Proposed Amendments to the *Equal Opportunity Act 2010*

Section	***Problem***	***Example / Explanation***	***Reasons for amending***	***Solution***
Reinstatement of the EO Act 2010 as at April 2010				
Part 9 of the EO Act 2010 as at 28/04/2010 (This Part was since partially repealed and substantially amended)	Requiring individual complainants to enforce the EO Act. There is no statutory body with the power to enforce compliance with the EO Act.	People are often traumatised by the discrimination or harassment, particularly sexual harassment, and do not have the emotional resources or social supports needed to pursue lengthy litigation. This can lead to people settling their claim for a relatively low amounts of compensation given to the difficulties of proving their complaint and the stress of litigation.	• We should not expect targets of sexual harassment or discrimination to put their careers, savings, reputation and mental health on the line to enforce sexual harassment and discrimination laws. • We do not expect victims of sexual assault to prosecute the perpetrator, nor do we require employees to prosecute their employers or co-workers for other unsafe workplace practices; the Victorian Workcover Authority does this. • There is some evidence to suggest that compliance with laws such as discrimination laws improves if there is the threat of enforcement, even if this threat is rarely carried out.	Re-enact Part 9 of the EO Act 2010 as it was at 28/04/2010
Sections 81-84 – the religious exceptions.	The exception for discrimination because of religious beliefs or purposes is unacceptably broad.	Currently a religious school would be allowed to discriminate against a gardener because they have been divorced or are in a same-sex relationship, even though this is irrelevant to their role. The discrimination permitted by service and educational providers as a result of this exception is also extraordinarily broad, especially in circumstances where many such organisations receive financial assistance from the	As currently worded, the EO Act exceptions for discrimination based on religious reasons are overly broad and fail to eliminate discrimination to the greatest possible extent in accordance with the objectives of the EO Act.	Permit discrimination only where it is reasonable, proportionate and necessary to protect the right to freedom of religion.

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		government.		
Coverage of all public conduct of public authorities				
Multiple	The EO Act fails to cover certain areas of public life and public functions, such as policing and correctional services. The EO Act only prohibits discrimination by the Police where it occurs during the provision of a service. This has been interpreted as applying only to situations where the Police are protecting or assisting members of the public, and does not apply to investigation of crime or arrests: *Henderson v Victoria* (1984)	In *Kyriakidis v State of Victoria* (Human Rights List) [2014] VCAT 1039 the applicant had been arrested by the police at which time he claimed that he was sick, unwell and having a panic attack. He stated that he repeatedly asked for a doctor and alleged that the arresting officer ignored his request. If this police function were covered by the EO Act, it may constitute discrimination within the meaning of s7, including a failure to make reasonable adjustments for a person with a disability. However, the Tribunal struck out the complaint on the basis that the police activities complained of were not "services" provided to him, and were therefore not covered by the EO Act. Many people feel that they have been discriminated against by Police during an investigation or arrest. For example, a number of people have reported that they feel that they were arrested because of their disability, in circumstances where the Police were advised of this, and then denied access to necessary medication or other medical treatment. Similar issues arise in relation to prisoners who feel that they have been discriminated against in prison, where the circumstances of the impugned conduct are often unlikely to be considered "services" for the purpose of the EO Act.	• The Charter already prohibits public authorities from breaching the right to equality when performing public functions. • The Labor Government has made a commitment to make the development of a human rights culture in Victoria a key priority and to restore human rights standards to their proper place in the public service and local government (2014 Victorian ALP Platform, p 69). • Exceptions can be included to address any specific concerns.	Prohibit all forms of discrimination, sexual harassment and victimisation by a person performing any public function or exercising any function or power under a Victorian law or Victorian government program, in similar terms to s29 of the *Disability Discrimination Act 1992* (Cth).

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	EOC 92-027.			
Protected Attributes				
Section 4 – definition of "gender identity"	The current definition requires people to identify as either men or women and does not protect those who do not identity as either male or female.	From the Final Report of the Inquiry into the Exceptions and Exemptions in the *Equal Opportunity Act 1995*: "The Committee observes that the legal position of transgender and intersex people under the Act is unclear and may be denied a full measure of protection under the Act as a result. The Committee notes that the Act essentially rests on the assumption that every person belongs to one of two sexes, and that many exceptions relate only or principally to the attribute of sex, and the Act does not make adequately address the question of transgender and intersex persons and their non-discrimination rights under the Act in relation to their sex." Remove current definition: (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)— (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)— (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or	Consistency with the *Sex Discrimination Act 1984* (Cth).	Update to the simple, comprehensive and effective federal definition of 'gender identity' under section 4 of the *Sex Discrimination Act 1984* (Cth). This definition also encompasses gender expression. Note proposed inclusion of intersex attribute below.

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		(ii) by living, or seeking to live, as a member of that sex And replace with Commonwealth definition: Gender Identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.		
Section 6 – protected attributes	The protected attributes do not include 'intersex status' and current legislation on gender identity fails to protect intersex people.	Use the Commonwealth definition: ***"intersex status"*** means the status of having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.	Consistency with the *Sex Discrimination Act 1984* (Cth).	Include 'intersex status' as a protected attribute or an updated formulation of this attribute following discussion with intersex groups.
Section 6 – Attributes	"Experiencing family violence or stalking" is not a protected attribute	Many women lose their jobs because of circumstances outside of their control caused by family violence. For example, women have reported being dismissed because: their estranged partner telephoned them constantly at work; they had to take time off work to report property damage and stalking to the Police, attend intervention order proceedings and ensure their child's safety; and their employer refused to make adjustments to enable compliance with an intervention order.	• Around 1.6 million Australian workers are entitled to domestic violence leave under workplace policies or Enterprise Bargaining Agreements, indicating widespread public support for this issue: http://www.afr.com/news/policy/industrial-relations/telstra-introduces-domestic-violence-leave-20150113-12na7h. • The FW Act provides workers experiencing family violence with a	Include "experiencing family violence or stalking" as an attribute in s6.

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			right to request a change in working arrangements: s65(1). • The Government made a commitment to "[e]nsure all women have the right to equal opportunities in developing and pursuing their life in a state of personal freedom and safety". • The 2014 Victorian ALP Platform acknowledges that "[f]amily violence has devastating consequences and it affects every culture and group in society. Victims and women at risk deserve a comprehensive, sustained and cross-sectional Government commitment to tackling and preventing this crime."	
Section 6 – Attributes	"Irrelevant criminal record" is not a protected attribute.	Individuals who are discriminated against based on an irrelevant criminal record currently have little legal recourse. People can experience discrimination during recruitment processes as a result of a criminal record from their early twenties during a very different period in their life. This can have unfair and devastating consequences for them and continues to marginalise and disenfranchise people who are often already experiencing disadvantage.	• Discrimination on the basis of criminal record is prohibited by the *Australian Human Rights Commission Act 1986* (Cth), although there is no mechanism for enforcing this obligation. • It is also unlawful in the Northern Territory and Tasmania. • This amendment is consistent with the Labor Government's pledge that it will examine the merits of a spent and mistaken convictions regime in circumstances of non-violent and low-level convictions where no re-	Include "irrelevant criminal record" as an attribute in s6.

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			offending has occurred: 2014 ALP Platform, 67.	
Clarifications and technical improvements				
Schedule 1 Section 18 of the *VCAT Act 1998* (Vic)	VCAT has discretion to dismiss an application that has been made more than 12 months after the alleged contravention, but this power does not explicitly require VCAT to take into account any time spent in the dispute resolution process at the VEOHRC, which itself can take many months.	QBE Insurance made an application under this provision to strike out the discrimination claim of Ms Ingram on the basis that it related to a contravention that occurred more than 12 before she lodged her VCAT application. However, Ms Ingram had spent approximately 9 months engaged with QBE's internal dispute resolution procedure and a further 7 months participating in the VEOHRC dispute resolution process. Member Phillips dismissed the strike-out application, but it nonetheless put the applicant to additional expense and drew out the process. *Ingram v QBE Insurance Australia Limited* (unreported decision of Member Phillips, 26 November 2014).	• Applicants should not be penalised for attempting to resolve their dispute using ADR processes, especially the statutory process offered by the VEOHRC. • The case law is already sympathetic to this argument. • Despite this, respondents regularly make strike-out applications, putting the parties to unnecessary time and expense, which generally cannot be recovered because it is a costs-free jurisdiction. • Given the low amounts of compensation available in discrimination cases, the cost of responding to a strike-out application eliminate the cost-benefit of proceeding with the claim, even if the Applicant has strong prospects of success.	Delete this provision and/or include a range of mandatory factors that should be take into account by VCAT when exercising this power. Also clarify that where an application has been made to the VEOHRC the 12 month deadline for filing an application at VCAT starts when the Commission terminates the complaint; and/or
Part 8 – Disputes	The VEOHRC no longer has the power to compel	People often do not know the full name of the person who has sexually harassed them, discriminated against them or vilified them. This is particularly common when someone is	• The VEOHRC previously had the power to compel the provision of information.	Reinsert s114 of the EO Act 1995 in the EO Act.

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	the provision of information reasonably necessary to conciliate a complaint, as it did under s114 of the EO Act 1995.	a young person working at a fast food or retail shop where they only know the first names of their co-workers, or where they do not speak English well. It is also the case where the respondent is a stranger (eg racial vilification). This makes it extremely difficult and in some cases impossible for someone to make a complaint against the individual person, even where the name and contact details of the individual are known by a third party, such as the employer or the Police.	• The absence of any mechanism for compelling the provision of information reasonably necessary to conciliate a complaint means results in yet another barrier for someone who is subjected to unlawful conduct in seeking a remedy. • It is likely that the very existence of this power would result in greater information sharing between the parties, even without requiring the VEOHRC to perform this function. • The Explanatory Memorandum to the 2010 Act states that the powers provided were similar to those already provided in the 1995 Act. No reason for the removal of these powers was given in the Explanatory Memorandum to the 2011 Amendments.	See also s108(1A), EO Act 1995.
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Section 104(1)(g) – Victimisation	At the moment protection against victimisation only covers people who provide information in relation to a formal proceeding and not internal or	It is common for someone to have a workplace discrimination claim that would be strong if their co-workers would provide supporting evidence, but they are too scared to do so. Currently, the legal protections are extremely limited.	One of the most effective ways to combat discrimination and sexual harassment is for bystanders to support the target of the treatment. However, there are many reasons why a person would not do so, with job security being one of the most significant reasons. Bystanders should not be penalised for	Extend the protection in s104(1)(g) to include people who provide information relating to an allegation unless false and not done in good faith.

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	informal investigations or allegations.		providing their support, in good faith, to a victim of discrimination or sexual harassment. The law should support bystanders and victims of discrimination or sexual harassment to take appropriate action.	
Section 42 – exception allowing an education authority to set and enforce reasonable standards of dress, appearance and behaviour for students	This is a very broad exception that may disadvantage transgender students, students with religious beliefs that have dress requirements and female students.	Section 42 states that a standard of dress must be taken to be reasonable if the educational authority took into account the views of the school community in setting the standard. It can be very distressing for a transgender student if their school insists that they wear the school uniform of their biological gender. However schools can rely on this exception and argue that the discrimination is now unlawful.	• This exception is likely to be inconsistent with the protection against gender-identity discrimination under s21(2)(c) of the *Sex Discrimination Act 1984* (Cth) (with the exception of discrimination that is permitted due to the religious exemption at s38(3)). • One of the commitments in the 2014 Victorian is to improve the health and safety of same sex attracted and gender questioning students by ensuring that schools effectively address homophobia.	Section 42: Add a sub-section which provides that the standards of dress exception does not apply to the attributes of gender-identity or sex. Consider amending the section to also ensure a human rights compatible interpretation in relation to religious beliefs.
Section 105 – liability for authorising and assisting discrimination	The Act currently fails to impose liability on all persons with responsibility for unlawful conduct	People who work in age or disability care can be subjected to sexual harassment by the residents. In this situation it is difficult to bring a claim against the employer under the EO Act, as it is unlikely that a court would find that the employer was sexually harassing the employee, as is required for a breach of s93. Further, it can not be said with certainty that the employer was requesting, instructing, inducing, encouraging, authorising or assisting the resident to sexually harass the employee, as is required to make out a	• To ensure that sexual harassment is eliminated to the greatest possible extent, consistent with the objectives of the EO Act. • It is important that employers are not allowed to simply turn a blind eye to unlawful acts against their employees.	Section 105: Extend the authorising and assisting provision to prohibit “permitting” a contravention, similar to the SDA and other anti-discrimination acts.

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		breach of s105 of the EO Act.	• Prohibiting employers from allowing or "permitting" a breach of the EO Act is consistent with their obligations under the *Occupational Health & Safety Act 1995* (Vic) to provide a safe workplace. • It is also consistent with the s 105 of the SDA, which provides that "A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act."	
Section 4: Definitions of "employment activity" and "employment entitlements"	Currently the EO Act only protects people from making inquiries about their employment entitlements; it does not protect them from discrimination for exercising or proposing to exercise their employment entitlements.	Employees commonly feel that they have been discriminated against both because of their disability and because they made a workers compensation claim. It is unclear whether the EO Act would protect an employee from discrimination for submitting a workers compensation claim or for receiving workers compensation, although it seems unlikely. An employee in this situation would need to report the discrimination to the Victorian Workcover Authority and hope that the matter is investigated. They are unable to bring an individual claim. Alternatively, they might lodge a general protections application under the *Fair Work Act 2009* (Cth), alleging that the employer took adverse action against them for exercising, or proposing to exercise, a workplace right. However, this jurisdiction may not be the most favourable	There is little point in protecting employees against discrimination for making enquiries about their employment entitlements if there is no protection against unlawful treatment taken because they then exercise those employment entitlements. Amending the definition of "employment activity" to include the exercise of employment entitlements would create more consistency with the *Fair Work Act 2009* (Cth) general protections provisions.	Section 4: Define "employment activity" to include "(c) exercising or proposing to exercise his or her employment entitlements".

Section	***Problem***	***Example / Explanation***	***Reasons for amending***	***Solution***
		jurisdiction for dealing with their complaint of disability discrimination.		
Section 9 – Indirect discrimination	It has been argued that the effect of including sections requiring reasonable adjustments for disability and reasonable accommodation for family responsibilities (being positive action) have the effect of negating any argument that the prohibition of indirect discrimination also extends to a failure to take positive action. The interpretive argument is that the prohibition on indirect discrimination also required positive action then the reasonable	Difficulties can arise where an adjustment is required to a service in order to allow a person with an attribute other than disability to access the service. For example a person with a baby may require a tour operator to schedule breaks and provide facilities to enable them to breastfeed their baby whilst on the tour. Respondents can argue that they are not required to make adjustments to a service for attributes other than disability because there is no explicit obligation to do so. Further Respondents can argue that because there is no explicit obligation to make reasonable adjustments the indirect discrimination provision should be read down to not require any positive action or adjustments. This argument relies on the 'same matter'/'same power' rule, being that if two provisions ostensibly deal with the same issue, then the more general power is interpreted in a way that carves out the more specific power/obligation. Otherwise the statutory provision providing the more restricted power/obligation would have no work to do: *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] 280 ALR 18. In the context of the EO Act, this principle would apply to reduce the power of the more general prohibition on indirect discrimination to cover instances of disadvantage caused by a respondent's failure to take reasonable positive steps (ie make reasonable adjustments), because such an interpretation would leave the reasonable adjustment/accommodation provisions in the EO Act with	This was not the intention of Parliament when making the amendment. The reasonable adjustment/accommodation provisions were simply intended to clarify the existence of the positive obligation not to discriminate in certain circumstances. The Explanatory Memorandum for the 2010 Act makes it clear that the concept of reasonable adjustments should not be limited to the attribute of disability or restricted by the introduction of sections 20, 33, 40 and 45. At page 14 it states: "In addition, the reference in subclause (3)(e) to "reasonable adjustments" is not intended to be restricted to the duties to make reasonable adjustments for people with impairments in clauses 20, 33, 40 and 45. In the context of indirect discrimination, the concept of reasonable adjustments has a general meaning that could apply to other attribute. Similarly, the reference to "reasonable accommodation" in subclause (3)(e) is not restricted to duties not to unreasonably refuse to accommodate parental and carer responsibilities in clauses 17, 19, 22 and 32." "Subclause (3)(e)" is s9(3)(e) of the EO	Clarify that the protection against indirect discrimination may impose a positive obligation and is not diminished by the inclusion or non-inclusion of a corresponding reasonable adjustments provision.

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	adjustment / accommodation provisions would have no statutory work to do.	no work to do.	Act, which provides that whether adjustments or accommodation could be made to a requirement, condition or practice is a relevant circumstance when considering the reasonableness of that requirement, condition or practice for the purpose of the test for indirect discrimination.	
Opportunities				
Does not exist	There is no explicit obligation for duty holders to make reasonable adjustments due to pregnancy. Many pregnant workers require some adjustments to their working conditions or arrangements because of the physical symptoms of pregnancy. For example a woman may need to take more regular bathroom breaks,	*Bevilacqua v Telco Business Solutions (Watergardens) PL* (Human Rights) [2015] VCAT 269: Ms Bevilacqua's morning sickness caused her to vomit frequently and suffer dizziness, feel faint, experience hot flushes and back, leg and lower stomach pain. She needed to frequently run to the toilet to vomit and to sit down to rest. Her symptoms would often last all day. She claimed that her employer refused to make reasonable adjustments for these symptoms, such as allowing her to sit down or take more frequent toilet breaks or reduce her hours, among other things. Her claims of direct and indirect discrimination were complicated. Her claim was perhaps most easily characterised as a failure to make reasonable adjustments. She therefore argued that her morning sickness was a disability, and that her employer failed to make reasonable adjustments for her disability.	• It is not intuitive for most people to treat morning sickness or other symptoms of pregnancy as a disability, as these are normal conditions of pregnancy. As a result, there is likely to be significant confusion and lack of awareness about a duty holder's obligations to make reasonable adjustments for pregnant women. • Because of this, and because such claims can be complex, they will rarely settle quickly. This results in unnecessary legal expense, as time and money is spent trying to understand legal obligations and enforce them. • While the FW Act provides for transfer to a safe job or paid 'no safe job leave' if the employee is fit to work but	Insert provisions in the EO Act requiring duty holders to make reasonable adjustments that are required by women because they are pregnant or by their partners who are caring for them.

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	to sit rather than stand, or to avoid heavy lifting incidental to her role during her pregnancy. While the EO Act requires reasonable adjustments to be made for parents and carers as well as those with a disability, there is currently no positive obligation on employers to make reasonable adjustments for a woman during her pregnancy.	VCAT held that while "[i]n ordinary life a pregnant woman suffering morning sickness is not considered to be a person with a disability", for the purpose of the EO Act, morning sickness is a disability	unable to perform her role for health and safety reasons, this solution is generally too extreme. More commonly, there will simply be some minor aspects of the employee's role that requires adjustment, or the employee requires flexibility to accommodate her morning sickness. • The Labor Government made a commitment to: o eradicate discrimination against all women by implementing legislation and providing services which promote equal opportunity for women; o provide support for women to access resources that ensure more women can enter the workforce, return to work after caring for children and comfortably retire from work; and o Provide support for women who experience discrimination and marginalisation. • NSW Labor recently released its "Protecting Women at Work" policy, which pledges to amend NSW discrimination laws to include: o a positive legal duty on employers	

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			to reasonably accommodate the needs of workers who are pregnant, have carer/family responsibilities, or request flexible working arrangements; ○ new protections from sex discrimination in the form of redundancy, dismissal and the non-renewal of work contracts for employees who are pregnant, on parental leave or have family and caring responsibilities; and ○ improved pay discrimination laws, including mechanisms for inquiry, evaluation and correction of gender pay discrimination.	
Section 75 – authorised by statute	This section provides an extremely broad exception that permits discrimination simply if it is "authorised by", rather than "necessary to comply with", an Act or enactment.	In *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 at [138] VCAT suggests that the phrase "authorised by" does not permit conduct unless it is *required* by an Act or enactment. In that case Manningham City Council banned Mr Slattery from all council buildings because of behaviours that were caused by his disabilities. The Council argued that it was authorised to do so by the *Occupational Health and Safety Act 1995* (Vic) for the purpose of protecting the health and safety or its staff. The Tribunal found that the ban imposed by the Council "was not appropriately designed to secure the health and safety of employees, because it did not constitute an appropriate and commensurate measure of protection from an identified level of risk."	• As currently interpreted, the phrase "or is authorised by" in s75 adds little to the phrase "is necessary to comply with" in that section. • The seemingly broad exception creates confusion, which in turn adds to the cost of compliance and enforcement. • The Charter requires a human rights compatible interpretation of s75 in any event, thereby significantly narrowing the meaning of "or is authorised by".	Remove the words "or is authorised by" from s75. *Equal Opportunity Act 1984* (SA)

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		However, many respondents are unaware that s75 is interpreted in this way and believe that the protection it affords is much wider.	• The EO Act has the broadest statutory authority exception of any State or Territory. Only the Northern Territory and Queensland have similarly worded exceptions, being – "A person may do an act that is necessary to comply with, or is **specifically** authorised by" statute (emphasis added).[1] However, NSW, WA, the ACT and Tasmania all restrict discrimination to that which "was necessary for the person to do in order to comply with a requirement" in, "done necessarily for the purpose of complying with a requirement of" or "reasonably necessary to comply with" an Act or enactment.[2] The SDA and DDA permit things done "in direct compliance with" legislation.	
Racial and Religious Tolerance Act 2001 (Vic) ("RRTA")	The current test for racial or religious vilification is incredibly difficult to meet and rarely	Of approximately 16 cases brought under the RRTA, only 2 have been successful.[3] The legal test is complicated and fails to adequately protect individuals against racial or religious vilification in Victoria. In *Bennett v Dingle* (Human Rights) [2013] VCAT 1945,	• Labor has pledged to promote a no tolerance approach to racism in Victoria together with respect for the values of the broader community. • Currently the RRTA prohibits inciting	Amend the RRTA to align it with s18C of the RDA. Include appropriate exceptions to protect

[1] *Anti-Discrimination Act 1991* (Qld), s106 and *Anti-Discrimination Act 1992* (NT), s53.

[2] *Anti-Discrimination Act 1977* (NSW), s54; *Equal Opportunity Act 1984* (WA), s69; *Discrimination Act 1991* (ACT), s30; and *Anti-Discrimination Act 1998* (Tas), s24.

[3] *Kahlil v Sturgess (Anti Discrimination)* [2005] VCAT 2446 (23 November 2005); *Ordo Templi Orientis v Legg (Anti Discrimination)* [2007] VCAT 1484 (27 July 2007).

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	used.	Member French found that Mr Dingle yelled at Mr Bennett in a public park, "you big fat Jewish slob" and "Hitler was right about you bastards". However, the Tribunal held that other than the applicant, no one else who was nearby heard the comments and no ordinary person would have been incited by the comments in any event, so the conduct did not breach the RRTA.	vilification rather than actual vilification, and therefore sets the bar for unlawful conduct far too high. That is, ss 7 and 8 prohibit a person from engaging in conduct on the grounds of a person's race or religion "that incites hatred against, serious contempt for, or revulsion or severe ridicule of" that person. • Further, the test inappropriately focuses on the conduct rather than the harm inflicted. This is compared to s18C of the *Racial Discrimination Act 1975* (Cth), which makes it unlawful to do an act that is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people". • There is widespread public support for protection against racial vilification, in the terms contained in s18C.	freedom of speech, as contained in s18D of the RDA.
Part 17 - definition of employee, employer etc.	At the moment volunteers are protected from sexual harassment in the workplace but not from discrimination.	A middle aged woman applies for a volunteer position to answer phones at a large charity but despite having the requisite skills she is told by a young recruitment manager that she is 'too old' and that they needed younger people who know about technology.	• Volunteers make a significant contribution to the community and are entitled to be free from discrimination in their unpaid working environment. • Businesses already have obligations to volunteers in relation to work health and safety and sexual harassment so the increase in regulatory burden would not be great and would in fact	Part 17 of the Act should be amended to include volunteers in the definition of employee.

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			harmonise employers' obligations towards all workers – paid and unpaid. • Volunteering Victoria and other not for profit organisations support the inclusion of volunteers.	
Additions				
Part 4, Division 4 – (partly covered on page 7 of the List of Proposed changes document distributed	Not all actions of Victoria Police are captured by the EOA because of the need to fit within the definition of "services"	In order to build upon and support the initiatives committed to by Victoria Police in its *Equality is not the same* report, and to ensure fair and impartial policing in Victoria we call upon the Victorian Government to: Pass an amending act (the *"Anti Racial Profiling Amendment Act"*) (Amending Act) that enacts legislative amendments which would: *prohibit the practice of racial profiling by:* amending the *Equal Opportunity Act 2010* (Vic) (EOA) to explicitly make Part 4, Division 4 of the EOA applicable to VicPol. This would create an avenue for complainants to bring an action for racial profiling as a contravention of section 44 of the EOA (EOA Offence);		
Sections 16, 17, 20.	Protections do not adequately cover discrimination in the job application process	Employers only have to make reasonable adjustments for employees (i.e. current employees) or persons **offered** employment. This appears to mean that employers can legally refuse to employ a job applicant with a disability or with parent or carer responsibilities on the basis that it would mean having to make reasonable adjustments.	The Act appears to authorise discrimination against job seekers who require reasonable adjustments due to their disability or parental or carer status, and the protection, and fails to provide protection from discrimination throughout the recruitment process.	Amend sections 17 and 20 to make it specifically unlawful to refuse to employ a prospective employee if the reason is that they

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		In addition, section 16 titled "Discrimination against Job Applicants" could be interpreted to restrict protection to people offered employment or to situations where someone discriminates by refusing or deliberately omitting to offer the person employment. This is compared to s 15(1)(a) of the *Disability Discrimination Act*, which prohibits disability discrimination "in the arrangements made for the purpose of determining who should be offered employment." Section 14(1)(a) of the *Sex Discrimination Act* and s 18(1)(a) of the *Age Discrimination Act* are worded similarly, therefore protecting people against discriminatory recruitment processes. The practical effect of these provisions is illustrated in the age discrimination case of *Hopper v Virgin Blue Airlines Pty Ltd* [2005] QADT 28, in which the QADT found that Virgin Blue Airlines indirectly discriminated against older applicants for flight attendant roles by requiring them to demonstrate "Virgin flair". The Tribunal found that job applicants were required to sing and dance and there was a strong focus on youth and attractiveness. It would have been more difficult for these women to have brought this case under the EO Act, because it is the recruitment process rather than the offer of employment that is discriminatory.		would require reasonable adjustments in order to perform genuine and reasonable requirements the role. Amend section 16 to reflect wording similar to the *Disability Discrimination Act 1992* (Cth) that captures discrimination in the recruitment process.
Section 20-21	It is not explicitly clear whether principals have to make 'reasonable adjustments' for 'contract workers' i.e. in labour hire arrangements.	Under section 20 of the EO Act, employers are required to make 'reasonable adjustments' for employees with a disability. However, it is not explicitly clear under the EO Act whether principals have to make 'reasonable adjustments' for 'contract workers' with a disability (contract workers are those who do work for a principal under a contract between the person's contracted employer and the principal)	• Resolves uncertainty in the law as to whether principals are required to make reasonable adjustments for contract workers • Applies the same legal standard in relation to making reasonable adjustments to both employers and	Insert a provision that explicitly indicates a principal must make reasonable adjustments for contract workers with a disability.

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			principals • Although not explicitly stated in *Disability Discrimination Act 1992* (Cth) ('DDA'), there is a greater implication in the DDA that principals are required to make reasonable adjustments for contract workers, by way of section 21A and the AHRC confirms this on its website.	There does not seem to be any case law at present but, in JobWatch's experience, this lack of protection for contract workers has been a problem.
Section 8(2)(b)	For an act to be discriminatory, it must be a 'substantial reason' for the act	When there are two or more reasons for an act, that act is discriminatory if a 'substantial reason' is one of the prescribed attributes under section 6 of the EO Act (e.g. race, gender). What distinguishes a 'substantial reason' from any other reason is not outlined in the EO Act. By contrast, three of the Commonwealth anti-discrimination laws (the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) & *Age Discrimination Act 2004* (Cth)) stipulate there if there are two or more reasons for an act, the attribute only has to be one of reasons for the act (does not have to be a 'substantial' reason)	• Resolves uncertainty in the law as to what constitutes a 'substantial' reason • Brings the 'two or more reasons' requirement in-line with the corresponding Commonwealth anti-discrimination laws	Amend s8(2) of the EO Act, in similar terms to: • RDA s18 • DDA s10 • ADA s16 • FW Act s360
Does not exist	The burden of proof in the EO Act is placed on	Under the EO Act, it is well established that the burden (or onus) of proof is placed on the complainant to prove their claim.4 Since it is difficult to prove the state of mind of the	• It is more reasonable to have a respondent discharge their burden of proof (i.e. prove that they didn't	Insert a provision that establishes a reverse burden of

[4] See, eg, *GLS v PLP (Human Rights)* [2013] VCAT 221, [34]; *Pham v Drakopoulos & Ors (Anti-Discrimination)* [2012] VCAT 1198, [23]; *Finch v The Heat Group Pty Ltd (Anti-Discrimination)* [2010] VCAT 802, [956].

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	the complaint to prove their claim.	person or party alleged to have discriminated, this has been a significant factor in why many discrimination claims fail.5 It has been made even more difficult for a complainant to establish their claim because both the legislation and the judiciary have failed to outline the precise state of mind in the respondent which the complainant must prove.6	discriminate against the compliant) than it is for the complainant to establish their onus of proof (i.e. the state of mind of the respondent) • Shifts the system of anti-discrimination law to a more equal playing field, rather than have the current legal regime which is weighed heavily in favour of the respondent • Brings the burden of proof in-line with General Protections adverse action discrimination under the Fair Work Act 2009 (Cth). It also brings the onus of proof in-line with the corresponding anti-discrimination laws in the United States of America and the United Kingdom	proof, in similar terms to s361 of the Fair Work Act 2009 (Cth)
Section 72 – competitive sporting activities	There is a blanket exemption against people of one sex or gender identity participating in competitive sport in which “the strength, stamina or physique of competitors is	Victorian Equal Opportunity and Human Rights Commissioner Kate Jenkins, has stated: "There is a myth that transgender people will gain a competitive advantage by participating as their affirmed gender. These false assumptions can lead to discrimination, bullying and exclusion."		Remove ‘gender identity’ from blanket exemption at section 72(1). Sporting organisations would still be able to apply for an exemption under section 89.

[5] See, eg, Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2nd ed, Federation Press 2014) 142.

[6] *Ibid* 75.

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	relevant”			