



Victorian Discrimination Law

Part 2—What is Discrimination

7 **Meaning of discrimination**

(1) Discrimination means—

(a) direct or indirect discrimination of an attribute; or

(b) a contravention of section 33, 40, 45, 54, 55 or 56.

(2) Discrimination on the basis of multiple discrimination or

(a) that a person has at any time, whether the time of the



Victorian Equal Opportunity & Human Rights Commission

Published by the Victorian Equal Opportunity and Human Rights Commission
Level 3, 204 Lygon Street, Carlton, Victoria 3053. April 2013.

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Acknowledgements

This resource was produced with the assistance of Lander & Rogers. The Commission also acknowledges the valuable input from Victoria Legal Aid, the Victorian Civil and Administrative Tribunal, and Beth Gaze from the University of Melbourne in commenting on drafts of the material.

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Printed on Precision.

978-0-9875444-0-7 (Print)

978-0-9875444-1-4 (Online)

Foreword

I am pleased to present on behalf of the Victorian Equal Opportunity and Human Rights Commission the *Victorian Discrimination Law* resource.

It provides a comprehensive coverage of decisions in the jurisdiction as well as highlighting a range of relevant issues of practice and procedure. I have no doubt that judges, academics, practitioners, students and many others will find this research invaluable as they attempt to better understand the law of discrimination and victimisation in Victoria.

The vision of the Victorian Equal Opportunity and Human Rights Commission is for 'a community where every person values, understands and respects human rights and equal opportunity'.

The extent to which this vision has already been realised is a matter for debate. However, it is beyond doubt that Victoria is a wonderful, multicultural state, which encourages diversity and the inclusion of people from many backgrounds, cultures and religions.

Unfortunately, we still see many examples of discrimination and victimisation, particularly in regard to religion, race, sexual orientation, disability and age. This happens in employment, in the provision of goods and services, in education, in health services, in sport and on the street.

But through legislation such as the Equal Opportunity Act, the Racial and Religious Tolerance Act and the Charter of Human Rights and Responsibilities Act, our community is beginning to properly understand, value and enshrine human rights and equal opportunity.

As with all developing areas of law, the Courts and Tribunals have been instrumental in interpreting relevant legislation, and helping us understand our rights, duties and obligations. More and more people are becoming aware of their rights, the legislation that enshrines and protects those rights, and the remedies available to enforce those rights. As such, it is becoming more common for the judicial system to consider these issues and provide decisions that will serve as guides for the community in grappling with these issues.

My thanks go to everyone involved in the compilation of this wonderful publication and I commend this important resource to you.



John Searle
Chairperson
Victorian Equal Opportunity
and Human Rights Commission

Acting Commissioner's message

This year marks the 35th anniversary of the Equal Opportunity Act coming into effect in Victoria and is an opportune time to stop and reflect on the development of Victorian jurisprudence.

Discrimination law is still a relatively young area of the law and the complexity of issues that it covers is still being revealed. Over three decades in Victoria it has become apparent that discrimination law is more complex and challenging in practice than many people understood or anticipated.

The breadth of attributes covered by Victorian discrimination law has expanded to reflect our recognition that many groups within our society experience discrimination leading to disadvantage and exclusion in areas of public life where they should expect and experience equal treatment. These include the workplace, in education, in accommodation, sport and when accessing those services we use every day like transport, shops and public space.

Equal opportunity law in Victoria has evolved to keep pace with our understanding of the nature and impact of discrimination. Initially, individual complaints were the main tool the law provided to address issues of discrimination but over time the legislation has recognised the need for more complex, systemic responses to discrimination. Our most recent Equal Opportunity Act provides simpler definitions of discrimination, a streamlined dispute resolution process and the ability for the Commission to use other functions and powers to understand and address systemic discrimination.

The Commission also has an active role in contributing to the development of jurisprudence through our intervention and amicus curiae functions. We also work to support the legal profession in Victoria, advocates and community members to deepen their understanding of discrimination law.

Discrimination case law provides us with valuable guidance and insight into the application and interpretation of the law and we hope this resource helps build a deeper appreciation and understanding of discrimination law in Victoria.

To ensure it is accessible and easily available this resource is available online and will be updated regularly to reflect developments in the law.

We welcome your feedback and suggestions for how *Victorian Discrimination Law* can be improved in future editions.



Karen Toohey
Acting Commissioner
Victorian Equal Opportunity
and Human Rights Commission

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Chapter 1

> Introduction

Scope of this resource

1. The *Equal Opportunity Act 2010 (Vic)* commenced on 1 August 2011, and builds on over 30 years of anti-discrimination law in Victoria. Because the Equal Opportunity Act was a wholesale replacement of its predecessor, this is an opportune time to commence a new case law resource – one that we can continue to build on and update as cases are heard under the new Act. This is the first resource of its kind for Victoria.
2. This resource provides an overview of the Equal Opportunity Act and an analysis of the case law that helps to guide the application of the Act in practice. It also provides guidance on the scope of, and interaction between, exceptions and exemptions under the Equal Opportunity Act in light of its objective to promote substantive equality.
3. Because the Equal Opportunity Act is a new law, reference is made to issues which have arisen under the predecessors to the Equal Opportunity Act, principally the *Equal Opportunity Act 1995 (Vic)*, where they continue to be relevant.
4. This resource is not intended to be an academic text but, rather, a practical guide to the law as it currently applies in this jurisdiction and significant issues that have arisen in cases brought under the Equal Opportunity Act. While the focus of this resource is the Victorian legislation, where relevant, it will also make reference to principles as they apply in other jurisdictions including in other States and Territories and at the Commonwealth level. It is not intended to be an exhaustive study of discrimination law in these other jurisdictions. Nor is this resource intended to be a substitute for legal advice. It is, by its nature, general.
5. It is also important to note that case law from other jurisdictions, and decisions of the Victorian Civil and Administrative Tribunal are informative and provide guidance about how these issues may be approached in the future, but they are not binding precedent that must be followed in future cases.
6. Links to legislation and cases have been provided where these resources are freely available on the internet.
7. *Victorian Discrimination Law* will be updated regularly to reflect the latest developments in the law. This version is dated April 2013.
8. We welcome your feedback and suggestions for how we can improve this resource. Please contact us by:
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Abbreviations used in this resource

9. The following abbreviations are used throughout this resource.
Charter *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
Commission Victorian Equal Opportunity and Human Rights Commission
Equal Opportunity Act *Equal Opportunity Act 2010 (Vic)*
1995 Act *Equal Opportunity Act 1995 (Vic)*
VCAT Victorian Civil and Administrative Tribunal (also referred to as the Tribunal)

Background

10. The Equal Opportunity Act makes it unlawful to discriminate against a person on the basis of a protected attribute listed in the Act, to sexually harass someone, or to victimise someone for speaking up about their rights, making a complaint, helping someone else make a complaint or refusing to do something that would be contrary to the Equal Opportunity Act.
11. The Equal Opportunity Act also puts in place a number of measures to help encourage the identification and elimination of discrimination, sexual harassment and victimisation, and to promote and facilitate the progressive realisation of equality.
12. To help achieve this, the Commission provides a timely and effective dispute resolution service and a number of statutory functions to encourage and facilitate best practice and compliance.
13. People can also bring a complaint about a breach of their rights to the Tribunal for determination.

Objects and purpose of the Equal Opportunity Act

14. One of the objects of the Equal Opportunity Act is to 'eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent'¹. Amendments to the Equal Opportunity Act added new objects to [section 3](#) of the Act, which include a greater focus on identifying systemic issues.
15. The objectives, or the aims, of the Equal Opportunity Act include the following:
 - a. to eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible
 - b. to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities Act
 - c. to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
 - d. to promote and facilitate the progressive realisation of equality, as far as reasonably practicable by recognising that... the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.²
16. The objectives are not merely aspirational statements. Rather, they are important tools for interpreting the Equal Opportunity Act. This is because where different interpretations are available VCAT and courts are required to interpret the legislation in a way which promotes the objectives over an interpretation which does not.³ For example, an interpretation which would help to eliminate discrimination will generally be preferred to an interpretation which would further entrench inequalities.
17. Substantive equality goes further than simply treating all people the same (which is sometimes referred to as 'formal equality'). The phrase 'substantive equality' used in [section 3\(d\)\(iii\)](#) of the Equal Opportunity Act, means achieving equal outcomes for individuals and groups of people in addition to equal opportunities. One way in which the Equal Opportunity Act seeks to promote substantive equality is by requiring duty holders to make reasonable adjustments and accommodations for persons with disabilities and parent/carer responsibilities. This helps to remove some of the structural barriers to equality.
18. By aiming for the progressive realisation of substantive equality, the Equal Opportunity Act recognises that we do not all compete on even ground and some positive steps must be taken to 'level the playing field'⁴. Another way in which the Equal Opportunity Act seeks to achieve substantive equality is through the promotion of special measures, which are discussed further in [Chapter 15](#) of this resource.

1 [Equal Opportunity Act 2010 \(Vic\) s 3\(a\)](#).

2 [Equal Opportunity Act 2010 \(Vic\) s 3](#). Refer to this section for the complete statement of objectives.

3 [Interpretation of Legislation Act 1984 \(Vic\), s 35\(a\)](#). See also [Project Blue Sky v Australian Broadcasting Authority \(1998\) 194 CLR 355, \[388\]-\[389\]](#).

4 Attorney General Robert Hulls, Second Reading Speech to the [Equal Opportunity Bill 2010 \(Vic\)](#) Hansard, Legislative Assembly, 10 March 2010, 783.

19. However, the Equal Opportunity Act recognises that substantive equality cannot be achieved immediately. According to the Explanatory Memorandum, the ‘progressive realisation’ of equality refers to the ‘gradual implementation of measures over time’ and ‘will be dependent on the capacity and resources of the duty holders’.⁵ The need to balance the ultimate aims of equality with the practical realities faced by duty holders is reflected in many ways. For example, in the factors which are relevant to deciding whether adjustments or accommodations are reasonable in all the circumstances.

Interaction with other legislation

20. The Equal Opportunity Act operates alongside federal anti-discrimination legislation, including the *Australian Human Rights Commission Act 1986 (Cth)*, *Age Discrimination Act 2004 (Cth)*, *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)* and the *Fair Work Act 2009 (Cth)*.⁶

21. This means that people – such as employers, educators, service providers, clubs, sporting bodies and local governments – must avoid breaching their obligations under the laws at both the Commonwealth and Victorian levels. Generally speaking, however, a person claiming discrimination must select one jurisdiction in which to bring the claim. For example, the Commission may decline to provide dispute resolution services if the person has already initiated proceedings in another forum, or if the complaint has already been, or would more appropriately be, dealt with by another court or tribunal. A person is also barred from bringing a complaint under federal anti-discrimination legislation if they have already made a complaint or commenced proceedings under state law.⁷

22. In Victoria, the Equal Opportunity Act also operates alongside the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) and the *Racial and Religious Tolerance Act 2001 (Vic)* (RRTA). The Charter provides human rights protections for people in Victoria, including protecting the right to equality.⁸ The RRTA promotes racial and religious tolerance in Victoria, by prohibiting acts which constitute racial and religious vilification, and provides an avenue of redress for the victims of such vilification.

Interaction with the Charter

23. The Charter interacts with the Equal Opportunity Act in a number of ways. First, under [section 38](#) of the Charter, ‘public authorities’⁹ must not act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human rights. This means that if a public authority unlawfully discriminates against a person in breach of the Equal Opportunity Act, the conduct may also constitute a breach of the right to equality under the Charter. Importantly, the Victorian Civil and Administrative Tribunal (VCAT) operates as a ‘public authority’ when carrying out certain administrative functions under the Equal Opportunity Act, including granting temporary exemptions from unlawful discrimination. In those circumstances VCAT must also consider and comply with Charter rights. Therefore, VCAT must consider its obligations under the Equal Opportunity Act in the context of the human rights protected by the Charter.

5 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 4.

6 Note that on 19 November 2012 the Federal Government released an exposure draft of the *Human Rights and Anti-Discrimination Bill* which would consolidate federal anti-discrimination legislation (except the provisions contained in the Fair Work Act 2009).

7 For example, [Racial Discrimination Act 1975 \(Cth\) s 6A](#); [Sex Discrimination Act 1984 \(Cth\) s 10](#); [Disability Discrimination Act 1992 \(Cth\) s 13](#); [Age Discrimination Act 2004 \(Cth\) s 12](#).

8 [Charter of Human Rights and Responsibilities Act 2006 \(Vic\) s 8](#).

9 ‘Public authority’ is defined in [s 4\(2\)\(j\)](#) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. For further consideration about the obligations of public authorities under the Charter, see [Lifestyle Communities Ltd \(No 3\) \[2009\] VCAT 1869](#), [33]-[46].

24. [Section 32](#) of the Charter also requires Victorian legislation to be interpreted consistently with human rights, 'so far as it is possible to do so consistently with their purpose'.¹⁰ Therefore, VCAT and the courts need to look at human rights when they are interpreting laws, including the Equal Opportunity Act. VCAT and the courts may look to international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right for guidance when interpreting a provision. In other words, [section 32\(1\)](#) of the Charter provides a 'statutory directive' that requires all persons engaged in the task of statutory interpretation to 'explore all possible interpretations of the provision(s) in question, and adopt that interpretation which least infringes Charter rights'.¹¹

Interaction with the RRTA

25. While this resource does not cover the RRTA, it is worth noting that conduct that constitutes unlawful discrimination under the Equal Opportunity Act, may also constitute racial or religious vilification under the RRTA.

What is unlawful discrimination?

26. Unlawful discrimination includes both 'direct' and 'indirect' discrimination, which are explored in [Chapter Two](#) of this resource.
27. In addition, there are a number of stand-alone provisions which constitute unlawful discrimination. Those are:
- an unreasonable refusal to accommodate a person's responsibilities as a parent or carer in work-related contexts (see [Chapter Six](#) of this resource)
 - a failure to make reasonable adjustments for a person with a disability in employment or in the provision of goods and services (see [Chapter Five](#) of this resource)
 - a failure to allow reasonable alterations to accommodation to meet the special needs of a person with a disability (see [Chapter Four](#) of this resource)

- refusing to provide accommodation to a person with a disability because he or she has an assistance dog (including requiring the person to pay an extra charge or keep the assistance dog elsewhere) (see [Chapter Seven](#) of this resource).

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

In what areas of life is discrimination unlawful?

29. The Equal Opportunity Act prohibits unlawful discrimination which occurs in specified areas of public life. The Equal Opportunity Act does not seek to operate in respect of purely private activities of private citizens. The division between private and public will be explored further in this resource. In essence, the Equal Opportunity Act prohibits unlawful discrimination in the following areas of activity:
- employment and related areas – which include partnerships, industrial organisations, employment agencies and qualifying bodies (including contracting and pre-employment)
 - education
 - the provision of goods and services and the disposition of land
 - the provision of accommodation
 - clubs
 - sport
 - local government.
30. Even within these areas of activity, not all discrimination will be unlawful. It is only where that discrimination occurs on the basis of a protected attribute (and provided that no exemption or exception applies) that the conduct will be unlawful.

¹⁰ [Ibid s 32](#).

¹¹ [Ibid s 32\(1\)](#).

What attributes are protected?

31. The Equal Opportunity Act prohibits discrimination on any of the following grounds:
- 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
32. The Equal Opportunity Act also prohibits discrimination against a person because of a personal association they have to a person with any of the attributes identified above.¹² [Chapter Three](#) of this resource explores the protected attributes in more detail.

What other protections are afforded by the Equal Opportunity Act?

33. In addition to prohibitions against discrimination, the Equal Opportunity Act expressly prohibits sexual harassment and victimisation. It also imposes positive obligations on affected persons to take steps to eliminate unlawful discrimination, sexual harassment and victimisation.
34. Where a person has an obligation not to unlawfully discriminate, then [section 15\(2\)](#) imposes a positive duty upon that person to avoid engaging in discriminatory conduct and, as far as possible, to take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment or victimisation. [Section 15\(6\)](#) provides some guidance on the question of what constitutes reasonable and proportionate measures. This positive obligation was newly introduced under the Equal Opportunity Act. A person cannot bring an individual complaint or dispute in relation to a breach of [section 15\(2\)](#), although the Commission has the powers to investigate compliance with the positive duty.¹³

12 [Equal Opportunity Act 2010 \(Vic\) s 7\(2\)](#).

13 [Ibid ss 15\(3\)-\(4\)](#).

Chapter 2

> Types of discrimination

35. Unlawful discrimination includes both 'direct' and 'indirect' discrimination on the basis of a protected attribute. The tests for direct and indirect discrimination are general tests which may apply to any circumstances of discrimination covered by the Equal Opportunity Act.

Direct discrimination

Overview

36. Direct discrimination occurs when a person treats, or proposes to treat, someone with a protected attribute unfavourably because of that attribute. [Section 8](#) of the Equal Opportunity Act defines direct discrimination as follows:

(1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

Examples

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

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

In determining whether a person directly discriminates it is irrelevant –

- whether or not that person is aware of the discrimination or considers the treatment to be unfavourable

- whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.¹⁴

Changes to direct discrimination

37. The 'unfavourable treatment' test for direct discrimination under the Equal Opportunity Act differs from the test under the 1995 Act and most formulations of direct discrimination under other state and federal anti-discrimination legislation. The more traditional formulation of the test for discrimination is that contained, for example, in [section 5\(1\)](#) of the *Sex Discrimination Act 1984*, where a person needs to be treated 'less favourably' than someone without the protected attribute.
38. The test in the Equal Opportunity Act does not require a comparison between the way the complainant was treated (or proposed to be treated) and the way in which another person, without the protected attribute or with a different attribute, would be treated in 'the same or similar circumstances' or 'in circumstances that are the same or are not materially different'. This more traditional formulation confirms what, in discrimination law, is referred to as the 'comparator test'.
39. Parliament's stated intention in making this shift away from the 'comparator test' was to simplify the definition by avoiding the unnecessary technicalities that often accompany the identification of an appropriate comparator.¹⁵

¹⁴ [Equal Opportunity Act 2010 \(Vic\) s 8](#).

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).

Comparative direct discrimination tests in ACT and SA

40. Section 8(1)(a) of the Australian Capital Territory's *Discrimination Act 1991* (ACT Act) contains a substantially similar test to the Equal Opportunity Act. Like the Equal Opportunity Act, it also states that discrimination occurs in circumstances where a person 'treats or proposes to treat the other person unfavourably because the other person has an attribute' that is protected by law.¹⁶ The absence of the comparator test in ACT anti-discrimination law was discussed in the case of *Prezzi v Discrimination Commissioner & Anor* (*Prezzi*),¹⁷ in which the ACT Tribunal, after noting the difference between the usual comparator test and the terms of the ACT Act, said at paragraph 20:

Section 8 of the Discrimination Act by way of contrast defines 'discrimination' in a way which does not involve any concept of differentiation or distinction in the consequences of the impugned treatment as between persons with different characteristics or attributes.¹⁸

41. It appears that this definition is modelled on that in the *Equal Opportunity Act 1984 (SA)*. The South Australian Act, however, includes a definition of unfavourable treatment which includes the concept of comparative treatment. Section 6(3) of that Act provides:

For the purposes of this Act a person ('the discriminator') treats another unfavourably on the basis of a particular attribute or circumstances if the discriminator treats that other person less favourably than in identical or similar circumstances the discriminator treats or would treat, a person who does not have that attribute or is not affected by that circumstance.¹⁹

42. The Equal Opportunity Act and ACT Act do not invite a comparison between the way in which a person who has a particular attribute is treated, compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded to the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or the conditions imposed or proposed would disadvantage that person, there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person.
43. While the term 'disadvantage' might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent. The primary meaning of 'advantage' does not import comparison. The Equal Opportunity Act and ACT Act are therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.
44. In Victoria, it is therefore unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably because of that attribute when compared with persons without that attribute. All that is required is to determine whether the consequences of dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interest, and whether the dealing has occurred because of a relevant attribute of the complainant.

16 *Discrimination Act 1991* (ACT) s 8(1)(a).

17 (1996) 39 ALD 729.

18 Ibid [20].

19 *Equal Opportunity Act 1984 (SA)* s 6(3).

Meaning of 'unfavourable' treatment

45. The Equal Opportunity Act does not define 'unfavourable treatment'. For the reasons set out above, it is unlikely that the concept of 'unfavourable' will itself import a comparison. Rather the question will be whether the treatment is unfavourable to the complainant. In *Prezzi v Discrimination Commissioner & Anor* (Prezzi),²⁰ the ACT Tribunal gave this term its ordinary meaning. 'Unfavourable' is defined in the Macquarie Dictionary to mean 'not favourable, not propitious, disadvantageous, adverse'.²¹
46. Unfavourable treatment is likely to occur where the consequences of the treatment complained of are – or would be – unfavourable to the complainant.²² Treatment may also be 'unfavourable' if a person is singled-out, or treated differently, because of a particular attribute.²³
47. Treatment which is likely to constitute 'unfavourable' treatment in employment, for example, include (this is not an exhaustive list):
- unlawful bullying or harassment
 - being denied or refused a benefit that is made available to others
 - being provided a benefit on unfavourable terms (for example, less pay or greater inconvenience)
 - unfair allocation of tasks (too many tasks or an unfair share of unpleasant tasks)
 - unfair rostering (including the allocation of leave and overtime)
 - exclusion from essential communications
 - being refused essential resources needed to do the job
 - being subjected to humiliation.
48. On the question of the difference between a 'less favourable treatment' test on the one hand and an 'unfavourable' treatment test on the other, the Tribunal in *Prezzi* said:

[...] it is clear that under the like legislation in other Australian jurisdictions different but less favourable treatment on the grounds of a certain attribute is sufficient to establish discriminatory conduct whatever the consequences for the complainant of the different conduct. Differential treatment is at the heart of the issue in those jurisdictions. Under the Discrimination Act the issue is whether the consequences of the acts complained of are unfavourable to the complainant. In most cases, the results of the two inquiries will be the same. But it is possible that the Discrimination Act test may require a different result in some special cases, where comparatively unfavourable treatment, viewed against the treatment accorded a person without the relevant attribute, does not produce an ultimately unfavourable result for the complainant. The present case may be one of those special cases.²⁴

49. This approach to the definition of direct discrimination was reinforced in the decision of *Lewin v ACT Health & Community Care Services*²⁵ in which the ACT Tribunal made the following comment:

Unlike other discrimination legislation in Australia section 8 of the Act does not involve the making of a comparison between the way in which a person who has a particular attribute is treated compared to a person without the attribute or with a different attribute. Section 8 requires our examination of the treatment accorded the aggrieved person or the conditions on which the aggrieved person is or is proposed to be treated. If the consequence for the complainant is unfavourable or if the conditions imposed would disadvantage the person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by that person (Prezzi). The test to be applied and the Act gives greater breadth of coverage to that required to be applied in other jurisdictions.²⁶

20 [1996] ACTAAT 132; (1996) 39 ALD 729.

21 *The Macquarie Dictionary* (5th ed, 2009).

22 [1996] ACTAAT 132; (1996) 39 ALD 729.

23 See, for example, *NC and Others v. Queensland Corrective Services Commission* [1997] QADT 22.

24 [1996] ACTAAT 132, [25].

25 [2002] ACTDT 2 93-201, [47].

26 *Ibid* [41].

50. *Prezzi* has been referred to positively in [Edgley v Federal Capital Press of Australia](#)²⁷ at paragraphs 53 and 54, where the Federal Court of Australia Full Court said:

Uninstructed by authority, and reading the provisions of section 8 literally, but as a whole, it would appear that the legislative intended to focus attention upon the following two quite different situations.

First where a person is treated unfavourably. ... Again, as noted in *Prezzi*, above, the adverb 'unfavourably' appears to have its ordinary meaning. The dictionary definition of the adjective 'unfavourable' include 'adverse' and this seems appropriate here. In other words section 8(1)(a) is directed at adverse behaviour towards a person because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination.²⁸

Humiliation as unfavourable treatment

51. Humiliation is not defined in the Equal Opportunity Act and its definition has not been the subject of significant Victorian case law. However, the issue of what conduct may constitute humiliation for the purposes of it constituting a 'detriment' for the purposes of discrimination was considered in [Walgama v Toyota Motor Corporation Australia Ltd.](#)²⁹
52. In that case, Mr Walgama made a complaint of discrimination against his employer Toyota, including on the grounds of race because he alleged he had been subjected to racial abuse by his colleagues. In particular, Mr Walgama had been preparing a roster which had been defaced with offensive racial language ('black c**t'). The Tribunal considered that the defacement of the roster constituted a 'denigration' of Mr Walgama, but did not constitute 'humiliation'.
53. In coming to its decision, the Tribunal considered the Oxford English Dictionary definition of humiliation, namely '[t]he action of humiliating or condition of being humiliated; humbling, abasement formerly often equal humbled or humbled condition, humility', as well as the meaning of the word 'humiliate': '[t]o make low or humble imposition, condition, or feeling; to humble. Refl to humble or abase oneself, to stoop, sometimes to prostrate oneself, to bow.'³⁰
54. The Tribunal concluded that given there was no evidence that the defaced document was shown to anyone other than Mr Walgama and those to whom he complained, it was 'difficult to see that in the circumstances he has been humiliated.'³¹ Note: this reasoning only applied to 'humiliation' and did not consider whether acts that contributed to a hostile working environment could amount to unlawful discrimination and a detriment in other ways, such as harassment.
55. The Tribunal took a similar view in [Poulter v State of Victoria](#), involving a complaint of victimisation in employment. In this case, the complainant's former employer had contacted his current employer to advise them he had been seen at the Tribunal in relation to a complaint made about them. The Tribunal found that although the conduct by the former employer was improper, the complainant's subjective perception of the situation, with nothing more, was not sufficient to comprise humiliation, and therefore detriment, under the Equal Opportunity Act.³²
56. However, in [Laverdure v Jayco Caravan \(Recreational Industries\) Pty Ltd & Anor](#), the Tribunal found that humiliation had occurred as a result of racist comments made to the complainant in the workplace. In particular, humiliation was found to have occurred in a situation where:

The language used, the circumstances of its use and the tone observed by independent witnesses were such as to attract to this conduct all the hallmarks of racial abuse, designed to cause humiliation and denigration of the Complainant.³³

27 [\[2001\] FCA 379](#).

28 [Ibid \[53\]-\[54\]](#).

29 [\[2007\] VCAT 1318](#).

30 [Ibid \[51\]-\[52\]](#).

31 [Ibid \[53\]](#).

32 [\[2000\] VCAT 1088, \[21\]](#).

33 [\[2001\] VCAT 1706, \[7\]](#).

57. The language used included calling the complainant ‘black prick’ and ‘black bastard’, and telling the complainant to go back to his place of birth, in an abusive and derogatory tone. The circumstances involved the comments being made in the workplace, not in a joking manner, and not as part of workplace banter, where work colleagues could overhear/witness the abuse.

Treatment ‘because of’ a protected attribute.

58. In order to establish direct discrimination, it is necessary to establish a causal connection between the treatment complained of and the protected attribute. Direct discrimination only occurs where the unfavourable treatment occurred ‘because’ of a person’s protected attribute. In discrimination law this is sometimes referred to as ‘causation’.

59. Of course, it is not uncommon for the discriminatory conduct to be based on multiple reasons. The Equal Opportunity Act provides that, in order to establish direct discrimination, the protected attribute must be a ‘substantial’ reason for the treatment, but it does not have to be the ‘only’ or ‘dominant’ reason.³⁴

60. This was discussed in *Stern v Depilation & Skincare Pty Ltd*,³⁵ where Deputy President McKenzie said:

The attribute need not be the only or dominant reason for the treatment, but must be a substantial reason for it. This means that the attribute must be a reason of substance for that conduct. The motive of the discriminator is irrelevant, and it is also irrelevant whether the discriminator was aware of the discrimination or considered the treatment less favourable. (emphasis added)³⁶

61. In that case, the Tribunal held that Ms Stern’s pregnancy was a ‘substantial reason’ for her redundancy. The Tribunal found that, although the ‘dominant reason’ for the redundancy was a downturn in business, the factor which ‘actuated the minds’ of the decision-makers who selected Ms Stern for redundancy was the fact that she was a part-time employee working reduced hours. The only reason Ms Stern was working those hours was because she was pregnant. Pregnancy was, therefore, a substantial reason for the conduct.³⁷

34 *Equal Opportunity Act 2010 (Vic) s 8(2)(b)*.
 35 [2009] VCAT 2725.
 36 *Ibid* [8].
 37 *Ibid* [67].

Is knowledge of a protected attribute relevant to direct discrimination?

62. Knowledge of the complainant’s protected attribute is relevant to the question of whether the treatment was ‘because of’ that protected attribute.
63. For example, in *Tate v Rafin*³⁸ (*Rafin*) the respondent revoked the applicant’s membership of a club following a dispute. The applicant claimed that the reasons for the revocation of his membership included his psychological disability, which manifested itself in aggressive behaviour. In this case, the respondent was unaware of the applicant’s disability. Wilcox J found that the respondent had not treated Mr Tate less favourably because of his psychological disability:

The psychological disability may have caused Mr Tate to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability.³⁹

64. Wilcox J’s reasoning in *Rafin* is consistent with the decision of the Full Federal Court in *Forbes v Australian Federal Police (Commonwealth)* (*Forbes*).⁴⁰ In that case, the Court accepted that the respondent had withheld information about the applicant’s medical condition on the ground that it considered that she did not have a disability and that this did not amount to discrimination ‘because of’ a disability.⁴¹
65. Nonetheless, in order to succeed in this type of defence, it is likely that a respondent will need to have a plausible and legitimate basis for claiming that it had no knowledge of the particular attribute.⁴²

38 [2000] FCA 1582.
 39 *Ibid* [67].
 40 [2004] FCAFC 95.
 41 *Ibid* [71]-[73], [76].
 42 See, Australian Human Rights Commission, *Federal Discrimination Law 2011*, ch 5, 17.

66. In *Forbes*, there was evidence that Ms Forbes had lodged a claim for a depressive illness with Comcare which had been rejected (including on review). An internal investigation process and review had also found that Ms Forbes' allegations in relation to a workplace incident which, she said, had caused her illness, were unsubstantiated. On those bases, the respondent had formed the view that the applicant did not have a disability.
67. The question of the respondent's knowledge, however, is not always a straightforward one. The case of *Wiggins v Department of Defence*⁴³ (*Wiggins*) demonstrates that, where something about the complainant's protected attribute is known by a respondent organisation, that knowledge may be imputed to individuals who engage in discriminatory conduct. In *Wiggins*, an officer of the respondent demoted the applicant in circumstances where the officer had only general knowledge of the applicant's disability. The officer knew only that the applicant had a medical condition confining her to on-shore duties, although he had no specific knowledge of the applicant's disability. Despite the officer in question not having specific knowledge about the applicant's disability, McInnis FM deemed the officer to have known the nature and extent of the applicant's disability as he could have accessed her medical records if he wanted to. This was sufficient to 'establish knowledge in the mind of' the Navy.⁴⁴ His Honour stated:

I reject the submission of the Respondent that the Navy does not replace Mr Jager as the actual decision-maker in the context or that the maintenance of information in a file does not equate to operational or practical use in the hands of the discriminator. In my view that is an artificial distinction which should not be permitted in discrimination under human rights legislation. To do so would effectively provide immunity to employers who could simply regard all confidential information not disclosed to supervisors as then providing a basis upon which it could be denied that employees as discriminators would not be liable and hence liability would be avoided by the employer.⁴⁵

43 [2006] FMCA 800; (2006) 200 FLR 438.

44 *Ibid.*, [168].

45 *Ibid.*

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

Inferring a reason for the treatment

69. It is often the case in discrimination claims that the reason for the treatment – the causation element – is not explicit or overt. Therefore, in order to make a finding that discriminatory conduct occurred because of a person's protected attribute, courts and tribunals often need to draw an inference about the reason for the treatment from the surrounding facts and evidence.
70. When inferring a discriminatory reason for certain conduct, the court or tribunal must be satisfied that there is no 'equally or more probable explanation of the conduct'.⁴⁶ This does not mean the court or tribunal is required to accept the innocent explanations proffered by the respondent in all circumstances.⁴⁷ Rather, if an innocent explanation is equally or more probable on the basis of the evidence and circumstances, an inference of unlawful discrimination cannot be drawn.⁴⁸
71. In *Department of Health v Arumugam*⁴⁹ (*Arumugam*), Fullagar J said it was not open to a tribunal to draw the inference that the applicant, Dr Arumugam, was not selected for the position of Psychiatrist Superintendent because of his race simply because another less qualified candidate was ultimately selected. Fullagar J said:

The mere fact that the appointment did not go to the man whom the Board considered to be clearly the better qualified candidate, did not of itself 'indicate discrimination of some kind'.⁵⁰

46 *Packer v Neal* [1997] VADT 52; citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

47 See, for example, *Poniatowska v Hickinbotham* [2009] FCA 680; *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

48 *State of Victoria & Ors v McKenna* [1999] VSC 310 [40] citing *Oyekanmi v National Forge Operations Pty Ltd* [1995] VADT 3.

49 [1988] VR 319.

50 *Ibid.* 325.

72. His Honour went on to say:
- If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inference to be drawn against dishonest explainers with greater certainty, but that is all. In the present case ‘the ground of race’ was, in the absence of explanation clearly lacking, and the non acceptance of this proffered explanation could not provide the missing elements.⁵¹
73. Note however that in *Arumugam*, Fullagar J held that it was necessary to show intention to make out a case of direct discrimination. This was subsequently negated by the High Court in *Waters v Public Transport Corporation (1992)*,⁵² and then by section 10 of the Equal Opportunity Act, which provides that motive is irrelevant.
74. A different conclusion to *Arumugam* was reached in *Oyekanmi v National Forge Operations Pty Ltd*.⁵³ In that case, the Tribunal considered a complaint by Mr Oyekanmi, an engineer originally from Nigeria, who claimed that he was dismissed from employment because of his race. The Tribunal inferred that the reason for Mr Oyekanmi’s dismissal was racially based. Relevantly, Mr Oyekanmi was asked during an employment interview whether he anticipated that he would have any problems working in an organisation that was ‘all white’. The chairman of the company also gave evidence that it was crucial for Mr Oyekanmi to have ‘credibility’ with his colleagues, including being able to strike up working relationships and be accepted by his workmates.⁵⁴ The Tribunal rejected the argument that the credibility requirement was racially neutral. Instead, it held that the credibility requirement was applied to Mr Oyekanmi because of a perception that others in the workforce might not accept him due to his race. Hence, the Tribunal found that the reason for the dismissal – the failure to satisfy the credibility requirement – was because of Mr Oyekanmi’s race.⁵⁵
75. Smith J considered these decisions, especially the findings in *Arumugam*, in the later case of *State of Victoria & Ors v McKenna*⁵⁶ (*McKenna*). In his reasons, Smith J cautioned that Fullagar J’s comments in *Arumugam* ought to be understood in the context of the facts of that particular case. He pointed out that, in *Arumugam*, the selection panel had proffered an alternative, innocent explanation. Namely, that the candidate appointed to the position was better suited to the role because he was more dynamic and articulate, albeit lesser qualified than Dr Arumugam.
76. Smith J went on to say that, in discrimination complaints, the person’s attribute, as well as societal prejudices and attitudes towards persons with that attribute, are relevant to drawing inferences. For example, the existence of racist attitudes and stereotypes within a community or organisation may leave open an inference of racial discrimination. It is then a matter for the court or tribunal to decide whether an innocent reason is equally or more probable than the proscribed reason. According to Smith J, a finding of discrimination would have been open in *Arumugam* ‘if, on the evidence, it was open to the Board to find that no selection Board acting reasonably could have preferred [the other applicant] to Dr Arumugam’.
77. Smith J applied these principles in *McKenna*, holding that it was appropriate for the Tribunal to infer that a police officer, Crossley, had disclosed the personal address of one of his colleagues, the complainant, to her ex-partner because of the complainant’s sex. Crossley had told the Tribunal that he would have disclosed the personal address of any colleague in similar circumstances, regardless of whether the colleague was a man or woman. However, Smith J agreed that it was open to the Tribunal to reject that evidence and, instead, infer that the reason for the conduct was a discriminatory one, particularly given the surrounding evidence about a sexist culture within the workplace and particularly the sexist attitude of Crossley. In those circumstances, ‘it was open to the Tribunal to conclude that Crossley was reacting again in a sexist manner to aggression on the part of a woman’.⁵⁷

51 Ibid 330.

52 (1992) 173 CLR 349.

53 [1995] VADT 3.

54 Ibid [78].

55 See, Jonathan Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’, 25(4) *Sydney Law Review* 535.

56 [1999] VSC 310.

57 Ibid [97].

Motive and intention not relevant

78. Under the Equal Opportunity Act, it does not matter whether the respondent was aware of the discrimination, or whether he or she intended to breach the law. Unlawful discrimination may be unintentional. In other words, the relevant question is, what was the 'true basis' for the conduct, putting the respondent's intention aside?⁵⁸
79. [Section 8\(2\)\(a\)](#) of the Equal Opportunity Act states that, in determining whether a person directly discriminates against another, it is not relevant whether that person – the discriminator – is aware of the discrimination or considers the treatment to be unfavourable.⁵⁹
80. [Section 10](#) of the Equal Opportunity Act also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'.⁶⁰ For example, an employer who refuses to employ a candidate because she is Aboriginal, not because the employer dislikes Aboriginal people, but because the employer thinks that an Aboriginal person working in the job would be given a hard time by other employees, who are prejudiced towards Aboriginal people, still discriminates against that candidate.⁶¹

Indirect discrimination

Overview

81. Legal protections against indirect discrimination recognise that treating all people the same, regardless of difference, may unfairly disadvantage some people or groups of people. Indirect discrimination is often subtler and may be more difficult to recognise than direct discrimination.
82. Under the Equal Opportunity Act, indirect discrimination occurs when an unreasonable requirement, condition or practice – which may appear to treat people equally – has the effect of disadvantaging, or potentially disadvantaging, a group of people with a particular protected attribute.

83. [Section 9](#) of the Equal Opportunity Act defines 'indirect discrimination' as follows.

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

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

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

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

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

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

58 See, for example, [Australian Iron and Steel v Banovic \[1989\] HCA 56](#); (1989); 168 CLR 165; (1989) 89 ALR 1 [9] (Gaudron and Dean JJ); See also [Waters v Public Transport Corporation \[1991\] HCA 49](#); (1992) 173 CLR 349 (Mason CJ, Gaudron and Dean JJ).

59 [Equal Opportunity Act 2010 \(Vic\) s 8\(2\)\(a\)](#).

60 [Ibid s 10](#).

61 [Explanatory Memorandum, Equal Opportunity Bill 2010 \(Vic\) 14](#).

Examples

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

(2) An advertisement for a job as a cleaner requires an applicant to speak and read English fluently. This may disadvantage a person on the basis of his or her race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.⁶²

Changes to indirect discrimination

84. This test for indirect discrimination in the Equal Opportunity Act differs in a number of respects from the test which applied under the previous 1995 Act.
85. For example, under the 1995 Act, the complainant had to demonstrate that he or she could not comply with the relevant requirement, condition or practice, and that a substantially higher proportion of people without the particular attribute could comply. In contrast, the Equal Opportunity Act simply requires the complainant to establish that the requirement, condition or practice causes, or is likely to cause, 'disadvantage' to people with the particular attribute. Therefore, it is not necessary to draw comparisons between people with and without the attribute.
86. Another point of difference between the 1995 Act and the current Equal Opportunity Act, is that the respondent now has the burden of proving that a defence applies to a complaint of indirect discrimination. Under the Equal Opportunity Act, the complainant has to prove the circumstances giving rise to the claim, namely the requirement, condition or practice which caused them to suffer disadvantage. However, the respondent then has the burden of proving that requirement, condition or practice is reasonable. This reflects the fact that the respondent is usually better placed to justify and provide evidence about the reasons why the condition, requirement or practice

was imposed. The current Equal Opportunity Act also provides further guidance about the factors to be considered in deciding whether a requirement, condition or practice is reasonable.

The meaning of 'requirement, condition or practice'

87. To satisfy the test for indirect discrimination, there must be a 'requirement, condition or practice' on which the complaint is based. It is up to the complainant to formulate, with sufficient precision, the requirement, condition or practice complained of.⁶³
88. The Equal Opportunity Act does not define the terms 'requirement', 'condition' or 'practice'. However, in relation to similar provisions in anti-discrimination laws, courts have said that these elements should be interpreted in a broad rather than technical manner, for example, to encompass 'any form of qualification or prerequisite demanded'.⁶⁴
89. Nonetheless, the Tribunal is not bound by the complainant's formulation of the requirement, condition or practice. Rather, the Tribunal must ascertain the true factual position as to the formulation and existence of a requirement, condition or practice. It may decide that the requirement, condition or practice complained of did not exist, or that a different one applied, based on all the facts and circumstances.⁶⁵

63 See also *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 [10]; (1989) 168 CLR 165; *Siewwright v State of Victoria* [2012] FCA 118.

64 *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 [10]; (1989) 168 CLR 165, 185 (Dawson J), cited with approval by the High Court in *Waters v Public Transport Corporation* [1991] HCA 49; (1992) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J). Also see *State of New South Wales v Amery* [2006] HCA 14 [63] (Gummow, Hayne and Crenna JJ).

65 *State of New South Wales v Amery* [2006] HCA 14 [208] Callinan J; *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211 (10 November 2006) [35] Davis J citing *Amery*. See also *Gounder v Allmand* [2007] VCAT 1898 [87]

62 *Equal Opportunity Act 2010* (Vic) s 9.

90. For example, in *State of New South Wales v Amery*,⁶⁶ a group of female teachers brought an indirect discrimination complaint on the basis of sex. They argued that their employment was subject to a condition that in order to access higher salary scales, they were required to obtain permanent status.⁶⁷ All the complainants were supply casuals as their family responsibilities meant they could not be deployed around the state in the same way as permanent teachers. They argued that, as women with family responsibilities they could not comply with the condition, but a substantially higher proportion of men could comply.
91. In upholding the State's appeal, the majority of the High Court determined that there had been no indirect discrimination. Justices Gummow, Hayne and Crennan held that the phrase 'requirement or condition' must be given a broad meaning rather than a technical one, given 'the nature of the mischief'.⁶⁸
92. However, despite a broad interpretation of the phrase, their honours found the alleged condition had not been imposed on the teachers' employment with the state because they had been specifically employed as 'casual teachers' under a statutory scheme, rather than employed as 'teachers' more broadly. The High Court considered this to be a material distinction between the positions and their terms of employment. Moreover, the structure of employing permanent and casual teachers as distinct roles with separate pay scales was not one adopted by the state or created by decision of the state as employer as a condition placed on the teachers' employment. Rather, this structure was imposed on the state by statute and industrial award.⁶⁹
93. The requirement, condition or practice does not need to be explicit. It may be implied from the circumstances. For example, in *Waters & Ors v Public Transport Corporation*, the High Court said that the removal of conductors from trams gave rise to a requirement or condition that tram travellers be able to use the system without the help of conductors.⁷⁰ In *Catholic Education Office v Clarke*, the Full Court of the Federal Court of Australia stated that the expression 'requirement or condition should be construed broadly to include any form of qualification or pre-requisite, although the actual requirement or condition should be formulated with some precision'.⁷¹ The Court went on to say, '...the legislation should be given a generous interpretation and alleged discrimination should not be permitted to evade the statutory definition...by defining its services so as to incorporate the alleged requirement or condition'.
94. Case law also suggests that the 'requirement or condition' does not need to be absolute in order to support a claim of indirect discrimination. For example, a preference which has a practical, rather than theoretical impact may constitute a requirement or condition. Therefore, in *Secretary, Department of Foreign Affairs and Trade v Styles & Anor*⁷², the Full Court of the Federal Court of Australia held that the employer's 'preference' for a candidate employed at a particular grade (within the public sector classification scale) constituted a 'condition or requirement', notwithstanding the fact that candidates from lower grades were still invited to apply for a role. In that case, the Court said, '[we] agree with the learned primary judge that something falling short of an absolute bar to selection may be a "requirement or condition"'.⁷³

66 [2006] HCA 14.

67 Ibid [17] per Gleeson CJ.

68 Ibid [63] per Gummow, Hayne, Crennan JJ.

69 Ibid [78]-[82] Their Honours did not go on to consider whether the conduct was reasonable, but Gleeson CJ, Callinan and Heydon JJ did, and found the conduct was reasonable in the circumstances. Kirby J dissented.

70 [1991] HCA 49; (1992) 173 CLR 349 (Mason CJ, Gaudron (Deane J agreeing) Dawson and Toohey JJ).

71 [2004] FCAFC 197, 86 [103].

72 [1989] FCA 342; (1989) 88 ALR 621.

73 Ibid [26] (Bowen CJ and Gummow J).

95. Some examples of requirements, conditions or practices that have been found to exist in recent Victorian cases include: the requirement for security guards to wear a particular firearm holster at work;⁷⁴ the requirement for passengers to be able to sit safely in an economy-sized seat in order to be guaranteed air travel in economy class;⁷⁵ a rule that a doctoral candidate at university take no more than 12 months' break from study;⁷⁶ and a requirement that moviegoers access cinemas by stairs only.⁷⁷

Essential terms of an employment contract

96. In the employment context, case law under the 1995 Act suggests that in order to support a claim of indirect discrimination the requirement, condition or practice must be something more than an essential term of the employment contract. Something which is inherent to the 'nature of the job itself' cannot support a claim of indirect discrimination.⁷⁸ These principles were applied in *McDougall v Kimberly-Clark Australia Pty Ltd*,⁷⁹ in which the Tribunal held:

On the authorities, the complainant must identify a requirement or condition which is separate from the terms of her employment contract or from the nature of the job itself... The relevant requirement or condition must apply not just to the complainant but to all the relevant persons, in this case all the employees of the company.⁸⁰

97. In that case, the Tribunal held that a requirement for the complainant to work in Victoria was not a 'requirement, condition or practice' capable of supporting a claim of indirect discrimination. That was because Ms McDougall had accepted a sales role based in Victoria. She then voluntarily relocated to Perth where she sought help for her gambling problem. Subsequently, she told the company that she could not work in Victoria. The Tribunal found as follows:

74 *Sagris v Chubb Security Australia Pty Ltd; Morros v Chubb Security Australia Pty Ltd* [2008] VCAT 2334.

75 *Perrett-Abrahams v Qantas Airways Limited* [2000] VCAT 1634.

76 *Torres v Monash University* [2006] VCAT 1208, [54].

77 *Hall Bentick v Greater Union Organisation Pty Ltd* [2000] VCAT 1850.

78 *Clymo v Wandsworth London Borough Council* [1989] IRLR 241, 247. See, eg, *Francis v British Airways Engineering Overhaul Ltd* [1982] IRLR 10 [15]; *Brook v London Borough of Haringey* [1992] IRLR 478 [483].

79 *McDougall v Kimberly-Clark Australia Pty Ltd* [2006] VCAT 2211.

80 *Ibid* [35].

It cannot be said that the fact that her duties involve working in Victoria constitutes the imposition of a discriminatory requirement or condition... In this context, the company was not imposing any requirement on her; rather, she was in effect seeking to vary her terms of employment so that the location of her employment was Western Australia rather than Victoria.⁸¹

98. In support of this reasoning in *McDougall*, Vice President Judge Davies relied on *State of Victoria v Schou (No 2)* (*Schou No 2*)⁸² (also discussed at [paragraph 99](#) below). Relevantly in *Schou No 2*, the applicant (a sub-editor of the Hansard reports) claimed that she had been indirectly discriminated against, because an unreasonable requirement or condition had been placed on her employment that she attend work full time at Parliament on house-sitting days. Ms Schou said that unlike her colleagues, she could not comply with this condition because of her status as a carer and parent. At first instance the Tribunal upheld Ms Schou's complaint, but on appeal to the Court of Appeal her complaint was rejected.
99. The key question on appeal in *Schou No 2* was whether the requirement as formulated was reasonable in all the circumstances. Phillips JA held that it was reasonable, noting it seemed 'almost inconceivable that the attendance requirement for sub-editors to attend the house on sitting days should be regarded as not reasonable.'⁸³ In particular, Phillips JA considered that there would be 'ample reason' to justify the requirement to work from Parliament in the context of Ms Schou's employment and the duties she was required to perform, considering the requirement was a term of her contract of employment when it was first made.⁸⁴

81 *Ibid* [36].

82 [2004] VSCA 71.

83 *Ibid* [24].

84 *Ibid*.

100. However, the reasoning in *Schou No 2* and *McDougall* in relation to a condition or requirement being part of the essential or inherent terms of employment does not appear to have been followed in subsequent indirect discrimination cases. Further, the finding in *McDougall* that the relevant requirement or condition must apply not just to the complainant but to all the relevant persons appears to contradict other cases which have indeed found an unreasonable condition which applied only to one person.
101. For example, in *Kelly v TPG Internet*,⁸⁵ Raphael FM found that an employee had been indirectly discriminated against by the imposition of a condition that her promotion to a more senior role be offered and accepted on an 'acting' basis instead of a permanent basis, in circumstances where the employee was pregnant and planning to take maternity leave. However, another employee whom the company knew intended to take leave was appointed to a permanent role around the same point in time.⁸⁶
102. These aspects of *McDougall* and *Schou No 2* should therefore be treated with caution.

Essential term of other types of contract

103. The question of whether any essential term of a contract or service can constitute a condition or requirement for the purpose of making out an indirect discrimination claim may also be relevant to other areas of public life.
104. For example in, *Catholic Education Office v Clarke*,⁸⁷ Madgwick J found that a school had indirectly discriminated against a deaf student by the imposition of terms or conditions on which the school was prepared to admit the student. His Honour held that the school has imposed a 'requirement or condition', namely 'to participate in and receive classroom instruction without the assistance of an interpreter'. In considering what were essential terms of the service offered by the school, Madgwick J found:

It is not necessarily inherent in the education of children in high schools that such education be undertaken without the aid of an interpreter. It is not perhaps even necessarily inherent, in an age of computers and cyberspace, that it be conducted to any particular degree in spoken English or in any other spoken language, although the concept of conventional classroom education may be accepted as necessarily implying the use of a spoken language.⁸⁸

105. It remains to be seen whether these principles will apply – and, if so, to what extent they will apply – under the Equal Opportunity Act in light of key changes to the law, such as the positive duty to eliminate discrimination,⁸⁹ and the requirements to make 'reasonable adjustments' for a person with a disability⁹⁰ and to not unreasonably refuse to accommodate a person's responsibilities as a parent or carer.⁹¹

Meaning of 'disadvantage'

106. Section 9(1)(a) of the Equal Opportunity Act is concerned with the consequences of the treatment complained of. In order to satisfy the test for indirect discrimination, the requirement, condition or practice must have adverse consequences for people with the relevant attribute. Specifically, the effect (or likely effect) of the requirement, condition or practice must be to cause 'disadvantage'.
107. The Equal Opportunity Act does not define 'disadvantage'. In light of the objects and purposes of the Equal Opportunity Act, the term 'disadvantage' is likely to be interpreted broadly. Under the ACT Act, for example, it has been held that disadvantage occurs simply where the treatment is 'adverse to the interests' of persons with the relevant attribute.⁹² It is not necessary to draw a comparison between the outcomes for people with and without the relevant attribute.⁹³

85 [2003] FMCA 584 (15 December 2003).

86 Ibid [56].

87 [2003] FCA 1085, [45]; (2003) 202 ALR 340.

88 Ibid 45.

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

90 Ibid s 19.

91 Ibid s 20.

92 *Firestone and Australian National University [2009] ACTDT 1 [45]*. See, for example, *J v Federal Capital Press of Australia Limited [1999] ACTDT 2* where 'disadvantage' was taken to include treatment which denied the complainant the opportunity to 'participate in an activity that is generally perceived contain advantages to those who are allowed to participate'.

93 *Prezzi v Discrimination Commissioner & Anor (1996) 39 ALD 729.*

Is the condition, requirement or practice 'reasonable'?

108. As explained above, the person who imposed the requirement, condition or practice, has the burden of proving that it was reasonable in all the relevant circumstances. If the requirement, condition or practice is found to be reasonable in the circumstance, it does not constitute indirect discrimination.

109. The question of reasonableness is a factual question. In relation to Commonwealth anti-discrimination law, the Federal Court of Australia has described the reasonableness test as follows.

[...] the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.⁹⁴

110. [Section 9\(3\)](#) of the Equal Opportunity Act is consistent with this approach. That section sets out a number of factors to be taken into account in deciding reasonableness. In summary, those factors are:

- a. the nature and the extent of the disadvantage caused
- b. whether the outcome is proportionate to what the respondent sought to achieve by imposing the requirement, condition or practice
- c. the costs of any alternative measures
- d. the respondent's financial circumstances
- e. whether reasonable adjustments or accommodation could be made to reduce the disadvantage caused.⁹⁵

94 [Secretary, Department of Foreign Affairs and Trade v Styles & Anor \[1989\] FCA 342](#), [51]; (1989) 88 ALR 621, 634. Quoted with approval by Dawson and Toohey JJ in [Waters & Ors v Public Transport Corporation \[1991\] HCA 49](#); (1992) 173 CLR 349. See also [Amery v State of New South Wales \(2004\) EOC 93-352](#) and [Clarke v Catholic Education Office \(2003\) FCA 1085](#). This test of reasonableness was also applied by the Victorian Supreme Court in [State of Victoria v Turner \[2009\] VSC 66](#).

95 [Equal Opportunity Act 2010 \(Vic\) s 9\(3\)\(a\)](#).

111. The Explanatory Memorandum clarifies that none of these facts in isolation will be determinative of reasonableness. There may also be other relevant factors depending on the particular case.⁹⁶

112. In [Schou No 2](#)⁹⁷ Phillips JA commented that the central question is whether the condition, requirement or practice actually imposed is reasonable, and not whether some alternative arrangement proposed by the complainant is also reasonable:

As I have said, so far from being not reasonable, the attendance requirement was perfectly reasonable... The existence of the alternative – an alternative which was put forward merely as a short-term solution to the temporary problem – did not dictate the contrary. That is not to say that alternatives are irrelevant: as already noticed, the fact that an alternative could have been adopted will ordinarily be one of the circumstances that must be examined in determining reasonableness. But it must be one that bears upon the reasonableness of the condition or requirement at issue.⁹⁸

113. Phillips JA went on to provide an example where one condition or requirement is no 'better suited' to the employer's needs than another, in which case 'it ceases to be reasonable to insist upon the one over the other'.

114. It remains to be seen whether the explicit requirement to consider the availability of reasonable adjustments or accommodation in an analysis of 'reasonableness' goes further than the test set-out by Phillips JA in [Schou No 2](#).

Motive and intention not relevant

115. Indirect discrimination may be unintentional. [Section 9\(4\)](#) of the Equal Opportunity Act states that in determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.⁹⁹ This complements [Section 10](#) of the Equal Opportunity Act, which also clarifies that 'in determining whether or not a person discriminates, the person's motive is irrelevant'.¹⁰⁰

96 [Explanatory Memorandum to the Equal Opportunity Bill 2010](#), 14.

97 [\[2004\] VSCA 71](#).

98 *Ibid* 26.

99 [Equal Opportunity Act 2010 \(Vic\) s 9\(4\)](#).

100 *Ibid* s 10.