



Submission to the Equal Opportunity Act Review

January 2008

Overview

The Victorian Council of Social Service (VCOSS) has served Victorians as the peak independent coordinating body of the social and community services sector for over 60 years. VCOSS raises awareness of the existence, causes and effects of poverty and inequality and advocates for the development of a sustainable, fair and equitable society. As well as promoting the wellbeing of those experiencing disadvantage and contributing to initiatives seeking to create a more just society, VCOSS also provides a strong, non-political voice for the community sector.

VCOSS works together with its members on issues of poverty and inequality and seeks to ensure that community resources and services are accessible and affordable. VCOSS promotes community participation and strengthening the value of citizenship in our community. VCOSS advocates on behalf of disadvantaged Victorians through:

- policy development and analysis;
- direct advocacy to government;
- evidence based research;
- reports, media releases and submissions;
- an annual State budget submission;
- strengthening the community sector with collaborative initiatives; and by
- providing a range of services to member organisations.

The Victorian Council of Social Service (VCOSS) congratulates the Attorney-General on the initiative to establish an independent review of the *Victorian Equal Opportunity Act 1995* and to reform the legal framework for understanding and responding to discrimination.

The current review presents a significant opportunity to reconsider the nature and approach to discrimination in Victoria, particularly in light of the wide mandate given to the Reviewer 'to ensure that discrimination is eliminated to the greatest possible extent'¹. Together with the *Victorian Charter of Human Rights and Responsibilities Act 2006* ('the Charter'), the *Equal Opportunity Act (EOA)* represents one of the most significant legal protections for disadvantaged and excluded groups in Victoria. A review of this nature provides a unique opportunity to reconceptualise discrimination and enact appropriate measures to respond to, eliminate and prevent discriminatory practices.

Effective legislative reform is informed by an understanding of the practical application of the law to the lives of people most affected by it, and VCOSS

¹ Victoria, Department of Justice, 'Equal Opportunity Act Review: Terms of Reference', in *Equal Opportunity Review: Discussion Paper*, November 2007, 51.

welcomes the consultation process adopted and the opportunity to contribute a submission to the review.

For this reason, VCOSS was disappointed at the limited time provided for accepting submissions, and at the timing of the submission deadline. The two month discussion paper consultation period, which included the Christmas – New Year period, has been insufficient to properly engage our membership in a discussion on the *Equal Opportunity Act* review in time for the 14 January deadline, particularly as most organisations close over the Christmas – New Year period and many people take holidays at this time which significantly curtails the time available to consult and to prepare submissions. VCOSS did appreciate the short extension, and hopes that any future consultation periods will be mindful of what factors are impacting on organisations' capacity to contribute to this significant review.

The Human Rights Community Engagement Project conducted by VCOSS and the Federation of Community Legal Centres in 2005,² demonstrated that most Victorians who are marginalised socially and economically are also marginalised politically and are unlikely to participate in public submission processes such as this one without support. As the peak body of the social and community sector, VCOSS is keen to contribute effectively to the current review process by consulting as widely as possible with our membership about the impact of discrimination on the lives of their clients and service users, and to garner their reflections on potential changes to the anti-discrimination framework. More time is needed for a genuinely inclusive state-wide consultation on a matter of such importance and complexity.

Introduction

The introduction of the Victorian Charter represented a significant development in Victoria's commitment to social justice. It has provided a framework for all future legislative development in Victoria, and as of 1 January 2007, all new Victorian legislation should be compatible with the human rights set out in the Charter.

Any reforms to Victorian anti-discrimination laws should be consistent with Australia's international and domestic human rights obligations, including any international treaties to which Australia is a signatory, and the Victorian Charter. The principle of non-discrimination is fundamental to the exercise and enjoyment of human rights and is included in all international human rights treaties. Section 8 of the Charter enshrines this right and states: 'Every person has the right to enjoy his or her human rights without discrimination'³. The grounds on which discrimination is prohibited are based on the attributes contained in the *Victorian Equal Opportunity Act*, and as such the list of protected attributes has a direct bearing on whether or not a person can enjoy the protection afforded by the right to be free from discrimination, or the discriminatory application of the law.

In addition, the renamed Victorian Equal Opportunity and Human Rights Commission ('the Commission') – formerly the Equal Opportunity Commission of Victoria (EOCV) – has taken on new roles and responsibilities under the Charter, including the primary responsibility for education, monitoring and reporting on the operation of the Charter. The current review provides an opportunity to harmonise the dual functions and operation of the Commission and ensure that human rights and anti-discrimination are complementary frameworks.

² Stephanie Cauchi, *Making Human Rights Real: Final Report of the Victorian Human Rights Community Engagement Project*, Victorian Council of Social Service, September 2005.

³ *Victorian Charter of Human Rights and Responsibilities Act 2006*, s8(2).

1. Is there a case for reforming the law?

It is VCOSS' experience that discrimination remains endemic and entrenched, and despite the major advances over the past 30 years, that the current anti-discrimination framework is largely failing those that are most in need of its protection.

There is a compelling need to change the law to more accurately reflect people's experience of discrimination. The current framework assumes that discrimination is aberrant, not pervasive, and is based on an individual, event-specific complaint system that positions discrimination as transgressive behaviour rather than being often a product of systemic inequity.

It is vital that any reform acknowledges that a strong link exists between disadvantage and discrimination, and that this discrimination often manifests in ways which are subtle and systemic. It is also true that people with limited social, economic, financial and political capital are often the least able to challenge the basis or manifestations of such discrimination.

The Discussion paper notes that there is a discrepancy between the common understanding of discrimination as being 'unfair treatment against a person because of their membership of a socially defined group' and the narrower legal definition⁴. A greater fit is needed between the legal definition of discrimination and the broader meaning to adequately reflect social expectations regarding protection from discrimination.

In particular, VCOSS recommends urgent reform to:

- ❑ Explicitly recognise the link between disadvantage and discrimination;
- ❑ Acknowledge social status as a protected attribute (a definition should include, but not be limited to employment status, source of income and homelessness)⁵;
- ❑ Address systemic discrimination in the complaints process, but also when considering proactive role the Commission may have to positively promote equality and eliminate discrimination; and
- ❑ Clarify the meaning and scope of indirect discrimination.

The scope and extent of discrimination

Discrimination prevents people from being able to fully participate fully in social, economic, political and cultural life and being active participants in their community.

For many people with disability, for example, the Victorian *Equal Opportunity Act (EOA)* seems to provide a more accessible and expedient, and less expensive, forum in which to pursue a complaint than the *Disability Discrimination Act 1992 (DDA)*. However, neither piece of legislation adequately defines or prohibits systemic discrimination, which is particularly evident in areas such as housing, employment and transport.

⁴ Discussion Paper, above n1, 1.

⁵ Philip Lynch and Bella Stagoll 'Promoting Equality: Homelessness and Discrimination' (2002) 7 Deakin Law Review 15).

Indigenous Victorians

Indigenous Victorians experience disadvantage and discrimination across nearly every measure.

Indigenous Victorians have poorer health and education outcomes across all age groups and across all measures, including reduced life expectancy, higher levels of cardiovascular disease, chronic illnesses, and respiratory diseases, lower education levels (retention rate to Year 12 38% Indigenous, 81% non-Indigenous) and higher unemployment rates (unemployment rate: 15% Indigenous, 5% non-Indigenous). This disadvantage is also evident for Indigenous children and young people: for example one in ten Indigenous children under 15 years old report having ear/hearing problems, about three times the rate of non-Indigenous children,⁶ lower birth weights, higher infant mortality, lower immunisation rates, lower use of Maternal and Child Health Services, higher rates of mental illness, and are over-represented in child protection, being 9.8% more likely to be the subject of substantiations.⁷

This disadvantage stems from discrimination in a range of areas, including employment, housing, education, and health and community services. Indigenous Victorians experience significant levels of racism, which prevents them from participating both economically and socially in their communities. Further, many services and supports are not based on a culturally sensitive practice, thereby not meeting the needs of Indigenous Victorians.

Access to housing

Around 512,000 Australians, or 2.5 per cent of the population, use mobility aids⁸. Extrapolating from this data⁹, an estimated 125,000 Victorians use mobility aids, imputing that they have a mobility impairment¹⁰.

There are no provisions at either the State or Federal level which mandate that housing be built to an accessible, visitable or adaptable standard¹¹. The Federal *Draft Access to Premises Standard* covers only 'residential buildings other than homes',

⁶ Australian Bureau of Statistics, *4715.0 National Aboriginal and Torres Strait Islander Health Survey, 2004–05*, 2006.

⁷ Department of Human Services, *Aboriginal Services Plan: Key indicators 2004-05*, State of Victoria, Melbourne, June 2006; Aboriginal Affairs Victoria, Department for Victorian Communities, *The Victorian Government Indigenous Affairs Report July 2002 – July 2004*, State of Victoria, Melbourne, 2005, p.38; ABS 2000: DHS, Burden of Disease report

⁸ ABS, *Survey of Disability, Ageing and Carers*, 4430.0, 2003, p 31, table 13

⁹ Victoria-specific data are not available.

¹⁰ Based on an estimated Victorian population of 5,022,000 as at June 2005,

<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3235.2.55.001>

¹¹ These definitions of visitable, adaptable and accessible housing are adapted from 'Housing for Life: Planning for Accessible and Adaptable Homes in Victoria', Housing Resource and Support Service, www.hrss.org.au

Visitable Housing

Visitable dwellings allow everyone (including wheelchair users) to visit with dignity, stay overnight, and for an occupant with a disability to reside temporarily.

Adaptable Housing

Adaptable housing provides for access to areas essential for all visitors regardless of ability and age (i.e. visitability) but also includes structural features that allow for cost efficient alterations which will make the dwelling readily useable for anyone. Adaptable housing allows occupants to remain in their dwelling when their mobility is impaired through frailty or disability, by ensuring that any necessary alterations are cost effective. All adaptable dwellings should be visitable, but additional provisions enable the dwelling to be altered without major structural works and at much lower cost to make it fully accessible and useable in the future.

Accessible Housing

Accessible dwellings allow full access and use for all occupants and visitors.

including such accommodation as boarding houses, backpackers and disability-specific housing¹².

There is currently no regulation for housing to meet a minimum adaptability standard,— meaning that it can be modified if necessary at relatively low cost. Modifications to a property that is not accessible or adaptable can be extremely expensive, imposing a huge cost burden on people with a disability, many of whom are already significantly financially disadvantaged in comparison to those without a disability. In addition, the lack of visitable housing prevents many people with a disability from participating in social activities that people without a disability take for granted. One VCOSS stakeholder noted:

The isolation occasioned by people with a disability having difficulty visiting their friends', neighbours and family's houses...excludes people with a mobility impairment from numerous contacts and networks, with those without such impairments take for granted. There are the social events of course (BBQs, birthday and other parties, children's sleepovers etc)....

Not being able to participate in such gatherings is personally disappointing, difficult and at times devastating, and this is for good reason. Social gatherings are very often what makes life worthwhile and enjoyable. They allow for informal contacts which can lead to further social activities...and such fragile and haphazard eventualities as meeting people with whom one forms various degrees and kinds of friendships including romantic involvements.

Inaccessibility...not only excludes people with a mobility impairment but also precludes others from receiving what excluded people have to offer. One small (pragmatic) example would be the possibility of babysitting for others, but there is of course people's wit, people's grace, people's courage, people's grief, people's shyness, and the numerous other elements of people that enrich our lives.¹³

While the *DDA* prohibits discrimination in rental housing, there is substantial anecdotal evidence that many people with a disability still experience discrimination from landlords and real estate agents in trying to rent a home. Also, while both the *DDA*¹⁴ and the *EOA*¹⁵ make it unlawful for landlords or owners to disallow a person with a disability to make alterations to a rental property to accommodate their disability if certain conditions are met, often landlords and owners can make it difficult for a person with a disability to do so.

Access to premises

There is currently no prohibition against systemic discrimination against people with disabilities in access to public and commercial premises at either the State or Federal level. The *DDA* allows discrimination in access to premises if they are designed to be inaccessible and any alteration would impose 'unjustifiable hardship' on the owner¹⁶. The proposed Federal *Draft Access to Premises Standard* was developed to strengthen protection against discrimination in access to public and commercial premises in the *DDA* but has not yet been adopted into law.

¹² http://www.hreoc.gov.au/disability_rights/standards/Access_to_premises/premises_advisory.html

¹³ Bartl, B, *Submission to Inquiry under section 207 of the Equal Opportunity Act 1995 by the Scrutiny of Acts and Regulations Committee regarding Discrimination in Planning, Building and Local Government Law*, 2004, unpublished.

¹⁴ s 25 (2) d.

¹⁵ s 5 (51) i.

¹⁶ s 23 (2) a.

Transport

There is significant discrimination in the provision of transport and transport concessions in Victoria. Many older people and people with disabilities are not able to use public transport. Approximately one third of people with a disability in Victoria – around 300,000 people state wide - report difficulty in using public transport.¹⁷ In addition, 18 per cent of people over the age of 60 report needing assistance with transport, rising to 33 per cent for 80-84 year olds and 43 per cent of 85-89 year olds.¹⁸ A significant proportion of these people are largely dependent on door-to-door transport for their independent mobility. This transport is largely provided by taxis and community transport services.

People dependent on taxis and community transport to meet their mobility needs face significantly higher transport costs than people who are able to access public transport. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) noted, 'the current provision of taxi services does not provide the economic accessibility which is available to bus, tram and train travellers'.¹⁹

Significant differences exist for people able to use public transport, and those or are not able to do so due to age or the nature of their disability. These include:

- ❑ the relatively high cost of taxi fares compared to public transport;
- ❑ restrictions on the annual amount of concession travel available through the Multipurpose Taxi Program (MPTP), where no such restriction exists on public transport concessions;
- ❑ the application of this restriction to people with certain types of disabilities and not others; and
- ❑ the complexity of the application process for the program, where public transport users may simply use a Centrelink Health Care Card.

People unable to use public transport due to disability or illness may be eligible for the Multipurpose Taxi Program (MPTP), which entitles them to a 50% concession on the use of taxis. An average taxi trip in Melbourne costs \$18.80, which would be reduced to \$9.40 for members of the MPTP.²⁰ A typical return trip by taxi would therefore cost \$18.80 with the currently available concession. By contrast, people living in Melbourne who are able to use public transport pay a daily concession ticket of between \$2.60 (Zone 1) and \$5.30 (Zone 1 and 2).

The MPTP concession is capped at \$30 per trip and is limited to \$1,045 per year. People with particular disabilities or illnesses are automatically exempt from the annual cap to their MPTP usage while others may apply to have this cap removed. The choice of which disabilities are eligible and which are not appears fairly arbitrary: for instance ADHD is included while heart disease and arthritis are not. Furthermore, the MPTP card costs \$16.50 and is valid for 6 years while public transport concession cards do not incur a fee.

Community transport is a general term used to describe not-for-profit transport alternatives for people who are unable to use public transport or cannot afford to use

¹⁷ Department of Infrastructure (DOI), *Accessible public transport in Victoria: action plan 2006 – 2012*, DOI, Melbourne, September 2006, 6.

¹⁸ Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers 2003*, ABS, Canberra, September 2004.

¹⁹ Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Time to respond: realising equality for people with a disability utilising taxi services*, VEOHRC, Melbourne, November 2007, A-4.

²⁰ Essential Services Commission (ESC), *Issues Paper: Taxi Fare Review 2007-08*, ESC, Melbourne, December 2007, 24.

taxis on a regular basis. In Victoria, community transport is not funded by government but rather is provided from an ad hoc mix of funding and in-kind support from volunteers, local government and community organisations as well as contributions from passengers. As such, community transport services are often limited to particular trip types and particular passenger groups.

In Canada, anti-discrimination legislation has resulted in the provision of door-to-door 'specialised transit' services to people unable to use public transport. The fares for these services are meant to be equivalent to public transport fares.²¹

Discrimination in public transport accessibility is also experienced by carers of young children. VCOSS focus groups with young parents revealed that some bus companies require parents to fold their prams before entering a vehicle without assistance from the driver effectively preventing some parents from travelling and causing significant distress to others.²² In Victoria, some public transport accessibility infrastructure, such as manually deployed ramps on trains, is only available for people in wheelchairs, but not carers or people who are ambulant but have difficulties with their mobility.

Employment

Around 20 per cent of Victorians have some sort of disability.²³ While people with disability report discrimination in the open employment market, it can often be difficult to prove when it manifests as systemic discrimination, as the following anecdotes related to VCOSS illustrate:

- ❑ Managers see that employing someone with a disability is taking a risk and unless they are supported by senior management and the Board to employ people from disadvantaged groups, they are unlikely to do so²⁴
- ❑ 'I don't always say I've got MS when I apply for jobs because then I get put at the end of the pile... Employers automatically think that you are a time-bomb as soon as you tell them you have MS.'²⁵
- ❑ 'My employer saw my diagnosis ... not me'²⁶
- ❑ A woman with a mental illness, had been offered an administration job in a workplace with about twenty staff. The week before she was due to start work, the employer discovered that she had been suffering from severe depression and that she was on medication. The employer rang her, apologised and said they no longer 'needed her – the business could cope without an extra staff person'.²⁷
- ❑ One man obtained work through a temporary agency as a casual in the textiles industry. He told his employer he has epilepsy. After about three months he had two seizures at work and provided medical certificates. On

²¹ See Ontario Human Rights Commission website, <http://www.ohrc.on.ca/en/resources/news/theme-transit/view>

²² J Fritze, "You might as well just stay at home": young parents and transport in Victoria, VCOSS, Melbourne, September 2007.

²³ ABS 2003, above n16, 19, table 5.

²⁴ HREOC, *WORKability: People with Disability in the Open Workplace Interim Report of the National Inquiry into Employment and Disability August 2005*, cited by Innes, G, 'Using the Law to Make a Difference', Sir Ninian Stephens Lecture, May 2007,

http://www.hreoc.gov.au/about/media/speeches/human_rights/2007/law_make_difference.html#fn5

²⁵ Camela, P and Wilson, K, *Job retention and workforce participation by people with chronic and mental illness*, DEAC, presentation, May 2007.

²⁶ Ibid.

²⁷ Anderson, J and McCarthy, A, *Submission: Productivity Commission Inquiry into the Disability Discrimination Act 1992 (Cth)*, JobWatch, 2003, unpublished

returning from the doctor the agency rang to say the employer had terminated his employment due to too many sick days.²⁸

- A parent called on behalf of his daughter who was on probation in a real estate business. She was instructed to do dicta-phone work although this was not part of her duties. She explained that she had a hearing problem and could not do that work. After the explanation she was ignored and bogus telephone calls were made to her²⁹.

²⁸ Ibid.

²⁹ Ibid.

2. Are there better ways to prevent discrimination?

The relationship between disadvantage and discrimination

It is VCOSS' conviction that a strong causal link exists between disadvantage and discrimination.

The Discussion Paper notes that the State Government recognises the link between discrimination and disadvantage in key government strategies and policy documents, including the Attorney-General's *Justice Statement*, *A Fairer Victoria*, and *Challenges in Addressing Disadvantage in Victoria*. The current review provides an opportunity for the rhetoric consistent across the whole of government policy to be enshrined in legislation in order to provide *effective* protection from discrimination.

Discrimination remains widespread, but many forms of discrimination are not addressed, or not adequately addressed, by the current anti-discrimination framework. For instance:

- ❑ According to a 'snapshot' at 17 January 2006, approximately half of all people in prison had two or more characteristics of serious disadvantage. These characteristics include being unemployed, being homeless, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being of Aboriginal or Torres Strait Islander descent.³⁰
- ❑ Women's total average earnings have dropped in the last 10 years and now equal about 66% of men's earnings.³¹
- ❑ People from areas of high socioeconomic disadvantage are likely to have increased morbidity and mortality rates. The AIHW estimates that death rates in Australia would reduce by 19% for men and 12% for women if the health of all Australians was on par with the richest 20% of Australians³².
- ❑ Aboriginal and Torres Strait Islander people reported higher rates of unemployment, poorer educational outcomes and lower rates of home ownership than non-Aboriginal people³³.
- ❑ Although comprising less than one per cent of Victorians aged 0–17, Indigenous children represent 8.3 per cent of the total number of current clients within the child protection system, and are six times more likely to be removed from their family by Child Protection Services.³⁴

People with a disability report living with the effects of the intersection between discrimination and broader disadvantage. They felt that their disability negatively affected income, employment prospects, overall financial situation, their relationships with other people, and their interactions with the judicial system and the public sector. Many participants articulated through their descriptions of their housing pathways the

³⁰ *Growing Victoria Together Progress Report*, 2005-06, Appendix B – Service Delivery, p358.

Department of Premier and Cabinet, State of Victoria.

³¹ VicHealth, *Discrimination and Violence as determinants of mental health and wellbeing: Research Summary 3*, January 2005, 3.

³² Australian Institute of Health and Welfare, *Australia's Health 2006*, p. 154

³³ Australian Institute of Health and Welfare, *Australia's Health 2004*, (2004) 201.

³⁴ Victorian Council of Social Service, *State Budget Submission 2005-06*, (2005) 31.

view that they lack the housing choices that people without disabilities have. For instance:³⁵

- ❑ Landlords were not receptive to modifications being carried out. One person had made what they considered to be very minor modifications to their bathroom, but they were harassed by the landlord over this matter;
- ❑ Another person noted: “Being disabled means you cannot get a job and this means you cannot improve your housing options”;
- ❑ One issue that was important for some participants was problems with landlords or real estate agents (in the case of private tenants)...As one participant said, “It doesn’t matter what disability you have, the landlords and the real estate agents treat you terribly”. This was a common view for other participants, particularly those with a psychiatric disability.
- ❑ Participants noted that many toilets simply are not accessible to them, and that if they can get in, they cannot get out again. Similarly, many reported *ad hoc* arrangements for having a shower that lasted for years. Many noted that they avoid meeting in friends’ homes – preferring to meet in cafés or restaurants – simply because of problems in going to the toilet.

VCOSS supports strengthening existing provisions in the EOA against discrimination in accessing and making modifications to rental accommodation. VCOSS also supports strengthening the role of the VEOHRC in preventing such discrimination, for example, building on its ‘Access All Areas’ publication directed at property managers working with people with disability who require support.

VCOSS strongly recommends that reform to the EO Act should explicitly recognise the link between discrimination and disadvantage.

Attributes

The Discussion Paper notes that the two main reasons why the EOA currently has limited impact on addressing causes and effects of disadvantage are because the legal definition of discrimination does not always accord with the different outcomes apparent for people or groups who are disadvantaged; and because successful complaints do not address structural issues like poverty and homelessness.

It is VCOSS’ view that the single most effective measure that can be taken in the current review to address causes and effects of disadvantage is to include social status as a prohibited ground for discrimination. Social status should be defined to include but not be restricted to, *inter alia*, employment status, source of income and homelessness³⁶;

VCOSS is aware that this issue was considered in 2005, and refers the Reviewer to the numerous submissions prepared at that time, in particular that of the PILCH Homeless Person’s Legal Clinic submission, dated 23 December 2004.

VCOSS strongly recommends that social status be included in the Equal Opportunity Act as a protected attribute.

³⁵ Kroehn et al, *The Housing Careers of Persons with a Disability and Family Members with Care Responsibilities for Persons with a Disability*, Project C: Qualitative Data Collection Report of Focus Groups, National Research Venture 2: 21st Century Housing Careers and Australia’s Housing Future, AHURI, June 2007, unpublished.

³⁶ Lynch and Stagoll, above n5.

Definition of disability

There is no specific definition of what constitutes disability in the *EOA*. The definition of 'disability' in the *Disability Act 2006* is different to - and considerably weaker than - the definition of disability in the *DDA*, making its compliance with the *DDA* inconsistent. For example, the definition of disability in the *DDA*³⁷ includes mental and physical illness, whereas the definition in the *Disability Act 2006*³⁸ does not.

The prevention of disability discrimination would be improved if the *EOA* adopted a specific definition of disability that is broader than the definition contained in the *Disability Act 2006*.

VCOSS suggests that this definition be either the definition contained in the *DDA*, or in the UN Convention on the Rights of People with Disabilities³⁹. The former would harmonise State anti-disability discrimination legislation with the *DDA*; the latter would be consistent with Victoria's adoption of the *Charter of Human Rights and Responsibilities Act 2006*.

Action Plans

The use of Action Plans has been occurring with some success in the Disability sector as an active means of preventing discrimination.

In Victoria, Disability Action Plans (DAP) are legislated through the *Disability Act 2006*. The *DDA* is referenced in section 38 (2) of the *Disability Act 2006*, where a DAP is defined as a Plan which complies with Part 3 of the *DDA*.

The Victorian *Disability Act 2006*, however, requires only public sector bodies to prepare DAPs. Section 39 (6) states that Government Departments are required to develop DAPs, as well as 'prescribed' statutory authorities and corporations, but these authorities and corporations do not seem to be prescribed in either the Act or the accompanying regulations. There is no requirement that private organisations prepare DAPs. While the Victorian Office for Disability has a role in supporting organisations who wish to prepare DAPs, the Office has no clear mandate to promote the preparation of DAPs by private organisations⁴⁰.

According to the *Disability Act 2006*, for a DAP to comply with the *DDA* it must include the provisions listed under 3 (61) of the *DDA*, and public sector bodies must report and bodies must report on the implementation of their DAP in their Annual Report. However, no body is charged under the *Disability Act 2006* with monitoring implementation of DAPs, either singly or systemically, or ensuring that goals or targets set within DAPs are met.

VCOSS believes that there should be greater alignment between the *EOA* and Disability Action Plans in order to strengthen the coverage and operation of DAPs.

³⁷ s 4 (1), *Disability Discrimination Act 1992* (Cth).

³⁸ s 3 (1), *Disability Act 2006* (Vic).

³⁹ There is no specific definition of what constitutes a disability in the UN Convention on the Rights of People with a Disability. The preamble states that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". Article 1 states that "(p)ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". See <http://www.un.org/disabilities/default.asp?navid=23&pid=151#sqc3>

⁴⁰ http://www.officefordisability.vic.gov.au/disability_action_plans.htm

VCOSS recommends that the Commission have a role in promoting the development of DAPs by private organisations, and in registering and monitoring the implementation of DAPs where they are developed. This role should complement the work of the Victorian Office for Disability in providing support and advice to organisations in developing DAPs⁴¹.

Other Strategies

There is also a place for the introduction of proactive strategies. For example, to improve employment opportunities for people with disabilities at the State level, the Victorian Government has implemented a Disability Employment Strategy. While the intention is to improve the recruitment, retention and promotion of people with disability, its focus is on the public sector only.

VCOSS supports building a positive culture of non-discrimination in private sector employment for people with disabilities, building on work it has done in this area such as developing the publication 'Disclosing Disability in Employment'⁴². This should be done in conjunction with the Victorian Office for Disability, which develops campaigns and hosts a range of online resources around employment of people with disability⁴³. Strategies which the VEOHRC could adopt as part of this focus include:

- ❑ working in partnership with employers and industry bodies to identify strategies to encourage more businesses to proactively employ people with disabilities
- ❑ acting as an independent 'third party' to provide intervention on request by an employer or employee to advise on options eg. flexible work arrangements, job transfer or restructure
- ❑ promotion of examples of 'best practice' in employment and retention of people with disability
- ❑ facilitation of peer-to-peer training for employers
- ❑ building a partnership with the Australian Employers Network on Disability, a not-for-profit employer-led association promoting the benefits to business of employing people with disability.⁴⁴

⁴¹ http://www.officefordisability.vic.gov.au/disability_action_plans.htm

⁴² Victorian Equal Opportunity and Human Rights Commission, *Disclosing Disability in Employment: Guidelines for people with disabilities and their advocates* (2007),

<http://www.humanrightscommission.vic.gov.au/publications/disability%20disclosure%20guidelines/>

⁴³ http://www.officefordisability.vic.gov.au/research_and_resources.htm#employment

⁴⁴ <http://www.employersnetworkondisability.com.au>

3. Are there better ways to resolve discrimination?

Effectiveness of current complaints system

Current approaches to resolving discrimination assume that there are identifiable parties to a dispute, and that these parties have the will and capacity to engage with the complaints and conciliation process in the first place.

It is VCOSS' experience that many people either do not feel comfortable approaching formal bodies such as the Commission, or feel that there is little that can be done to effectively protect their rights. In the community consultations conducted by VCOSS around the introduction of the Victorian Charter, a disturbing trend evident was that people felt the onus of dealing with discriminatory behaviour lay with themselves and that there was little effective assistance available from outside. This was particularly true for people from a non-English speaking background and visible minorities. People spoke of ignoring discriminatory comments made, or of 'being strong' in themselves if harassed or abused.⁴⁵

Formal dispute resolution can be intimidating and may be viewed as a last resort, (if in fact it is viewed as an option at all); it can be time consuming and stressful; applicants may be fear of adverse consequences; claims are individual and event-specific and do not generally address systemic problems of rights abuses, nor complaints by a group of people; and it may not be culturally appropriate or meaningful.

Effective and appropriate remedies for dealing with discrimination must be culturally relevant and explored collaboratively with affected communities. Complaints mechanisms must be equally accessible to everybody in practice, and not merely in theory.

Resolution of discrimination claims needs to be broadened to protect people from the effects of systemic discrimination, and not be solely dependent on an individual's ability to enforce their rights.

Response to systemic discrimination

In VCOSS' experience, the current investigative process is inadequate for responding to allegations of systemic discrimination.

In 2005, VCOSS and the Federation of Community Legal Centres (FCLC) made a formal submission requesting the EOCV undertake a systemic review of discrimination against women in prison under s156 of the *Equal Opportunity Act 1995* (Vic). After undertaking a preliminary investigation, the Commission declined to seek approval from the Attorney-General to undertake a systemic review, at least in part because it was felt that the complaint could be more adequately addressed through a human rights framework, and that the Commission's role was more effectively served through its educative function under s 162. The process has reached a stalemate, and to date has produced no substantial change to the conditions of women in Victorian prisons.

Please refer to the Appendix of the FCLC' submission for a more detailed chronology of the submission to the EOCV regarding systemic discrimination against women in Victorian prisons.

⁴⁵ Cauchi, above n2.

Orders

Remedies available in resolving a complaint, particularly when that complaint arises as a consequence of systemic discrimination, must be capable of effecting a systemic effect and not merely an individual one. Such instances have broader public interest and relevance than merely to the individual concerned.

VCOSS has been involved in assisting one complainant to raise a complaint about bus operators not publishing the timetable for accessible buses at bus stops. Through mediation it was possible to get the bus operator to identify the schedule of accessible bus stops at the nearest bus stop to the complainant's home but not at other bus stops provided by that company, and not at stops provided by other companies. Soon after the decision, the bus company withdrew its provision of services and the service was re-tendered, rendering the original commitment meaningless.

Systemic discrimination is still a problem on public transport and is one which is not usefully resolved on a person by person basis. Furthermore, facility for representative and third party complaints are needed for public transport even with the *Disability Standards for Accessible Public Transport*, as these do not cover all relevant issues nor have clear complaints process.

Access to legal representation

Adequate representation and assistance for individuals to bring complaints is integral to the effective functioning of a complaints and conciliation process given the frequent disparity in power between parties.

VCOSS endorses the recommendations made in the Federation's submission to increase funding for community legal centres or Victoria Legal Aid to provide legal advice and representation for discrimination complaints.

4. Can the Commission's Governance be improved?

As of 1 January 2007, the renamed Victorian Equal Opportunity and Human Rights Commission took on new roles and responsibilities under the Victorian Charter to promote and protect human rights. Given the decision to merge the anti-discrimination and human rights functions within the one Commission rather than to create separate Commissions or Commissioners, it is logical that the twin functions of the Commission be harmonised in regard to the Commission's governance and institutional structure. Any changes proposed must respect the integral role the Commission plays in not only eliminating discrimination, but also in fostering a positive cultural shift towards respecting human rights. For this reason VCOSS reiterates the arguments made earlier that the Commission's anti-discrimination mandate be seen within a human rights framework that entails a positive obligation to create a climate of substantive equality, not merely the absence of discriminatory behaviour.

VCOSS has no specific recommendations to make regarding the institutional structure of the Commission.