

Submission to the Victorian Equal Opportunity Review

**Sara Charlesworth
Centre for Applied Social Research
RMIT University**

Introduction

The Discussion Paper raises a number of important and overlapping issues in respect to the possible reform of the Victorian *Equal Opportunity Act 1995* (EOA). This submission focuses mainly on better mechanisms for resolving discrimination, both individual and systemic. While many of the comments are relevant to all the areas currently covered by the EOA, this submission concentrates on the issues from the vantage point of paid work, that is, in the area of employment. The empirical work it draws on is focused on the attributes of sex and parental or carer status. Where the submission responds to specific questions or issues in the Discussion paper, the numbers of these questions and/or sections are indicted.

The first section briefly canvasses the need for reform. The second section highlights the need for adequate data in relation to establishing the extent of discrimination in Victoria, to support action to reduce systemic discrimination and to monitor the efficacy of the EOA in redressing both individual and systemic discrimination. The third section then argues for a simpler, quicker and more accessible system for dealing with complaints raised by individuals or groups of individuals. The fourth section sets out a number of mechanisms that could be employed to encourage compliance with the EOA and also to encourage positive organisational action towards both the elimination of discrimination and the promotion of equality. The final section very briefly considers the role of the Victorian Equal Opportunity and Human Rights Commission in administering the EOA and giving effect to the Victorian Human Rights Charter and argues for a multi-role Commission as is the case with the New Zealand Human Rights Commission.

Need for Reform

It is now over 30 years since equal opportunity legislation was first enacted in Victoria. While prohibition against discrimination in the area of employment continues to be the major focus of formal complaints made to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), participation in, and the nature of, employment has changed dramatically since 1977.

There has been an increasing participation of women in the paid workforce, including those with children under school age, albeit mainly in poorer quality part-time employment (Preston 2007). The 'price' many women pay to work reduced hours to accommodate work and family responsibilities in terms of casualised conditions and poorer hourly wages has been well documented (see for example Campbell & Charlesworth 2004; Chalmers et al 2005). At the same time conditions of employment have become increasingly deregulated moving from centralised wage fixing to enterprise bargaining in the early 1990s to an increasingly emphasis on individual bargaining and degraded employment minima from the

late 1990s on. Casual employment has increased dramatically and now comprises almost a quarter of all employment and a third of female employment in particular. Casual employment includes a large group of workers across all industries, but with particular concentrations in retail, accommodation cafes and restaurants, and cultural and recreational services (Campbell 2007), in which the majority of employees are women. At the same time deregulation of employment conditions has worsened the conditions even for permanent workers, particularly those working on a part-time basis where the pay gap with full-time workers has grown (Campbell 2007).

The interaction of these changes in participation and employment has led to an increase in gender-based inequalities in the labour market and, in many cases, to more entrenched systemic discrimination within organisations (Preston et al 2006; Maddison & Partridge 2007). These inequalities range from the increasing pay gap between men and women, between full and part-time workers and between those working in feminised industries and those working in male-dominated industries (Preston et al 2006; Peetz 2007) to poorer job quality. The well-being and mental health effects of poor job quality, especially on mothers, are also becoming increasingly recognised (Stazdins et al 2007), with consequent costs for the public purse. The phenomenon of what Preston calls an ‘advancement gap’, where sex segregation both within industries and organisations and the ghettoisation of part-time employment makes it very difficult for many women to progress and take advantage of their increasingly levels of education, is also apparent. This advancement gap in turn has negative labour market consequences in terms of redressing skill shortages, especially in non traditional sectors where attraction and retention is a particular problem (Preston 2007). At the same time however the *discriminatory* effects of such changes are increasingly invisible and normalised. This is due in large part to the dominant neo-liberal policy and political context over the last decade where focus has been on the individual ‘choices’ made by individual women, rather than on the promotion of gender equality. This normalisation of systemic discrimination, and indeed of direct discrimination, is reflected in the steady decline in formal complaints made under the EOA, despite the advent of WorkChoices in March 2006, and indeed in hearings before VCAT. This is because, as I have argued elsewhere, to be able to ‘name’ discrimination you have to be able to ‘see’ it (Charlesworth 2007). Seeing discrimination can be very difficult where responsibility for any social risks and disadvantage in employment is shifted on to the individual worker.

These brief comments in relation to gender discrimination and inequality are confined to the area of employment under the EOA. However, they point to the need for a modernisation of the legislation that can be used to more effectively and respond to the working realities for men and women in the changed workplace of the 21st century. As a starting point, and in response to some of the issues raised in section 3.4 of the Discussion Paper, I advocate a change of name to the legislation, from the ‘Equal Opportunity Act’ to something more aspirational such as the ‘Equality Act’. This name change could provide an impetus to a rethinking of the day to day practices in the complaint handling process and the work and roles of the VEOHRC. It would reflect the broad aims of both an individual complaints mechanism and positive action measures to address systemic disadvantage (see Charlesworth 2007) and would recognise more explicitly the links with the Charter of Human Rights and Responsibilities in any amendments to come out of the current Review. There would need in turn to be consequent amendments to the section 3 objectives of the current EOA moving, for example, from promoting recognition and acceptance of everyone’s right to

equality of opportunity to promoting recognition and acceptance of everyone's right to *substantive equality*. Renaming the EOA as the Equality Act would thus arguably create the space to engender community debate about what constitutes substantive equality. Further, as discrimination claims become equality claims, attention will be drawn in the individual complaint process both to the absence of equality and to its effect on individual and group claimants, which can then be linked to positive measures to address the systemic disadvantage from which such claims spring.

In sum then, the political, social and employment context today is very different from when the first equal opportunity legislation was first introduced in Victoria. Action is needed on many fronts but legislation has an important role to play as a part of a comprehensive strategy for tackling inequality, discrimination and disadvantage (Dickens 2007). What counts in the success of any such strategy, however, is how the legislation is operationalised in practice at the industry level, in organisations and by the agencies responsible for the legislation (VEOHRC and VCAT). Ensuring that the actual process of complaint handling, data collection and monitoring and other functions of the VEOHRC are as effective as possible is thus critical.

Need for Adequate Data & Active Monitoring

This section, which relates in the main to issues raised in section 3.3 of the Discussion Paper, argues for the collection and use of data to monitor the extent of discrimination in Victoria, including that reflected in complaints made to the VEOHRC. It also draws attention to the need for such data to be used to take proactive steps both in reducing discrimination and promoting equality more generally, and to educate the both potential complainants and respondents. This is necessary if the current complaint system is to be able to better comply with the Attorney General's Justice Statement criteria for an effective dispute resolution system. These criteria include: fairness, transparency and accountability (see question 4.2.1 in Discussion Paper).

Equality Indicators and Benchmarks

While beyond the scope of the current Review, work remains to be done to establish a series of indicators or benchmarks against which the extent of discrimination and the progress towards equality can be measured. There are a number of sets of indicators in use internationally that could be considered when considering movement in gender (in)equality in employment. See for example the gender statistics provided by the United Nations Economic Commission for Europe on Work and the Economy (<http://w3.unece.org/pxweb/DATABASE/STAT/3-GE/03-WorkAndeconomy/03-WorkAndeconomy.asp>) and the Gender and Work Database at York University in Canada (<http://www.genderwork.ca/cms/displaysection.php?sid=30>). The West Australian Office of Women's Policy also keeps a modest score card which provides data over time against a range of indicators such as the representation of women in public life, perceived health and well-being of senior women as well as various aspects of women's labour force participation (see <http://www.community.wa.gov.au/NR/rdonlyres/BBC41107-7341-4BDA-9051-7E963566E870/0/DCDRPTWomensReportCardUpdateApril2006.pdf>).

Supporting Action to Reduce Individual and Systemic Discrimination

Currently, the data collected and analysed in respect of individual complaints and inquiries made to the VEOHRC is inadequate to monitor the efficacy of the EOA in redressing either individual or systemic discrimination. In particular, relatively little is known in the area of employment about the socio demographic and employment characteristics of complainants or the employers and workplaces about which they make complaints.

Currently, basic data is collected when complainants lodge a complaint, including the grounds of complaint, the complainant's sex and key dates such as referral to conciliation etc. A summary of the complaint at the time of lodgement is also collected. This data is available for analysis within the VEOHRC with some data used for the statistical overviews provided in the Annual Report. From my analysis of 84 VEOHRC conciliation files opened between January and March 2004 (see Attachment 1), it would appear that a further data collection sheet is frequently but not always sent out to complainants. Where it is, it would appear most complainants provide the details requested, which go to age, occupation etc. However there is no systematic coding of this data such that would provide an overview of complaints by any of the socio demographic data collected. Further, while the industry sector of relevant respondents can be readily identified, this data is also not routinely collected and analysed. The VEOHRC Annual Reports indicate that data *is* collected on the type of employer respondent, for example type of government organisation, private sector etc. However, the data is not differentiated by industry sector.

It would also be most useful to systematically collect and disseminate data on the main detriments alleged by complainants. For example, in its Annual Reports the NSW Anti-Discrimination Board categorises the type of employment complaints, such as work environment and harassment, dismissal, classification/benefits, recruitment/selection etc. Further, while data relating to legal and other representation of complainants and respondents and to the details of settlements are available on VEOHRC complaint files, such data do not appear to be routinely coded and analysed. Data that is currently available on VEOHRC complaint files including details on outcomes such as the type of settlement, and, where monetary, the quantum of the settlement, should also in my view be routinely coded and made available in Annual Reports and/or on the VEOHRC website.

There needs to be a serious and committed attempt to collect data from inquiries and complaints made to the VEOHRC that will enable both the monitoring of the efficacy of the EOA and the VEOHRC processes and practices as well as providing the basis for proactive steps to address systemic discrimination against various groups, in various areas and in particular industries.

Good data collection and analysis is vital not only for reporting and accountability purposes, but also for monitoring trends in complaints and for the education and research activities undertaken by the VEOHRC. Such data can form the basis of feedback to

employer associations, unions, government and the broader community so that discrimination issues can be tackled in a proactive way. For example in my analysis of the 2004 conciliation files (described in Attachment 1), it appeared that the retail industry was an important one for formal sex/gender based complaints in the period under study. Such information could be used to form the basis of industry-specific anti discrimination and equality strategies in consultation with the appropriate union and employer associations.

The socio-demographic and employment-related data currently collected by Job Watch from callers to its advice service provides a useful template in the area of employment. Importantly such data needs to be published on the VEOHRC website with more detailed data made available to a range of bodies and individuals including unions, employer associations, government departments and researchers.

For accountability purposes and education purposes it would also be useful to regularly publish summary details of finalised conciliations as HREOC does as noted in section 4.4.5 of the Discussion Paper. Based on my own research and consultation in a wide range of industries, few employees or employers understand the conciliation process or indeed its potential in resolving grievances. Such data is currently available internally in the VEOHRC. The HREOC register of conciliated and finalised complaints is available to the public and is used both for research purposes and education purposes. See: http://www.hreoc.gov.au/complaints_information/register/sda/sda_jul04_dec04.html. These small summaries, while apparently restricted at HREOC to successful outcomes, provide a realistic snapshot of the conciliation process as well as the types and grounds of the discrimination that are the basis of complaints.

Resolving individual complaints

In this section I draw on the research project described in Attachment 1 as well as other research I have undertaken (see for example Charlesworth and Macdonald 2007). In my view the current complaint handling system under the EOA is too onerous, legalistic and formal for both complainants and respondents. It meets few of the criteria set out in the Attorney General's justice statement for an effective dispute resolution process. The perceived need to remain impartial and the investigation process in particular can work against the practical accessibility of the complaint process and the speedy resolution of complaints.

In my research based on VEOHRC conciliation files opened in 2004, it appeared in some instances that the investigation of complaints went more to the substantive merits of a claim than to establishing whether a complaint fell within the ambit of the EOA and that

it was conciliable.¹ In addition, based on an analysis of the paper files only, there was some evidence that the industrial relations and workplace context of employment-based discrimination was not always well understood. This is a problem as what appear to be neutral workplace requirements may have a discriminatory effect. Moreover making judgments about allegations made by complainants requires a good understanding of the likely workplace context of those complaints, which may depend on industry sector, whether the employee is employed on an ongoing or casual basis, or indeed on the gender make-up of a workplace.

A new VEOHRC complaint handling process

I propose that the current complaints handling process be recast to better meet the Attorney General's Justice Statement criteria for an effective dispute resolution system. In particular, it is my view that any investigation phase of the complaint process needs to be confined explicitly to establishing whether the complaint raises an attribute covered by the EOA and falls under one of the relevant areas of the EOA, and whether conciliation or other alternative dispute resolution is likely to assist resolve the complaint. One model that is worth considering is the relatively recent New Zealand Human Rights Commission (NZ HRC) dispute resolution process, which focuses on resolving complaints in the most effective, informal and efficient manner possible in keeping with the Human Rights Act. The case management system aims to ensure that complaints of unlawful discrimination are dealt with effectively and in a timely fashion to reach fair and effective resolutions of complaints at the earliest possible opportunity (NZ HRC 2007: 32). The main steps in this process are as follows:

1. Triage of complaints:
 - Assessment as to whether the Commission is the right agency and/or whether information can help the parties clarify or resolve their complaint.
 - Assessment as to whether it may be within the unlawful discrimination provisions or whether it relates to broader human rights issues.
2. Complaints that relate to unlawful discrimination are either passed to the duty mediator (to start to deal with on the day); or acknowledged and assessed further (if the nature of the complaint suggests that immediate intervention will not be productive).
3. After assessment, complaints are assigned to mediators
 - Mediation depends on the engagement of all parties. Mediators give and receive expectations from parties against timeframes, follow them up and keep all parties informed as to progress or reasons for delay
 - Where matters are unresolved after mediation, they are referred to the Human Rights Review Tribunal. At this stage the Office of Human Rights Proceedings, an independent part of the Human Rights Commission, may also be involved in providing legal representation to complainants.

¹ While during the course of collecting data from the conciliation files, I had the opportunity to note the operation of a number of VEOHRC practices as reflected in the files, the purpose of this research was *not* focused on auditing or monitoring VEOHRC processes and procedures. My comments are based on the paper file analysis and do not claim to be a complete or necessarily balanced analysis of VEOHRC complaint-handling. Further, the study I undertook was restricted to one set of complaints in a limited and specific time period.

The flexible dispute resolution process allows a range of interventions. Some complaints are resolved through the provision of information which can enable self help. In 2007, the NZ HRC managed to close 90 percent of complaints within three months of receipt.

The system of triage, in particular, has enormous potential. In a recent project on pregnancy discrimination we found that those who are experiencing workplace discrimination require the sort of practical support and non-technical, non-legalistic advice that the NZ system apparently provides in this phase (see Charlesworth and Macdonald 2007). The role of the Duty Mediators is also an innovative one that would, especially in the employment context, facilitate the speedy resolution of disputes in an informal way that works to maintain rather than exacerbate any rupture of the employment relationship. I note that on the NZHRC website the role of the duty mediators in this respect is to:

- Provide informal intervention and try to resolve dispute
- Provide sounding board for discussion of human rights issues
- Gather data for systemic issues
- Encourage attitudinal change

The NZ system is from all reports working well. I understand that members of the EOA Review team have spoken with relevant officials of the NZ HRC and will have information about any internal assessment of their new complaint handling process.

Legal representation in the VEOHRC complaint handling process

In relation to some of the issues raised in section 4.4.2, it is my view that the practice of allowing lawyers, and on occasion barristers, to attend conciliation hearings can make it more difficult to resolve complaints and ought to be actively discouraged by the VEOHRC, particularly where the respondent only is legally represented.² The NSW system whereby legal representation is only by leave of the President of the Anti-Discrimination Board (see 4.4.2 in the Discussion Paper), would serve to act as a brake on the default acceptance of legal representation in the complaint handling process under the EOA.

There is also some evidence (see for example Charlesworth and Macdonald 2007) that some complainants believe that they need legal representation to pursue a complaint at the VEOHRC. While this is not in fact the case (indeed in the analysis of the 2004 VEOHRC complaints, respondents were far more likely to be represented by lawyers than complainants), this perception acts as a disincentive for many potential complainants to pursue complaints. Further, the situation where respondents are represented where complaints are not, adds to the power imbalance already present in an employment relationship. In addition, it is unclear the extent to which legal representation aids the conciliation process. In a small recent project undertaken with the VEOHRC, details of which have been provided to the Review team, the presence of legal representation was more likely to be associated with unsuccessful conciliations than with successful conciliations.

² This is not to argue however that the VEOHRC should not provide legal advocacy and representation to complaints as highlighted in the last section of this submission

Tribunal hearings

In Victoria, discrimination matters that cannot be resolved in conciliation may be referred to VCAT. However the current process at VCAT with mediation before any hearing is onerous for the parties and arguably involves a duplication of alternative dispute resolution. In my view the previous system under the former Equal Opportunity Board was much more effective. Parties understood that when a complaint was referred to the Tribunal that a hearing would take place unless the matter settled. This worked to both encourage settlements 'on the door of the court' and also reduced waiting times for the determination of a matter.

There is unfortunately a paucity of meaningful data about the actual effectiveness of the mediation process at VCAT. What is apparent, particularly in the area of sex discrimination in employment, is that there are increasingly fewer hearings. In 2006 for example, only seven such cases under the EOA were determined by VCAT, with four of these being procedural matters only. The slowdown in complaints and the lack of a developed body of case law means that much of the influence anti-discrimination law can have on workplace practices and culture is greatly diminished (Charlesworth 2007). Thus in respect to the issues raised in section 4.3.3 of the Discussion Paper, I would advocate that whatever new complaint dispute resolution process emerges from the Review, that it is VEOHRC that has the responsibility for this process rather than VCAT. This would leave VCAT free to provide a faster and more effective determination function that can hopefully lead to a more robust and nuanced interpretation of the law.

Further, while I recognise that the role of VCAT is not under consideration in the current Review, it is my view that it would be preferable to have a specific equality review tribunal such as in New Zealand and Queensland and as was formally the case in Victoria. A quick look at the number of cases going through the Australian tribunals compared to the other administrative tribunals indicates both a larger number of cases per capita being determined as well as more in which discrimination is proven. For example, while not necessarily comparable, there appear to have been in 2006 to have been 11 cases raising issues of sex and related discrimination in employment in which the Queensland Anti-Discrimination Tribunal made decisions. Of these one was an exemption and one was an application to strike out. Out of the remaining 9 cases (7 sexual harassment, one pregnancy/family responsibilities and one both sexual harassment and pregnancy/family responsibilities), all were upheld or partly upheld. In contrast in the same period in Victoria of the three substantive matters raising issues of sex and related discrimination in employment determined by VCAT (all sexual harassment), two were dismissed and one upheld. This is consistent with the data provided on p 13 of the Discussion Paper where it would appear that discrimination was proven only in less than 10 percent of the cases finalised at a full hearing at VCAT in 2006/7.

Linking individual complaint resolution to systemic measures

The individual complaints system under the EOA needs to be linked with measures to address systemic discrimination such as positive action (Charlesworth 2007). This can be achieved in part by the suggestions made above in respect of data collection and as well as by the use of audits of workplace practice where a complaint is lodged. That is, making an equality claim should trigger discussion with the organisation in which the claim has arisen about taking proactive steps to address any systemic disadvantage identified in the claim This

could take place at the start of the complaint process, after under the triage process set out above, when a complaint is settled at conciliation, and/or when a complaint is upheld at hearing. In the United Kingdom, for example, Employment Tribunals have the power to make an ‘action recommendation’ to ensure steps are taken to improve an employer’s policies and practices as they relate to the complaint. I also note that, as set out in the Discussion Paper in section 4.5.9, the NSW Administrative Decisions Tribunal can also make similar orders. While the VEOHRC would take responsibility for raising the issue of positive action to address systemic discrimination with organisations and respondents where inquiries and complaints are made, VCAT should be responsible for making orders to address the broader systemic issues that are raised in the course of the determination of a complaint referred to it. Links between both individual complaints lodged with VEOHRC and in determinations made by VCAT should be made with other action-based and goal-oriented equality duties, such as those implemented in the United Kingdom’s Race, Disability and Gender Equality duties (Charlesworth 2007) briefly outlined below.

Addressing systemic discrimination

There are a number of measures that that could be employed to encourage compliance with the EOA and also to encourage positive organisational action towards both the elimination of discrimination and the promotion of equality. The Discussion Paper outlines for example in section 3.3 a number of examples such as codes of practice, guidelines, actions plans and public alerts. All are useful measures. In this section I focus briefly on a further two such measures that are also raised in the Discussion Paper, namely public sector duties and procurement policy.

Equality duty – public and private sector

The Discussion Paper raises the issue of public sector duties in section 3.3.10 in the context of the Charter of Human Right and Responsibilities. The recently implemented Gender Equality Duty in the UK for example places the legal responsibility on public authorities to promote gender equality and eliminate sex discrimination, in respect of employment, the provision of services and policy making. Public authorities in England, Wales and Scotland are also required to meet special duties to identify and then take steps to eliminate disadvantage and inequality. For example the specific duties require public authorities in England to take the following steps:

- prepare and publish a gender equality scheme, showing how it will meet the authority’s general and specific duties and setting out its gender equality objectives;
- consider, in formulating the authority’s overall objectives, the need to include objectives that address the causes of any gender pay gap;
- gather and use information on how the authority’s policies and practices affect gender equality in the workforce and in the delivery of services;
- consult stakeholders (i.e. employees, service users and others, including trade unions) and take account of relevant information in order to determine the authority’s gender equality objectives;
- assess the impact of the authority’s current and proposed policies and practices on gender equality;

- implement the actions set out in the authority's scheme within three years, unless it is unreasonable or impracticable to do so; and
- report on the scheme every year and review it at least every three years.

The recent Review of the West Australian *Equal Opportunity Act 1984* also recommended placing a 'gender duty' on public employers.

While recognising the broad public sector duty in the Charter of Human Right and Responsibilities as set out in section 3.4.10 of the Discussion Paper, I believe there is still a place for specific equality duties that cover the most frequently used attributes in the EOA, sex (including sexual harassment and parental/carer status), impairment and race in *both* the public and private sectors.

Further, it is my view that serious consideration should be given to extending such equality duties to the private sector. This is to ensure that in the area of employment, in particular, all those who have redress under the individual complaint mechanism under the EOA are also able to benefit from positive action taken to address systemic discrimination and disadvantage. There has been considerable debate in the UK about the extension of such equality duties to the private sector. In a recent paper Michael Rubenstein argues persuasively that where such duties cover only the public sector rather than extend also to the private sector, there are a number of negative consequences that fall on employees, business in and government. These include:

- To the extent that public sector equality duties mean that public sector workers are more likely to have equal opportunities and less likely to be discriminated against in practice because of the mechanisms accompanying the positive duties, failure to regulate private sector employers to the same extent means that private sector workers are, to that extent, second-class citizens.
- Heavy regulation of public sector employers as a result of the positive duties imposes costs on the public sector employer and provides an incentive for public authorities to contract out work to the deregulated private sector.
- Light-touch regulation of the private sector places the more progressive private sector employers who wish to adopt high equal opportunities standards at a competitive disadvantage, at least in the short term (Rubenstein 2007: 1-2).

It is worth noting that for almost 20 years in Northern Ireland there has been a statutory requirement on private sector employers to monitor and report on their equality practices, in relation to the employment of Catholics under the 1989 Fair Employment and Treatment (NI) Order (FETO). Under the FETO if companies fail to meet statutory reporting and workforce monitoring requirements, or instructions to apply affirmative action, sanctions can be placed on employers including exclusion from public authority contracts. As noted by the European Commission's Community Action Program to Combat Discrimination, these requirements have had a greater long term deterrent effect than the sanctions following litigation. They point to a recently published evaluation that assessed the changes that have taken place as a result of the fair employment legislation. That assessment confirmed:

- a substantial improvement in the employment profile of Catholics;
- a considerable increase in the numbers of people working in integrated workplaces, in contrast to continuing segregation in public housing; education, rather than religion, now the main determinant of social mobility;
- employers indicating that strong legislation has helped change practices, and evidence suggesting that affirmative action agreements have helped to redress workplace under-representation (European Commission's Community Action Program to Combat Discrimination 2006).

In ensuring positive duties are implemented and are effective, there needs to be an appropriate compliance regime. Fredman argues for a number of steps in the compliance pyramid, moving from encouragement and support to promote a co-operative rather than adversarial approach, to scrutinizing report and equality plans and their implementation, with provision for sanctions if appropriate (2005). In my view, the VEOHRC should have the responsibility for scrutinizing reports and equality plans and their implementation relevant to any public and or private sector duties, with the prosecution of any breaches by VEOHRC a matter to be determined by VCAT.

Government purchasing policy

The UK Equalities Review found that there was evidence that using procurement to promote equality in employment is generally accepted by the business community to be a sensible approach for government to take and further that requiring suppliers to follow sound equalities principles, and to adopt the provisions of an updated public sector duty to promote equality, could have a profound impact (cited in Rubenstein 2007: 17-18).

As noted in the Discussion Paper, an important initiative taken by the Victorian government has been to encourage employers in certain sectors of the private sector to adhere to minimum decent employment standards through the development of an Ethical Purchasing Policy to provide a mandatory safety net of fair employment standards for employees in nominated vulnerable sectors (security services, catering, cleaning services and the textiles, clothing and footwear industries) who are engaged in the provision of goods or services to Victorian Government public sector entities. The policy requires suppliers and sub-contractors from these sectors involved in the provision of goods or services to Victorian Government entities to:

- provide terms and conditions of engagement for on-shore employees, all sub-contractors and their on-shore employees that are not, on balance, less favourable than those provided by the relevant federal award(s) as at 26 March 2006
- incorporate any increases or improvements from determinations of the Australian Fair Pay Commission into the terms and conditions of engagement

The Ethical Purchasing Policy provides a useful template to use the government's purchasing power to both encourage good practice in relation to the elimination of discrimination and the promotion of equality and also to effectively sanction those organisations that breach the Victorian equal opportunity legislation. Christopher McCrudden's recent book (2007) makes a powerful case for using the government's purchasing power for to 'buy' social justice outcomes in the private sector. In particular, he

points to the Northern Ireland FETO example as support for the effective use of procurement as a mechanism to enforce anti-discrimination legislation, while also highlighting the role of procurement to advance a wider conception of distributive justice.

The Multiple Roles of VEOHRC

In Chapter 3 of the Discussion Paper the main questions set out in Chapter 3 and 4 are essentially concerned with the role of the VEOHRC and the powers it should have in preventing and resolving discrimination. There has been a view both within and outside VEOHRC that the secrecy provisions of the EOA together with the current role of VEOHRC in complaint-handling make it difficult, if not impossible, to take on an advocacy role for complainants and to pursue measures to address systemic discrimination and disadvantage. Thus in order to free up the VEOHRC to take on the latter roles, there has also been the view expressed that another body could take on the management of the dispute resolution process for individual or representative complaints. As noted above, I believe there is a strong case for the Commission to maintain and enhance its current roles, including in complaint resolution and education, as well as take on additional roles in the area of positive action and advocacy and representation aimed at not only eliminating discrimination but also at advancing equality.

Any concern about the capacity of VEOHRC to carry out multiple roles, presuming it is adequately funded to do so, could be reduced by removing the current secrecy provisions. While the current EOA provision in section 192 provides that information can be recorded disclosed or communicated where it is necessary to do so, in practice it has acted as a constraint on the provision of information about the Commission's work and indeed on what is available in the public domain. This has led to a lack of transparency about the VEOHRC processes and indeed some considerable confusion about the complaint resolution process in the community. In my view section 192 of the EOA should be repealed and provision made simply for the confidentiality of discussions and of the identity of the parties to any conciliation or dispute resolution where one or both request this. Further, I would respond in the affirmative to question 4.5.7.1 that the VEOHRC should be able to make reasonable and or necessary disclosures for the purposes of the performance of a function or exercising its duties and powers under the EOA.

In summary, while much needs to be done in addressing systemic discrimination, any changes in this area need to be linked to the provision of an enhanced and responsive forum for the resolution of individual and representative complaints. Responsibility for the resolution of complaints is critical for the VEOHRC to keep its 'nose to the ground' and to be aware on a day to day basis of the types of issues that are arising in particular areas or for particular groups, responding on an individual and systemic basis as necessary. There is also a role for a separate but linked part of the VEOHRC to provide legal assistance to complainants as per the NZ Office of Human Rights Proceedings, which works in tandem with the NZ HRC. In my view, a body such as the NZ Office of Human Rights Proceedings could also be endowed with the power to bring proceedings for an offence under the EOA or other enforcement that may be necessary to support positive action towards the elimination of discrimination and the advancement of equality.

References

- Campbell, I. (2007) *Globalization and Changes in Employment Conditions in Australia*, Report prepared for the Conditions of Work and Employment (TRAVAIL) program of the International Labour Organisation (unpublished).
- Campbell, I and Charlesworth, S (2004) *Background Report: Key Work and Family Trends in Australia*, Melbourne, Centre for Applied Social Research, RMIT University: Melbourne.
- Chalmers, J., Campbell, I. and Charlesworth, S. (2005) 'Part-Time Work and Caring Responsibilities in Australia: Towards an Assessment of Job Quality', *Labour & Industry* 15 (3), 41-66.
- Charlesworth, S (2007) 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities' *The Clare Burton Memorial Lecture 2007* <http://mams.rmit.edu.au/tug062qz5vva1.pdf>.
- Charlesworth, S. and Macdonald, F. (2007) *Hard Labour? Pregnancy, Discrimination and Workplace Rights*, Office of the Workplace Rights Advocate: Melbourne.
- Dickens, L. (2007) 'The Road is Long: Thirty Years of Equality Legislation in Britain', *British Journal of Industrial Relations*, 45(3): 463–74.
- European Commission's Community Action Program to Combat Discrimination (2006) 'The Fair Employment and Treatment Order (FETO) Northern Ireland' *Roma Rights Quarterly* No 1: 9-11.
- Fredman, S. (2005) 'Changing the Norm: Positive Duties in Equal Treatment Legislation', *Maastricht Journal of European and Comparative Law*, 12: 369–98.
- Maddison, S. and Partridge E. (2007) *How Well Does Australian Democracy Serve Women?*, Report No. 8, prepared for the Democratic Audit of Australia, School of Social Sciences, The Australian National University. <http://democratic.audit.anu.edu.au>.
- McCrudden, C (2007) *Buying Social Justice: Equality, Government Procurement, and Legal Change* Oxford University Press: Oxford.
- New Zealand Human Rights Commission [NZ HRC] (2007) *Annual Report 2007* http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/19-Nov-2007_11-42-32_HRC_ANNUAL_REPORT_07.pdf
- Peeetz, D. (2007) *Assessing the Impact of 'WorkChoices' — One Year On*, Report to the Department of Innovation, Industry and Regional Development: Victoria.
- Pocock, B. (2006) 'Jobs, Care and Justice: A Fair Work Regime for Australia', *Clare Burton Memorial Lecture 2006*, <http://www.barbarapocock.com.au/documents/Burton2006.pdf>.
- Preston A. (2007) 'Gender (In)Equality in Participation and Opportunity: the Case of Australia', paper at the *National Conference on Women and Industrial Relations Our Work ... Our Lives 2007*, 20–1 September: Adelaide.
- Preston, A., Jefferson, J. and Seymour, R. (2006) *Women's Pay and Conditions in an Era of Changing Workplace Regulations: Towards a "Women's Employment Status Key Indicators" (WESKI) Database*, Women in Social and Economic Research [WiSER], Curtin University of Technology: Perth.
- Rubenstein, M. (2007) 'Equality, the Private Sector and the Discrimination Law Review: A Preliminary Report', Paper presented to the *Seminar on Discrimination Law Review*, 27 June 2007, Greater London Authority: London. <http://www.edf.org.uk/news/MichaelRubenstein.doc>.

Strazdins, L, Shipley, M and Broom, D (2007) 'What Does Family-Friendly Really Mean? Wellbeing, Time and the Quality of Parents' Job' *Australian Bulletin of Labour* 33(2): 202-225.