

**SUBMISSION OF THE FEDERATION OF COMMUNITY
LEGAL CENTRES (VIC.) INC**

TO THE DEPARTMENT OF JUSTICE

**PROPOSED AMENDMENTS TO THE *EQUAL
OPPORTUNITY ACT 1995 (VIC)***



July 2006

This submission was prepared on behalf of the Federation of Community Legal Centres (Vic) in consultation with various individual member centres including Darebin Community Legal Centre, Disability Discrimination Legal Service, Fitzroy Legal Service, Gippsland Community Legal Service, Jobwatch, Tenants Union of Victoria, Victorian Aboriginal Legal Service and Youthlaw.

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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance, representation and community legal education to more than 60,000 Victorians each year. We also work on strategic research, casework, policy development and social and law reform activities.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

Introduction

The Federation strongly supports the Victorian Government's commitments to addressing institutional and systemic barriers to opportunity and to the advancement of human rights in Victoria. This position has previously been articulated in various submissions made to the Victorian Government.¹

The Federation commends the Government on putting forward these amendments to the *Equal Opportunity Act 1995* (Vic) ("the Act") that will address systemic discrimination. Many of the proposals are significant and long overdue. The Federation remains committed to working constructively with Government to develop and implement further strategies, initiatives and legislation that further protect and enhance human rights, and eliminate systemic discrimination.

As previously outlined, the Federation acknowledges that there are limitations to the impact that legal processes can have on addressing the causes and effects of poverty. The continued expanding gap between rich and poor in our community is evidence of a need for increased attention to be directed towards overcoming disadvantage, both in the legal and social systems². Further resources and programs need to be directed to addressing the underlying causes and effects of socio-economic disadvantage. Legislative changes should not be relied upon by government to avoid making further efforts to deal with the issues.

¹ See "Submission to the Attorney General's Proposal to amend Equal Opportunity Legislation to prohibit discrimination against the homeless and unemployed", February 2005 and "Submission to the Human Rights Consultation Committee in Response to *Have Your Say about Human Rights in Victoria*", August 2005 and "Feedback to the Human Rights Consultation Committee Final Report: *Rights, Responsibilities and Respect*", January 2006. All available from www.communitylaw.org.au/fedclc/pages/LawReform/

² *AMP-NATSEM Income and Wealth Report Issue 8: Trends in Spatial Income Inequality*, by Ann Harding, Mandy Yap and Rachel Lloyd, published on September 2004, AMP-NATSEM Income and Wealth Report Issue 8.

The Specifics of the Proposal

Part 1: Improving the legislative response to systemic discrimination

Section 104 - Representative Complaints

The Federation strongly supports amendments to the Act that will allow for representative complaints. This is particularly important for already marginalised communities including people who are sensitive to potential victimisation should they complain in their own names.

The Federation does not believe however that section 19 of the RRTA is the most appropriate mechanism for representative complaints. In particular, the requirement that each person be named in the complaint does not overcome the fear of stigmatisation, victimisation and further discrimination, which is currently a significant barrier for vulnerable people to wanting to make a complaint under the Act.

The Federation supports a broader representative complaints mechanism, such as that contained in the *Human Rights and Equal Opportunity Act 1986* (Cth) that does not require the consent of the complainants. We support the representative complaints process being the same for both complaints to the EOCV and complaints that proceed to VCAT.

Section 136 - Remedies by VCAT

The Federation supports the expansion of the powers of VCAT to allow for the making of orders affecting a broader group of individuals than the complainant.

We also support the EOCV being empowered to extend the terms of an agreement to a broader group of individuals where appropriate. Given that the majority of complaints are settled at conciliation and do not reach the VCAT hearing stage, this would significantly improve the capacity of the EOCV to address systemic discrimination.

Section 9 – Indirect discrimination – definition

The Federation supports:

- a. removing the proportionality test; and
- c. shifting the onus of proof from the complainant to show that a requirement or condition found to be discriminatory is reasonable in the circumstances.

We are concerned at the proposal to replace the proportionality test with new criteria of proof of detriment. This may have the undesired effect of causing problems for the complainant because detriment would need to be measured and the effects of discrimination are sometimes difficult to quantify eg: sense of rejection etc. A new criteria of proof of detriment would need to be easy to

establish and should acknowledge that the act of discrimination is an assault to human dignity in and of itself.

Section 83 - Exemption applications

The Federation supports the formalisation of the arrangement whereby the EOCV is notified of an “unusual” application, given standing under the Act to make submissions in relation to exemption applications and given the power to apply for exemptions.

We support Schedule 1 including criteria by which a Presidential Member of VCAT would make the decision that it is “appropriate” to refer a matter to the EOCV. The EOCV should be given the opportunity to intervene in all potentially significant or questionable exemption applications.

Section 3 – Objectives

The Federations strongly supports the proposed amendments to section 3 as outlined in the Issues Paper.

Section 162 – EOCV’s educative and research functions

The Federations supports the expanded educative and research functions as outlined in the Issues Paper. This change needs to be accompanied by adequate increased resources for the EOCV to fulfil these functions. Furthermore, community organisations need to be adequately funded to ensure appropriate and accessible education strategies for particular communities are developed and implemented.

Section 73 VCAT Act – Intervention power

The Federation supports amendments that allow the EOCV to intervene in VCAT proceedings as outlined in the Issues Paper.

Part 2: Improving the efficiency, effectiveness and fairness of complaints resolution processes

Section 104 – Lodgement by authorised agent

The Federation supports changes to the Act to provide capacity for the lodgement of a complaint by an authorised agent. We believe legal professionals should be specifically acknowledged as a class of agents, so that submissions by legal practitioners must be considered as part of a complaint. This is in addition to the capacity for lodgement by guardians or disability advocates etc.

As outlined above we do not support amendments that require an agent be authorised by named complainants for representative complaints.

We do however concede that authorisation is required for individual complaints to ensure the complainant's wishes are heard in the proceedings.

Section 108 – Extension of time for investigation

The Federation does not oppose the proposal to extend the period of notification to the parties as outlined, nor the proposal to include a process for review of the EOCV's decision to decline to entertain a complaint.

We are however concerned that a review process complaint may have the unintended and undesirable consequence of creating an additional barrier for vulnerable complainants. Specifically, we are concerned that respondents may use this appeal mechanism as a tactical means of placing an additional burden on the complainant.

Section 179 – Delegation of complaints functions by EOCV

In principle, the Federation does not oppose the concept of delegation of complaint functions, in order to allow more time for Members' to focus on policy and advocacy work. We are, however, concerned at the proposal to delegate some of the important decisions including the power to decline to entertain a complaint (section 108), decisions that a complaint is non-conciliable (section 113) or decisions about expediting complaints (section 119).

In dealing with the conciliation process, Federation members report that conciliators have attempted to mediate and resolve complaints without conciliating and advocating for the Act and principles of non-discrimination and human rights protection. Our members have also expressed concern that conciliations take place without allowing or encouraging parties to seek independent legal advice where it is appropriate or necessary. We are concerned that a delegation of Member's powers to more junior staff will proliferate bad practice rather than achieving better outcomes for individuals and addressing systemic discrimination.

The Federation supports any delegation of decision making powers being accompanied by further training of EOCV staff and accountability mechanisms for decision making.

Inquiry meetings

The Federation agrees with the concerns outlined in section 12.2 regarding inquiry meetings. We also support the proposal not to amend the Act to refer specifically to inquiry meetings. We do not oppose the proposal to allow inquiry meetings to proceed directly into conciliation but we have concerns about the way inquiry meetings are currently being used.

The Federation is concerned that informal inquiry meetings are called in inappropriate cases, in particular before a thorough investigation has taken place or before third party perspectives have been sought, where it is clearly a case that requires this. Inquiry meetings in these cases, at an early point, can place vulnerable complainants under pressure to accept an inadequate resolution.

We support inquiry meetings being used as part of the investigation process to illicit further information from the parties before conciliation takes place.

We do not support inquiry meetings taking the place of conciliation where discrimination has occurred and is not acknowledged by the respondent.

Part 3: Updating technical aspects of the EO Act

Section 4 – Definitions of “industrial activity”, “industrial organisation” and “employment”, “employee” and “employer”

The Federation supports the proposed changes to definitions. We fully support the views of our member centre and employment law specialist Jobwatch, and the comments in their submission.

The Federation supports a further amendment to the definition of employment to include volunteers. There is no case for exclusion of volunteers, particularly given the State Government’s support for volunteering.

Section 82 – welfare measures and special needs

The Federation supports the proposed amendments as outlined in the discussions paper.

Section 51 – Discrimination by refusing to allow alterations

The Federation supports the expansion of section 51 to cover body corporates. We fully support the views of our member centre and tenancy law specialist Tenants Union of Victoria, and the comments in their submission. In particular we support further consideration being given to security of tenure in residential tenancies for tenants that require alterations to property.

Section 192 Secrecy

The Federation supports amendments that would mean the EOCV is not bound by confidentiality agreements and can publish outcomes without the names of the parties.

The Gaps in these proposed amendments

The existing Act fails to provide for the Commissioner's "own motion investigation" for systemic discrimination, except where the Attorney-General consents³. The Federation recommends the EOCV be empowered to conduct investigations into systemic discrimination on the basis of protected attributes where there is evidence to suggest that a particular group of people are being discriminated against, but do not personally want to lodge an individual complaint. This would allow community organisations to submit issues and evidence to the EOCV for investigation without the need to "wait" for a willing individual to complain.

A large number of specific and general exceptions, e.g. for religious organisations, small business and in education and employment that were introduced by the previous Kennett government still remain in the Act, even though these exceptions were strongly opposed by Labor MP's while in opposition⁴. The Federation supports the removal of these exceptions.

The Federation has previously argued for an expansion in the attributes covered by section 6 of the Act to protect against discrimination on the basis of a criminal record, socio-economic background and employment status. We would welcome the opportunity for further discussion about expanded attributes.

The Federation supports the proposals outlined by our member centre, the Disability Discrimination Legal Service. We support amendments to the Act so as to mirror the broader approach to the definition of impairment taken by the *Disability Discrimination Act (Cth) 1992*. We also support changes to the definition of disability to include the presence in the body of organisms that may cause disease or illness. The Act should also specify "impulse disorder" as a psychological disorder. We also support amendments to Division 4, so as to expand the provision of services to include those provided by the government to the public in general and to persons who may in be in detention or incarceration.

³ s.156, *Equal Opportunity Act 1995*

⁴ "The end result of the 52 exemptions in the bill is that this is an equal opportunity bill in name only. The exemptions in the bill erode any substantive gains from the inclusion of new grounds of discrimination. The bill does more to encourage than to eradicate discrimination in this state." Bruce Mildenhall, 25 May 1995, Parliamentary Hansard.