



Submission to the Equal Opportunity Review Options Paper May 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; and
- strengthening the community sector with collaborative initiatives and by
- providing a range of services to member organisations.

RESPONSE TO OPTIONS PAPER

VCOSS welcomes the opportunity to comment on the Options Paper. Many of the options proposed offer a valuable opportunity for real, significant reform of the anti-discrimination framework, and VCOSS is gratified to note that the Options Paper reflects issues and concerns raised by many of the submissions to the first stage of the Equal Opportunity Act Review.

CHAPTER TWO – A NEW FRAMEWORK FOR THE EO ACT

VCOSS supports the initiative to reform the framework of the Equal Opportunity Act (“EO Act”) to work towards substantive equality by attempting to actively remove barriers preventing equality and encouraging active compliance. We commend the Review for acknowledging that the current model is not effective in eliminating discrimination and for

attempting to reform the anti-discrimination framework so that it is less reactive and dependent on individual, event-specific claims that often have limited impact on structural or systemic discrimination. For this reason, VCOSS reiterates that there is a compelling need to change the law to more accurately reflect people's experience of discrimination.¹ It is vital that a reformed anti-discrimination framework includes a positive duty not to discriminate and shifts the responsibility away from individuals having to demonstrate discrimination, which has been particularly problematic in dealing with indirect or systemic discrimination.

VCOSS also reiterates the view put forward in our original submission to the EO Act that the list of protected attributes must be expanded to include social status as a prohibited ground for discrimination, as the single most effective measure that can be taken to address the causes and effects of disadvantage.

Option 1 – update the EO Act to reflect passage of the Charter:

VCOSS does not support Option 1.

As the Options Paper clearly recognises, the existing Equal Opportunity framework is failing the people who need it most.² One of the principal factors preventing the current EO Act from satisfactorily redressing discrimination is the lack of mechanisms for recognising substantive equality or creating a positive duty not to discriminate. As Option 1 proposes that neither of these issues are addressed in an amended EO Act, VCOSS does not support Option 1.

If Option 1 becomes the recommended option, then at a minimum it is necessary to include specific recognition of the links between the new Victorian *Charter of Human Rights and Responsibilities Act* and the EO Act.

Option 2 – framework to address systemic discrimination

VCOSS supports a number of proposals in Option 2.

We support the recognition of explicit links with the Charter, particularly the non-discrimination provision in section 8 recognising equality before the law; the requirement that Public Authorities act compatibly with the principles and provisions of the Acts; and the requirement to work towards substantive equality.

VCOSS supports explicit acknowledgment that special measures are not discriminatory.

VCOSS supports an 'express requirement to make reasonable adjustments'. We also support reversing the onus on respondents to demonstrate why refusal to make 'reasonable adjustments' is reasonable.³

VCOSS supports the initiative to create a positive duty not to discriminate which must apply to both the public and private sectors. This must occur through measures

¹ VCOSS, *Submission to the Equal Opportunity Act Review*, Victorian Council of Social Service, January 2008, 3.

² Options Paper, 9.

³ Ibid, 31.

described in chapter 3 including education, research, monitoring and reporting, and advocacy-related options, not simply through the existing complaint mechanism.

Option 3: framework to address systemic discrimination and create equality

VCOSS believes that Option 3 best achieves improved outcomes within the Victorian anti-discrimination framework, as it establishes a wider obligation to create substantive equality, not necessarily limited to existing attributes and current areas of operation. In VCOSS' opinion, Option 3 is more aligned with the stated aims of the Equal Opportunity Act Review Discussion Paper to make Victoria a fairer place in which to live⁴ by imposing more of a positive duty to create equality.

VCOSS notes the discussion in the Options Paper of the United Kingdom (UK) 'Equality Act' model which imposes a general duty to promote equality of opportunity. This would go a way towards addressing the problem that the current EO Act faces by framing discrimination as equality of *opportunity*, not as achieving substantive equality.

VCOSS disagrees that any such duty be limited to public authorities. If the Act is serious about attempting to eliminate discrimination to the greatest possible extent, then the duty must extend to all bodies to whom the Act applies. This is compatible with, but does not duplicate the obligations under the Charter 'to ensure that all acts and decisions are performed and made in a way that is cognisant of and compatible with the human rights contained in the Charter'.

By creating a positive or general duty, the obligations under the EO Act would mirror those of the Charter. There are, however, notable differences between human rights and equality frameworks that require both Acts to contain similar and complementary responsibilities. Given the largely individual nature of human rights, relying on the Charter alone to create substantive equality will not in itself eliminate systemic discrimination, and the EO Act has the potential for broader application.

The Options paper notes that Option 2 is the preferred option as it does not impose an undue regulatory and compliance burden. While VCOSS recognises that such initiatives proposed in Option 3 would need to be assessed through a cost/benefit analysis, we believe that this alone should not prevent consideration of this option.

CHAPTER THREE - MECHANISMS FOR THE ELIMINATION OF DISCRIMINATION

While VCOSS recognises that the labels given to each of the proposed Options are useful descriptors, we consider the terminology to be misleading. The terms 'educator', 'facilitator' and 'enforcer' all have embedded meanings which will colour the reception of the suggested mechanisms in each. The term 'enforcer' has particularly negative connotations that most supporters of an equality framework would not want to have associated with an Equal Opportunity and Human Rights Commission.

⁴ Discussion Paper, iii.

Notwithstanding the terminology, we recognise that each of the options contains a mixture of education, facilitating compliance and enforcement, and that the question in each is where the balance falls. We also acknowledge that the final roles and powers will be impacted by dispute resolution options chosen and potential conflicts of interest.

Option 1 – The educator role

VCOSS does not support Option 1. The amendments suggested are beneficial in themselves but do not go far enough. The review has recognised that the reactive nature of the current framework is one of the significant barriers towards resolving systemic discrimination. Retaining the existing Act with minor amendments would do little to alter this.

Option 2 – The facilitator role

Option 2 improves on Option 1 by including the possibility of various mechanisms including guidelines, codes of practice, standards and/or regulation and action plans.

VCOSS supports positive measures to facilitate and encourage compliance with an equality framework, including:

- An increased role in litigation (both intervention and *amicus curiae* powers);
- expanding the Commission's inquiry, research and education powers, including encouraging bodies to take active measures such as action plans and enforceable undertakings to reduce these barriers;
- Increased reporting role;
- The power to apply for court orders to enforce VCAT decisions, particularly in public interest cases;
- The power to apply to VCAT to issue an unlawful act notice.

VCOSS does not support the proposal that action plans (or any other such measures) be mandatory for the public sector and voluntary for the private sector. As stated above, any measures should apply equally to all bodies bound by the Act.

Option 3 – The enforcer role

VCOSS believes that Option 3 best achieves substantive equality as it provides for a more assertive role in pursuing elimination of discrimination. It is VCOSS' view that powers to take measures to reduce barriers must be accompanied by enforcement powers if they are to have any real effect.

For example, the philosophy of inclusion is often not a given, particularly when it comes to including children and young people with a disability. While educational institutions use the rhetoric of inclusion, this is often not accompanied by actions or financial contribution. Children and young people with a disability and their families are often turned away due to a lack of resources, experience or poor accessibility. This exclusion should not be tolerated in today's society. Enforceability is important to ensure that children and young people who are experiencing disadvantage are included – regardless of cost – and not put into the 'too-hard basket', however well-meaning the intentions are. Any institution or body delivering essential services should have to adhere to the relevant standards and legislation and provide an equitable and accessible service for all. Without enforcement mechanisms, discrimination will continue to occur and children

and young people will continue to be excluded from participating in activities and services that they have a right to attend.

VCOSS supports the proposal to include the following measures:

- The power to issue unlawful act notices;
- The power to apply to VCAT for the enforcement of those notices;
- A power to apply for injunctions to prevent discrimination occurring;
- A stronger advocacy function;
- A power to initiate complaints that is not limited to matters arising from investigations or inquiries;
- A provision for the Commission to issue enforceable codes of practice⁵

VCOSS cautiously supports a provision for standards to be developed and made by regulation, however this would require an analysis of the regulatory burden, particularly on smaller organisations which would find the burden of compliance more onerous.

CHAPTER FOUR – DISPUTE RESOLUTION

VCOSS does not have a preference for a specific Option proposed.

In principle, VCOSS supports early, free, accessible and flexible ADR to all people who are in need of it. The current process is unwieldy and needs to be streamlined. Having access to early advice would yield long-term benefits to all parties at all stages of the dispute resolution process, and increase satisfaction of all parties with the process.

VCOSS supports the proposal that the Commission be given powers to intervene in court hearings as *amicus curiae*.

VCOSS supports the proposal to increase funding for representative complaints through specialist legal service/s.

VCOSS does not support the proposal in Option 3 that no discrimination-specific ADR services would be offered outside those provided by VCAT. This proposal undermines principles of accessibility, and hinders the quick and simple resolution of complaints. While access to VCAT is important, the relatively formal nature of the process can be intimidating and a disincentive to pursue a complaint. It is important that ADR exists outside VCAT to encourage those who wish to pursue a less formal complaint process.

Legal advice and representation

Option 1 – Commission to provide legal advice and representation

VCOSS does not support Option 1. VCOSS agrees with the considerations put forward in the Options Paper that the risk of actual or perceived conflict of interest could compromise the Commission's effective functioning.

⁵ Options Paper, 66-67.

Option 2 – Increase funding to existing legal service providers

VCOSS supports provision of increased funding to enable community legal centres or Victorian Legal Aid to provide legal services on equal opportunity matters. These organisations already enjoy a level of trust and confidence, have the relevant experience and provide valuable services through established networks within the community that enables them to be of most use to people who are unable to afford private representation. This increase in funding must be adequate for the level of legal advice and representation required.

Option 3 – Create an independent statutory office of equal opportunity proceedings

VCOSS does not oppose the creation of an independent statutory office of equal opportunity proceedings, but support would be dependent on the structure and functions of such a body and the potential relationship with other bodies. VCOSS is particularly concerned that any such office should be accessible to people experiencing discrimination, and does not undermine or conflict with services provided by the community legal sector.

CHAPTER FIVE – THE COMMISSION’S GOVERNANCE

VCOSS reiterates the comments made in our original submission that the Commission’s structure must reflect its anti-discrimination mandate, and should 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 does not have specific comments to make on the proposed governance structure of the reformed Commission.

Further comment

All of the measures proposed above are contingent on adequate resourcing. Whichever options are ultimately chosen must be accompanied by the commitment of appropriate funds.

Please contact VCOSS for further information on this submission.