

The Hon Robert Clark MP
Attorney General
Level 26, 121 Exhibition Street
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29 March 2011

Equal Opportunity Act 2010 (Vic) – investigative functions of the Victorian Equal Opportunity and Human Rights Commission

Dear Attorney,

The Federation strongly supports the role of the Victorian Equal Opportunity and Human Rights Commission (**Commission**) in initiating investigations into systemic discrimination and believes the functions and powers granted to it under the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) are appropriate for this purpose.

We are writing to provide you with information regarding the importance of these functions and powers to request that you maintain them.

1. Background

In March 2010, the Coalition indicated that it opposed provisions contained in the *Equal Opportunity Bill 2010*, including the investigative powers granted to the Commission.¹ Recent media reports suggest that the Coalition may seek to amend the investigative powers granted to the Commission under the EOA 2010.²

2. The Commission needs the power to investigate systemic discrimination

The functions and powers granted to the Commission to investigate systemic discrimination were introduced to address the limitations of the individual complaint system in addressing discrimination.

It is well recognised that the individual complaints based system does not provide a sufficiently strong mechanism to address discrimination. Aggrieved individuals do not always initiate discrimination complaints due to financial, legal and emotional difficulties³ or because they fear adverse consequences such as risks to housing or employment. Research by the Commission in 1999 found that 72% of people who experience discrimination “do nothing about it”.⁴

¹ Robert Clark, ‘Coalition to oppose Brumby’s threat to rights of Victorians’ (Media Release, 23 March 2010) <<http://www.robertclark.net/?s=%22Equal+Opportunity%22>>

² Melissa Fyfe, ‘Religious groups to regain bias rights’, *The Age* (online), 13 February 2011 <<http://www.theage.com.au/victoria/religious-groups-to-regain-bias-rights-20110212-1ardw.html>>

³ Julian Gardner, ‘An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report’, June 2008, 124 [6.95].

⁴ Independent Review of the Equal Opportunity Act 1995 Discussion Paper page 6.

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3. Investigations and inquiries

The EOA 2010 allows the Commission to undertake investigations and public inquiries. The Commission cannot initiate investigations into individual disputes.⁵ Rather, the practice in question must be serious, indicate a possible contravention of the EOA 2010 and must relate to a class or group of persons.⁶ The Commission can only undertake public inquiries into serious issues affecting a class or group of persons.⁷ The Commission must obtain the consent of the Attorney General to conduct a public inquiry.⁸

4. Appropriate investigative powers

The Commission's powers are appropriate to its investigative functions. In defined circumstances, the Commission can:

- compel the production of information or documents necessary for the conduct of an investigation; and
- compel attendance to answer questions in the course of an investigation.

These powers are not new to the Commission. The previous *Equal Opportunity Act 1995* (**EOA 1995**) empowered the chief conciliator in certain circumstances to compel both the production of documents and the attendance of persons.⁹

Effective investigations require access to relevant documents and in some contexts attendance at hearings. This is well recognised for the purposes of many statutory authorities tasked with monitoring compliance with laws such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, Fair Work Australia and Worksafe.

For example, under the *Fair Work Act 2009* (Cth) (**FWA 2009**), a Fair Work Inspector is empowered, under defined circumstances, to enter premises and require a person with access to a document to produce it to the inspector who can make copies of it.¹⁰ Offsite, Fair Work Inspectors can require production of documents with notice.¹¹ The Fair Work Ombudsman's functions include investigating instances of discrimination in employment.¹²

Similarly, under the *Information Privacy Act 2000*, the Privacy Commissioner, under defined circumstances, can require a person to attend before them to answer questions relevant to the matter under consideration.¹³

⁵ Explanatory memorandum, *Equal Opportunity Bill 2010* (Vic), 57.

⁶ See the EOA 2010 subsections 127(a) – (c).

⁷ EOA 2010 s 128.

⁸ *Ibid*.

⁹ Explanatory memorandum, *Equal Opportunity Bill 2010* (Vic), 59. Compare sections 132 and 133 of the EOA 2010 with sections 114(2)(b) and 114(2)(a) of the EOA 1995 respectively.

¹⁰ FWA 2009 s 708 and s 709(d).

¹¹ *Ibid* s 712.

¹² See the FWA 2009 sections 682(1)(c) and 351.

¹³ *Information Privacy Act 2000* (Vic) s 45(2).

5. Safeguards on the Commission's powers

Part 9 of the EOA 2010 ensures that those subject to investigation are treated fairly:

- In conducting an investigation, the Commission is bound by the principles of natural justice unless otherwise expressly provided within Part 9¹⁴ (no express provision currently exists for that purpose).
- A person required to attend before the Commission is entitled to be paid a reasonable sum and is entitled to legal or personal representation.¹⁵
- A person has protection against self incrimination – they can refuse to answer a question or provide information if doing so would tend to incriminate them.¹⁶
- The Commission can give directions prohibiting disclosure of a person's identity if anonymity is necessary to protect that person's security of employment, privacy, or a Charter right; or to protect the person from victimisation.¹⁷
- The Commission can give directions prohibiting or limiting the publication of information of any evidence.¹⁸
- Where a compliance notice has been issued, a person has 28 days to apply for a review of the issuing of, or any term of, the compliance notice.¹⁹

As a public authority, the Commission must also act compatibly with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

6. Appropriate enforcement mechanisms

The Commission will determine the appropriate action to take upon the completion of an investigation. Potential measures include:

- taking no further action;
- entering into an agreement regarding the action required in order to comply with the EOA 2010;
- accepting an enforceable undertaking (which can only be accepted where the Commission believes an unlawful act has occurred, is occurring or is likely to occur);²⁰ and
- issuing a compliance notice (which can only be issued to remedy a suspected unlawful act).²¹

The enforcement mechanisms are appropriately tailored towards educating people and organisations of their duties and encouraging compliance and best practice without resorting to punitive measures.

The compliance measures will provide the person or organisation time to comply before further action is taken by the Commission and will assist organisations to minimise risks of an individual complaint being made.

The Fair Work Ombudsman's enforcement powers are similar to those contained in Part 9 of the EOA 2010. The Fair Work Ombudsman can accept an enforceable undertaking where he or she reasonably believes there has been a breach of a civil

¹⁴ EOA 2010 s 130(2).

¹⁵ EOA 2010 s 133(2).

¹⁶ EOA 2010 s 135.

¹⁷ EOA 2010 s 136.

¹⁸ EOA 2010 s 137.

¹⁹ EOA 2010 s 146(3)

²⁰ Explanatory memorandum, Equal Opportunity Bill 2010 (Vic), 62.

²¹ Ibid 63.

remedy provision;²² and can issue a compliance notice in certain circumstances.²³

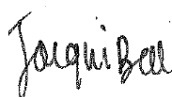
7. Importance of these functions to our clients

Community legal centres work to improve the lives of our clients and potential clients, who are some of the most vulnerable members of our community. Our clients include people facing multiple sources of disadvantage such as homelessness, disability and financial hardship. Around 82% of our clients earn less than \$26,000 per year.²⁴

Effectively addressing and preventing unlawful discrimination is critical to our clients' effective participation in society. Accordingly, we urge you to maintain the Commission's functions and powers under the EOA 2010.

Please contact us if you would like any further information.

Sincerely



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Policy Officer

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²² FWA 2009 s 715.

²³ FWA 2009 s 716.

²⁴ Review of the Commonwealth Community Legal Services Program March 2008, 6.

<<http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>>