



## **Submission to the Victorian Attorney-General's independent review of the Equal Opportunity Act 1995 (Victoria)**

*January 2008*

*by Youthlaw, Young People's Legal Centre Inc.*

Youthlaw is pleased to provide the following comments on the Review. Please note we also endorse the Victorian Federation of Community Legal Centres' submission to the Review.

### **1. INTRODUCTION**

Youthlaw, Victoria's state-wide community legal centre for young people, works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs within a human rights and social justice framework.

Youthlaw is co-located with 7 other youth services as part of Frontyard Youth Services at 19 King St, Melbourne which provides a range of free services for young people aged 12-25 who are homeless or in need of support. In the 2006/7 financial year, Frontyard Services assisted 1,832 young people and had 11,000 contacts with young people. Young people accessing Frontyard Services are mostly aged between 18 and 25 and are either homeless, experiencing significant family breakdown or deemed to be 'at risk'

Our awareness of the discrimination experienced by young people has been through legal advice sessions each week day between 2 and 5pm, projects involving young people, significant community legal education with young people and close working relationships with a range of youth and legal services.

### **2. CASE FOR REFORMING THE LAW**

Youthlaw's work with young people over six years indicates that young people do experience significant and wide ranging discrimination, however very few young people lodge formal complaints with the VEOHRC or HREOC. In our view there is definitely a case for reform in this area of law.

#### **2.1 Projects**

##### **2.1.1 Human Rights Youth Forum 2007**

In February 2007 VEOHRC and Youthlaw held a one day human rights youth forum which attracted approximately 70 delegates aged between 16 and 25 years from 44 local government areas across Victoria. The key human rights issues raised by forum delegates were young people's experience of discrimination on basis of age, race, religion and physical disability (p11 - <http://www.youthlaw.asn.au/humanrights/forum-report.html>) Delegates called for strategies that would improve young people's knowledge of and access to existing services and complaint procedures.

##### **2.1.2 Discrimination and the Law Youth Forum**

In partnership with the Centre for Multicultural Youth Issues, Youthlaw held a forum on 22<sup>nd</sup> March 2007 attended by approximately 50 young people. Attendees were aged between 16- 25 years and were from predominantly Muslim backgrounds and from a range of countries including Sri Lanka, Somalia, Bangladesh, Ghana, Sudan, Eritrea, Iraq, Iran and Lebanon. They included some new arrivals (having arrived in Australia within the past five years) and first and second generation refugees and migrants.

The forum aimed to provide an avenue for CALD young people to discuss their understandings and experiences of discrimination relating to school, police and the workplace and to devise strategies and solutions to these issues. In the related workshops many participants noted that they had experienced discrimination and they did not know how to or did not feel comfortable in making complaints about discrimination. Participants thought that discrimination was often the result of cultural misunderstandings and negative stereotypes.

## **2.2 Casework and community legal education**

Observations from Youthlaw's casework and community legal education sessions highlight that young people experience direct and indirect discrimination on basis of age, race, religion, physical disability and also employment status, sexual orientation, criminal records and social & economic status, and homelessness.

During 2006/7 financial year Youthlaw lawyers conducted 42 legal education sessions with young people in schools, TAFE's and other community based venues throughout Victoria with a total of around 863 participants. Most sessions raised issues of discrimination and the law and were opportunities for Youthlaw to hear from young people about their experiences.

Youthlaw casework statistics indicate that over the past 6 years only 2.3% of our casework consisted of discrimination cases. Of these cases some 70% were related to discrimination in employment, apprenticeships and training situations.

Areas of direct and indirect discrimination affecting young people include:

- Being treated unfavourably by ticketing inspectors on public transport simply because they are young
- Being harassed by police in public spaces when they are hanging out with a group of their friends.
- Being denied use of accommodation facilities because they are members of a same sex attracted group
- Being refused employment opportunities on the basis of irrelevant minor criminal records or even when no conviction was recorded against young offenders.
- Being refused an application to rent a property by a real estate agent/landlord because of their age or social status.
- A growing trend that children and young people are targeted especially in the mobile industry and this has made children very vulnerable in their participation in the contract making process.
- Vulnerability of an increased number of young workers (post the introduction of Work choices) employed on a casual basis or receiving cash in hand payments, who can not claim unfair dismissal, and are also unlikely to access complaints processes and are more likely to accept decisions made by employers.
- Young people with some disabilities (e.g. acquired brain injury) no longer eligible for assistance from integration aides and therefore not able to access the mainstream education system.

## 2.3 Impacts of discrimination on young people

Discrimination can systemically exclude young people from access to goods, services, the justice system, health care, housing, employment and other things which can result in homelessness or unemployment.<sup>1</sup> On the other hand, social inclusion and participation in civil, political, social, cultural and economic life can reduce and resolve homelessness and unemployment.

Discrimination can also diminish well-being, cause ill health and exacerbate or maintain homelessness and unemployment. According to the World Health Organization, 'discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status'.<sup>2</sup> This is consistent with an emerging consensus that discrimination and stigmatisation are major causal factors and consequences of social exclusion and ill health among people experiencing homelessness and unemployment, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping.<sup>3</sup>

## 3. PREVENTING DISCRIMINATION

### 3.1 Technical aspects of EO Act to be improved

#### 3.1.1 Exemptions in Act

Although we acknowledge an examination of exemptions and exceptions within the Act are not within the terms of reference of this Review, we stress that they should be considered by the Government to ensure the Act itself is not a barrier to the prevention of discrimination.

Taking one example, the EOA allows exceptions to discrimination on the grounds of sexual orientation especially that found in Section 77 of EOA which contains a widely worded provision which is unique in Australian equal opportunity jurisdictions. It exempts discriminatory conduct where a respondent is able to establish that:

*'the discrimination is necessary for the ... [respondent] to comply with the ... [respondent's] genuine religious beliefs or principles'.*

This exception has probably been a factor discouraging potential gay and lesbian complainants from lodging a complaint of discrimination. This is borne out by the void of Anti Discrimination Tribunal case law on point.

It would be strategic of the Attorney General in the context of a broader legislative audit to review whether such an exemption complies with the *Victorian Charter of Human Rights and Responsibilities (Vic) 2006* the "Charter"). In particular it may prove difficult to demonstrate how the interference authorised by the exemption with a person's right to be

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<sup>1</sup> Paula Braveman and Sofia Gruskin, 'Poverty, Equity, Human Rights and Health (2003) 81(7) *Bulletin of the World Health Organization* 539, 539.

<sup>2</sup> World Health Organization, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) 6.

<sup>3</sup> Lisa Waller, 'Living with Hepatitis C: From Self-Loathing to Advocacy' (2004) 180 *Medical Journal of Australia* 293; S Zickmund, E Y Ho, M Masuda et al, 'They Treated Me Like a Leper: Stigmatization and the Quality of Life of Patients with Hepatitis C' (2003) 18 *Journal of General International Medicine* 835. See also Alison McClelland and Fiona Macdonald, 'The Social Consequences of Unemployment' (Business Council of Australia, July 1998) <<http://www.bsl.org.au/pdfs/social.pdf>>.

equal before the law (protected by the Charter) is reasonably justifiable in terms set out in the limitation section (section 7(2) of the Charter).

### **3.1.2 Expansion of attributes in Act**

Youthlaw has previously argued and repeats its call for an expansion of the attributes covered by section 6 of the Act to protect against discrimination on the basis of a criminal record and social status.

#### **a) Criminal records**

The issue of criminal record discrimination assumes particular importance because of the ever-increasing number of criminal history checks carried out each year. It is important that employers are able to refuse to employ someone whose criminal record is genuinely relevant to the inherent requirements of a position (see *Private Security Act 2004* and the *Working With Children Act 2005*). However, in Victoria there is no legislated spent convictions scheme in Victoria which regulates the release of old criminal records nor are there any mechanisms to protect people from discrimination on the basis of an irrelevant criminal record. As a result a minor or irrelevant criminal history is proving, for many people, to be a systemic barrier to opportunity.

We note that the Victoria Police Information Release Policy releases criminal history information on the basis of findings of guilt rather than convictions. The discretionary powers of judges under the Sentencing Act 1991 (Vic) not to record a conviction, are undermined by the police policy of releasing information about findings of guilt without conviction. The resultant release of information and confusion about the meaning of criminal records has had a dramatic impact on young people's lives and their livelihoods. People have lost their jobs, refused employment and discriminated against on the basis of trivial matters.

#### **b) Social status**

The Act does not provide any protection from, or redress in relation to, discriminatory treatment on the ground of social status. "Social status" should be defined to include a person's status as homeless, unemployed or a recipient of social security payments and source of income. Reform of the Act by adding "social status" as a prohibited ground of discrimination is imperative to ensure that some of the most vulnerable members of our community are protected from unfair and unjust treatment.

From Youthlaw's experience, discrimination may occur simply because a young person's primary income is a social security benefit and there may be a stigma attached to this. The benefit does not have to be an unemployment benefit. Young people can be discriminated against because they are in receipt of Youth Allowance or a Disability Support Pension for example. We endorse the definition of 'unemployment status' adopted by PILCH as this covers recipients of payments, benefits, pensions or allowances under the *Social Security Act 1991 (Commonwealth)*.<sup>4</sup>

Adding social status (as defined above) as an attribute on the basis of which discrimination is prohibited, would be a welcome step towards bringing Victorian law into compliance with international human rights law, particularly under the *International Covenant on Civil and Political Rights (Article 26)*, the *International Covenant on Economic, Social and Cultural Rights (Article 2.2)* and the *Convention on the Rights of the Child (Article 2)*.

#### **Recommendation 1:**

PILCH submission: Amendment of the Equal Opportunity Act 1995 (Vic) to Prohibit Discrimination on the Basis of 'Homelessness' or 'Employment Status', 2005

Amend the Act to add criminal record and social status as protected attributes.

### **3.2 Strengthen the Commission's educative role**

Youthlaw acknowledges the Commission's work in educating the community about the law and processes. Community legal centres also provide significant community legal education in this area. We see substantial scope for the Commission and the CLC sector to work in partnership to further strengthen this educative work. Community legal centres are well positioned to assist the commission to design and deliver education to vulnerable community groups that are most vulnerable to discrimination. Community Legal Centres do.

The significant work undertaken by community legal centres including specialist centres such as Youthlaw and Disability Discrimination Legal Service needs to be recognised and appropriately resourced.

#### **Recommendation 2:**

Community legal centres be funded to provide community education to community populations most risk of discrimination.

### **3.3 Commission's own motion proceedings/investigations**

It is submitted that the powers under Part 8 of the EO Act for the VEOHRC to investigate and refer matters independent of a complaint are too restrictive. The current Act does not provide for the Commissioner's "own motion investigation" for systemic discrimination, except where the Attorney-General consents

#### **Recommendation 3;**

Provide VEOHRC with broad ranging own motion powers that would enable the Commission to investigate and review systemic discrimination concerns, whether this arises from a formal complaint or not.

Youthlaw recommends that the Commission 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 Commission for investigation without the need to "wait" for a willing individual to complain. An ideal model would be where the Commission works in partnership with community legal centres and on identification of an issue the Commission conducts consultations/ briefings and investigations at the relevant local community centre.

This reform would bring the VEOHRC into line with other jurisdictions.

- a) The NSW Anti-discrimination Board has general powers under section 119(1) of the Anti-discrimination Act 1977 (NSW) to perform such investigative functions.
- b) The powers of the Canadian Human Rights Commission are also instructive in considering the powers that should be accorded to the VEOHRC to investigate systemic discrimination. The Canadian Human Rights Commission has the power to initiate complaints for breaches of the Canadian Human Rights Act. In addition,

the Canadian Human Rights Commission may appoint an investigator to investigate a complaint.

- c) New Zealand's Human Rights Commission also is provided with additional functions and powers not enjoyed by the Victorian EOHC that provide a more substantial basis for the Commission to address systemic discrimination in New Zealand such as appear in or bring own proceedings.

### 3.4 Codes of Conduct and guidelines

Some jurisdictions have introduced or have proposed non-binding anti-discrimination codes of practice, which are developed by anti-discrimination bodies. Codes of practice are provided for under, for example, section 120A of the *Anti-discrimination Act 1977* (NSW) and have been proposed to be introduced by Discrimination Law Review in the United Kingdom.<sup>5</sup> New Zealand's Commission prepares and publishes guidelines and voluntary codes of practice for the avoidance of acts or practices that may be inconsistent with, or contrary to, the *Human Rights Act*.

#### **Recommendation 4;**

VEOHRC be given the power to make binding or non binding codes of conduct or guidelines regarding the requirements of the EO Act. The availability of guidelines would, go some way to remove inherent "legalese" involved in discrimination, and for the community to be provided with greater clarity regarding their rights and compliance obligations.

### 3.5 Policy framework

Youthlaw recommends the establishment in Victorian of a policy framework analogous to the Policy Framework for Substantive Equality<sup>6</sup> established across governments and the *Equal Opportunity Commission* in Western Australia. This would ensure proactive and systematic investigation, and implementation of changes needed to stamp out entrenched and systemic racism, that is racism that is embedded in policies and practices of organisations. It is important that the *Victorian Charter* be the impetus for innovations such as the creation of such a policy and practice framework, so that a *Charter* can effectively create systemic change and real changes in the ways that many people are treated.

### 3.6 Published reports

#### **Recommendation 5;**

VEOHRC adopt the approach of other jurisdictions such as UK where the ECHR publishes reports (after seeking public input) regarding discrimination in society. The Commission could also release regular investigation reports such as the Victoria Ombudsman's Office. Publication of de-identified decisions would also assist in raising public awareness of discrimination cases and indirectly promote systemic change.

## 4. RESOLVING DISCRIMINATION

In Youthlaw's experience, disadvantaged people often do not complain about discrimination or harassment that they have experienced. This may be because they are either not aware of their rights and options, or they believe that the system will not support them. Under the existing law complainants face a number of barriers to achieving a just result. This has been well documented in relation to young people in *Seen and Heard*:

<sup>5</sup> United Kingdom, Communities and Local Government, *Discrimination Law Review: A framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007) 76.

<sup>6</sup> See: <http://www.equalopportunity.wa.gov.au/pdf/framework.pdf>

*priority for children in the legal process* (HREOC 1997). Comments about the complaint processes in practice are found in *Racial and Religious Discrimination, Vilification and Harassment Project Report* by the Western Suburbs Legal Service (2006) and include:

- *if they lodge complaints they feel they must carry them and take responsibility for them*
- *complaint processes can be complicated, long, frustrating and unappealing*
- *although there is no need for a lawyer during complaint resolution some report feeling disadvantaged if they do not use a lawyer.*
- *the remedies available are limited and often not binding*

Looking at each barrier in turn:

#### **4.1 Reverse onus of proof**

Referring to the first barrier, the burden borne by the complainant to prove that the situation arose out of discrimination, it is the defendant who often has access to all the information and may simply refuse to reveal the reasons behind their actions. To enable the Act to be genuinely effective for those discriminated against Youthlaw recommends that the onus of proof be reversed so that the defendant bears the burden of proving that the act was not based on discrimination.

#### **Recommendation 6:**

Reverse onus of proof so that the respondent bears the burden of proving that the act was not based on discrimination.

#### **4.2 Accessibility of complaint mechanisms**

The HREOC report referred to above clearly articulates the alienation and disadvantages faced by children and young people in accessing legal processes and complaints mechanisms. They are more likely to feel intimidated, confused and embarrassed concerning their legal problem or issue. This intimidation may be compounded if they are of CALD background or experiencing homelessness or mental health issues.

The Commission's statistics indicate a very low number of young people make complaints. Participants at the "*Discrimination and the Law*" Youth Forum confirmed that often young people don't know how to make complaints or may not use existing complaint handling mechanisms because they are not seen as particularly 'youth or user friendly'.

Young people have told Youthlaw that they find the initial making and recording of the complaints onerous and complicated. They are often anxious about the process and wish to be empowered with knowledge about the complaints process and what to expect next.

#### **Recommendation 7;**

Complaint handling processes should be made more accessible to young people. In particular a person should be able to make a verbal complaint or make a written complaint that doesn't necessarily formally comply with formal requirements and these should be accepted at first instance and then a preliminary investigation of the complaint takes place.

In order to improve the current Victorian Commission's complaint handling functions in this regard we could adopt aspects of the NSW model, which had been recommended by the WA Commissioner in 2007 EO Act Review Report. In the NSW Anti-Discrimination Act complaints lodged do not have to establish a *prima facie* case as the Commission is able to seek further information and evidence as part of its investigation.

**Recommendation 8;**

The VEOHRC should be proactive in obtaining complaints by targeting communities that are vulnerable to discrimination. We would suggest the VEOHRC set up in community centres where such communities of interest are comfortable and advertise that they are there to assist the making of and complaints.

### 4.3 Legal representation for young complainants

As mentioned above although there is no requirement in the Act for a complainant to have a lawyer during a complaint resolution some young people report feeling disadvantaged if they do not use a lawyer. However it is our observation that it is difficult for children and young people to access free legal representation via community legal centres or Victoria Legal Aid for discrimination cases.

Discrimination complainants are often unsure and/or unfamiliar with legal system or processes involved with the Tribunal. Accordingly, when these marginalised complainants are left with an option to refer the matter to the Tribunal themselves, they are more likely to simply withdraw or give up pursuing the matter notwithstanding the merits of their case because of the absence of legal representation or support.

Currently community legal centres are limited in their capacity to provide more than initial advice. Victoria Legal Aid has very limited civil law capacity particularly out of metro areas.

**Recommendation 9;**

Explore the introduction of a dual complaint handling and legal representation role for the Commission. This could either be modelled on the New Zealand or Western Australian systems.

In New Zealand the Office of Human Rights Proceedings is a specialised, publicly funded organisation independent of the NZ Human Rights Commission that provides legal representation for people who have complained of breaches of the Human Rights Act so that they can take their case to the Human Rights Review Tribunal. People with complaints must first try to resolve the complaint through the mediation service provided by the Human Rights Commission. The Director has limited resources to provide legal representation and cannot provide this to all those who apply to him. Each case is assessed on its merits. If the Director decides to take a case the service is free. The Director may investigate a dispute further and attempt settlement and/or decide whether to take the dispute to the Human Rights Review Tribunal. If he decides not to provide legal representation, the complainant has the right to take their own case to the Tribunal, seek legal aid or at their own expense.

In Western Australia legal assistance is provided to complainants whose complaints were referred by the Commissioner to the Equal Opportunity Tribunal or State Administrative Tribunal for determination. The Commissioner only provides assistance in relation to complaints they consider have substance under the provisions of the Equal Opportunity

Act 1984. The Commission maintains relationships with a number of private law firms, which provide pro bono legal assistance to selected complainants in the Tribunal. By helping complainants who are making discrimination complaints because their special needs are not being met, the Commission's legal officers are able to provide assistance to people who, because of their disadvantage, are not in a position to do so themselves.

**Recommendation 10;**

Alternately we recommend consideration be given to funding dedicated legal positions to be attached to community legal centres to assist those who are most vulnerable to discrimination, to be assisted to lodge complaints and to be educated about equal opportunity, discrimination and human rights.

**4.4 Remedies**

If VEOHRC decisions were made 'enforceable or binding' this would send a serious message to perpetrators that discriminatory behaviour is not acceptable and will be dealt with seriously.

**Recommendation 11;**

That VEOHRC decisions be made 'enforceable or binding'

**5. COMMISSION'S GOVERNANCE STRUCTURE & MEETING THE OBJECTIVES OF THE EOA AND THE CHARTER.**

VEO&HRC has been empowered by the Charter to independently monitor the operation of the *Charter*. With these expanded powers it is more important than ever that the Commission be an independent body, providing an accountable and transparent process in assessing the operation of the *Charter* from a community perspective. Again there is significant scope to recognise and appropriately resource the ongoing advocacy community work contributed by the Community Legal Centre sector and link it to the Commission's processes.

VEOHRC needs to be a fearless advocate and will increasingly be expected to contribute to major debates on human rights ranging from dignity in care to the human rights of young people. It is essential that the CEO and/or Commissioners are provided with the independence that is necessary to have a strong advocacy voice.

**Recommendation 12;**

The VEOHRC be independent of government and that staff of the VEOHRC are not government employees.

In regard to children and young people particularly given the low number of formal complaints lodged by them we would recommend an independent Children and Young People's Commission be established with the necessary statutory powers needed to protect all children and young people. Unfortunately the Child Safety Commissioner lacks this independence being based in the Department of Human Services, and reporting to the government, rather than Parliament.

In this regard Victoria should take inspiration from the ACT experience. In ACT after the introduction of the Human Rights Act in 2004 a new Human Rights Commission was established in November 2006. The Commission promotes awareness of the rights and responsibilities of users and providers of services, and promotes understanding of and compliance with both the *Discrimination Act 1991* and the *Human Rights Act 2004*. The Commission promotes the human rights and welfare of people living in the ACT and provides an independent, fair and accessible one-stop shop for complaints of unlawful discrimination, and complaints regarding health services, services for older people, disability services and services for children and young people. The new body provides a single access point for people who want to access a range of complaints resolution, service improvement and community education facilities. It is more streamlined, accessible and it will be more efficient and flexible to meet new demands.

The Commission has absorbed the functions of the former ACT Human Rights Office and the Community and Health Services Complaints Commissioner's Office, as well as having new functions in the area of disability services, and in relation to children and young people. The three Commissioners the Human Rights and Discrimination Commissioner, the Health Services Commissioner and the Disability and Community Services and Children and Young People Commissioner.

The Children and Young People Commissioner has powers including the ability to listen to and consult children and young people, to investigate and resolve complaints and to ensure that the work of the Human Rights Commission is inclusive of children and young people, and is accessible to them.

***Recommendation 13;***

Establishment of an independent Children and Young People's Commission with the necessary statutory powers needed to protect all children and young people.