

Equal Opportunity Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

Clause 1 states the purpose of the Act.

Clause 2 is the commencement provision.

Part 1 comes into operation on the day the Act receives Royal Assent.

Section 225 comes into operation 1 year after section 29 comes into operation. The combined operation of these sections will provide a lead-in period of 1 year during which an employer may compulsorily retire his or her employees. After this it will be unlawful for an employer to compulsorily retire an employee on the basis of age.

- The remaining provisions come into operation on a day or days to be proclaimed or, if not proclaimed within 12 months of Royal Assent, on the first day after the end of that period.

Clause 3 states the objectives of the Act.

Clause 4 defines certain terms used in the Act.

Clause 5 provides for the Act to bind the Crown.

PART 2—WHAT IS PROHIBITED DISCRIMINATION?

Clause 6 lists the attributes on the basis of which discrimination is prohibited under the Act. The attributes listed in clause 6 are identified as being characteristics that are irrelevant to decisions regarding, for instance, the employability of a person or the suitability of a person as a tenant. The attributes include both existing and new grounds of discrimination.

The existing grounds of discrimination, or attributes, which are re-enacted, are—

impairment

- marital status
- political belief or activity
- race
- religious belief or activity
- sex
- status as a parent

The new grounds, or attributes, on the basis of which discrimination is prohibited are—

- age

industrial activity, which means—

being or not being a member of, or joining or not joining or refusing to join an industrial organisation

- participating in, not participating in or refusing to participate in a lawful activity organised or promoted by an industrial organisation. An industrial organisation is an organisation of employees, employers or any other trade or professional organisation
- lawful sexual activity, which means engaging in, not engaging in or refusing to engage in a lawful sexual activity. Lawful sexual activity means any form of sexual activity that is not prohibited by Victorian law. It is not intended to include paedophilia or bestiality
- physical features, which means a person's height, weight, size or other bodily characteristics, but is not intended to cover things like tattoos or body piercing
- pregnancy
- status as a carer. A carer is a person on whom another person is wholly or substantially dependent for ongoing care and attention, excluding a person who provides the care and attention wholly or substantially on a commercial basis. Carers are not limited to family members
- personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the listed attributes.

Clause 7 specifies the meaning of discrimination for the purposes of the Bill.

- discrimination means direct or indirect discrimination on the basis of an attribute listed in clause 6
- discrimination on the basis of an attribute includes discrimination on the basis of an actual or presumed attribute.

Clause 8 defines direct discrimination, in similar terms to the 1984 Act and other jurisdictions.

Clause 9 defines indirect discrimination in similar terms to the 1984 Act and other jurisdictions. Indirect discrimination is concerned not so much with discriminatory behaviour but with policies and practices which may have a discriminatory effect.

The person alleging indirect discrimination has the onus of proving such discrimination and providing evidence to support his or her allegation, including the unreasonableness of the requirement, condition or practice.

In determining whether a person discriminates (directly or indirectly) it is irrelevant whether or not that person is aware of the discrimination.

Clause 10 states that in determining whether a person discriminates (directly or indirectly), the person's motive for discriminating is irrelevant. For instance, an employer who refuses to employ a Chinese person, not because the employer dislikes Chinese people, but because the employer knows that the prospective employee would be mistreated by other staff, some of whom are prejudiced against Asian people, would commit an act of discrimination against the prospective employee.

Clause 11 provides that it is irrelevant whether discrimination occurs by a person—

- acting alone or in association with any other person
- doing an act or omitting to do an act.

This re-enacts the existing law.

Clause 12 makes it clear that if an exception in Part 3 or Part 4 or an exemption under Part 4 applies, it is not unlawful discrimination.

The onus lies upon a person who claims an exception to prove that the exemption applies.

PART 3—WHEN IS DISCRIMINATION PROHIBITED?

Part 3 specifies the areas of activity where discrimination on the basis of attributes specified in clause 6 are prohibited.

Division 1—Discrimination in employment

Clause 13 specifies the circumstances where an employer is prohibited from discriminating against a job applicant.

Clause 14 specifies the circumstances where an employer is prohibited from discriminating against an employee.

Clause 15 specifies the circumstances where a principal is prohibited from discriminating against a contract worker.

A contract worker is a person who does work for another person (the principal) under a contract between the person's employer and the principal.

A principal does not discriminate against a contract worker if the principal does or omits to do anything in relation to the contract worker that would not contravene the Act if done or omitted to be done by the employer of the contract worker.

Clause 16 provides an exception in relation to employment to provide domestic or personal services in relation to a person's home. For example, an employer may discriminate on the basis of any attribute, in determining who should be offered employment as a baby-sitter or house-keeper.

Clause 17 provides that a person may discriminate on the basis of specified attributes where the discrimination is in relation to genuine occupational requirements and gives examples of such requirements.

An employer may also limit the offering of employment to people of a particular age, sex, race or with or without a particular impairment in relation to a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

Additionally, an employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment. Discrimination on the basis of physical features in the areas of activity specified need not be based on reasons of authenticity or credibility. For instance, an employer could limit the offering of modelling or photographic work to people of a particular size and appearance.

Clause 18 provides that an employer may discriminate on the basis of political belief or activity in offering employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

Clause 19 provides an exception for employment in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

Clause 20 provides an exception for family employment so that an employer can limit the offering of employment to his or her relatives.

Clause 21 provides an exception for employment in small businesses. An employer can discriminate on the basis of any attribute in determining who should be offered employment if the employer employs no more than 5 people on a full-time basis. The 5 people include the people to whom employment is offered but not the relatives of the employer or people employed to provide domestic or personal services. Employment on a full-time basis is employment for at least 30 hours a week.

Clause 22 provides that an employer may discriminate against an employee or job applicant on the basis of impairment if, in order to perform the genuine and reasonable requirements of the employment, the employee or applicant requires or would require special services or facilities, but only if it is not reasonable for them to be provided.

Clause 23 enables an employer to set reasonable terms of employment, or make reasonable variations to those terms, to take into account the requirements of the employment or any special limitations of an employee or job applicant.

Clause 24 enables an employer to set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment. A requirement that all employees wear hair nets during working hours may be reasonable if the work involves the production of food but may not be reasonable in relation to work in a clothing shop.

Clause 25 provides an exception for employment that involves the care of children. For the operation of this exception, all specified conditions must be satisfied.

Clause 26 provides an exception in relation to the compulsory retirement of judicial officers, i.e. judges, magistrates and bail justices.

Clause 27 provides an exception for youth wages. An employer may pay an employee who is under the age of 21 years according to the employee's age, without infringing the prohibition on age discrimination.

Clause 28 provides that the Anti-Discrimination Tribunal, by granting an exemption under section 83, may authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is unsuitable for occupation by people of both sexes.

Clause 29 provides a 1 year exception for compulsory retirement. As a corollary of the prohibition on age discrimination, compulsory retirement ages will be abolished. Schedule 2 repeals many compulsory retirement ages specified in legislation.

For 1 year an employer may set an age for the compulsory retirement of an employee and/or retire an employee or require an employee to retire at a particular age. Thereafter, it will be unlawful discrimination to retire an employee or require an employee to retire at a certain age. The exception is provided to enable employers and employees to become informed of their rights and obligations.

Division 2—Discrimination in employment-related areas

Clause 30 prohibits a person intending to establish a firm comprising 5 or more partners from discriminating against another person in the terms on which the person is invited to become a partner. Discrimination is only prohibited in relation to the terms of partnership. A person can discriminate in determining who to invite to become a partner while in the process of establishing a firm.

Clause 31 prohibits discrimination by existing firms comprising 5 or more partners. A firm is prohibited from discriminating against a person—

in deciding who should be invited to become a partner

- in the terms on which the person is invited to become a partner.

A firm is also prohibited from discriminating against a partner of the firm in the circumstances specified in clause 31.

Clause 32 enables a firm, or a person intending to establish a firm, to discriminate on the basis of impairment, against a person seeking admission to the firm as a partner or against a partner in the firm where in order to perform the genuine and reasonable requirements of partnership in the firm, the person or partner requires or would require special services or facilities, but only if it is not reasonable for them to be provided.

Clause 33 enables a firm, or person intending to establish a firm, to set reasonable terms of partnership or make reasonable variations to those terms, to take into account any requirements of partnership or any special limitations of a partner or prospective partner.

Clause 34 prohibits discrimination by industrial organisations. An industrial organisation is an organisation of employees, an organisation of employers or any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment.

Clause 35 prohibits discrimination by qualifying bodies. A qualifying body is a person or body that is empowered to confer, renew or extend an occupational qualification.

Clause 36 enables a qualifying body to set reasonable terms in relation to an occupational qualification or make reasonable variations to those terms to take into account any special limitations of a person.

Division 2—Discrimination in education

Clause 37 prohibits discrimination by educational authorities. An educational authority is a person or body administering an educational institution. An educational institution is a school, college, university or other institution at which education or training is provided.

Clause 38 provides an exception for educational institutions which cater for particular groups in the community.

Clause 39 enables an educational authority to discriminate against a person on the basis of impairment if in order to participate or continue to participate in, or derive or continue to derive substantial benefit from the educational program of the authority, the

person requires or would require special services or facilities, but only if it is not reasonable for them to be provided.

Clause 40 enables an educational authority to set and enforce reasonable standards of dress, appearance and behaviour for students.

In relation to a school, a standard of dress, appearance and behaviour is taken to be reasonable if the educational authority administering the school has taken into account the views of the school community (for instance, the views of parents) in setting the standard.

Clause 41 provides an exception for age-based admission schemes.

This clause enables an educational authority to select students for an educational program on the basis of an admission scheme that has a minimum qualifying age (for instance, 5 years to start school) or that imposes quotas on students of different ages or age groups.

Division 4—Discrimination in the provision of goods, services and disposal of land

Clause 42 prohibits discrimination in the provision of goods and services. Services are defined extensively in clause 4, but exclude education or training in an educational institution because such services are specifically covered by Division 3. However, other services provided by an educational authority would be covered by this clause.

Clause 43 provides a limited exception in relation to the provision of insurance in the circumstances specified.

Clause 44 provides a limited exception, on the basis of age only, for credit providers in the circumstances specified.

Clause 45 enables a person to require, as a term of providing goods or services to a child, that the child be accompanied or supervised by an adult if there is a reasonable risk that, if unaccompanied or unsupervised, the child may—

- cause a disruption
- endanger himself or herself or any other person.

Clause 46 provides that a person may refuse to provide a service, or set reasonable terms for the provision of a service to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features, but only if it is not reasonable for the service to be provided in that manner.

Clause 47 prohibits a person from discriminating against another person in dealings in land. This prohibition on discrimination overrides anything to the contrary in any other legislation or instruments, including in any body corporate or service company rules in relation to subdivided land.

A person who breaches any covenant or obligation contained in any document referred to above, is not personally liable for such breach, if the person would have contravened this clause if the person had complied with the covenant or obligation.

Clause 47 does not apply to the leasing of land for accommodation purposes, as that is covered in Division 5.

Clause 48 provides an exception for dispositions of land by will or as a gift.

Division 5—Discrimination in accommodation

Clause 49 prohibits a person from discriminating against another person when offering to provide accommodation to the other person.

Accommodation is defined widely in clause 4, and includes both permanent and temporary accommodation and business premises as well as residential accommodation.

Clause 50 prohibits a person from discriminating against another person when providing accommodation to the other person.

Clause 51 requires a person who has provided accommodation to another person with an impairment to allow the other person to make reasonable alterations to the accommodation to meet that person's special needs, if specified conditions are met.

Clause 52 states that a person must not refuse to provide accommodation to a person with a visual, hearing or mobility impairment because that person has a guide dog, and must not charge extra because of the dog or require it to be kept somewhere else.

Clause 53 enables a person to refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

Clause 54 provides that a person may discriminate in deciding who is to occupy residential accommodation in which the person or his or her relatives and no more than 6 other people live.

Clause 55 provides that a person may refuse to provide accommodation to another person in a hostel or similar institution which is established wholly or mainly for the welfare of people with a particular attribute.

Clause 56 provides an exception for accommodation for students in educational institutions operating wholly or mainly for students with a particular attribute.

Clause 57 provides that a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for or in connection with a lawful sexual activity on a commercial basis, such as a licensed brothel.

Clause 58 is a similar provision to clause 47 (3) in relation to the prohibition of discrimination in accommodation.

Division 6—Discrimination by clubs and club members

Clause 59 prohibits a club from discriminating against applicants for membership.

For the purpose of the Act a club is limited to a social, recreational, sporting or community service club or community service organisation that occupies any Crown land or directly or indirectly receives any financial assistance from the State or a municipal council.

Clause 60 prohibits a club from discriminating against members of the club.

Clause 61 enables a club to exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established, if the club operates principally to—

- prevent or reduce disadvantage suffered by people of that group
- to preserve a minority culture.

Clause 62 enables a club to exclude a person from membership if the club exists principally to provide benefits for people of a particular age group and the person is not in that age group.

Clause 63 enables a club to provide separate, but similar, benefits for members of each sex.

Division 7—Discrimination in sport

Clause 64 is a definition section for the purposes of Division 7.

Clause 65 provides that a person must not discriminate against another person—

- by refusing or failing to select the other person in a sporting team
- by excluding the other person from participating in a sporting activity.

A sporting activity includes games and pastimes, for instance chess or debating.

Clause 66 provides exceptions for competitive sporting activities.

Division 8—Discrimination in local government

Clause 67 prohibits councillors from discriminating against fellow councillors and council committee members in the performance of their public functions.

Clause 68 gives an exception for discrimination on the basis of political belief or activity.

PART 4—GENERAL EXCEPTIONS AND EXEMPTIONS FROM THE PROHIBITION OF DISCRIMINATION

Clause 69 provides that a person may discriminate in any area of activity if the discrimination is necessary to comply with or is authorised by legislation or subordinate legislation.

Clause 70 states that a person may discriminate if the discrimination is necessary to comply with an order of the Anti-Discrimination Tribunal or an order of any other tribunal or court.

Clause 71 provides that the prohibition of discrimination does not apply to discriminatory provisions relating to pensions.

Clause 72 provides an exemption in relation to existing superannuation fund conditions. It is not prohibited discrimination to retain an existing superannuation fund condition in relation to a person who—

- is a current member of the fund
- becomes a member of the fund within 12 months.

Clause 73 specifies the circumstances under which discrimination on the basis of age, sex, marital status or impairment is permitted in relation to new superannuation fund conditions.

Clause 74 provides a general exception for charities.

Clause 75 provides a general exemption for religious bodies. This is similar to the exception contained in the 1984 Act for those bodies.

Religious bodies are subject to the sexual harassment provisions of the Act.

Clause 76 provides a general exemption to religious schools. This clause applies in relation to schools conducted in accordance with religious beliefs and principles, but not schools run by organised religious bodies (the latter are covered by clause 75).

A person or body to which this clause applies is subject to the sexual harassment provisions of the Act.

Clause 77 allows a person to discriminate if the discrimination is necessary to enable the person to comply with the person's genuinely held religious beliefs or principles.

Clause 78 re-enacts section 39 (a) of the 1984 Act to give private clubs exemption from the operation of the Act in relation to their activities.

Clause 79 makes clear that nothing in the Act is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority. The **Age of Majority Act 1977** specifies 18 as the age at which a person attains full age and capacity.

A person may discriminate against another person who is subject to a legal incapacity where the incapacity is relevant to the transaction or activity in which the parties are involved. For instance, a person may refuse to enter into a contract with a person who is under the age of 18 years.

Clause 80 contains exceptions to discrimination for conduct that is reasonably necessary for the protection of health, safety or property.

Clause 81 states that a person may provide benefits, including concessions, to another person based on age.

Clause 82 provides an exception to discriminate for the provision to people with a particular attribute of special services, benefits or facilities that are designed—

- to meet the special needs of those people
- to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.

Clause 83 sets out the procedure for the Anti-Discrimination Tribunal to grant exemptions from the Bill. This is similar to the existing procedure.

Clause 84 provides that the Minister may, on the application of any Minister, exempt any class of people employed within the public sector from the operation of Part 3 of the Act, to allow for compulsory retirement on the basis of age.

PART 5—PROHIBITION OF SEXUAL HARASSMENT

Clause 85 defines the term “sexual harassment” for the purposes of the Act as well as providing a definition of the phrase “conduct of a sexual nature”.

Clause 86 prohibits sexual harassment by employers and employees. For the purpose of this prohibition, a municipal councillor is an employer of council employees and a

company director or committee member of an incorporated or unincorporated association is an employer of employees of the company or association.

Clause 87 prohibits sexual harassment in common workplaces, regardless of whether the parties are employees, employers or self-employed.

Clause 88 prohibits sexual harassment by a partner in a firm.

Clause 89 prohibits sexual harassment by a member or employee of an industrial organisation.

Clause 90 prohibits sexual harassment by a member or an employee of a qualifying body.

Clause 91 prohibits sexual harassment by an employee or student of an educational institution or by a member of an educational authority.

Clause 92 prohibits sexual harassment in the provision or receipt of goods and services, whether or not the goods or services are provided or received for payment.

Clause 93 prohibits sexual harassment in the provision of accommodation.

Clause 94 prohibits sexual harassment by a member of a club.

Clause 95 prohibits sexual harassment by councillors.

PART 6—PROHIBITION OF OTHER CONDUCT AND VICARIOUS LIABILITY FOR DISCRIMINATION

Division 1—Victimisation

Clause 96 prohibits victimisation.

Clause 97 defines victimisation.

Division 2—Authorising or assisting discrimination

Clause 98 prohibits a person from authorising or assisting another person to discriminate against, sexually harass or victimise another person.

Clause 99 provides that both the person authorising or assisting the discrimination, sexual harassment or victimisation and the person who carries out the prohibited action are jointly and severally liable for the contravention.

Division 3—Discriminatory requests for information

Clause 100 prohibits a person from requesting or requiring another person to supply information that could be used by the first person to form the basis of discrimination against the other person.

Clause 101 provides an exception if the information is reasonably requested or required for a non-discriminatory purpose.

Division 4—Vicarious liability

Clause 102 sets out the circumstances in which an employer or principal will be found to be vicariously liable for the discriminatory conduct of an employee or agent.

Clause 103 provides that an employer or principal will not be vicariously liable for discriminatory conduct of an employee or agent where the employer or principal proves that he or she took reasonable precautions to prevent the conduct.

PART 7—COMPLAINTS AND THEIR RESOLUTION

Division 1—Making a complaint

Clause 104 sets out who may complain to the Commission and in what circumstances.

Clause 105 states that a complaint is made by lodging a written complaint with the Commission which sets out the details of the alleged contravention.

Clause 106 provides that the commission must assist complainants in the formulation of their complaints.

Division 2—Procedure after a complaint is made

Clause 107 provides that the Commission must notify the respondent in writing of the complaint as soon as practicable after receiving the complaint.

Clause 108 sets out the circumstances in which the Commission may decline to entertain a complaint. A complainant then has 60 days to require the Commission to refer the matter to the Tribunal. Failure by the complainant to require referral to the Tribunal within 60 days may lead to the Commission dismissing the complaint. If the complaint is dismissed, a complainant is prevented from taking any further action under this Act in relation to the subject matter of the complaint.

Clause 109 sets out the circumstances in which the respondent may apply to the Tribunal to have a complaint struck out.

Clause 110 provides that the Commission may dismiss a complaint if the complainant has not, in a period of 12 months, substantially responded to a request by the Commission for information.

Clause 111 provides that the Minister may refer a complaint directly to the Tribunal where the complaint raises an issue of important public policy.

Clause 112 sets out the circumstances where the Commission must refer complaints to the Chief Conciliator.

Clause 113 sets out the procedure where the Commission does not consider it reasonably possible that a complaint may be successfully conciliated. The Commission must notify the complainant, and, within 60 days, the complainant can require the Commission to refer the complaint to the Tribunal for determination. If the complainant fails to require referral, the Commission may dismiss the complaint.

Division 3—Conciliation of complaints

Clause 114 provides that the Chief Conciliator must make all reasonable endeavours to conciliate a complaint.

Clause 115 provides for conciliation agreements. If the parties reach agreement in relation to the subject matter of the complaint, a written record of the agreement may be prepared, signed by each party and certified by the Chief Conciliator. A copy may then be lodged with the Registrar of the Tribunal. On lodgement, the record of agreement is deemed to be an order of the Tribunal and may be enforced accordingly.

Clause 116 provides that anything said or done in the course of conciliation is not admissible in proceedings before the Tribunal or any other legal proceedings relating to the subject matter of the complaint.

Clause 117 sets out the procedure if conciliation is not successful. The Chief Conciliator must notify the complainant in writing and the Commission. The complainant, within 60 days after receiving the notice, may require the Commission to refer the complaint to the Tribunal for determination. If the complainant fails to require referral, the Commission may dismiss the complaint.

Clause 118 provides a procedure for any party to a complaint, either during or after the conciliation, to complain to the Commission about the method of conducting the conciliation. The Commission may investigate the complaint and issue directions about how to conduct future conciliations.

Division 4—Expedited complaints

Clause 119 provides that a complainant or respondent may apply in writing to the Commission for a determination that the complaint be expedited. The Commission is required to determine the application for expedition within 7 days.

Clause 120 sets out the grounds on which the Commission may determine to expedite a complaint. These include a case of sexual harassment in employment where the employment is continuing in similar circumstances, for instance where the complainant and alleged harasser continue to work in the same area. Emergency health matters are also covered, as are matters concerning the implementation of policy by a respondent.

Clause 121 provides for a respondent or complainant to apply in writing to the Tribunal for a review of the Commission's determination in relation to the expedition of a complaint under clause 120. The application for review must be made within 7 days after the applicant is given a copy of the Commission's determination. The Tribunal is required to begin hearing the application within 14 days after receiving it and must determine it as expeditiously as possible.

Clause 122 specifies the time limits for the conciliation of expedited complaints.

Clause 123 sets out the time limits for referring expedited complaints to the Tribunal for determination.

Clause 124 sets out the procedure where either the complainant or respondent may apply to the Tribunal to have an expedited complaint referred to the Tribunal for determination, without the complaint first going to conciliation.

Division 5—Special complaints

Clause 125 defines a special complaint.

Clause 126 sets out the procedure where a party to a complaint who considers it to be special compliant may require the Tribunal to refer the complaint to the Supreme Court for determination under this Division.

Clause 127 requires the Supreme Court to determine whether a complaint referred to it is a special complaint or not. If the Supreme Court determines that the complaint is not a special complaint, it must order that the complaint be referred back to the Tribunal and that all costs relating to the referral of the complaint to the Court be paid by the party that required the referral.

Clause 128 sets out the procedure where the Supreme Court determines that a complaint is a special complaint. The Court is to act as the Tribunal and is empowered to make any order that is available to the Tribunal. However, in making such order, the Court is required to have regard to specified factors.

Clause 129 sets out the costs provisions relating to special complaints.

Clause 130 provides that any party to a special complaint may appeal to the Court of Appeal, on a question of law, from an order of the Supreme Court, within 30 days after the order was made.

Division 6—Interim orders and preliminary conferences

Clause 131 sets out the procedure for the Tribunal, on the application of either the complainant or Commission, to make interim orders to prevent any party to the complaint from acting in a prejudicial manner.

Clause 132 sets out the procedure for preliminary conferences by the Tribunal before it proceeds to hear a complaint.

Clause 133 provides that a party to a complaint or a representative of a party, who was present at a preliminary conference, may object to the Tribunal member who held the preliminary conference being on the panel constituting the Tribunal to hear the complaint.

Division 7—Jurisdiction of the Tribunal

Clause 134 specifies the circumstances in which the Tribunal may hear a complaint.

Clause 135 sets out the time limits within which the Tribunal is required to commence to hear an expedited complaint.

Clause 136 sets out the orders that the Tribunal may make after hearing a complaint. These are substantially the same as the Equal Opportunity Board's existing powers, but it is made clear that the Tribunal may decline to make an order even if a complaint is proven.

Clause 137 empowers the Tribunal to make interim orders during a hearing, to prevent any party acting in a prejudicial manner.

Clause 138 empowers the Tribunal to order costs.

Clause 139 requires the Tribunal, on the request of a party to any proceedings, to give written reasons to the party, for any orders it makes in relation to the proceedings.

Clause 140 provides for the enforcement of monetary orders of the Tribunal.

Division 8—Procedure of the Tribunal

Clause 141 requires the Tribunal to act fairly and according to the substantial merits of the case in all proceedings before it.

Clause 142 provides that, except to the extent it determines, the Tribunal is not bound by the rules of evidence or by practices and procedures applicable to courts of record.

Clause 143 provides that, unless the Tribunal orders otherwise, all hearings before the Tribunal must be held in public.

Clause 144 specifies who may appear before the Tribunal or who may represent a party to proceedings before the Tribunal. It also provides for an interpreter or other person, such as a reader, to assist a person in a Tribunal hearing.

Clause 145 provides that the Tribunal may join other parties to a proceeding or grant a person leave to intervene in the proceedings.

Clause 146 provides that the Tribunal may make any technical amendments to the complaint in proceedings before it that it sees fit.

Clause 147 requires the Tribunal to give a party to proceedings, reasonable notice of the time and place it intends to hear the proceedings and a reasonable opportunity to call evidence, cross-examine witnesses and/or make submissions to the Tribunal.

Clause 148 empowers the Tribunal to take evidence on oath or affirmation.

Clause 149 empowers the Tribunal to retain and copy documents.

Division 9—Appeals from the Tribunal

Clause 150 provides that any party to proceedings before the Tribunal may appeal to the Supreme Court, on a question of law, from an order of the Tribunal. An appeal must be lodged within 30 days after the Tribunal's order was made.

Clause 151 provides that, before instituting an appeal, the party intending to appeal must notify in writing every other party to the proceedings and the Registrar of the Tribunal of the party's intention to appeal.

Clause 152 empowers the Tribunal, if a question of law arises in proceedings before it, to seek the Supreme Court's opinion. The Tribunal may do this of its own motion or on the application of any party.

Division 10—General

Clause 153 provides for the reconstitution of the Tribunal where a member of the panel hearing a proceeding has ceased to be member or has ceased to be available for the purposes of the proceedings.

Clause 154 empowers the Tribunal or the President to give directions as to any matter or thing not provided for by this Act or the regulations in relation to any proceedings or inquiry before the Tribunal.

Clause 155 empowers the Tribunal to extend or abridge any time limits fixed by the regulations for the doing of any act, if the Tribunal considers it necessary or desirable in the interests of justice or fairness.

PART 8—INVESTIGATIONS BY THE COMMISSION AND TRIBUNAL

Clause 156 provides the procedure where an investigation may be initiated by either the Commission or the Tribunal.

Clause 157 specifies the matters that may be investigated under clause 156.

Clause 158 sets out the procedure to be followed by the Commission in conducting an investigation. It provides that the Commission is to conduct an investigation in the same manner, as nearly as practicable, as it were a complaint.

Clause 159 sets out the powers of the Tribunal in relation to inquiries.

PART 9—ADMINISTRATION

Division 1—The Commission

Clause 160 provides that the Equal Opportunity Commission established under the 1984 Act continues to exist under the new Act. The Commission is a body corporate with all the powers and responsibilities associated with a body corporate. This clause also provides for the use of the common seal and the recognition of the seal by the courts.

Clause 161 sets out the functions of the Commission and provides that the Commission has all the power necessary to enable it to perform these functions.

Clause 162 sets out in more detail the Commission's educative and research functions.

Clause 163 sets out the membership of the Commission.

Clause 164 provides that a member of the Commission holds office for a term as specified in the instrument of appointment. A term can not exceed 5 years but a member is eligible for reappointment. Clause 164 (3) provides that members are not subject to the **Public Sector Management Act 1992** with the exception of Part 9 or in accordance with Part 8. Part 9 of that Act gives members who were formerly public servants a right of return to the public service. Part 8 gives the Governor in Council the power to apply sections of the Act to statutory offices, including the Commission.

Clause 165 sets out the circumstances under which a member of the Commission may be removed from office and the means by which a member may resign from the Commission.

Clause 166 provides that the Governor in Council may fill casual vacancies on the Commission where a member ceases to hold office.

Clause 167 provides for the appointment of a chairperson of the Commission. It also sets out the circumstances under which the chairperson may be removed from office and the means by which the chairperson may resign as chairperson.

Clause 168 provides that, if a member of the Commission is unable to perform his or her duties, the Governor in Council may appoint an acting member for the period of inability.

Clause 169 provides for the payment of members of the Commission.

Clause 170 provides for the procedure of the Commission.

Clause 171 provides that an act of the Commission is not invalid by reason only of a defect or irregularity in connection with the appointment of a member or acting member, a vacancy in the office of a member or on the ground that the occasion for an acting member to act had not arisen or had ceased.

Clause 172 sets out the Commission's power of delegation.

Division 2—Chief Conciliator

Clause 173 provides for the appointment of a Chief Conciliator of the Commission. The Chief Conciliator is also the chief executive officer of the Commission.

Clause 174 provides for the term of office of the Chief Conciliator.

Clause 175 sets out the circumstances under which the Chief Conciliator may be removed from office and the means by which a member may resign from the Commission.

Clause 176 provides that, if the Chief Conciliator is unable to perform his or her duties, the Governor in Council may appoint an acting Chief Conciliator for the period of inability.

Clause 177 provides for the payment of the Chief Conciliator

Clause 178 sets out the functions, powers and duties of the Chief Conciliator.

Clause 179 sets out the Chief Conciliator's power of delegation.

Division 3—Anti-Discrimination Tribunal

Clause 180 provides for the establishment of the Anti-Discrimination Tribunal. It also sets out the membership of the Tribunal.

Clause 181 sets out the functions, powers and duties of the Tribunal.

Clause 182 sets out how the Tribunal is to be constituted for the purposes of proceedings and inquiries.

Clause 183 provides that the President is responsible for the arrangement of Tribunal business.

Clause 184 provides for the appointment of the President and the Deputy Presidents. It sets out the qualifications of the President and Deputy Presidents. It provides for the term of office and the means by which the President and Deputy Presidents may resign from office.

Clause 185 provides for the term of office of a member of the Tribunal including the President and Deputy Presidents. *Clause 185 (3)* provides that members are not subject to

the **Public Sector Management Act 1992** with the exception of Part 9 or in accordance with Part 8.

Clause 186 provides that, if a member of the Tribunal is unable to perform his or her duties, the Governor in Council may appoint an acting member for the period of inability.

Clause 187 provides for the payment of members of the Tribunal.

Clause 188 provides for the method by which a member of the Tribunal may be removed from office and the means by which a member may resign from the Tribunal.

Clause 189 provides that an act, decision or order of the Tribunal is not invalid by reason only of a defect or irregularity in connection with the appointment of a member or acting member, a vacancy in the office of a member or on the ground that the occasion for an acting member to act had not arisen or had ceased.

Clause 190 sets out the procedure for the meetings of the Tribunal.

Division 4—General Provisions for the Commission and Tribunal

Clause 191 provides for the appointment of the Registrar and staff of the Tribunal and Commission.

Clause 192 sets out the secrecy requirements imposed on persons holding office with the Tribunal and the Commission including members, acting members, the Chief Conciliator and members of staff. A person who fails to comply with the secrecy requirements is liable to a fine of up to 10 penalty units (\$1,000).

Clause 193 provides immunity to members and acting members of the Tribunal and the Commission, including the Chief Conciliator, for anything done or omitted to be done in good faith in the performance of functions under the Act.

Clause 194 requires the Tribunal to produce an annual report, to be tabled in Parliament. It also requires the Commission to put certain information in its annual report under the **Financial Management Act 1994**, which is also tabled in Parliament (under that Act).

PART 10—OFFENCES

Division 1—Discriminatory advertising

Clause 195 contains the offence of discriminatory advertising which carries a penalty of up to 20 penalty units (\$2,000).

Clause 196 provides for a defence to a charge of discriminatory advertising.

Clause 197 provides that the Commission may bring proceedings for the offence of discriminatory advertising. Failure to produce documents at the request of the Commission for the purpose of these proceedings attracts a penalty of up to 20 penalty units (\$2,000).

Division 2—Other offences

Clause 198 contains the offence of failure to comply with orders of the Tribunal made under specified sections of the Act and conciliation agreements. This offence carries a

penalty of up to 20 penalty units (\$2,000) and 5 penalty units (\$500) for each day that the non-compliance continues.

Clause 199 contains the offence of failure to appear before the Tribunal. This offence attracts a penalty of 20 penalty units (\$2,000).

Clause 200 makes it an offence to refuse to give evidence or produce documents when appearing before the Tribunal. This offence carries a penalty of up to 20 penalty units (\$2,000).

Clause 201 makes it an offence not to attend before the Chief Conciliator for the purpose of discussing the subject matter of a complaint if notified under clause 114 (2) to attend. This offence carries a penalty of 20 penalty units (\$2,000).

Clause 202 contains the offence of contempt of the Tribunal or Commission. This offence carries a penalty of up to 20 penalty units (\$2,000).

Clause 203 makes it an offence to give false or misleading information to any person exercising powers or performing functions under this Act. This offence carries a penalty of up to 20 penalty units (\$2,000).

Clause 204 contains a protection against self-incrimination. It is intended that this protection only apply to information that may incriminate a person in relation to an offence, but not in relation to a contravention of Part 3, 5 or 6.

Clause 205 provides that offences against this Act are to be dealt with summarily.

Clause 206 provides that the Commission may bring proceedings for offences under this Division or under the regulations.

PART 11—GENERAL

Clause 207 requires the Minister to cause a review of Victorian legislation and subordinate legislation for the purpose of identifying discriminatory provisions.

Clause 208 sets out the means by which a complaint or proceeding may be brought against an unincorporated association.

Clause 209 provides that a contravention of the Act does not create civil or criminal liability except to the extent expressly provided by this Act.

Clause 210 provides that a person who lodges a complaint with, or produces evidence or information to, the Commission, the Chief Conciliator or the Tribunal is not liable for any damage suffered by another person as a result of that action.

Clause 211 limits the jurisdiction of the Supreme Court in relation to a number of situations. These include—

- where a person breaches a covenant or obligation contained in a document relating to land which is necessary to avoid discrimination against another person in the disposal of land or the provision of accommodation
- where a member or acting member of the Tribunal or Commission does anything or omits doing anything in connection with the Act, provided that the person acts in good faith

where a person lodges a complaint or produces evidence or information to the Commission, the Chief Conciliator or the Tribunal and another person suffers damages as a result of this action

where the Commission has dismissed a complaint because the complainant has not required it to be referred to the Tribunal

- where a person has chosen an avenue of review under the **Public Sector Management Act 1992** in relation to a matter that could have been the subject of a complaint.

Clause 212 sets out the power of the Governor in Council to make regulations.

PART 12—REPEALS, AMENDMENTS AND TRANSITION PROVISIONS

Clause 213 defines the terms “Board” and “old Act” for the purposes of this Part.

Clause 214 repeals the **Equal Opportunity Act 1984** (the old Act) and three other amending Acts.

Clause 215 provides that, despite the repeal of the old Act, the existing appointed members of the Commission continue to hold office subject to the terms and conditions of their original appointment. Similarly the Chief Conciliator continues to hold office subject to the terms and conditions of his or her appointment.

Clause 216 provides that the President of the Equal Opportunity Board becomes the President of the Tribunal when clause 214 comes into operation. The President is subject to the terms and conditions of his or her original appointment but is subject to clause 188 in relation to resignation, suspension or removal. Similarly a member of the Board becomes a member of the Tribunal and holds office subject to the terms and conditions of his or her original appointment, but is also subject to clause 188.

Clause 217 (1) provides that a complaint that has been lodged prior to the repeal of the old Act must be dealt with as if the old Act had not been repealed. *Clause 217* (2) provides that any proceeding in relation to a complaint awaiting hearing by the Board is to be dealt with by the Tribunal applying the provisions of the old Act. *Clause 217* (3) provides that any matter heard but where a final order has not yet been made or alternatively where the matter is to be reheard following an appeal, is to be dealt with by the Board under the provisions of the old Act. *Clause 217* (4) provides for the continuation of the Board until all proceedings in relation to complaints lodged with the Board have been completed. *Clause 217* (5) provides the President with the authority to make an order to resolve any difficulties which may arise due to the operation of this transitional provision.

Clause 218 provides that if a complaint in respect of a contravention of the old Act has not been lodged before the repeal of the old Act it cannot be lodged with the Commission. However, if the complaint also constitutes a contravention of this Act it can be dealt with as if this Act were in operation at the time the contravention took place. The clause applies despite the operation of section 14 of the **Interpretation of Legislation Act 1984** which makes provision as to the effect of repeal of Acts.

The intention of the transitional provisions is that complaints already lodged under the old Act are determined in accordance with that Act, but, once the new Act commences, no new complaints are to be lodged in relation to discrimination under the old Act. People’s

rights are preserved by allowing them to complain under the new Act in relation to things that happened before the new Act commenced (as long as a complaint has not been lodged under the old Act and the matter would have been discrimination under that Act).

Clause 219 makes transitional provision for matters under investigation by the Commission. Essentially, matters already under investigation by the Commission under section 41 of the old Act or matters referred to the Board under section 42 are to be dealt with as if the old Act had not been repealed.

Clause 220 makes provision for the Tribunal to submit the Board's annual report for the financial year ending on 30 June 1995 if the Board has not already done so before the repeal of the old Act.

Clause 221 provides that temporary exemptions granted under section 40 of the old Act will continue to operate despite the repeal of the old Act.

Clause 222 provides that a reference to the Board in an Act, an enactment or any other document must be taken to be a reference to the Tribunal after the commencement of this section.

Clause 223 provides for consequential amendments to other Acts as set out in Schedule 1. These consequential amendments mainly replace references to the old Act in other Acts with references to the new Act or replace definitions of "discrimination" in other Acts which are linked to the old Act.

Clause 224 provides for the repeal of provisions contained in other Acts, as set out in Schedule 2, which impose compulsory retirement ages.

Clause 225 provides for the sunset of section 29 which relates to compulsory retirement. Clause 29 permits an employer to set an age for the compulsory retirement of an employee or alternatively may retire an employee at a particular age. Clause 2 (3) provides that clause 225 comes into operation one year after clause 29 comes into operation. The effect of this clause is to exempt compulsory retirement from the operation of the Act for one year.

PART 13—AMENDMENT OF THE APPEAL COSTS ACT 1964

Clause 226 amends the **Appeal Costs Act 1964**. Where a respondent is successful in proceedings before the Supreme Court in relation to a special complaint under Division 5 of Part 7 of this Bill, the Supreme Court is empowered, on application made on that behalf, to grant to the complainant or to any one or more several complainants, an indemnity certificate in respect of the proceedings. This indemnity certificate entitles the complainant to be paid from the Appeal Costs Fund. The provisions effectively equate the position of an unsuccessful complaint in a special complaint proceeding with that of an unsuccessful respondent to an appeal.

SCHEDULES

Schedule 1 contains consequential amendments.

Schedule 2 repeals compulsory retirement provisions in legislation.