despite providing a letter from his treating endocrinologist supporting his application for employment, the medical service conducting the assessment recommended to the Ambulance Service that the complainant was unsuitable for the position because of his diabetes. Acting on the basis of this recommendation, the Ambulance Service rejected the complainant for the position.
199. Mr Vickers claimed that he had been directly discriminated against on the basis of his diabetes in the Ambulance Service's decision not to employ him. Mr Vickers also argued that the Ambulance Service's process of selection amounted to direct discrimination in the arrangements made for the purposes of determining who should be offered employment. The Ambulance Service sought to rely on the defence that it is not unlawful for an employer to discriminate against a person who is unable to carry out the inherent requirements of the job.
200. In emphasising that employers must investigate each case according to its own individual circumstances, the Federal Magistrates' Court held that the Ambulance Service had unlawfully discriminated against the complainant in refusing to consider his employment application further on the basis of his diabetes. The Court held that the 'inherent requirements' defence could not be relied upon on the basis that the complainant had never had a hypoglycaemic event; had previously been able to control his diabetes during hospital shift work; and that should his blood glucose levels alter, he would easily be able to take appropriate remedial measures which would not pose a threat to patients of the Ambulance Service.
201. In *Tarr v Torrens Transit Services (North) Pty Ltd*,¹⁷⁹ the Equal Opportunity Tribunal found that failing a back fitness test should not have disqualified a bus driver from getting a job. The complainant was given pre-employment tests, including a back fitness test. The complainant was then told he could not do the job because he had failed the back fitness test. The Tribunal found that a back fitness test did not show whether Mr Tarr could do the job.
202. The Tribunal rejected the medical testing which formed the basis of the refusal to employ the complainant, finding that the respondent did not:
- ...attempt to undertake an overall assessment of an applicant, having regard to recent work experience and history. [The respondent] did not make a balanced assessment of all of the test results in context. It seems, from the evidence, that [the respondent] did not appreciate the difference between the fulfilment of job requirements and the presence of risk factors.¹⁸⁰
- The Tribunal concluded that this meant the respondent was thus in no position to assess the extent of the risk factor identified, reasoning that medical testing before employment needs to be specifically related to the work the person has to do.
203. In the decision of *Melvin v Northside Community Service*,¹⁸¹ the complainant was dismissed because of her impaired eyesight, on the basis of an optometrist's report that she was 'legally blind'. The report however did not answer the questions the employer had asked, or address the complainant's ability to perform the inherent requirements of the job. The Australian Human Rights and Equal Opportunity Commission found that Ms Melvin had been unlawfully discriminated against. It accepted specialist medical and other evidence that she could in fact perform the inherent requirements of the job, and awarded her over \$56,000 in damages. In this context the exception contained in [section 86](#) relating to the protection of health, safety and property may also be relevant. This is discussed further at [Chapter Eight](#) of this resource.

178 [\[2006\] FMCA 1232](#).

179 [\[2008\] SAEOT 12](#).

180 *Ibid* [33].

181 [\[1996\] HREOCA 20](#).

Any other 'detriment'

204. The Equal Opportunity Act also prohibits discrimination in work by subjecting an employee to 'any other detriment'. [Section 4](#) of the Equal Opportunity Act specifies that 'detriment' includes 'humiliation and denigration'.¹⁸²
205. However, the Equal Opportunity Act does not exhaustively define 'detriment'. Case law suggests that a person suffers detriment where he or she is placed 'under a disadvantage of a matter of substance'¹⁸³ or 'suffers a material difference in treatment'¹⁸⁴ which is 'real and not trivial'.¹⁸⁵
206. Examples of other treatment which may constitute a detriment include:
- dismissal
 - demotion
 - terminating employment during a probationary period on the basis of pregnancy¹⁸⁶
 - selecting an employee for redundancy on the basis of a protected attribute¹⁸⁷
 - unlawfully requiring a pregnant employee to take unpaid maternal leave¹⁸⁸
 - requiring an employee to attend a 'painful' and 'humiliating' meeting about performance¹⁸⁹
 - harassment, or 'depriving an employee of quiet enjoyment of employment'¹⁹⁰

- altering an employee's position in a manner that is prejudicial to the employee (for example by requiring the employee to change their work location, hours or duties)
 - loss of status and responsibility¹⁹¹
 - being laughed and, in certain circumstances, smirked at, by fellow employees¹⁹²
 - denying flexible work arrangements/ refusing access to part time employment.¹⁹³
207. In [Dickie v State of Victoria & Ors](#)¹⁹⁴, VCAT was not satisfied that an 'emotionally charged exchange of views' between the applicant and another person constituted a 'detriment' to the applicant.

Humiliation

208. The Equal Opportunity Act is clear that causing a person to experience humiliation – for example, subjecting a person to public ridicule or racial abusing the workplace¹⁹⁵ - constitutes a 'detriment'. This is discussed in more detail in [paragraphs 51 to 57](#) of this resource.

Reasonable requirements and conditions

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

182 See the discussion in relation to humiliation and [Walgama v Toyota Motor Corporation Australia Ltd \[2007\] VCAT 1318](#) above at [Chapter 2](#) of this resource.

183 [Bogie v University of Western Sydney](#) (1990) EOC 92-313.

184 [Bailey v Australian National University \[1995\] HREOCA 274](#).

185 [Sivanathan v Commissioner of Police \(NSW\)](#) (2001) NSWADT 44.

186 See, eg, [Tran v Swinburne University & Ors \[2000\] VCAT 1083](#).

187 See, eg, [Stern v Depilation & Skincare Pty Ltd \[2009\] VCAT 2725](#).

188 See, eg, [Kogoi v East Bentleigh Child Care Centre \[1997\] VADT](#) (6 March 1997).

189 [Drummond v Telstra Corporation Limited \[2008\] VCAT 2630](#), [67]; [Drummond v Telstra Corporation Limited \(Anti-Discrimination\)](#) [2009] VCAT 2411 (13 November 2009), [25].

190 [Candan v Holden Ltd & Ors \[2000\] VCAT 2300](#), [39] citing [R v Equal Opportunity Board ex parte Burns \[1985\] VR 317](#); [Bebbington v Dove \[1993\] 5 VIR 28](#).

191 [King v Nike Australia Pty Ltd \[2007\] VCAT 70](#) (19 January 2007), [148]-[149].

192 [Packer v Vagg and the Department of Education \[2001\] 2218](#) (22 November 2001), [22].

193 [Howe v QANTAS Airways Ltd \[2004\] FMCA 242](#) (15 October 2004) at [7.8] of the applicant's submissions, set out at [62] of the decision and discussed at [129].

194 [\[2009\] VCAT 713](#).

195 [Laverdure v Jayco Caravan \(Recreational Industries\) Pty Ltd & Anor \[2001\] VCAT 1706](#); [Walgama v Toyota Motor Corporation Australia Ltd \[2007\] VCAT 1318](#); [Poulter v State of Victoria \[2000\] VCAT 1088](#).

210. For example, in *State of Victoria v Schou (No 2)*¹⁹⁶ (*Schou No 2*) the Victorian Court of Appeal found that the requirement for Hansard Reporters to attend full-time at Parliament House when Parliament was sitting was reasonable in all the facts and circumstances. A factor in the court's reasoning was that the requirement was 'appropriate and adapted' to Parliament's needs.¹⁹⁷ However, it is worth noting that the decision in *Schou No 2* concerned the 1995 Act under which there was no obligation to accommodate an employee's obligations as a parent or carer. It is possible that a court today, would reach a different result in light of the conclusion that alternative working-from-home arrangements proposed by the complainant, Ms Schou, were also found to be reasonable.

Exceptions relating to employment and related areas

211. There are several permanent exceptions that make discrimination lawful in employment and related areas. These exceptions, which are discussed in [paragraphs 473-498](#), relate to:

- a. adjustments for a person with disabilities that are not reasonable¹⁹⁸
- b. offering employment for domestic or personal services¹⁹⁹
- c. employment for the care of children, where discrimination is necessary for their wellbeing²⁰⁰
- d. offering employment to people of one sex where it is a genuine occupational requirement of employment that employees be people of a particular sex²⁰¹
- e. offering employment on the basis of political belief or activity for political employment²⁰²
- f. offering employment to people with a particular attribute to deliver services for people with the same attribute²⁰³
- g. the payment of youth wages²⁰⁴

196 [\[2004\] VSCA 71 \(30 April 2004\)](#).

197 Ibid. Note that the requirement in *Schou No 2* arose in the context of an allegation of an unreasonable requirement.

198 *Equal Opportunity Act 2010* (Vic) s 23, 34.

199 Ibid s 24.

200 Ibid s 25.

201 Ibid s 26.

202 Ibid s 27.

203 Ibid s 28.

204 Ibid s28A.

h. early retirement schemes²⁰⁵

i. reasonable terms of an occupational qualification.²⁰⁶

Discrimination in education

212. [Part 4, Division 3](#) of the Equal Opportunity Act prohibits discrimination in education.

213. Under this Division, an 'educational authority' (namely a person or body which administers a school, college, university or other educational institution) must not discriminate against students or prospective students. Discrimination may occur in relation to admissions, the delivery modes, access to benefits, expulsion or 'any other detriment' experienced by the student.²⁰⁷

214. These provisions apply to entities which run schools, TAFE Institutes, and Universities in both the private and public sector. They also apply to any other entity or person which runs an educational institution. An educational institution is defined broadly to include any institution at which education or training is provided.

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

216. A school may provide parents with 'services' in the course of providing education to their offspring. In *Murphy v New South Wales Department of Education*²⁰⁸ the Commissioner held that the parents of a disabled student were treated less favourably by the school than the parents of able-bodied children. The school created a hostile environment, which caused the parents to leave the suburb, where they had lived for some years, and transfer their daughter to another school. This was a substantial detriment that occurred because of their daughter's disability. Note however that 'services' under section 4 of the Equal Opportunity Act does not include training and education in an educational institution, but may include things ancillary to the provision of training and education, such as enrolment, case management, the provision of facilities and furniture, and communication with parents about the wellbeing of their children.

205 Ibid s 29.

206 Ibid s 37.

207 Ibid s 40, s 38.

208 [\[2000\] HREOCA 14](#).

217. Put simply, an educational authority must not discriminate against a student or prospective student in its dealings with that person in their capacity as a student or prospective student. This prohibition extends to both direct and indirect discrimination.
218. In addition, the Equal Opportunity Act now includes an express and positive obligation on educational providers to make reasonable adjustments for students or prospective students who need adjustments made to enable them to 'participate in or continue to participate in or derive or continue to derive any substantial benefit from an educational program'.²⁰⁹ This obligation applies unless the educational authority can demonstrate that the person would not be able to participate or derive a substantial benefit from the educational programme, even if adjustments were made.²¹⁰
219. The Equal Opportunity Act provides a couple of examples of the type of adjustments that an educational authority could make for a person with a disability, namely, the provision of a teachers' aide or particular computer software program or moving a course or event from an inaccessible venue to an accessible one.
220. Types of adjustments will depend on the student's disability, but could include things like:
- a. modifying educational premises: for example, providing ramps, modifying toilets and ensuring that classes are in rooms accessible to the student
 - b. modifying or providing equipment: for example, lowering lab benches, enlarging computer screens, providing specific computer software or an audio loop system
 - c. changing assessment procedures: for example, allowing for alternative examination methods, such as oral exams, or allowing additional time for someone else to write an exam for the student
 - d. changing course delivery: for example, providing study notes or research materials in different formats.
221. A range of factors are identified as relevant to the question of whether an adjustment is reasonable. These are set out in detail in [section 40\(3\)](#). Reference is made in this provision to acts that comply with the various requirements of the *Disability Discrimination Act 1992 (Cth)*. In the context of disability discrimination in education, the Disability Discrimination Act provides that the Minister may, by legislative instrument, formulate disability standards in relation to any area in which it is unlawful for a person to discriminate against another.²¹¹
222. In 2005, the Commonwealth promulgated the *Disability Standards for Education* under the *Disability Discrimination Act 1992 (Cth)*. The Equal Opportunity Act operates concurrently with federal discrimination law including the *Disability Discrimination Act 1992 (Cth)*. Not only does it do so by operation of law, but this interaction is expressly referred to and relied upon in the way in which section 40 is drafted. For example, [section 40\(4\)](#) expressly provides that:
- An educational authority is not required to make an adjustment under subsection (2) to the extent that the educational authority has complied with or has been exempted from compliance with, a relevant disability standard made under the Disability Discrimination Act 1992 of the Commonwealth in relation to the subject matter of that adjustment.²¹²
223. The aim of this provision is to ensure that there is some consistency across both state and federal jurisdictions in dealing with the concepts of disability discrimination and the need to make reasonable adjustments and, presumably, to avoid a situation where the same educational authority is held to be compliant with federal discrimination laws but in breach of state laws.
224. Many of the cases which have been brought under the predecessor to the Equal Opportunity Act in the education context relate to claims of disability discrimination. By and large they have involved significant consideration of the technical requirements needed to establish either direct or indirect discrimination. Because of the changes to the definitions of both direct and indirect discrimination which now apply under the Equal Opportunity Act,²¹³ it is unclear what relevance these earlier cases will continue to have.

209 [Equal Opportunity Act 2010 \(Vic\) s 40](#).

210 [Ibid s 41](#).

211 [Ibid s 41](#).

212 [Equal Opportunity Act 2010 \(Vic\) s 40\(4\)](#).

213 Refer to the discussion in [Chapter Four](#) of this resource.

225. What is evident from these earlier cases however, is that such claims turn on their specific facts. This is not likely to change. Some of the issues which are likely to continue to arise include:
- a. does the person have a protected attribute?²¹⁴
 - b. were they subjected to unfavourable treatment?²¹⁵
 - c. if so, is there a causal nexus between that treatment and their protected attribute?²¹⁶
 - d. in the case of indirect discrimination, is any condition or requirement that has been imposed, reasonable?²¹⁷ Whether the condition, requirement or practice complies with the Disability Standards for Education is likely to be particularly relevant to the consideration of 'reasonableness'.

Religion in education

226. In the case of *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development*,²¹⁸ the Tribunal considered a claim of direct discrimination against the Department of Education and Early Childhood Development (Department) made by parents of children at Victorian State primary schools. The complainants argued that the method of providing religious instruction in these schools, which is based on distinctive religious tenets and beliefs, was discriminatory because:

- a. children not participating in religious instruction (Non-participating Students) are identified as different, and separated from, their classmates when religious instruction classes are held
 - b. there is no curriculum instruction during religious instruction classes for Non-participating Students, denying them the opportunity to be taught secular subjects
 - c. religious instruction is timetabled during school hours.
227. The complainants sought that:
- a. the Department make religious education something parents must opt into – the Department amended its policy to shift to an opt in system in 2011 following the lodgement of the complaint
 - b. that religious instruction occur after school or at lunchtime
 - c. that Non-participating Students be provided with proper educational alternatives – the amendments to Department policy also included a commitment that Non-participating Students would be engaged in meaningful activities.

228. Judge Timothy Ginnane held that the complainants had failed to establish that the Department had discriminated against the Non-participating Students within the meaning of the 1995 Act or the Equal Opportunity Act, finding that 'the evidence did not establish that the children, who did not attend SRI at the three schools, were treated in any discriminatory manner,'²¹⁹ and accepting evidence of teachers that there was no teasing, bullying or pressure on students to attend religious instruction. His Honour reasoned that 'instruction is not compulsory and parents have a choice whether their children attend. If they do not, they engage in useful, non-curriculum activities under teachers' supervision.'²²⁰

214 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

215 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

216 See, for example, *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

217 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873, *Beasley v Department of Education and Training* [2006] VCAT 187; *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

218 See, for example, *Turner v Department of Education and Training* [2007] VCAT 873; *Beasley v Department of Education and Training* [2006] VCAT 187; *Zygorodimos v Department of Education and Training* [2004] VCAT 128.

219 Ibid [6].

220 Ibid.

229. A school may provide parents with ‘services’ in the course of providing education to their offspring. In *Murphy v New South Wales Department of Education*²²¹ the Commissioner held that the parents of a disabled student were treated less favourably by the school than the parents of able-bodied children. The school created a hostile environment, which caused the parents to leave the suburb, where they had lived for some years, and transfer their daughter to another school. This was a substantial detriment that occurred because of their daughter’s disability. Note however that ‘services’ under section 4 of the Equal Opportunity Act does not include training and education in an educational institution, but may include things ancillary to the provision of training and education, such as enrolment, case management, the provision of facilities and furniture, and communication with parents about the wellbeing of their children.
230. In dismissing the complaint, his Honour noted that ‘attendance by a child at special religious instruction does not, necessarily, indicate that the child, or the parents, hold any particular religious beliefs.’²²²
231. It should be noted that this case was still under consideration in the preparation of this resource, the complainants appealed VCAT’s decision to the Supreme Court of Victoria. The appeal had not yet been heard at the time of publication of this resource.

Exceptions relating to education

232. There are several permanent exceptions that make discrimination lawful in education. These exceptions, which are discussed in paragraphs 371 and 499 to 506, relate to:
- dedicated programs for students of a particular sex, race, religious belief, age or age group, or students with disabilities²²³
 - adjustments for a person with disabilities in education that are not reasonable²²⁴
 - standards of dress and behaviour²²⁵
 - age based admission schemes and age quotas.²²⁶

221 [2000] HREOCA 14.

222 Ibid.

223 *Equal Opportunity Act 2010 (Vic)* s39.

224 Ibid s 41.

225 Ibid s 42.

226 Ibid s 43.

Discrimination in the provision of goods, services and land

233. Part 4, Division 4 of the Equal Opportunity Act makes it unlawful to discriminate in the provision of goods and services and in the disposal of land. The Equal Opportunity Act prohibits discrimination:
- by refusing to provide goods or services to a person²²⁷
 - in the terms on which goods or services are provided²²⁸
 - by subjecting the person to ‘any other detriment’ in connection with the provision of goods or services²²⁹
 - by refusing to dispose of any land to the other person²³⁰
 - in the terms on which land is offered to the other person.²³¹
234. There are also specific obligations on service providers to make reasonable adjustments for a person with a disability, as discussed in Chapter Five of this resource.²³²

What are ‘services’ for the purposes of the Equal Opportunity Act?

235. Section 4 of the Equal Opportunity Act defines ‘services’ as follows:
- services includes, without limiting the generality of the word –
 - access to and use of any place that members of the public are permitted to enter
 - banking services, the provision of loans or finance, financial accommodation, credit guarantees and insurance
 - provision of entertainment, recreation or refreshment
 - services connected with transportation or travel
 - services of any profession, trade or business, including those of an employment agent

227 *Equal Opportunity Act 2010 (Vic)* s 44(1)(a).

228 Ibid s 44(1)(b).

229 Ibid s 44(1)(c). See, for example, *Yesilottlak Ali v State of Victoria - Department of Human Services* [1999] VCAT 637 (3 May 1999) in relation to an alleged detriment in the provision of services.

230 Ibid s 50(1)(a).

231 Ibid s 50(1)(b).

232 Ibid s 45.

vi. services provided by a government department, public authority, State owned enterprise or municipal council – but does not include education or training in an educational institution.²³³

236. 'Services' is defined inclusively such that it is not limited to those falling within the categories listed in [section 4](#) of the Equal Opportunity Act. The only clear limit on the area of services is that education or training in an education institution is not a service. However, this kind of activity would be captured within the area of education.
237. A generous interpretation of 'services' is therefore appropriate,²³⁴ particularly given that the Equal Opportunity Act is beneficial legislation, and an interpretation that furthers the objectives of the Equal Opportunity Act and provides access to redress for those alleging discrimination is likely to be consistent with the [Charter](#).
238. The Tribunal made general comments about the scope of 'services' in the decision of [Bayside Health v Hilton](#),²³⁵ which are consistent with this approach. Specifically, DP McKenzie stated:
- The definition of 'services' in section 4 is inclusive and not exhaustive. Even from the inclusions, one can see that the definition is extremely broad. It covers a diverse range of things provided by a diverse range of individuals and bodies. Putting the inclusions to one side, 'services' has its ordinary dictionary meaning and covers any act of helpful activity.²³⁶
239. DP McKenzie considered that services can be tangible or intangible, voluntary or provided for payment, and can be provided to more than one person. Furthermore, the fact that services may be regulated by statute does not deprive them of the character of services.²³⁷

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

Services established in case law

241. The following have been held to constitute 'services' for the purposes of predecessors to the Equal Opportunity Act:
- a. protection of, and assistance to, members of the public by police²³⁸
 - b. the staging of a parade or a general exhibition by a council²³⁹
 - c. a service may be provided in the future²⁴⁰
 - d. provision of pastoral services and conduct of mass by a parish priest²⁴¹
 - e. the actions of the Principal Registrar in responding to a request to amend the Birth Register under the *Births Deaths & Marriages Act 1973* to the benefit of an applicant who had had gender reassignment surgery²⁴²
 - f. the provision of facilities within prisons for the care and custody of children by prisoners²⁴³
 - g. visits by a spouse to a prisoner²⁴⁴
 - h. the decision to refuse legal aid to a child²⁴⁵
 - i. access to infertility treatment under the *Victorian Infertility Treatment Act 1995* (Vic).²⁴⁶

233 [Equal Opportunity Act 2010 \(Vic\) s 4.](#)
 234 [IW v Perth \[1997\] HCA 30; \(1997\) 191 CLR 1.](#)
 235 [\[2007\] VCAT 1483.](#)
 236 [Ibid 17.](#)
 237 [Ibid 18.](#)

238 [Staberhofer v The City of Sale \(1990\) EOC 92-292.](#)
 239 [Falun Dafa Association of Victoria Inc. v Melbourne CC \[2003\] VCAT 1955 \(23 December 2003\).](#)
 240 [Waters v Rizkalla \[1991\] 1 VR 12 \(24 January 1990\).](#)
 241 [Tassone v Hickey \[2001\] VCAT 47 \(4 July 2001\).](#)
 242 [AB v Registrar Births, Deaths and Marriages \[2006\] FCA 1071 \(16 August 2006\) \[65\].](#)
 243 [Henderson v Victoria \(1984\) EOC 92-027.](#)
 244 [Clarkson v Governor of Metropolitan Reception Prison \(1986\) EOC 92-153.](#)
 245 [George v Victoria Legal Aid \[2000\] VCAT 2014 \(31 October 2000\).](#)
 246 [McBain v Victoria \[2000\] FCA 1009.](#)

Statutory services

242. There is some uncertainty around whether services provided by a statutory authority in accordance with legislation constitute 'services' for the purposes of anti-discrimination laws, including the Equal Opportunity Act.
243. The issue is not legally settled and the case law supporting this interpretation often relates to legislation other than the Equal Opportunity Act.
244. It is the Commission's view that the broad definition of 'services' under the Equal Opportunity Act includes services provided by a government department, public authority, State owned enterprise or municipal council.²⁴⁷ The fact that a service is set out in legislation does not exclude it from being a service within the meaning of the Equal Opportunity Act.
245. The question of what governmental activity will constitute a service was considered by the High Court in *IW v City of Perth*²⁴⁸ in the context of Perth City Council's decision to reject an application for town planning approval for a centre for people with HIV. In that case, the members of the High Court took different approaches to the question of whether the Council was providing a service, and, if it was, how that service should be identified. The majority determined that the Council had not provided a service by refusing to exercise a statutory discretion to approve the application for rezoning. However, the judges did not share the same reasoning for their conclusion, making the application of the case to other situations difficult. However, the majority did agree that in some cases the performance of statutory duties may also amount to a 'service' to a particular individual.
246. In subsequent cases, the Courts have held:
- the provision of additional superannuation benefits under Retirement Benefits Regulations was a service.²⁴⁹
 - a regulatory impact statement prepared by the Commonwealth Attorney-General for Cabinet in relation to a disability standard was not a service.²⁵⁰
 - the alteration of a person's sex on birth registration was a service.²⁵¹
247. There is nothing to suggest that this interpretation might change in light of the new Equal Opportunity Act. The Equal Opportunity Act re-enacts the definition of services in the 1995 Act, and there is nothing in the Explanatory Memorandum²⁵² or the Second Reading Speech²⁵³ to the Equal Opportunity Act to indicate that the approach to statutory services may differ.

Identifying the 'service' claimed with sufficient particularity

248. In *Waters & Ors v Public Transport Corporation*,²⁵⁴ the High Court of Australia considered a complaint about the discriminatory effect of changes to the Victorian public transport system on people with disabilities. The changes included the removal of conductors from trams and the introduction of a new ticketing system described as 'scratch tickets'.²⁵⁵ In considering the case before it, a majority of the High Court was of the view that it is important to define what the 'service' is with particularity. In this instance, the service was defined broadly as the 'public transport system'. The majority held that the introduction of 'scratch tickets' and the removal of conductors were incidental to the provision of the service, and not, as the respondent sought to argue, separate services in themselves.

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

248 [\[1997\] HCA 30](#); (1997) 191 CLR 1.

249 [Australian Education Union v The Human Rights & Equal Opportunity Commission & Anor \[1997\] FCA 1288](#); (1997) 80 FCR 46.

250 [Vintila v Federal Attorney-General \[2001\] FMCA 110 \(1 November 2001\)](#).

251 [AB v Registrar Births, Deaths and Marriages \[2006\] FCA 1071 \(16 August 2006\)](#).

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

253 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 115-121 (Rob Hulls, Attorney-General).

254 [\[1991\] HCA 49](#); (1992) 173 CLR 349.

255 *Ibid* [2]-[3] The new tickets were to be purchased from retail shops and validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken. Each of the nine complainants suffered from a disability making it 'exceedingly difficult, if not impossible, to use scratch tickets' (Mason and Gaudron JJ).

249. *Towie v State of Victoria*²⁵⁶ (*Towie*) adopted the same reasoning as the High Court in *Waters*. Mr Towie complained that the Magistrate's Court failed to accommodate his hearing impairment by not providing him with a graphic equaliser and headphones during a hearing, despite his requests for this equipment. Mr Towie argued that the State provides a service which can be described as 'access to justice', or 'access to court processes', and that he was discriminated against by the State's failure to provide equipment which would allow him to participate in this service in the same way as others.
250. The Tribunal rejected Mr Towie's argument and concluded that the 'service' he had identified was so vague, undefined and non-specific that it was not a service at all. The Tribunal considered that if it were to adopt Mr Towie's reasoning, it would mean that the 'service' would vary according to the needs of individuals seeking access to the courts. For example, for a person with an impairment who needs special equipment to effectively participate in the hearing process, the service would relate to the provision of equipment. For a non-English speaker who needs an interpreter to effectively participate in the hearing process, the service would vary to relate to the provision of interpreters. The Tribunal considered that such variation removes the distinction between the 'service' and the terms on which the service is provided. The Tribunal considered that Mr Towie was seeking the provision of a new service and a policy change, rather than making a claim regarding an existing service and seeking a remedy under the 1995 Act.
251. The *Towie* decision indicates that a specific identification of the 'service' being provided may be required, and that where services can be described as of a general nature to the community, and can be delivered variably to individuals, there may be difficulty in separating what the 'service' is from what the terms of the service are. This seems to contrast with the Tribunal's decision in *Falun Dafa Association of Victoria Inc. v Melbourne CC*²⁵⁷ where it commented, 'the performance of an activity can represent the provision of services to more than one person or group of persons, and that the nature or character of the service so provided can differ from recipient to recipient'.
252. While *Towie* and *Waters* underline the importance of identifying the service with some degree of specificity, the decisions appear to turn on the particular facts and identification of the 'service' in each case.
253. It is unclear whether the Tribunal would make the same finding if *Towie* were heard today, in light of *Charter* considerations and explicit reasonable adjustment requirements which require a service provider to consider individual circumstances.
- Does the service have to be directed to the complainant?**
254. While there needs to be some service offered, provided or denied to the complainant for the conduct to come within 'services', the service does not have to be directed solely to the complainant. It is also unnecessary that the complainant be the person who is the 'main' recipient of a service, as long as there are services offered, provided or denied to the complainant.
255. In *Bayside Health v Hilton*,²⁵⁸ Mr Hilton made a complaint about the way he was treated by a hospital where his partner was a patient. The hospital lodged an application to strike out Mr Hilton's complaint on the basis that the following were not able to be considered services:
- support provided to Mr Hilton by the hospital's social workers and psychologists
 - ad hoc accommodation provided to Mr Hilton by the hospital
 - other services that were broadly described as the provision of information by the hospital to Mr Hilton
 - communication by the hospital with Mr Hilton, and involvement of Mr Hilton in decision-making concerning the Mr Hilton's partner's treatment and care.
- Although the hospital's application was rejected, the Tribunal noted that not every hospital provides services to every member of a patient's family. However, in Mr Hilton's case, services were directly provided to Mr Hilton on account of his being the patient's partner and his direct involvement in decision-making regarding the patient's care.

256 [2007] VCAT 1489 (22 August 2007).

257 [2003] VCAT 1955.

258 [2007] VCAT 1483.

256. In contrast, the Tribunal in *Judd v State of Victoria*²⁵⁹ found that there was no service provided to the complainant in circumstances where the complainant claimed that the Department of Transport had discriminated in the provision of services by permitting a design of buses that were insufficient to accommodate a tall person comfortably. In that case, the Tribunal found that there was no service to the complainant because the design rules in question are determinations made by the Commonwealth Minister for Transport in administering the *Motor Vehicle Standards Act 1989* (Cth). Considering the provisions of that legislation, the Tribunal concluded that the design rules represent vehicle standards that are instruments of a legislative character, and not services directed to the complainant.
257. In the case of *Zangari v St John Ambulance Service*,²⁶⁰ the Western Australia State Administrative Tribunal held that two paramedics who attended Dr Zangari's surgery to provide a service to one of her patients did not provide a service to her as the attending doctor.
258. The Tribunal noted that, even though Dr Zangari had called the ambulance, she was not the 'pivotal link' or 'conduit' between St John Ambulance and the patient, finding that the paramedics were required to take control of the situation and provide medical care to the patient, and that a medical practitioner should take a step back when an ambulance arrives.
259. The Tribunal commented that it might be possible for St John Ambulance to provide a service to another medical practitioner who called an ambulance in different circumstances, but noted that each case would turn on its facts.
260. In terms of these circumstances, the Tribunal commented, 'the mere fact that Dr Zangari might have benefited from St John Ambulance providing services to her patient is not sufficient to establish that she was a person receiving a service within the meaning of [the legislation].'²⁶¹

Nature and character of services can differ between recipients

261. In *Falun Dafa v MCC*,²⁶² the Tribunal considered whether Melbourne City Council had refused to provide a service to the Falun Dafa Association of Victoria (an organisation promoting, amongst other things, meditation and exercise) in excluding it from participation in the 2003 Moomba Parade.
262. Falun Dafa argued that, in staging the Moomba Parade and determining who would be permitted to participate, the Council provided a service to participants and potential participants, including Falun Dafa by allowing it to present its culture and beliefs to a large audience. Falun Dafa contended that the proper characterisation of the service was one of exercising decision-making power, and that, whilst the Council provided a service to the public by staging the Moomba Parade for entertainment, the conduct of the parade was also a service to the participants.
263. Judge Bowman agreed that services can be reciprocal and represent the provision of services to more than one person or group, so that the nature and/or character of the service provided differs between recipients, and expressly agreed with the proposition that different facets of an activity may represent services that can be characterised differently.
264. His Honour concluded that in organising and staging the Moomba Parade, the MCC provided a service to participants and prospective participants (whereby they could promote themselves). Furthermore, the Council provided a service in deciding who could participate in the Moomba Parade.

Ignoring customers is refusal of service

265. *Whitehead v Criterion Hotel*²⁶³ considered circumstances where the complainant entered a hotel dining room with her three children and a friend. After changing dining rooms at the manager's request, the group waited for some time for service. The complainant began to breastfeed her youngest child. The manager again approached the group and displayed annoyance at the act of breastfeeding in a dining room. The group finally left the hotel after being ignored for another 10 minutes.

259 [2000] VCAT 2495.

260 [2010] WASAT 6.

261 Ibid [198].

262 [2003] VCAT 1955.

263 (1985) EOC 92-129.

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

Ejection from hotel due to drunkenness

267. In *Cruikshank v Walker*,²⁶⁴ the complainant alleged discrimination on the ground of impairment after being told to leave the respondent's hotel and being barred from drinking at the hotel.

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

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

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

Provision of government accommodation and associated benefits.

271. In *Power v State of Victoria*,²⁶⁵ a profoundly intellectually disabled man lodged a complaint that he was discriminated against in the provision of accommodation and services provided by the Victorian Government. The complainant's allegations concerned living conditions and access to training, recreational and other activities.

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

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

Attending council meetings

274. *Byham v Preston City Council*²⁶⁶ considered a complaint by a person with disabilities who was keenly interested in local affairs and made a point of attending council meetings, which were located on the second floor of a building. The complainant was usually able to attend council meetings by having his son assist him up the stairs.

275. The complainant had raised the issue of a lift numerous times before the council, and a preliminary study of the feasibility of a lift had been performed. It was estimated that a lift would cost approximately \$150,000 to install, an expense which the council considered unjustified. No other complaints regarding the lack of access to the first floor had been received by the council, although the complainant pointed to a large number of elderly and disabled ratepayers who could benefit from the installation of a lift.

276. The complainant alleged that this was a case of indirect discrimination, the relevant requirement being that the complainant access the first floor via a staircase in order to attend council meetings, with which a lower percentage of people with disabilities were able to comply when compared with people who did not have disabilities.

277. The former Board held that, in spite of the fact that the complainant usually attended council meetings through the assistance of his son, he could not comply with the requirement to access the first floor via the staircase. The fact that the complainant was able to access the first floor with the assistance of another person was not sufficient.

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

264 (1987) EOC 92-212.

265 (1988) EOC 92-221.

266 (1991) EOC 92-377.

Council recreation services

279. Recreational services provided by a local council, such as swimming, aerobics and leisure facilities, will most likely be considered a 'service' under [Part 4, Division 4](#) of the Equal Opportunity Act. For example, in *Pulis & Banfield v Moe City Council*²⁶⁷ the former Equal Opportunity Board considered a complaint in relation to discrimination in services by two men, who were refused entry to a recreation centre's 'women's night' for aerobics, sauna and swimming on Monday evenings. In that case the Board found that the women's night did constitute discrimination.
280. However, this decision was made prior to the introduction of [section 12](#) of the Equal Opportunity Act in relation to 'special measures'. Under the Equal Opportunity Act, council recreational services including after-hours aerobics swimming and other events specifically designed to cater for the needs of culturally and linguistically diverse groups (such as Muslim women), may be covered by the special measures provision in [section 12](#). Special measures are explained in more detail in [Chapter 15](#) of this resource.
281. For example, in *Casey Aquatic & Recreation Centre*²⁶⁸ the applicant applied for an exemption under [section 89](#) of the Equal Opportunity Act to enable the applicant to open the Casey Aquatic & Recreation Centre on any Friday evening (when it would otherwise be closed) between 8pm and 10pm for women, girls and boys aged up to seven years only. It also applied for an exemption to staff the centre with women only during those hours and to advertise that service. The particular focus was on providing a service to Muslim women and their children, and evidence was provided to support the need for the segregated services. The Tribunal found that the Casey Aquatic & Recreational Centre did not require an exemption as the proposed services fell within the special measure provision of the Equal Opportunity Act meaning the conduct would not be discriminatory.

267 (1986) EOC 92-170 and (1988) EOC 92 – 243.

268 [2012] VCAT 893.

282. Similarly, in *Darebin City Council Youth Services v Victorian Equal Opportunity and Human Rights Commission*,²⁶⁹ the Council applied for an exemption under [section 89](#) of the Equal Opportunity Act to enable it to host two women's only events, to mark the end of Ramadan and the other to provide a music based social event. Ultimately, the Tribunal found that the proposed conduct was a special measure under [section 12](#) of the Equal Opportunity Act, so no exemption was necessary.

Do prisoners receive services from Corrections Victoria?

283. This issue has arisen in a number of cases and will depend on the particular factual circumstances.
284. In the case of *Garden v Victorian Institute of Forensic Mental Health t/as Thomas Embling Hospital*,²⁷⁰ the Tribunal held that the following were not services provided to the complainant, a prisoner at the Hospital:
- reports made to the Adult Parole Board. The Tribunal considered that the provision of the reports was a service, however, the service was provided to the Board, not to the complainant. The reports were not for treatment purposes and no copy of them was provided to the complainant
 - the continued presence of a particular staff member in the ward in which the complainant was located despite the complainant's requests that he be removed. The Tribunal considered that the true nature of the service provided was the provision of nursing services to each patient, and not the provision of a particular individual as primary nurse, or the provision of a primary nurse chosen by the complainant
 - the Tribunal assumed, however, that the sending and receiving of mail was a service provided to prisoners.
285. The Federal Court decisions of *Rainsford v State of Victoria* (at [first instance](#),²⁷¹ and on [appeal to the Full Court](#)²⁷²), considered a complaint by a prisoner made against Corrections Victoria under the *Disability Discrimination Act 1992* (Cth).

269 [2011] VCAT 1693.

270 [2008] VCAT 582.

271 *Rainsford v Victoria* [2007] FCA 1059.

272 *Rainsford v State of Victoria* [2008] FCAFC 31.

286. The complainant claimed the bed he was required to sleep in was inappropriate for his impairment, and that transport without breaks to enable him to stretch aggravated his impairment. One of the questions posed in this case was whether Corrections Victoria provided the prisoner with transport services or accommodation.
287. At first instance, Justice Sundberg held that the activities of transport between prisons and cell accommodations were not 'services' to the complainant, but rather were basic and inherent aspects of prison incarceration.²⁷³ In making these findings, Justice Sundberg observed that although some government functions are undoubtedly services, not all of them are. This is a question of fact determined by the situation in the particular case.
288. On appeal, the Full Court considered it was unnecessary to decide whether Justice Sundberg erred in his interpretation of what constitutes a 'service'.²⁷⁴ However, the Full Court did note that, while the issue was not argued in depth, there was 'some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility'.
289. The duty to interpret legislation consistently with human rights in the Charter²⁷⁵ means that an interpretation of 'services' in the Equal Opportunity Act that limits prisoners' access to equality and anti-discrimination rights would be less likely to be adopted by the Tribunal or the Victorian Supreme Court in future cases.
290. In *Mahommed v State of Queensland*²⁷⁶ the Queensland Anti-Discrimination Tribunal (QADT) held that Corrective Services Department indirectly discriminated against a Muslim prisoner, Mr Mohammed, in the provision of goods and services on the basis of religious belief or activity by requiring that he eat general prison fare (without fresh Halal meat) during the first three months of his prison term. The QADT held that the fact that Mr Mohammed was serving a long prison sentence was a very relevant consideration as to the reasonableness of the requirement to eat standard prison fare.²⁷⁷

273 *Rainsford v Victoria* [2007] FCA 1059.
 274 *Rainsford v State of Victoria* [2008] FCAFC 31.
 275 *Charter of Human Rights & Responsibilities Act 2006* (Vic), s 32(1).
 276 [2006] QADT 21.
 277 *Ibid* [58].

Do police provide individuals with a service?

291. Inactivity on the part of police officers could be characterised as a refusal of services.
292. In *Field Meret v State of Victoria*²⁷⁸ the Tribunal considered a complaint alleging that police had discriminated against the complainant, because she was a Protestant, in the course of investigating the alleged abuse of her granddaughter by the granddaughter's father.
293. The investigation was the result of the complainant claiming that the child would be at risk of abuse because the father was a Roman Catholic. More specifically, she alleged the police did not take a statement from her daughter about the possible abuse, assigned the investigation to a particular officer and 'misinformed' the Department of Justice.
294. VCAT made the comment that police 'fulfil a public duty to investigate crime but they do not provide a service to any individual such as the Complainant in the circumstances of this case where the Complainant is not a victim of crime or where there is a duty owed to protect her', and dismissed the complaint as misconceived.

Volunteers as recipients and providers of services?

295. The Equal Opportunity Act specifically excludes volunteers and unpaid workers from its definition of employees (except for the purposes of sexual harassment).²⁷⁹ However, in keeping with the notion of reciprocal services endorsed in *Falun Dafa v MCC*,²⁸⁰ and with the broad application of the term 'services', volunteers can be considered to receive, and provide, services within the meaning of the Equal Opportunity Act. A volunteer who has contact with others as part of their volunteer role may provide a service to another person, and their conduct while providing these services will be subject to the Equal Opportunity Act.²⁸¹ (Refer to related discussions about volunteers in [paragraphs 550–553](#) and [603](#) of this resource). A volunteer in an organisation can also receive services from that organisation, such as training.

278 [1999] VCAT 616.
 279 *Equal Opportunity Act 2010* (Vic), s 4; *Nason v RVIB & Ors* [2002] VCAT 403.
 280 [2003] VCAT 1955.
 281 *Buljan v Ethnic Broadcasting Association of Victoria Ltd* [2000] VCAT 2020.

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

296. The exceptions that make discrimination in the provision of goods and services lawful under the Equal Opportunity Act, which are discussed in [paragraphs 507–512](#), relate to:
- adjustments for a person with disabilities that are not reasonable²⁸²
 - offering insurance, or the terms on which an insurance policy is provided²⁸³
 - offering or refusing an application for credit²⁸⁴
 - requiring adult supervision as a term of providing goods and services to a child²⁸⁵
 - the disposal of land by will or gift.²⁸⁶

Discrimination in accommodation and access to public premises

297. [Part 4, Division 5](#) of the Equal Opportunity Act makes it unlawful to discriminate in relation to accommodation. The Equal Opportunity Act prohibits a person from discriminating against another person:
- in offering to provide accommodation²⁸⁷
 - in providing accommodation.²⁸⁸
298. The Equal Opportunity Act also prohibits discrimination by refusing to:
- provide accommodation to a person with a disability because they have an assistance dog, or requiring the person to pay an extra charge or to keep the assistance dog elsewhere²⁸⁹
 - allow reasonable alterations to be made to accommodation to meet the special needs of a person with a disability.²⁹⁰
A number of conditions apply to these obligations, including that the 'adjustments' to the accommodation must be made at the expense of the person with the disability and not unduly impact other occupiers
 - in relation to lots affected by an owners' corporation, allow reasonable alterations to be made to common property to meet the special needs of a person with a disability.²⁹¹

282 [Equal Opportunity Act 2010 \(Vic\), s 46.](#)

283 [Ibid s 47.](#)

284 [Ibid s 48.](#)

285 [Ibid s 49.](#)

286 [Ibid s 51.](#)

287 [Ibid s 52.](#)

288 [Ibid s 53.](#)

289 [Ibid s 54.](#)

290 [Ibid s 55.](#)

291 [Ibid s 56.](#)

What is accommodation for the purposes of the Equal Opportunity Act?

299. [Section 4](#) of the Equal Opportunity Act defines 'accommodation' as follows.
- accommodation includes –
 - business premises
 - a house or flat
 - a hotel or motel
 - a boarding house or hostel
 - a caravan or caravan site
 - a mobile home or mobile home site
 - a camping site.²⁹²
300. Accommodation should be looked at broadly and given a wide interpretation.²⁹³ It expressly covers the most obvious categories such as renting houses, apartments and hotel rooms, but also extends to areas such as camping, caravan and mobile home sites and property intended to be used for business purposes.

Discrimination in offering to provide accommodation²⁹⁴

301. A person must not discriminate against another person:
- by refusing, or failing to accept the other person's application for accommodation²⁹⁵
 - in the way in which the other person's application for accommodation is processed²⁹⁶
 - in the terms on which accommodation is offered to the other person.²⁹⁷

292 [Ibid s 4.](#)

293 [Burton v Houston \[2004\] TASSC 57.](#)

294 [Equal Opportunity Act 2010 \(Vic\) s 52.](#)

295 [Ibid s 52\(a\).](#)

296 [Ibid s 52\(b\).](#)

297 [Ibid s 52\(c\).](#)

Discrimination in providing accommodation²⁹⁸

302. Section 53 of the Equal Opportunity Act provides that a person must not discriminate against another person:
- by varying the terms on which the accommodation is provided to the other person²⁹⁹
 - by denying or limiting access by the other person to any benefit associated with the accommodation³⁰⁰
 - by evicting the other person from the accommodation³⁰¹
 - by refusing to extend or renew the provision of accommodation to the other person³⁰²
 - in the terms on which the provision of accommodation to the other person is extended or renewed³⁰³
 - by subjecting the other person to any other detriment in connection with the provision of accommodation to that person.³⁰⁴

Examples of discrimination in the provision of accommodation

303. The following circumstances have been found to give rise to unlawful discrimination in the provision of accommodation:
- Refusing to allow a family with teenage sons to book holiday park accommodation³⁰⁵
 - Refusing to rent premises to be occupied by women and children without husbands³⁰⁶
 - Refusing to hire a caravan to people of a certain ethnic background³⁰⁷
 - Using tenancy application forms that included discriminatory questions, such as, 'are you single, married, divorced, widowed, separated?'; 'What are your child care arrangements?'³⁰⁸
 - Refusing to rent a flat to two adults because they are both men.³⁰⁹

298 [Ibid s 53.](#)

299 [Ibid s 53\(a\).](#)

300 [Ibid s 53\(b\).](#)

301 [Ibid s 53\(c\).](#)

302 [Ibid s 53\(d\).](#)

303 [Ibid s 53\(e\).](#)

304 [Ibid s 53\(f\).](#)

305 [Galea v Hartnett – Blairgowrie Caravan Park \[2012\] VCAT 1049.](#)

306 [Calman & Ors v Haloulos \(1986\) EOC 92-163.](#)

307 [Bull & Anor v Kuch & Anor \[1993\] HREOCA 15.](#)

308 [Calman & Ors v Haloulos \(1986\) EOC 92-163.](#)

309 [Wagen v Nicholas Moss \(Vic\) Pty Ltd & Ors \(1985\) EOC 92-121.](#)

304. In [Galea v Hartnett – Blairgowrie Caravan Park](#),³¹⁰ the respondent, who operated a caravan park, was alleged to have discriminated against the applicant by refusing the applicant's holiday booking because he and his wife had two sons (one adult, one older teenager), who were also to come on the holiday.
305. The applicant had telephoned the respondent to make an enquiry about booking a caravan site at the Blairgowrie Caravan Park over the summer holidays. The applicant was advised that a site was available, and several days later, drove to Blairgowrie to confirm the booking and pay the required deposit. The applicant alleged that on arriving at the caravan park and informing the respondent the ages of his two sons, 18 and 21 years old, the respondent stated that he had a problem with the children, as they were young adults, and the applicant's family did not fit in with the park's clientele. The respondent allegedly stated that he preferred middle aged couples with young children, and that he could not help the applicant with a booking.
306. At hearing, the respondent gave evidence that he believed the caravan park would not be suitable for the applicant's family because he thought the applicant's sons would not enjoy spending all of the holiday with their parents, and that the only issue he had with the ages of the applicant's sons was in relation to the tariffs to be charged.
307. The Tribunal was satisfied that a substantial reason for the respondent's refusal to provide accommodation to the applicant was because he intended to bring his two sons on the holiday, amounting to direct discrimination and a breach of both the prohibition against discrimination in offering to provide accommodation, and the prohibition against discrimination in the provision of goods and services (the offering of accommodation being a service). Whilst the Tribunal did not consider the circumstances sufficient to warrant an award of aggravated or exemplary damages, the Tribunal did award the applicant damages of \$1,000 for distress, hurt and humiliation.

310 [\[2012\] VCAT 1049.](#)

308. In *Bull & Anor v Kuch & Anor*,³¹¹ the respondent operated a business providing emergency caravan hire accommodation. When a council officer sought to obtain emergency accommodation for the complainants, an Aboriginal couple, the first respondent replied that she would not rent to 'Aboriginals' under any circumstances whatsoever. When the first respondent was told by the council officer that her refusal might amount to discrimination, she replied that she did not care. The Australian Human Rights and Equal Opportunity Commission described the case as a 'serious and significant case of blatant racial discrimination', particularly as the refusal arose in emergency circumstances, and ordered the owners to pay the complainants compensation of \$20,700.
309. In *Calman & Ors v Haloulos*,³¹² two women seeking new premises for a women's refuge answered an advertisement for a rental property. The respondent, whose daughter owned the property, intimated to one of the complainants that they would not be able to afford the rent, and suggested that she come back with her husband. When she replied that she had no husband, the respondent asked her to leave. When advised of the complainants' intention that four women and two children would live in the property, the respondent told all the women present to leave. The Tribunal held that the respondent had treated the women less favourably than applicants who were married couples, and had not made any enquiries about the complainants' ability to pay the rent.

310. In the case of *Wagen v Nicholas Moss*³¹³ the complainant, a single male who sought to rent a house with a male friend, was advised by the real estate agent that his application was unsuccessful because the owner had requested that the property be leased to a 'happy family'. The complainant was told that the house would be re-advertised and his application might be reconsidered if no suitable applicant responded to the advertisement. Eventually, the complainant was told his application had been unsuccessful, forcing him to rent another house on less favourable terms (higher rent and a shorter-term lease).
311. The Tribunal held that the real estate agent had discriminated against the complainant on the ground of marital status by rejecting his application and giving it a lower order of precedence than other applications. The damages awarded took into account the extra rent and shorter lease of the house the complainant ended up leasing. No order was made against the owner of the house.

Other discrimination in connection with accommodation

312. A number of cases have considered broader connections between the provision of accommodation and unlawful discrimination.
313. For example, the federal case of *Marlene Ross v Heinz Loock*³¹⁴ considered circumstances where a landlord, his female tenant and others were socialising together in the landlord's unit. At the end of the evening when the other guests left, the landlord asked the tenant to stay behind to discuss something. He then made unwelcome sexual advances on the tenant. Soon after, the landlord terminated the tenancy. The Commission found that the landlord's conduct was sexual harassment, and unlawful, because the landlord was her accommodation provider. It was held in this case that the landlord had, therefore, sexually harassed the tenant in the course of providing accommodation.

311 [1993] HREOCA 15. See also *Smith v Jamsek* [2012] NSWADT 3.

312 (1986) EOC 92-163.

313 (1985) EOC 92-121.

314 [2000] HREOCA 6.

314. The case of *Houston v Burton*³¹⁵ considered complaints about noise in connection with accommodation. In that case, the complainant and respondent shared a balcony in an apartment complex. The complainant had complained to the respondent about the noise levels in the apartment complex. The respondent subsequently started shouting vilifying statements at the complainant whilst on their shared balcony, on the basis that she was transgender. The Tribunal considered section 22(1) of the *Anti-Discrimination Act 1998* (Tas), which prohibits discrimination in any activity in connection with protected areas of public life, including accommodation, and found that at the time of the conduct complained of, the complainant was undertaking an activity in connection with accommodation within the meaning of the legislation.³¹⁶ This was because the complainant was engaged in the activity of speaking to the respondent about his conduct, as her neighbour, which was impacting on the quality of her accommodation. On appeal, the Supreme Court of Tasmania upheld the Tribunal's findings.³¹⁷ Justice Blow considered that section 22(1) applies to anyone who has any contact with someone who is engaged in or undertaking an activity that has some degree of connection with one of the matters listed in section 22, in this case, accommodation.
315. In the case of *H v G*,³¹⁸ the Tasmanian Tribunal considered that to apply the prohibition against discrimination in accommodation to people in a personal relationship, living under the same roof, would be stretching the connection too far. The Tribunal considered that the conduct complained of, namely Mr G's treatment of Ms H, related to their relationship; and although the fact they lived together facilitated Mr G's conduct, the Tribunal did not believe that the alleged discrimination was sufficiently connected with accommodation to properly bring the claim within unlawful discrimination in accommodation. Distinguishing *Burton v Houston*,³¹⁹ the Tribunal considered that the only connection was that the parties shared accommodation, and Mr G considered Ms H should do all of the housework. The connection to accommodation must be clear and cogent in order for the prohibition to apply.

315 [2003] TASADT 3.
 316 *Anti-Discrimination Act 1998* (Tas) s 22.
 317 *Burton v Houston* [2004] TASSC 57.
 318 [2010] TASADT 5.
 319 [2004] TASSC 57.

Do prisoners receive accommodation from Corrections Victoria?

316. In *NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of Matthews v Queensland Corrective Services Commission*,³²⁰ the Queensland Anti-Discrimination Tribunal (QADT) considered complaints on behalf of five prisoners that the respondent had discriminated against them in accommodation on the basis of their HIV positive status. The allegations of discrimination included being housed in a medical segregation unit, not being given the option to work in the kitchen at the prison, and for a time not being permitted to attend the oval at the same time as the mainstream protection prisoners. Applying *Hoddy v Executive Director, Department of Corrective Services*,³²¹ the QADT noted that it is open to a prisoner to complain of discrimination in the provision of services or facilities, accommodation and work (i.e. work at the prison). The QADT found that the treatment of the complainants in the correctional centres was less favourable than that of other prisoners who were not HIV positive, and accordingly the respondent had been in breach of the *Anti Discrimination Act 1991* (Qld).

Discrimination in access to public premises

317. Section 57 of the Equal Opportunity Act prohibits discrimination on the basis of disability in relation to access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether or not for payment). This includes discrimination:
- by refusing to allow access to, or use of, the premises or any facilities in the premises³²²
 - in the terms or conditions on which a person is allowed access to, or use of, the premises or facilities in the premises³²³
 - in providing the means of access to the premises³²⁴
 - by requiring a person to leave or cease use of any facilities in the premises.³²⁵
318. For the purpose of these provisions, 'premises' includes a structure, building, aircraft, vehicle, vessel, a place and a part of premises.

320 (1998) EOC 92-940.
 321 (1992) EOC 92-397.
 322 *Equal Opportunity Act 2010* (Vic) s 57(1)(a)-(d).
 323 *Ibid* s 57(1)(b)(e).
 324 *Ibid* s 57(1)(c).
 325 *Ibid* s 57(1)(f).

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

319. Several exceptions make it lawful to discriminate in the provision of accommodation and access to public premises (discussed in [paragraphs 513 to 523](#)). The exceptions relate to:
- accommodation that is unsuitable or inappropriate for occupation by a child because of their design or location³²⁶
 - shared rental accommodation³²⁷
 - accommodation provided by a hostel or similar institutions for the welfare of persons of a particular sex, age, race or religious belief³²⁸
 - accommodation for students³²⁹
 - accommodation for commercial sexual services³³⁰
 - access to, or use of, public premises that is not reasonable.³³¹

Access to cinema

320. In the case of [Hall-Bentick v Greater Union Organisation Pty Ltd](#),³³² a cinema was ordered to modify its premises and screening practices after the Tribunal found it had indirectly discriminated against the wheelchair-bound complainant by not providing wheelchair-access to him in its cinemas and cinema facilities such as bathrooms. The Tribunal required Greater Union not only to modify its premises and screening practices to ensure that all discriminatory circumstances were eliminated, but also to screen latest release films in the smaller theatre that had wheelchair access.

Discrimination in clubs

What is a 'club'?

321. The way the Victorian Parliament has sought to balance this has resulted in a change to the definition of what constitutes a 'club' under the Equal Opportunity Act.
322. 'Club' was previously defined under the 1995 Act by reference to whether it was a social, recreational, sporting or community organisation occupying Crown Land or directly or indirectly receiving financial assistance from the State or a municipal council,³³³ the Equal Opportunity Act now defines a club by reference to:
- the number of members (i.e. more than 30)
 - whether the members are associated together for social, literary, cultural, political, sporting, athletic or other lawful purpose
 - whether it has a licence to supply liquor
 - whether it operates its facilities wholly or partly from its own funds.³³⁴
323. The definition does not extend to temporary limited licences and major event licences issued for events over a limited period or for one-off events.³³⁵ The changes in this definition were intended to bring the concept of what is a club, and therefore, what falls within the jurisdiction of the Equal Opportunity Act, into line with similar definitions under federal anti-discrimination laws.³³⁶

326 [Ibid s 58A.](#)

327 [Ibid s 59.](#)

328 [Ibid s 60.](#)

329 [Ibid s 61.](#)

330 [Ibid s 62.](#)

331 [Ibid s 58.](#)

332 [\[2000\] VCAT 1850.](#)

333 [Equal Opportunity Act 1995 \(Vic\) s 4.](#)

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

335 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\), 6.](#)

336 [Sex Discrimination Act 1984 \(Cth\); Disability Discrimination Act 1992 \(Cth\).](#)

Discrimination against applicants for membership

324. Subject to the relevant exceptions, this Division of the Equal Opportunity Act prohibits discrimination against applicants for club membership³³⁷ and club members.³³⁸
325. [Section 64](#) of the Equal Opportunity Act provides that:
- a. a club, or a member of the committee of management or other governing body of a club, must not discriminate against a person who applies for membership of the club:
 - i. in determining the terms of a particular category or type of membership³³⁹
 - ii. in the arrangements made for deciding who should be offered membership³⁴⁰
 - iii. by refusing or failing to accept the person's application for membership³⁴¹
 - iv. in the way the person's application for membership is processed³⁴²
 - v. in the terms on which the person is admitted as a member.

Discrimination against club members

326. Further, a club, or a member of the committee of management or other governing body of a club, must not discriminate against a member of the club by:
- a. refusing or failing to accept the member's application for a different category or type of membership³⁴³
 - b. denying or limiting access to any benefit provided by the club³⁴⁴
 - c. by varying the terms of membership³⁴⁵
 - d. by depriving the member of membership³⁴⁶
 - e. by subjecting the member to any other detriment.³⁴⁷

What is a club for the purposes of the Equal Opportunity Act?

327. Associations which fall within this definition cannot discriminate against existing or prospective members of the club, unless an exception applies.
328. There is no separate definition for voluntary bodies in Victoria, nor any requirements as to incorporation or non-incorporation.
329. Under the 1995 Act, a 'club' meant a social, recreational, sporting or community service club or organisation that occupied Crown land or received direct or indirect State or council funding. Clubs falling outside this definition were considered 'private clubs'. The philosophy underlying the exception for private clubs was the promotion of freedom of association and the sharing of mutual interests. The second reading speech to the *Equal Opportunity Act 1984* (Vic) noted that organisations wishing to maintain exclusivity, of whatever nature, are free to do so but the Government will not make available, to general organisations engaging in unacceptable discrimination, public moneys or access to public property. This position has significantly changed under the Equal Opportunity Act, and private clubs are no longer automatically exempt from the prohibitions against discrimination. However, exceptions may still apply, such as those for single sex clubs, clubs for minority cultures or particular age groups.

Exclusion from club not racially based

330. In *Toledo v Eastern Suburbs Leagues Club Limited*,³⁴⁸ the complainant and his party of Japanese visitors sought entry to the Eastern Suburbs Leagues Club. A heated altercation took place between the complainant and the club doorman when the visitors were unable to produce adequate identification. The complainant alleged that he and his visitors were refused entrance to the club on the basis of their race.

337 [Equal Opportunity Act 2010 \(Vic\) s 64.](#)

338 [Ibid s 65.](#)

339 [Ibid s 64\(a\).](#)

340 [Ibid s 64\(b\).](#)

341 [Ibid s 64\(c\).](#)

342 [Ibid s 64\(d\).](#)

343 [Ibid s 65\(a\).](#)

344 [Ibid.](#)

345 [Ibid.](#)

346 [Ibid.](#)

347 [Ibid.](#)

348 [\[1992\] HREOCA 22.](#)

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

Refusal of club membership due to marital status

333. In *Ciemcioch v Echuca-Moama RSL & Citizens Club Ltd*,³⁴⁹ the Federal Commission found that, in rejecting the complainant's application for club membership, the Echuca-Moama RSL Citizens Club had discriminated against her on the ground of her marital status.
334. The complainant argued that the rejection was based on the fact that the club held a grudge against her husband who had been involved in a dispute with the club culminating in litigation. The club contended that a decision by it involving a grudge in relation to the complainant's husband, was not one that involved any connection with the fact of the complainant's marriage to her husband.
335. The Federal Commission favoured a liberal construction of the definition of marital status in the *Sex Discrimination Act 1984 (Cth)*,³⁵⁰ and held that the presence of the characteristics of loyalty and support in interpersonal relationships other than marriage did not prevent their classification as characteristics appertaining generally to a person's marital status.
336. The Federal Commission considered that there was enough evidence to raise a suspicion in the mind of the complainant that she had been discriminated against, and that suspicion was more than just a fanciful one. The club was ordered to reconsider the complainant's application to join the club, and to pay her \$3,000 damages by way of compensation.

Refusal of club membership due to political belief

337. [Section 4](#) of the Equal Opportunity Act defines political belief or activity as:
- holding or not holding a lawful political belief or view
 - engaging in, not engaging in or refusing to engage in a lawful political activity.
338. This re-enacts the definition of political belief or activity that was in the 1995 Act. The Supreme Court in Tasmania has considered the implications of discrimination on the grounds of political belief or activity in relation to the refusal of club membership. In *Lindisfarne R & SLA Sub-Branch and Citizen's Club Inc and Another v Buchanan*,³⁵¹ Mr Buchanan claimed that the Sub-Branch and the Citizen's Club (Clubs) had discriminated against him on the grounds of his political beliefs when he tried to join the Clubs, by requiring him to sign a declaration that he was prepared to swear or affirm loyalty to the Sovereign of the Commonwealth, and that he would uphold the Constitution of the Commonwealth, which was a precondition for membership of the Clubs.
339. Mr Buchanan was a republican, and on this basis saw it as hypocritical for him to swear loyalty to the Monarch. He therefore amended his application to swear loyalty to the Commonwealth. His application was rejected on this basis, because it did not comply with the prescribed requirements for eligibility for membership. Mr Buchanan brought a claim that he had been discriminated against on the basis of his political beliefs, which was upheld by the Anti-Discrimination Tribunal of Tasmania. The Clubs appealed this decision to the Supreme Court of Tasmania.

349 [1994] HREOCA 2.

350 *Sex Discrimination Act 1984 (Cth)* s 6.

351 (2004) 80 ALD 122.

340. The Supreme Court held that the fact that the monarchist aspect of the Clubs' objectives did not negate the attraction of membership for some republicans did not mean that the membership requirement did not disadvantage those republicans barred from membership who, because of their conscience, could not meet the requirements. The Court was satisfied that otherwise qualified applicants for membership who could not reconcile their republican beliefs with the membership requirement, was an identifiable ground, and the requirement disadvantaged those holding that political belief more than those not a member of that group. On that basis, the appeal was dismissed, and the finding of unlawful discrimination upheld.
344. The Commission found that the opportunity to tee-off on a Saturday was a benefit and that female members' access to this benefit had been restricted. The Commission was not persuaded by the club's argument that it would be impracticable to have more than two womens' tee-off times on a Saturday because the men participate in a separate competition on that day.
345. The Commission found that it was practicable for the benefit to have been used by men and women to the same extent, noting that the question of practicability is different from 'whether it is desirable, or whether the committee may think it desirable, that the men members should have a greater use of the course on the Saturday.' Therefore, the restricted playing times was held to constitute sex discrimination, as women had their access to a benefit by the club limited, and did not receive a fair and reasonable proportion of use of the benefit (even allowing for the fact that fewer women played golf than men).

Club playing times

341. *Corry & Ors v Keperra Country Golf Club*³⁵² considered the case of a Queensland golf club which had limited the number of highly-sought after Saturday tee-off times available for women members, while no such limit applied to male members. The restriction meant that only eight women could play, and only at designated times, whereas men were able to tee-off at all other times.
342. The female members complained that the restriction constituted unlawful sex discrimination because it limited the female members' 'access to any benefit provided by the club'.³⁵³
343. The club relied on an exception to the prohibition (identical to [section 69](#) of the Equal Opportunity Act) which provided that the discrimination complained of would not be unlawful if:
- it is not practicable for the benefit to be used or enjoyed to the same extent by both men and women (First Limb)
 - either the same or an equivalent benefit is provided for the use of men and women separately from each other, or men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit (Second Limb).³⁵⁴
346. Because the First Limb of the exception was not made out, the discrimination was unlawful and the Commission was not required to rule on the Second Limb, regarding whether men and women members were each entitled to 'a fair and reasonable proportion of the use and enjoyment of the benefit'.
347. The club had argued that the availability of two tee-off times was a fair and reasonable proportion given the respective numbers of men and women that were likely to wish to play the course on a Saturday. However, the Chairman of the Commission expressed doubt that the club's arrangements met the 'fair and reasonable proportion' test in the Second Limb of the exception.
348. The Commission declared that the club must permit all members, regardless of sex, to sign up in single sex groups, choosing tee-off times on a 'first-come, first-served' basis.

352 (1986) EOC 92-150.

353 [Sex Discrimination Act 1984 \(Cth\) s 25\(2\)\(c\)](#).

354 [Ibid s 25\(4\)](#).

Exceptions relating to discrimination by clubs and club members

349. Discrimination by clubs and club members may be lawful under several exceptions (discussed in [paragraphs 524 to 532](#)), including:
- clubs for minority cultures³⁵⁵ and political purposes³⁵⁶
 - clubs and benefits for particular age groups³⁵⁷
 - single sex clubs³⁵⁸
 - a club providing separate access to benefits for men and women.³⁵⁹

Discrimination in sport

350. The Equal Opportunity Act prohibits discrimination in sport. Specifically, under [section 71](#) of the Equal Opportunity Act, it is unlawful to discriminate against a person on the basis of a protected attribute (for example, disability, sex or race) by:
- refusing or failing to select them in a sporting team³⁶⁰
 - excluding them from participation in a sporting activity.³⁶¹

What does 'participating in a sporting activity' mean?

351. 'Participating in a sporting activity' is broadly defined to include the activities of people who are themselves not 'playing' the particular sport – for example, coaching, umpiring or refereeing, and participating in the administration of a sporting activity.³⁶²

Meaning of 'sport' and 'sporting activity'

352. 'Sport' and 'sporting activity' have their ordinary meaning, and the Equal Opportunity Act expressly states that they include a game or a pastime.³⁶³
353. In the past, the Tribunal has confirmed that the ordinary meaning of sporting activity includes activities that may normally be regarded as recreational rather than purely sporting, and includes non-competitive games where physical athleticism is not a factor.³⁶⁴

354. In [Robertson v Australian Ice Hockey Federation](#),³⁶⁵ DP McKenzie summarised the scope of 'sport' in considering a complaint by Ms Robertson that, on the basis of her sex or age, she was banned by the Federation from playing ice hockey, unless she played in a women's competition. DP McKenzie noted that:

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

355. The Explanatory Memorandum to the *Equal Opportunity Bill 2010 (Vic)* also makes clear that 'sporting activity' includes games and pastimes like chess and debating.³⁶⁶

Interaction with other provisions

356. Where a complaint may be lodged in the 'sport' area, there may also be the potential for a complaint to be lodged in the 'services' or 'clubs' areas.
357. It is unlawful for a club, or a member of a club, committee or management body, to discriminate against a person on the basis of a protected attribute by denying them membership to a club or in the terms on which the person is admitted as a member.³⁶⁷ This could include opportunities to be involved in sporting activities, as was the case in [Robertson v Australian Ice Hockey Federation](#).³⁶⁸

355 [Equal Opportunity Act 2010 \(Vic\) s 66](#).

356 [Ibid s 66A](#).

357 [Ibid s 67](#).

358 [Ibid s 68](#).

359 [Ibid s 69](#).

360 [Equal Opportunity Act 2010 \(Vic\) s 71\(a\)](#).

361 [Ibid s 71\(b\)](#).

362 [Ibid s 70](#).

363 [Ibid](#).

364 [Robertson v Australian Ice Hockey Federation \[1998\] VADT 112](#).

365 [Ibid](#).

366 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\), 70](#).

367 [Equal Opportunity Act 2010 \(Vic\) s 64](#).

368 [\[1998\] VADT 112](#).

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

Exceptions relating to sport

360. [Section 72](#) of the Equal Opportunity Act provides an exception to discrimination on the basis of sex and gender identity for competitive sporting activities. This exception is discussed in [paragraphs 434 to 441](#).

Discrimination in local government

361. [Part 4, Division 8](#) of the Equal Opportunity Act makes it unlawful to discriminate in local government. Specifically, [section 73](#) of the Equal Opportunity Act prohibits a councillor of a municipal council from discriminating against:
- a. another councillor of that council
 - b. a member of a committee of that council who is not a councillor of that council
- in the performance of his or her public duties.
362. To the extent that local governments provide services or employ staff, their activities are also covered by other parts of the Equal Opportunity Act.

363. In the case of *Evans v Brimbank CC*³⁶⁹ a local councillor complained that individual fellow councillors had discriminated against him on the basis of his impairment when they refused to grant him leave of absence from a number of council meetings. The refusal occurred in circumstances where leaves of absence had been routinely granted to other councillors when they had requested leave. The complainant indicated that the reason for his absences was his stress-related illness. The council had put the complainant on notice that if he wished to be granted leaves of absence, some evidence of his medical condition would be needed, together with an indication as to when he would be able to resume duties. This information was not provided. Ultimately, after the complainant missed four meetings without leave being granted, an extraordinary vacancy was declared and a by-election was triggered for the councillor's area.
364. Senior Member Lyons noted that the complainant had not provided medical certificates indicating that he was unfit to attend meetings, and had not indicated when he would be able to resume attendance. The Tribunal considered that for the councillor to provide such information would not have imposed an unreasonable burden on him.
365. In circumstances where the councillor appeared capable of attending other council-related events and making media comments in his capacity as a councillor, the Tribunal considered that the complainant's actions led to the stated reasons for his absences legitimately being called into question.
366. For these reasons, the Tribunal determined that, in all the circumstances, the councillors had not unlawfully discriminated against the complainant councillor.

Exceptions relating to local government

367. [Section 74](#) of the Equal Opportunity Act provides an exception to discrimination by councillors on the basis of political belief or activity. This exception is discussed in [paragraphs 533 to 534](#).

369 [\[2003\] VCAT 1904](#).