

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. A168/2012

CATCHWORDS

Equal Opportunity – Discrimination in the area of employment on the grounds of physical features – direct discrimination – whether treatment is unfavourable – meaning of unfavourable – whether physical features is the reason for the conduct – whether discrimination permitted – claim of victimisation – Equal Opportunity Act 2010 ss 3, 4, 6, 7, 8, 13, 18, 75, 103, 104, 109, 125, Charter of Human Rights and Responsibilities Act 2006 ss 7, 15, 32, 38, Police Regulation Act 1958 ss 5, 17, 69.

APPLICANT	Michael Kuyken
RESPONDENT	Ken Lay
INTEVENER	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	J. Grainger, Member
HEARING TYPE	Hearing
DATE OF HEARING	23, 24, 25, 26 and 27 September 2013
DATE OF ORDER	29 November 2013
DATE OF REASONS	29 November 2013
CITATION	Kuyken v Lay (Human Rights) [2013] VCAT 1972

ORDER

- 1 The application is dismissed.

J. Grainger
Member

APPEARANCES

For Applicant	In person
For Respondent	Richard Niall, Senior Counsel, with Jack Tracey, Counsel
For Intervener	Jennifer Jones, Solicitor

REASONS

BACKGROUND

- 1 The applicant, Michael Kuyken (**Mr Kuyken**), is a Leading Senior Constable employed by Victoria Police.
- 2 Mr Kuyken has worked for Victoria Police as a sworn member for 17 years. He currently has facial hair, which he describes as a neatly trimmed goatee. He has done so since about 2004, when Chief Commissioner Christine Nixon amended the Grooming Standard contained in the Victoria Police Manual (**VPM**) to allow sworn members to have neat and tidy beards, including goatees.
- 3 On 9 December 2011, the respondent, Chief Commissioner Ken Lay, (**Chief Commissioner Lay**), informed all sworn members of Victoria Police by email that the guidelines for Uniform and Appearance in the VPM were being updated and would take effect on 1 January 2012 (**the 9 December 2011 email**).¹
- 4 Chief Commissioner Lay explained in the email that Victoria Police's appearance in the community, at courts and in an operational context had been "subject to much debate". He wrote that he was "keen to ensure a more uniform look" that "sends a powerful message to the community" that Victoria Police is a "professional organisation" and "we are as one, and that we care about ourselves and the community".
- 5 The email explained (relevantly) that the changes for male members included the banning of ponytails or buns, and beards, goatees, soul patches and other forms of facial hair other than clean, tidy and neatly trimmed sideburns and moustaches (**the new Grooming Standard**).²
- 6 Mr Kuyken shaved off his goatee whilst on leave over the 2011/2012 Christmas/New Year period in order to comply with the new Grooming Standard.
- 7 On 29 December 2011, Chief Commissioner Lay sent an email to senior management reiterating the changes contained in the new Grooming Standard (**the 29 December 2011 email**). Chief Commissioner Lay stated, "these changes will become force policy and there is a requirement to comply with the new standards". However, it also stated that the new Grooming Standard would not apply to members of Victoria Police who had made a complaint to the Victorian Equal Opportunity and Human Rights Commission (**the Commission**) until those complaints had been determined (**the exemption to the application of the new Grooming Standards**).³ Chief Commissioner Lay also stated that the policy would "build on the image of Victoria Police" and that it was important to Chief

¹ JFS-5 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

² JFS-4 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

³ JFS-7 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

Commissioner Lay that the members “protect and enhance the Victoria Police image, a major component being our consistent and professional appearance”.

- 8 When Mr Kuyken returned to work in early January 2012, he learnt that some other members had made complaints about the new Grooming Standard to the Commission and that those members were exempted from complying with the new Grooming Standard until the complaints were resolved. As a result, Mr Kuyken also made a complaint to the Commission and grew back his goatee. In an email dated 14 February 2012, Chief Commissioner Lay’s delegate, Commander (then Superintendent) Jeffrey Forti (**Commander Forti**) confirmed that Mr Kuyken was exempted from complying with the new Grooming Standard until his complaint was resolved.⁴
- 9 On 27 June 2012, Chief Commissioner Lay sent a third email to all sworn members about the new Grooming Standard, which had by then been in force for just under six months. The email explained that the new Grooming Standard would be “ratified in law” because of an amendment to the *Police Regulation Act 1958* (Vic) (**the PR Act**) which would come into effect on 1 July 2012.
- 10 The Commission conducted a conciliation on 29 June 2012. The dispute was not resolved and in an email dated 31 August 2012, Commander Forti informed Mr Kuyken and the other members who had complained to the Commission that they were to either comply with the new Grooming Standard or make an application to the Tribunal by 28 September 2012 (**Commander Forti’s email dated 31 August 2012**).⁵ The email stated that if the members made an application to the Tribunal, the exemption to the application of the Grooming Standard would continue until the Tribunal proceedings were heard and determined. However, the email also stated that if neither of the options were followed by 28 September 2012 then Mr Kuyken “could be subject to disciplinary action for non-compliance with the VPM”.
- 11 Accordingly, on 14 September 2012 Mr Kuyken made an application to the Tribunal. Fifteen other members also made applications to the Tribunal.

SUMMARY OF MR KUYKEN’S CLAIMS

- 12 Mr Kuyken alleges direct discrimination on the basis of physical features in the area of employment in breach of section 18(d) of the *Equal Opportunity Act 2010* (**the EOA 2010**).⁶ The specific physical feature claimed is facial hair.
- 13 Mr Kuyken also alleges victimisation under section 104 of the EOA 2010 and a breach of section 38 of the *Charter of Human Rights and*

⁴ JFS-14 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

⁵ JFS-15 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

⁶ See section 6 (j) of the EOA 2010.

Responsibilities Act 2006 (the Charter) in respect of his right to freedom of expression under section 15 of the Charter.

- 14 The specific conduct Mr Kuyken alleges to be discrimination is, in summary:
- (a) the introduction of the new Grooming Standard on 1 January 2012 banning sworn members of Victoria Police from having any form of facial hair other than clean, tidy and neatly trimmed sideburns and moustaches
 - (b) proposing to subject Mr Kuyken to disciplinary action unless he complies with the new Grooming Standard by shaving off his goatee, as set out in Commander Forti's email dated 31 August 2012
 - (c) the implication Mr Kuyken says is contained in Chief Commissioner Lay's emails dated 9 December 2011 and 29 December 2011 that because Mr Kuyken has a goatee, he is unprofessional, does not take pride in his appearance and does not care about himself or the community
 - (d) the implication Mr Kuyken says is contained in Commander Forti's email dated 31 August 2012 that because Mr Kuyken has a goatee, his appearance is unprofessional, inconsistent with other members and not well-groomed, and that he lacks the public's confidence, trust and respect
 - (e) media articles describing Mr Kuyken and the other members who made applications to the Tribunal as "rebel police" and subsequent comments made by the public, subjecting Mr Kuyken to "effective ridicule in a public forum"
 - (f) negative comments made on internal Victoria Police forums by other members about Mr Kuyken.
- 15 As a result, Mr Kuyken claims that:
- (a) he has been made to feel less professional
 - (b) he has suffered from angst, stress and anxiety
 - (c) his health has been affected due to lack of sleep
 - (d) he has suffered a loss of identity.
- 16 Mr Kuyken also claims he was victimised by Chief Commissioner Lay in breach of section 104 of the EOA 2010. Mr Kuyken alleges that Chief Commissioner Lay victimised him when Commander Forti gave Mr Kuyken the following directions in an email dated 4 October 2012:
- (a) to attend and manage the Tribunal proceedings while off-duty
 - (b) not to attend the Tribunal proceedings or meetings regarding the proceedings, while on duty or in Victoria Police uniform, and

- (c) not to use any Victoria Police vehicle to attend the proceedings or meetings regarding the proceedings (**the email dated 4 October 2012**).⁷
- 17 He also alleges Chief Commissioner Lay victimised him when he sought to have Parliament change the PR Act to confirm his power to make the new Grooming Standard.⁸
- 18 Finally, Mr Kuyken alleges that Chief Commissioner Lay has breached section 38 of the Charter in respect of his right of freedom of expression under section 15 of the Charter by making the new Grooming Standard.
- 19 Mr Kuyken seeks the following orders from the Tribunal:
- (a) that Chief Commissioner Lay amend the VPM so as to permit Mr Kuyken to grow and maintain a goatee whilst on duty
 - (b) that Mr Kuyken's leave be reinstated for each day he attended the Tribunal to pursue this application
 - (c) that Chief Commissioner Lay apologise to Mr Kuyken.

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

- 20 The Commission sought leave to intervene in these proceedings pursuant to section 159 of the EOA 2010.
- 21 The Tribunal granted the Commission leave to intervene on 20 June 2013. The Commission filed written submissions on 30 July 2013 and 18 September 2013.
- 22 Mr Kuyken adopted the submissions of the Commission save for its submissions on vicarious liability, which are discussed at paragraphs 25 to 28 below.

Submissions of the Commission in relation to Mr Kuyken's particulars of claim

- 23 In the Commission's submissions dated 30 July 2013, the Commission submitted that while Mr Kuyken's particulars of claim do not specifically allege a breach of Part 4 of the EOA 2010, the Tribunal may draw from Mr Kuyken's application that he is alleging a breach of section 18(d) of the EOA 2010 (subjecting the employee to any other detriment) in relation to his claim of direct discrimination by Chief Commissioner Lay. This is because:
- (a) it is implicit in Mr Kuyken's application that the area of public life is employment and this is supported by his witness statement, which states his length of service as an employee of Victoria Police

⁷ JFS-17 of the witness statement of Commander Jeffrey Forti, Exhibit R1.

⁸ This is alleged in Mr Kuyken's amended particulars, which were filed on 25 September 2013, mid-way through the hearing.

- (b) Mr Kuyken's application refers to "particulars of discrimination" outlining particular events he says amount to unfavourable treatment in his employment, as well as additional "detriment" allegedly suffered by him.
- 24 Chief Commissioner Lay did not take issue with these submissions and I am satisfied that Mr Kuyken's particulars of claim effectively allege a breach of section 18(d) of the EOA 2010.
- 25 The Commission also submitted that in the event that the Tribunal finds the allegations proven but that Chief Commissioner Lay was not personally responsible or liable for the discrimination, the Tribunal may wish to consider whether Chief Commissioner Lay is in any event vicariously liable under section 109 of the EOA 2010 for actions of other members of the police force.
- 26 Chief Commissioner Lay objected to this submission on the basis that the Commission had sought to characterise and represent Mr Kuyken's claim in a manner that was not consistent with the application and particulars of claim filed by Mr Kuyken. Chief Commissioner Lay submitted that, as a matter of procedural fairness, he was entitled to assume the case, facts and matters alleged against him are those pleaded in Mr Kuyken's particulars of claim.
- 27 He further submitted that the Commission's characterisation of Mr Kuyken's claim and contentions could not alter Mr Kuyken's case as if to supplement the case or to provide further and better particulars and that for these reasons, the Tribunal should reject the Commission's characterisation of Mr Kuyken's claim.
- 28 While the Commission's submission that section 109 of the EOA 2010 enables a person to bring an application to the Tribunal against employees who have breached, relevantly in this case, sections 8 and 18 of the EOA 2010 is correct, on the first day of the hearing, Mr Kuyken informed the Tribunal that he was not making any claims under section 109 of the EOA 2010. Accordingly, I do not intend to consider or make any findings in relation to Mr Kuyken's claims which are set out in paragraphs 14 (e) to (f) above as those claims relate to the conduct of other members of Victoria Police whom Mr Kuyken says have breached the EOA 2010.⁹ The exception to this is Mr Kuyken's claims in relation to Commander Forti's emails dated 31 August 2012 and 4 October 2012, as Commander Forti sent these emails in his capacity as Chief Commissioner Lay's delegate.¹⁰

SUMMARY OF CHIEF COMMISSIONER LAY'S DEFENCE

- 29 Chief Commissioner Lay says that there has been no discrimination in breach of the EOA 2010 because:

⁹ Mr Kuyken withdrew all claims against Deputy Premier Peter Ryan at the hearing.

¹⁰ See paragraph 3 of Chief Commissioner Lay's particulars of defence and the paragraph 11 of the written submissions filed on behalf of Chief Commissioner Lay dated 27 September 2013.

- (a) he does not admit that the attribute of physical features includes facial hair
 - (b) there has been no unfavourable treatment or proposed unfavourable treatment of Mr Kuyken because he was exempt from the operation of the new Grooming Standard pending the resolution of his complaint to the Commission and this proceeding
 - (c) in the alternative, if there was proposed unfavourable treatment, Mr Kuyken's attributes were neither a reason nor a substantial reason for the proposed treatment and instead, the proposed treatment was because of non-compliance with the VPM, and
 - (d) if there was proposed unfavourable treatment substantially because of Mr Kuyken's attributes, then the conduct is not unlawful under section 75 of the EOA 2010, because it was authorised by section 5(2) of the PR Act.
- 30 Chief Commissioner Lay denies Mr Kuyken has been victimised because:
- (a) Mr Kuyken is not entitled to be paid whilst conducting proceedings in the Tribunal and there is no practice of doing so within Victoria Police. Similarly, it is normal practice to require uniforms not be worn and Victoria Police vehicles not be used by members of the force who have issued proceedings in their own capacity and in their own interests, and when they are not on duty or representing Chief Commissioner Lay or Victoria Police.
 - (b) Seeking legislative reform could not be a detriment for the purposes of section 104 of the EOA 2010. The decision to amend the PR Act was that of the Parliament. It was not Chief Commissioner Lay's decision.
- 31 Chief Commissioner Lay also denies that there has been a breach of the Charter because:
- (a) facial hair is not a form of protected expression under section 15 of the Charter
 - (b) in the alternative, if it is a form of protected expression, the conduct of Chief Commissioner Lay is a permissible restriction on grounds of public order under section 15(3)(b) of the Charter, and
 - (c) in the alternative, if it is a form of protected expression, the conduct of Chief Commissioner Lay is a reasonable limitation under section 7(2) of the Charter.

ISSUES OF FACT AND LAW TO BE DETERMINED BY THE TRIBUNAL

- 32 The issues of fact and law to be determined by the Tribunal are:
- (a) In relation to Mr Kuyken's claim he has been directly discriminated against by Chief Commissioner Lay,
 - i. Does the attribute of physical features include facial hair?

- ii. Has Chief Commissioner Lay treated or proposed to treat Mr Kuyken unfavourably by subjecting Mr Kuyken to any detriment?
 - iii. If there was unfavourable or proposed unfavourable treatment, was Mr Kuyken's facial hair a substantial reason for the proposed treatment? (If the answer to this question is yes, then Chief Commissioner Lay has discriminated against Mr Kuyken.)
 - iv. If Chief Commissioner Lay has discriminated against Mr Kuyken, was it permitted under section 75 of the EOA 2010, because it was authorised by section 5(2) of the PR Act?
 - v. If Chief Commissioner Lay has discriminated against Mr Kuyken, was it permitted under section 75 of the EOA 2010 prior to 14 June 2012, which was when section 5(2)(c) of the PR Act was introduced?
- (b) In relation to Mr Kuyken's claim that Chief Commissioner Lay has victimised him
 - i. Did Chief Commissioner Lay victimise Mr Kuyken when he instructed him to attend and manage or conduct these proceedings while off-duty?
 - ii. Did Chief Commissioner Lay victimise Mr Kuyken when he instructed him not to attend the Tribunal or meetings regarding the proceedings while in Victoria Police uniform?
 - iii. Did Chief Commissioner Lay victimise Mr Kuyken when he instructed him not to use any Victoria Police vehicle to attend the Tribunal or meetings regarding the proceedings?
 - iv. Did Chief Commissioner Lay victimise Mr Kuyken when he sought to have Parliament change the PR Act to confirm the power to make the new Grooming Standard.
- (c) In relation to Mr Kuyken's claim that Chief Commissioner Lay has breached the Charter
 - i. Is facial hair a form of protected expression under section 15 of the Charter?
 - ii. If it is a form of protected expression, was the conduct of Chief Commissioner Lay a permissible restriction on grounds of public order under section 15(3)(b) of the Charter?
 - iii. If it is a form of protected expression, was the conduct of Chief Commissioner Lay a reasonable limitation under section 7(2) of the Charter?

DIRECT DISCRIMINATION

- 33 Discrimination is unlawful under the EOA 2010 when it occurs:
- (a) directly, as defined in section 8 or indirectly, as defined in section 9¹¹
 - (b) on the basis of a protected attribute in section 6¹²
 - (c) in a protected area of public life set out in Part 4, and
 - (d) in one of a number of prohibited ways set out in Part 4.
- 34 Sections 6 to 13 in Part 2 of the EOA 2010 comprise the overarching principles for a claim of unlawful discrimination and Part 4 sets out the protected areas of public life. The Commission submitted that the provisions in Part 2 and the protected areas in Part 4 must be read together for a logical framework for discrimination under the EOA 2010. I agree with this submission.
- 35 As stated in paragraph 12 above, Mr Kuyken claims Chief Commissioner Lay has directly discriminated against him.
- 36 Section 8 of the EOA 2010 provides that direct discrimination occurs when a person treats, or proposes to treat, a person with a protected attribute unfavourably because of that attribute.
- 37 Section 18(d) of the EOA 2010 provides that an employer must not discriminate against an employee by subjecting the employee to any other detriment.
- 38 Mr Kuyken bears the onus of proving that discrimination occurred in relation to his claim.¹³ If discrimination is found to have occurred, section 13(2) of the EOA 2010 provides that Chief Commissioner Lay bears the onus of proving that a lawful exception applied to his actions.

DOES THE ATTRIBUTE OF PHYSICAL FEATURES INCLUDE FACIAL HAIR?

- 39 As stated in paragraph 29 above, Chief Commissioner Lay did not admit that the attribute of physical features includes “hair or facial features”.
- 40 Accordingly, this is the first issue to be determined.
- 41 The EOA 2010 defines “physical features” as “a person’s height, weight, size or other bodily characteristics”.¹⁴
- 42 Mr Kuyken says facial hair is a physical feature that falls within this definition. Mr Kuyken adopted the submissions made by the Commission in this regard. Mr Kuyken also submitted that had Parliament intended to exclude facial hair from the definition of “physical features” it could have

¹¹ Section 7(1) of the *Equal Opportunity Act 2010* (Vic) (EOA 2010).

¹² Sections 8(1) and 9(1) of the EOA 2010.

¹³ *GLS v PLP* (Human Rights) [2013] VCAT 221 [34] (Justice Garde, P); *Tan v Xenos (No 3)* (Anti-Discrimination) [2008] VCAT 584 [73] (Judge Harbison VP).

¹⁴ See section 4 of the EOA 2010.

done so when it drafted the EOA 2010 given that the Tribunal had found that the definition of physical features contained in the *Equal Opportunity Act* 1995 (**EOA 1995**), which was the predecessor to the EOA 2010, included hair.¹⁵

SUBMISSIONS OF THE COMMISSION IN RELATION TO WHETHER THE ATTRIBUTE OF PHYSICAL FEATURES INCLUDES FACIAL HAIR

Approach to interpreting ‘bodily characteristic’

- 43 The Commission submitted that the Tribunal should adopt the ordinary meaning of “physical features” and “bodily characteristic”.
- 44 The Commission referred the Tribunal to the following definitions found in the Macquarie Dictionary:¹⁶
- (a) “bodily” as an adjective is defined as “(1) of or relating to the body; (2) corporeal or material, in contrast with spiritual or mental;”
 - (b) “characteristic” as an adjective is defined as “(1) relating to, constituting, or indicating the character or peculiar quality; typical; distinctive;” and
 - (c) “characteristic” as a noun is defined as “(1) a distinguishing feature or quality; (2) [omitted as not relevant]”.
- 45 The Commission submitted that if there are competing interpretations of the words available, the Tribunal must prefer a broad and liberal interpretation of “physical features” which promotes the objects of the EOA 2010 to one that does not.¹⁷ In doing so, the words “bodily characteristics” must only be assigned an interpretation that they “can naturally bear”.¹⁸

Bodily characteristics generally

- 46 The Commission referred the Tribunal to two decisions of the Tribunal that considered the meaning of “bodily characteristic”. In *Jamieson v Benalla Golf Club Inc*¹⁹ (**Jamieson**), the Tribunal considered a claim that tattoos were a “bodily characteristic”. DP McKenzie (as she was then) held that “bodily characteristic” meant characteristics that are “visible, distinctive and are attributes of the body”, and included any “distinctive bodily mark or attribute”, regardless of whether a person chose to have those attributes or not. DP McKenzie rejected the argument that the words “other bodily characteristic” in that definition were qualified by the words that precede them. In her view, the references to height, weight and size within the

¹⁵ *Fratras v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, which is discussed further at paragraphs 48 to 54.

¹⁶ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>.

¹⁷ *Waters v Public Transport Corporation* [1991] HCA 49, (1991) 173 CLR 349; *Fratras v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106.

¹⁸ *Fratras v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106 citing *Waters v PTC* [1991] EOC 92-930 and *Commonwealth v Human Rights and Equal Opportunity Commission* [1998] EOC 92-909.

¹⁹ [2000] VCAT 1849.

definition of physical features “do little to take away from or limit the generality of the words “or other bodily characteristic””.

- 47 This interpretive approach was also followed in the case of *Ruddell v DHS*²⁰ (**Ruddell**). In that case, the Tribunal considered a claim for discrimination on the grounds of the physical features of height, weight and loud voice. The Tribunal concluded that ‘bodily characteristics’ are features that distinguish a person from another person. The Tribunal also assumed (while noting that the matter was not beyond doubt) that “bodily characteristics” included both visible bodily characteristics like height and weight (as included in the definition) but also “any other bodily characteristics with an external manifestation such as voice which is audible.”²¹

Hair as a bodily characteristic

- 48 The Commission’s submissions drew the Tribunal’s attention to the decision of *Fratas v Drake International Ltd t/a Drake Jobseek*²² (**Fratas**), which directly addresses the question of whether hair constitutes a bodily characteristic under the EOA 1995.
- 49 The Tribunal considered a strike out application in relation to a claim of discrimination on the basis of physical features in the area of employment, in relation to allegedly negative comments about the applicant’s hair, posture, clothes and facial expressions.
- 50 In *Fratas*, DP McKenzie held that hair was a bodily characteristic, as was baldness and facial hair. In relation to the length of hair, the Tribunal noted that if the “arrangement, length, or colour of hair is untouched, it is hard to see how these aspects of the hair are not bodily characteristics also”. The colour (including artificial colouring) or arrangement (such as by cutting or combing) of the hair is not a bodily characteristic even though the hair itself remains a bodily characteristic. However, this does not prevent a claim made in relation to artificial colour or arrangement of hair as the “colour or arrangement cannot be divorced from the thing that is coloured or arranged”.²³
- 51 By way of contrast, the Tribunal found that posture and facial expressions, while based on physical features, do not amount to bodily characteristics. Similarly, clothing and the way a person is dressed are not “characteristics pertaining to a part of the body” and are not included in the definition of physical features.²⁴
- 52 In making its decision, the Tribunal in *Fratas* referred to the dictionary definition of ‘bodily’ and ‘characteristic’.

²⁰ [2001] VCAT 1510.

²¹ *Ruddell v DHS* [2001] VCAT 1510 [54]-[55].

²² (2000) EOC 93-038.

²³ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107.

²⁴ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107-108.

- 53 The Commission submitted that the Tribunal should follow *Fratas* and hold that facial hair is a bodily characteristic within the definition of physical features in the EOA 2010.

Choice and control over bodily characteristics

- 54 In *Fratas*, the Tribunal considered whether “physical features” included only those features and bodily characteristics that the person had no control over. Pointing to the inclusion of weight in the definition, DP McKenzie noted that this was something that could change, potentially as a result of choices the person made. For example, gaining weight through over-eating, or losing weight by dieting. Therefore, she considered, “by analogy, any other bodily characteristic does not cease to be a bodily characteristic because a person can or does not alter it.”²⁵

- 55 Similarly, in *Jamieson*, DP McKenzie stated:

Although height is not a matter of choice, weight and size, at least to the extent that size is dependent on weight, are at least in some circumstances. The acquiring of tattoos is of course entirely a matter of choice. In my view the choice of the words “physical features” as the definition itself, the term which is being defined, cannot be ignored when construing the rest of the definition. In its ordinary meaning physical features would embrace any distinctive bodily mark or attribute. I consider that the words “other bodily characteristic” has a broad meaning when looked at in this way. I note of course that there is no express exclusion of characteristics acquired after birth or of characteristics acquired as a matter of choice, as long as they can be described as characteristics of the body.

Second Reading Speech

- 56 The Commission submitted that if the Tribunal considers that the meaning of “bodily characteristics” is unclear or ambiguous, it can exercise its discretion under section 35 of the *Interpretation of Legislation Act 1984* (Vic) to refer to external material to assist with interpretation.
- 57 In the Second Reading Speech to the *Equal Opportunity Bill 1995* (which became the EOA 1995) (**Second Reading Speech**), the Attorney-General Mrs Wade stated the following in relation to the new attribute of physical features:

Victoria is the first jurisdiction in Australia to prohibit discrimination on the basis of a person's physical features, which are defined in the bill to mean a person's height, weight, size or other bodily characteristics. Society places too much emphasis on a person's bodily characteristics, over which the person may not have much control. For instance, a person may not have any control over a birthmark across his or her face. A person's physical features should not be used to

²⁵ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107.

judge the suitability of the person for a job. Ultimately, such judgment should be based on performance criteria.

If a person is the best qualified person and can perform the required duties, the fact that he or she is of a certain height or weight should be irrelevant. The attribute of physical features is not intended to include such things as tattoos or body piercing which a person may choose to acquire.²⁶

- 58 In *Jamieson* DP McKenzie took the view that the definition of “physical features” was clear, and so she did not need to refer to the Second Reading speech. However, given the Second Reading Speech showed Parliament’s intention to exclude tattoos, DP McKenzie commented that the Second Reading Speech could not limit or override the plain and broad words expressly included or excluded from the EOA 1995. She agreed that the Second Reading Speech had a use in determining the “object or underlying purpose of the legislation” and adopting a construction of the legislation that promotes that purpose.
- 59 The Commission submitted that if the Tribunal decides to consider the Second Reading Speech, that it be used to determine the underlying purpose of the legislation. In particular, the Tribunal should be conscious of Parliament’s intention that employers should not be entitled to rely on irrelevant matters in assessing an employee’s suitability for a job.

Preferred interpretation

- 60 In summary, the Commission submitted that the decisions of *Jamieson* and *Ruddell* should be followed and the Tribunal should interpret the attribute “physical features” according to its ordinary meaning. This includes any bodily characteristic that is visible and distinctive and which distinguishes one person from another, regardless of whether the person was born with those features, chose to have those features or has control over them. In the Commission’s submission, this includes long hair and facial hair.
- 61 The Commission further submitted that there is clear guidance in *Fratas* that facial hair is a bodily characteristic as claimed by Mr Kuyken.

SUBMISSIONS OF CHIEF COMMISSIONER LAY IN RELATION TO WHETHER THE ATTRIBUTE OF PHYSICAL FEATURES INCLUDES HAIR

- 62 Chief Commissioner Lay contended that facial hair does not come within the meaning of “physical features” or “other bodily characteristics”.
- 63 Specifically, Chief Commissioner Lay contended that the text of the EOA 2010 does not support a construction that facial hair or a style of hair are “other bodily characteristics” akin to height, weight or size.²⁷ He submitted that on a proper construction of section 6(j) and section 4, other bodily characteristics must mean characteristics of the body similar or akin to

²⁶ Hansard, *Legislative Assembly*, 4 May 1995, 1251; quoted in *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106.

²⁷ Section 4 of the EOA 2010.

height, weight or size. The term “physical features” is defined by the EOA 2010 in a limited way.

- 64 Chief Commissioner Lay submitted that how a person chooses to groom himself or herself, in terms of the length or style of the hair or whether, in the case of males, the person shaves, does not describe their bodily characteristics. The characteristics of the body are not things that the person chooses to change or adopt. Hair itself may be a feature of the human body, but the manner of its growth and style in which it is grown are not of themselves bodily characteristics.
- 65 He contended that Mr Kuyken seeks to read the definition as if it referred to physical appearance, which it does not. There is a clear textual difference between physical appearance and “bodily characteristic”. Grooming is not a bodily characteristic. It does not describe a characteristic of the body but rather how a person appears or presents their body.
- 66 Chief Commissioner Lay agreed that *Fratas*²⁸ provides some support for the contrary view. However, he submitted that decision should not be followed for two reasons. First, it was an interlocutory (strike out) hearing, not a final hearing. Secondly, McKenzie DP erroneously had regard to the ordinary meaning of “physical features” in construing the phrase “bodily characteristic”. Chief Commissioner Lay submitted that it was impermissible to construe the words of a definition by reference to the term defined.²⁹
- 67 Chief Commissioner Lay also submitted that the broad construction given by DP McKenzie gives insufficient regard to the purpose of the provision as reflected in the Second Reading Speech. In introducing the amendment, the Attorney-General noted “society places too much emphasis on a person’s bodily characteristics over which the person may not have much control”. The provision, then unique to Victoria, was to protect against discrimination on the basis of matters outside of the control of the person.
- 68 Accordingly, directing a person to groom themselves in a certain way in the context of employment does not involve less favourable treatment because of a physical feature, as that term is defined.

FINDINGS IN RELATION TO WHETHER THE ATTRIBUTE OF PHYSICAL FEATURES INCLUDES FACIAL HAIR

- 69 In *Towie v State of Victoria*³⁰ DP McKenzie stated while the Tribunal is not bound by its previous decisions, “principles of comity and consistency of decision-making should apply” and that she would only depart from a decision that was clearly in point if she thought that it was “clearly wrong”. I agree with DP McKenzie’s reasoning in this regard.

²⁸ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038.

²⁹ *Owners of ‘Shin Kobe’ Maru v Empire Shipping* (1994) 181 CLR at 419.

³⁰ [2007] VCAT 1489 at [28].

- 70 I see no reason to depart from the decision of DP McKenzie in *Fratas* that hair and facial hair are physical features. In my view, the expression “other bodily characteristics” is a broad expression that encompasses a person’s hair or facial hair, both of which are characteristics that are clearly “pertaining to the body”. As DP McKenzie held in *Fratas*:

In my view the words “other bodily characteristics” are not restricted to characteristics similar to height, weight and size. They include the form, makeup, build or proportions of the body or on any physical component of the body.

- 71 I agree with the Commission’s submission that the Tribunal should prefer a broad and liberal interpretation of physical features that promotes the objects of the EOA 2010 to one that does not. I also consider this interpretation of physical features to be the interpretation that is most compatible with human rights, particularly the right to equal and effective protection against discrimination,³¹ as required by section 32 of the Charter.
- 72 I am not persuaded by any of Chief Commissioner Lay’s submissions that the decision in *Fratas* was clearly wrong. In particular, I am not persuaded by Chief Commissioner Lay’s contention that DP McKenzie’s decision should not be followed because it was made in the context of a strike out hearing. DP McKenzie’s decision in *Fratas* that facial hair is a physical feature was unequivocal and final. I am also not persuaded that DP McKenzie’s decision should not be followed because she had regard to the ordinary meaning of “physical features” in construing the phrase “bodily characteristic”. Whilst the remarks of the High Court in *Owners of ‘Shin Kobe’ Maru v Empire Shipping* that it would be “quite circular to construe the words of a definition by reference to the term defined”³² appear correct as a statement of general principle, DP McKenzie’s decision in *Fratas* goes well beyond simply considering the definition of physical features. As stated in paragraph 70 above, DP McKenzie specifically considers the meaning of “other bodily characteristics” and I am satisfied that hair and facial hair falls within this definition.
- 73 I also agree with Mr Kuyken’s submission that had Parliament intended to exclude facial hair from the definition of “physical features” it could have done so when it drafted the EOA 2010, given that the decision in *Fratas* was made in respect of the definition of physical features contained in the EOA 1995, the predecessor to the EOA 2010. The fact that Parliament did not exclude facial hair from the definition of physical features when it introduced the EOA 2010 might indicate that it was content for the interpretation of physical features contained in *Fratas* to continue to be applied.

³¹ Section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³² Above at 419.

- 74 Accordingly, taking into account the wording of section 4 of the EOA 2010 on its face, the extrinsic materials, the available authority and section 32 of the Charter, it is my view that facial hair is a physical feature.

HAS CHIEF COMMISSIONER LAY TREATED OR PROPOSED TO TREAT MR KUYKEN UNFAVOURABLY BY SUBJECTING MR KUYKEN TO ANY DETRIMENT?

Mr Kuyken's evidence

- 75 Mr Kuyken gave evidence that he has been a serving member of Victoria Police for 16 years and has received an Ethical Standards medal for exemplary ethical conduct. He has worn a neatly trimmed goatee for around ten years. Mr Kuyken believes his neatly trimmed goatee does not in any way affect the way he performs his duties, previously as a police officer and currently as a police prosecutor. Mr Kuyken takes pride in his appearance and is not aware of any complaints about his goatee, particularly that he looks unprofessional or untrustworthy because of his goatee.
- 76 Mr Kuyken gave evidence that he did not want to shave off his goatee. He likes the appearance of his goatee. He also likes the way it makes him look and feel like an individual, while at the same time allowing him to maintain a well-groomed and professional standard of appearance. Mr Kuyken explained that his goatee is part of his character and an integral part of his identity. The thought of shaving it off fills Mr Kuyken with dread and causes him angst, stress and anxiety, particularly as he can see no legitimate rationale for shaving it off. Mr Kuyken told the Tribunal that his family has known him with a beard for around ten years and his 13 year old daughter has said she could not imagine him without a goatee.
- 77 Mr Kuyken gave evidence that he shaved off his goatee whilst on leave over the 2011/2012 Christmas/New Year period in order to comply with the new Grooming Standard. He gave evidence that he did so because he inferred from Chief Commissioner Lay's direction to comply with the new Grooming Standard, which was contained in his email dated 9 December 2011, that a refusal or failure to do so would result in disciplinary action and he was afraid of losing his job if he retained his goatee. Whilst he retained a moustache that complied with the new policy, he did not like the look of the moustache, which he described as an anachronistic "porn moustache" from the 1970s. He also did not like being able to see his "double chin". Mr Kuyken explained that he did not feel like himself without his goatee.
- 78 Mr Kuyken also gave evidence that he has suffered from stress and a lack of sleep due to not knowing what disciplinary action will be taken against him if he is unsuccessful in this proceeding and does not comply with the new Grooming Standard.

SUBMISSIONS OF THE COMMISSION IN RELATION TO WHETHER CHIEF COMMISSIONER LAY TREATED OR PROPOSED TO TREAT MR KUYKEN UNFAVOURABLY BY SUBJECTING MR KUYKEN TO ANY DETRIMENT

Test for direct discrimination

- 79 The Commission submitted that there is no requirement for the Tribunal to consider or find treatment or their “net effect” was a “reasonably foreseeable disadvantage” as suggested in Mr Kuyken’s amended points of claim, as this appears to impermissibly import tests from tort law.³³
- 80 The test for direct discrimination must be read in conjunction with section 18(d) to amount to a breach of the EOA 2010. Therefore, it is unlawful for Chief Commissioner Lay to treat or propose to treat Mr Kuyken unfavourably because of his physical features by subjecting Mr Kuyken to any detriment.

Unfavourable treatment

- 81 The EOA 2010 does not define the term “unfavourable” for the purposes of direct discrimination. The Commission submitted that the term “unfavourable” should be given its ordinary dictionary meaning. “Unfavourable” is defined in the Macquarie Dictionary as ‘not favourable; not propitious; disadvantageous; adverse’.³⁴
- 82 The Commission submitted that in interpreting the term “unfavourably”, the Tribunal should ensure it does not substitute the EOA 2010 test for the former test under the EOA 1995, which involved a comparison between the treatment of an applicant and other people without that attribute.
- 83 Parliament has deliberately removed the “comparator” requirement from the test of direct discrimination in order to “overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred”.³⁵
- 84 Under the new test, the Tribunal has to consider whether the treatment was unfavourable to Mr Kuyken. This can be interpreted as an inquiry into Mr Kuyken’s particular circumstances, including the impact on him personally, whether he has been disadvantaged in a general sense by the actions of Chief Commissioner Lay, or whether Chief Commissioner Lay has acted adversely to Mr Kuyken’s interests in his particular circumstances, on the basis of a protected attribute and in a protected area of public life.
- 85 Unfavourable treatment is not limited to the intended outcomes of a particular action or proposed action. It can also include unintended outcomes.
- 86 The Commission submitted that this interpretation of “unfavourable treatment” is supported by jurisprudence from the Australian Capital

³³ See paragraph 12 of Mr Kuyken’s amended points of claim.

³⁴ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>

³⁵ Explanatory Memorandum to the *Equal Opportunity Bill 2010*, pp12-13.

Territory (ACT), which has a similarly worded provision for direct discrimination in section 8 of the *Discrimination Act 1991* (ACT).³⁶

- 87 In particular, the former ACT Civil and Administrative Tribunal (**the ACT Tribunal**) decision of *Prezzi v Discrimination Commissioner*³⁷ gave the term ‘unfavourable’ its ordinary dictionary meaning, and found that it does not import a comparator test like other Australian jurisdictions which use the term ‘less favourably’ have. Rather:

All that is required is an examination of the treatment accorded the aggrieved person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person is unfavourable to that person, or if the conditions imposed or proposed would disadvantage that person, there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person.³⁸ (emphasis added)

- 88 The approach taken by the ACT Tribunal in *Prezzi* to defining the term “unfavourably” was cited with approval in obiter comments by the Federal Court in *Edgley v Federal Capital Press of Australia Pty Ltd*.³⁹
- 89 Finally, the Commission submitted that in interpreting “unfavourable treatment”, the Tribunal should have regard for the intention of Parliament as outlined in the Second Reading Speech to the *Equal Opportunity Bill 1995*, that employers should not be entitled to rely on irrelevant matters such as physical features in assessing an employee’s suitability for a job, or for assessing their performance.⁴⁰
- 90 The Commission referred the Tribunal to Mr Kuyken’s evidence that he has been employed satisfactorily for many years and has been meeting performance expectations, if not exceeding them, as evidenced by the receipt of an Ethical Standards medal, and his claim that he is now being threatened with disciplinary action because he has facial hair, which he says has no bearing on his performance or his ability to do his job.
- 91 The Commission submitted that if the Tribunal accepts this evidence, it should be a matter that is taken into account in determining whether the treatment of Mr Kuyken is unfavourable for the purposes of direct discrimination.

Detriment

- 92 The Commission submitted that the term “detriment” should be given its ordinary meaning by the Tribunal. The term “detriment” is used in section

³⁶ Although note: the test for discrimination in the *Discrimination Act 1991* (ACT) is a fused test: that is, the elements of direct and indirect discrimination are included in different parts of the same section. However, Courts have considered the elements of discrimination separately in jurisprudence.

³⁷ [1996] ACTAAT 13.

³⁸ *Prezzi, Patricia Anne and Discrimination Commissioner* [1996] ACTAAT 132, [22]-[24].

³⁹ *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379, [54].

⁴⁰ Hansard, *Legislative Assembly*, 4 May 1995, 1251.

18(d) of the EOA 2010 in a broad manner, and is defined non-exhaustively in section 4 of the EOA 2010 to include humiliation and denigration.

- 93 The Commission submitted that guidance can be drawn from definitions of the relevant terms contained in the Macquarie Dictionary:⁴¹
- (a) “detriment” is defined as “(1) loss, damage or injury; and (2) a cause of loss or damage”
 - (b) “humiliation” is defined as “(1) the act of humiliating; and (2) the state or feeling of being humiliated; mortification”
 - (c) “humiliate” is defined as “to lower the pride or self-respect of, cause a painful loss of dignity to; mortify”
 - (d) “denigrate” is defined as “(1) to sully; defame; and (2) to blacken”.
- 94 The Commission submitted that subjecting an employee to detriment therefore includes behaviour which lowers the pride or self-respect of that employee, causes them to lose their dignity, defames or blackens their name or reputation or otherwise causes them loss, damage or injury.
- 95 The Commission further submitted that the detriment suffered must be real and not trivial, and must be a matter of substance.⁴²
- 96 Examples of circumstances found to be detriment by the Tribunal in the past are:
- (a) Public humiliation or ridicule of an employee⁴³
 - (b) Requiring an employee to attend a painful and humiliating meeting about performance, resulting in a “black mark” against their employment record⁴⁴
 - (c) Depriving an employee of quiet enjoyment of employment and interfering with an employee’s quiet enjoyment of employment⁴⁵
 - (d) Being laughed at by other employees⁴⁶ and
 - (e) Loss of status and responsibility.⁴⁷

⁴¹ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>.

⁴² *Sivanathan v Commissioner of Police (NSW)* (2001) NSWADT 44; *Bogie v University of Western Sydney* (1990) EOC 92-313; *Drummond v Telstra Corporation Ltd (Anti-Discrimination)* [2009] VCAT 2411 [25].

⁴³ *Laverdue v Jayco Caravan (Recreational Industries) Pty Ltd v Anor (Anti-Discrimination)* [2001] VCAT 1706 [7]; compare with *Walgama v Toyota Motor Corporation Australia Ltd (Anti-Discrimination)* [2007] VCAT 1318 [51]-[53] where there was detriment in the form of denigration, but not humiliation.

⁴⁴ *Drummond v Telstra Corporation Ltd (Anti-Discrimination)* [2008] VCAT 2630 [67]; *Drummond v Telstra Corporation Ltd (Anti-Discrimination)* [2009] VCAT 2411 [25]

⁴⁵ *Candan v Holden Ltd and Ors* [2000] VCAT 2300 [39]; citing *R v Equal Opportunity Board ex parte Burns* [1985] VR 317 and *Bebbington v Dove* [1993] 5 VIR 28.

⁴⁶ *Packer v Vagg and the Department of Education* [2001] VCAT 2218 [22].

⁴⁷ *King v Nike Australia Pty Ltd (Anti-Discrimination)* [2007] VCAT 70 [148]-[149].

SUBMISSIONS OF THE COMMISSION IN RELATION TO WHETHER CHIEF COMMISSIONER LAY TREATED OR PROPOSED TO TREAT MR KUYKEN UNFAVOURABLY BY SUBJECTING MR KUYKEN TO ANY DETRIMENT

- 97 As stated in paragraph 29 above, Chief Commissioner Lay submitted that Mr Kuyken's claim for discrimination should be dismissed because, even if the Tribunal finds that Mr Kuyken has been discriminated against, the discrimination is permitted under section 75 of the EOA 2010. This is because the discrimination is now authorised by section 5(2)(c) of the PR Act, which was introduced on 14 June 2012. This contention is considered from paragraph 149 below.
- 98 Chief Commissioner Lay also contended that even before the amendment to section 5 of the PR Act, there was no discrimination because there was no unfavourable treatment or proposed unfavourable treatment of Mr Kuyken. In support of this submission, Chief Commissioner Lay relied on the fact that Mr Kuyken is exempt from the application of the new Grooming Standard pending the resolution of his EOHRC and VCAT complaints. He also denied that any of the emails sent by himself or Commander Forti implied that Mr Kuyken is unprofessional, does not take pride in his appearance or is not well-groomed, does not care about the community and lacks the public's confidence, trust or respect.
- 99 Chief Commissioner Lay also submitted that whilst, over objection, Mr Kuyken gave evidence about his treatment by other members of the police force and the media, that conduct does not form part of Mr Kuyken's case. The Chief Commissioner is only liable for his own conduct: he authorised the new Grooming Standard and accepts responsibility for its enforcement. Beyond that it is neither alleged nor proven that he has vicarious liability for other conduct that might constitute a breach of the EOA 2010, for example by denying a promotion or upgrade in duties because of a protected attribute. As stated in paragraph 28 above, I accept this submission.

THE TEST FOR UNFAVOURABLE TREATMENT UNDER SECTION 8 OF THE EOA 2010

- 100 The Tribunal recently considered the test for unfavourable treatment under section 8 of the EOA 2010.⁴⁸ At paragraph 51, Senior Member Nihill observed:

I accept that considering the treatment afforded to other people in the same situation may be of assistance in undertaking the task of assessing whether or not someone had been treated unfavourably, but I do not consider that the section *requires* me to do so. Unlike the previous provision, that in the EO Act 1995, which specifically required comparison, this provision does not. The Explanatory Memorandum indicates that the shift away from the previously clearly expressed requirement to compare relative treatment was purposeful.

⁴⁸ *Slattery v Manningham City Council* (Human Rights) [2013] VCAT 1869.

Under s 32 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) the Tribunal must interpret statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistent with their purpose. To do this, where the words of a statutory provision are unclear, or capable of more than one meaning, or the meaning is, as the Court of Appeal has noted, unresolved, I should give them whichever of the possible meanings is most compatible with human rights....

101 Senior Member Nihill then held:

Taking into account the wording of s 8 of the EO Act 2010 on its face, the extrinsic materials, the available authority and s 32 of the Charter, it is my view that the definition of direct discrimination in the EO Act 2010 does not require a comparator. What it requires is an analysis of the impact of treatment on the person complaining of it. This analysis may be informed by consideration of the treatment afforded to relevant others, particularly in circumstances where it is not clear whether the treatment is unfavourable.⁴⁹

102 In *Drummond v Telstra Corporation Limited*⁵⁰ Deputy President Macnamara (as he was then) considered the meaning of detriment in the EOA 1995.⁵¹ At paragraph 58, Deputy President Macnamara said:

Logically no complaint of direct discrimination can be proven or be other than frivolous and lacking in substance, unless, to use the words of Section 8(2)(b) of the Act, the attribute is a 'substantial reason' for the detrimental treatment.

103 At paragraphs 65 to 66, he said:

Mr Dalton relied upon a decision of Mathews DCJ sitting in the Equal Opportunity Tribunal of New South Wales in *O'Callaghan v Loder* [1983] 3 NSWLR 89, 105 where having reviewed the authorities, the learned Judge stated that the word '*detriment*' in anti-discrimination legislation should be seen as:

Requiring that a complainant has been placed under a disadvantage in comparison with employees of the opposite sex.

The disadvantage must be a matter of substance; the legislation is not directed to trivial distinctions in the treatment afforded to men and women. Subject to that, it is difficult to define the limits of a concept which is, as Brandon LJ said, essentially a matter of fact to be determined in each individual case.

This approach was adopted by Federal Magistrate Baumann in *Damiano v Wilkinson* [2004] FMCA 891. I am content to accept that as a proper formulation of what is required to demonstrate direct discrimination. I note that

⁴⁹ At [53].

⁵⁰ [2008] VCAT 2630.

⁵¹ The wording in section 18 of the EOA 2010 essentially mirrors the wording in section 15 of the EOA 1995.

Section 8(1) uses slightly different language, speaking of discrimination occurring when a person was treated ‘less favourably’. I accept however that whether one uses the word detriment or refers to less favourable treatment what is necessary to be shown is something of substance rather than something which is merely trivial. Mr Dalton conceded that in the industrial jurisdiction of the Federal Court it has been accepted that the administration of a formal warning to an employee does constitute a detriment because it is a ‘black mark’ on his record, the equivalent of an accrued demerit point....

104 DP McKenzie in *Fratas* also referred to “detriment” as meaning a “disadvantage”.

105 The meaning of treatment was considered by the Federal Court of Australia in *Edgley v Federal Capital Press of Australia Pty Ltd*.⁵² At paragraph 54, Beaumont ACJ said:

There is no special statutory definition of the verb "treat" and it is not a term of art. Its primary dictionary definition is "1. To act or behave towards in some specified way: (e.g.) to treat someone with respect" (*Macquarie Dictionary*). That definition seems apposite here. Again, as noted in *Prezzi*, above, the adverb "unfavourably" appears to have its ordinary meaning. The dictionary definitions of the adjective "unfavourable" include "adverse", and this seems appropriate here. In other words, s 8(1)(a) is directed at adverse behaviour **towards** a person, because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination.

FINDINGS IN RELATION TO WHETHER CHIEF COMMISSIONER LAY TREATED OR PROPOSED TO TREAT MR KUYKEN UNFAVOURABLY BY SUBJECTING MR KUYKEN TO ANY DETRIMENT

Findings in relation to the introduction and enforcement of the new Grooming Standard

106 I am not satisfied that the introduction of the new Grooming Standard on 1 January 2012, which banned facial hair other than clean, tidy and neatly trimmed sideburns and moustaches, alone constitutes unfavourable treatment. Whilst I accept that Mr Kuyken has suffered from angst and anxiety due to the thought of having to shave off his goatee in order to comply with the new Grooming Standard, the introduction of the new Grooming Standard itself was not “adverse behaviour...aimed at, or towards” Mr Kuyken.⁵³

107 As stated in paragraph 77 above, Mr Kuyken gave evidence that he shaved off his goatee whilst on leave over the 2011/2012 Christmas/New Year period in order to comply with the new Grooming Standard. He gave evidence that he did so because he inferred from Chief Commissioner Lay’s direction to comply with the new Grooming Standard, which was contained

⁵² [2001] FCA 379.

⁵³ *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379, [54].

in his email dated 9 December 2011, that a refusal or failure to do so would result in disciplinary action and he was afraid of losing his job if he retained his goatee.

- 108 I agree that the email dated 9 December 2011 contains an inference that if members do not comply with the new Grooming Standard, disciplinary action could result. This is because the email makes it clear that the new Grooming Standard will become force policy and must be complied with, and because under section 69 of the PR Act, a member commits a breach of discipline if he or she fails to comply with a standing order or instruction of the Chief Commissioner.⁵⁴
- 109 The threat of disciplinary action was more clearly stated in Commander Forti's email dated 31 August 2012, which he sent in his capacity as Chief Commissioner Lay's delegate. This email stated that Mr Kuyken "could be subject to disciplinary action for non-compliance with the VPM" unless he complied with the VPM by shaving off his goatee or he issued proceedings in VCAT, in which case he would be exempt from complying with the VPM until the proceedings were heard and determined. Mr Kuyken's amended particulars of claim state that he has "suffered stress and lack of sleep as a result of the lack of communication from management surrounding what disciplinary action he would face as a result of failing to comply with the [new] Grooming Standard".
- 110 I am satisfied that the implied threat of disciplinary action contained in the email dated 9 December 2011 and the direct threat contained in the email dated 31 August 2012 were made in circumstances where Mr Kuyken's goatee has no bearing on the quality of his work or his ability to do his job.
- 111 I am also satisfied that the direct threat of disciplinary action against Mr Kuyken contained in the email dated 31 August 2012 amounts to proposed unfavourable treatment by subjecting Mr Kuyken to a detriment. The threat of disciplinary action is proposed treatment that is 'not favourable, not propitious, disadvantageous, and adverse'.⁵⁵ It is also detrimental treatment, that is, treatment that places a person under a disadvantage that is real, a matter of substance and not trivial.
- 112 However, Mr Kuyken's amended particulars of claim contain no reference to, and make no allegations of unfavourable treatment or detriment flowing from the implied threat of disciplinary action contained in the email dated 9 December 2011. Mr Kuyken's amended particulars only refer to the direct threat of disciplinary action contained in Commander Forti's email dated 31 August 2012. In addition, whilst Mr Kuyken gave general evidence that the thought of shaving off his goatee causes him angst, stress and anxiety and his amended particulars of claim state that he has suffered stress and a lack of sleep due to not knowing what disciplinary action he would face if he did

⁵⁴ It was common ground that the new Grooming Standard, which was contained in the VPM, was a standing order for the purposes of this provision.

⁵⁵ *Slattery v Manningham City Council* at [57].

not comply with the new Grooming Standard, he did not give any specific evidence that would support a finding that the implied threat contained in the 9 December 2011 subjected him to unfavourable treatment or detriment. Accordingly, I am not satisfied that the implied threat of disciplinary action contained in the email dated 9 December 2011 amounts to proposed unfavourable treatment.

- 113 Whilst it is common ground that Mr Kuyken has not yet been subjected to any disciplinary action as he is exempted from the application of the new Grooming Standard until this proceeding is heard and determined, I am satisfied that he is, to use a common idiom, currently “under a cloud”. The direction to comply with the Grooming Standard and the threat of disciplinary action for non-compliance that was contained in Commander Forti’s email dated 31 August 2012 was sent to Mr Kuyken’s Superintendent and in my view, specifically singled out Mr Kuyken as being someone within Victoria Police who is now disapproved of because of the nature of his facial hair. These matters placed Mr Kuyken under a substantial disadvantage and clearly amount to a detriment.
- 114 In addition, in my view, given that the definition of direct discrimination contained in section 8 includes *proposed* unfavourable treatment and that section 18 specifically states an “employer must not discriminate against an employee”, section 18(d) should be read as including a prohibition against discrimination by *proposing* to subject an employee to any other detriment.
- 115 This conclusion is supported by the cases referred to in paragraph 96 above, which do not distinguish between unfavourable treatment and detriment when considering whether an applicant has been discriminated against. Rather, the two concepts are treated in a rolled up fashion. In particular, in the passage in *Drummond v Telstra Corporation Limited*, referred to at paragraph 103 above, Deputy President Macnamara appears to suggest that unfavourable treatment and detrimental treatment can be treated as similar concepts for the purposes of considering what constitutes direct discrimination. By logical extension, this means that proposed detrimental treatment could also amount to discrimination as proposed unfavourable treatment clearly does.
- 116 I also consider this interpretation of section 18 (d) to be the interpretation that is most compatible with human rights, particularly the right to equal and effective protection against discrimination,⁵⁶ as required by section 32 of the Charter.

Findings in relation to the promulgation of the new Grooming Standard

- 117 I am not satisfied that Chief Commissioner Lay’s emails dated 9 December 2011 and 29 December 2011 contained the alleged implications set out in paragraph 14 (c) above in relation to Mr Kuyken’s appearance and the way in which he is viewed by the community.

⁵⁶ Section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

- 118 Whilst both of these emails talk about the reasons why Chief Commissioner Lay had decided to implement the new Grooming Standard, they only do so in very general terms. In relation to the email dated 9 December 2011, Chief Commissioner Lay stated:

Our appearance in the community, at courts and in an operational context has been subject to much debate. Over recent years there has been a lot of feedback from both the public and from members that appearance standards need tightening.

I am keen to ensure a more uniform look. I think it sends a powerful message to the community that we are a professional organization, we are as one, and that we care about ourselves and the community.

After much consultation, the appearance standards of Victoria Police members will change. The new guidelines will take effect on the 1st January 2012. I am keen to ensure that everyone understands these changes so that they can conform on the day of implementation.

Whilst I accept that Mr Kuyken felt aggrieved by these statements, they are not specifically directed at Mr Kuyken and in my view, do not amount to unfavourable treatment.

- 119 Similarly, in the email dated 29 December 2011, Chief Commissioner Lay stated:

Recently I sent an email that outlined a new Grooming & General Appearance Policy. This was after extensive consultation right across the organization. There was strong support for some fundamental change from all ranks. On 1 January 2012, these changes will become force policy and there is a requirement to comply with the new standards.

...

The policy, together with the new police uniform to be rolled out around the end of next year, will build on the image of Victoria Police. It is important to me that we protect and enhance the Victoria Police image, a major component being our consistent and professional appearance.

Again, these comments are very general in nature and are not specifically directed at Mr Kuyken and in my view, do not amount to unfavourable treatment.

- 120 The position in relation to the comments contained in Commander Forti's email dated 31 August 2012 is different. In this email, Commander Forti stated:

As discussed in the Conciliation on Friday 29 June 2012 it is important for members of the police force to present a professional, consistent and well-groomed appearance to maintain the public's confidence, trust and respect. *Accordingly*, (my emphasis) the proposed amendment has not been agreed to by the Chief Commissioner.

- 121 The proposed amendment was to change the new Grooming Standard to allow neat, clean, tidy and closely trimmed goatees or full beards and to allow male members to wear long hair in a bun.
- 122 I am satisfied that the words set out in paragraph 120 above imply that if Mr Kuyken continues to have a goatee, he will not present a professional, consistent and well-groomed appearance that maintains the public's confidence, trust and respect. I am also satisfied that such a statement is likely to denigrate or humiliate Mr Kuyken and constitutes detrimental or unfavourable treatment.

IF THERE WAS UNFAVOURABLE OR PROPOSED UNFAVOURABLE TREATMENT, WAS MR KUYKEN'S FACIAL HAIR A SUBSTANTIAL REASON FOR THE PROPOSED TREATMENT?

- 123 The test for direct discrimination under section 8 of the EOA 2010 requires Mr Kuyken to establish a causal connection or relationship between the treatment complained of and the protected attribute. Section 8(2)(b) of the EOA 2010 further provides that 'it is irrelevant whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason'.

THE COMMISSION'S SUBMISSIONS IN RELATION TO WHETHER MR KUYKEN'S FACIAL HAIR WAS A SUBSTANTIAL REASON FOR THE PROPOSED TREATMENT

- 124 The Commission submitted that Mr Kuyken must show that the unfavourable treatment occurred substantially because of his physical features or, put another way, whether the physical features were the "real reason" or "true basis" for the conduct. This conclusion must be reached following an objective assessment of all the circumstances, including the Tribunal drawing inferences where appropriate.⁵⁷
- 125 The Commission also submitted there is no requirement for Chief Commissioner Lay to have intended to discriminate against Mr Kuyken because motive is irrelevant under section 10 of the EOA 2010.
- 126 Chief Commissioner Lay stated in his particulars of defence that, if the Tribunal finds that Chief Commissioner Lay treated Mr Kuyken unfavourably, then he denies that Mr Kuyken's physical features were a substantial reason for the treatment.
- 127 Instead, Chief Commissioner Lay contended that the proposed treatment was because of Mr Kuyken's "potential non-compliance with the VPM and for reasons, alternatively substantial reasons, which did not include Mr Kuyken's facial hair".⁵⁸

⁵⁷ *Purvis v New South Wales* [2003] HCA 62; (2003) 217 CLR 92, 143-144 [166] (McHugh and Kirby JJ) See also 101-102 [13]-[14] (Gleeson CJ); *Kapoor v Monash University and Anor* [2001] VSCA 247 [35] - [37] (Chernov JA); *State of Victoria & Ors v McKenna* [1999] VSC 310 [42].

⁵⁸ See paragraph 9.3 of the particulars of defence.

- 128 In *Kapoor v Monash University*⁵⁹ (**Kapoor**) the Victorian Court of Appeal considered the issue of causation. The appellant had claimed discrimination under the *Equal Opportunity Act 1984* (Vic) on the basis that her contract of employment with Monash University had not been renewed because she was socially reserved. The appellant claimed her reserved nature was a characteristic of her race or religion. However, the Court of Appeal found that the contract was not renewed because Monash University considered the applicant unsuitable for the role because she was not capable of doing the job. The Court noted that a *cause* of the unsuitability was the reserved nature of the appellant. However, the reserved nature did not amount to the *reason* for the actions and so the actions did not amount to discrimination.⁶⁰
- 129 In this way, the Court of Appeal drew a distinction between the “true reason” for the alleged discriminatory conduct of Monash University and the cause of the true reason. This is analogous to the argument made by Chief Commissioner Lay in these proceedings.
- 130 The Commission submitted that the Tribunal could distinguish *Kapoor* in circumstances where the reason for the action is so inextricably linked to the protected attribute (whether by direct evidence or by inference), that it is artificial to make a distinction between the true reason and the cause of that reason. The Commission relied on several decisions that support this approach.
- 131 The Federal Magistrates Court took this approach in *Wiggins v Department of Defence - Navy*⁶¹ in a claim under the *Sex Discrimination Act 1982* (Cth) (**the SDA**) and the *Disability Discrimination Act 1992* (Cth) (**the DDA**):
- I reject the submission by the Respondent that the transfer was not due to depression but rather due to her absence. In my view the absence was clearly due to the depression and the submissions by the Respondent seeking to distinguish the absence from the disability should not be permitted. The leave taken by the Applicant I am satisfied was due almost entirely to her depressive illness for which she required treatment. It is inextricably related to her disability and in turn it was the disability which effectively caused the concern for Commander Sadleir and led to the transfer.⁶²
- 132 Similarly in *Ware v OAMPS Insurance Brokers Ltd*⁶³ an employee was demoted and dismissed due to absences from work. The Federal Magistrates Court, in upholding a claim for discrimination under the DDA, considered that there was a sufficient causal link between the applicant’s disability and the employer’s action in demoting and terminating his

⁵⁹ [2001] VSCA 247.

⁶⁰ *Kapoor v Monash University* [2001] VSCA 247 [40].

⁶¹ [2006] FMCA 800.

⁶² *Wiggins v Department of Defence - Navy* [2006] FMCA 800 [170].

⁶³ [2005] FMCA 664.

employment, because the employee's absences were caused by his disability.⁶⁴

- 133 A Victorian example is *Stern v Depilation & Skincare Pty Ltd*⁶⁵, where the Tribunal found that the complainant's pregnancy was a 'substantial reason' for her redundancy. Although the 'dominant reason' for her redundancy was a downturn in business, the Tribunal found that the factor which 'actuated the minds' of the decision-makers was the fact that she was a part-time employee working reduced hours. The only reason that the complainant was working part-time was that she was pregnant.⁶⁶
- 134 Another example from the Victorian jurisdiction is *Oyekanmi v National Forge Operations Pty Ltd*⁶⁷. In that case, the Victorian Equal Opportunity Board (**the Board**) found that a Nigerian engineer was discriminated against on the basis of race. The Board found that there was a requirement that the applicant would maintain "credibility" with other employees. However, the Board found that a substantial reason for the requirement was the perception the employee would not be accepted by the other employees because of his race. Therefore, the Board found a causative connection between the conduct and the race, despite the "credibility" reason proffered.⁶⁸
- 135 The Commission also submitted that *Kapoor* could be distinguished because in that case, the act by the respondent of assessing the appellant's suitability for renewing her contact was in itself a lawful step. In these proceedings, Mr Kuyken has claimed that the new Grooming Standard and its implementation (including proposing disciplinary action for failure to comply) amount to unlawful discrimination.
- 136 The Commission submitted that applying *Kapoor* in these circumstances would lead to an absurd result, unintended by Parliament, whereby employers could subject their employees to detrimental disciplinary action or termination on the basis of a protected attribute, but be effectively exempted from the application of the EOA 2010 by claiming the "real reason" was failure to follow company policy. To a certain extent, the EOA 2010 covers this issue under its indirect discrimination provisions, but as in this application, there could be situations that fall outside those provisions, which the Tribunal needs to approach carefully.
- 137 The Commission also submitted that the intention of Parliament is relevant in relation to ascertaining the real reason for the conduct. As noted above, the Attorney-General has indicated that employers should not be entitled to rely on irrelevant matters such as physical features in assessing an employee's suitability for a job, or for assessing their performance.⁶⁹ In

⁶⁴ *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664 [113], [119].

⁶⁵ [2009] VCAT 2725.

⁶⁶ *Stern v Depilation & Skincare Pty Ltd (Anti-Discrimination)*[2009] VCAT 2725 [67].

⁶⁷ (1996) EOC ¶92-797.

⁶⁸ (1996) EOC ¶92-797, 78,896-897.

⁶⁹ Hansard, *Legislative Assembly*, 4 May 1995, 1251.

light of this the Tribunal should consider, in determining the real reason for Chief Commissioner Lay's conduct, whether Chief Commissioner Lay has drawn an artificial distinction between the cause of the action being a breach of the new Grooming Standard, and the reason for the breach of the new Grooming Standard being Mr Kuyken's facial hair.

CHIEF COMMISSIONER LAY'S SUBMISSIONS IN RELATION TO WHETHER MR KUYKEN'S FACIAL HAIR WAS A SUBSTANTIAL REASON FOR THE PROPOSED TREATMENT

138 Chief Commissioner Lay submitted that the real reason or true basis for the impugned conduct is the introduction and promulgation of the new Grooming Standard and its enforcement by subjecting Mr Kuyken to disciplinary action after the conclusion of these proceedings.

139 Chief Commissioner Lay relied on the decision in *Kapoor*, particularly the following passage:

[T]he first step in determining whether the impugned conduct is caught by the legislation is the ascertainment, by a consideration of all the surrounding circumstances, what was the substantial reason (or reasons) for that conduct and whether it was relevantly [physical features, sex/gender or religion] related. In other words, it is necessary to characterise the true basis on which the conduct was pursued.⁷⁰

140 Chief Commissioner Lay also relied on the evidence given by Commander Forti in relation to Chief Commissioner Lay's reasons for the introduction and promulgation of the new Grooming Standard, which in summary was to set grooming standards for Victoria Police as a whole which were aimed at achieving consistency and an improved public image for the force. Chief Commissioner Lay submitted that the real or true reason for making provision in the new Grooming Standard for the prohibition on beards (including goatees) was, as Commander Forti's evidence clearly shows, to set a particular standard that was simple and easy to comply with and enforce. The new Grooming Standard was not directed specifically at Mr Kuyken, and the reason for its introduction and promulgation was unrelated to his physical features. In other words, the new Grooming Standard was introduced and promulgated because the Chief Commissioner, without any specific reference to Mr Kuyken, wished to exercise his power under section 5 of the PR Act to require the whole of Victoria Police, save those subject to exemptions granted in accordance with the new Grooming Standard's provisions, to maintain grooming standards which, in his opinion, promoted a good public image and discipline.

141 Chief Commissioner Lay also submitted that contrary to the Commission's submissions in relation to the issue of causation, the approach followed by

⁷⁰ *Kapoor v Monash University* [2001] VSCA 247 at [37] per Chernov JA (with whom Brooking and Ormiston JJA agreed).

the Court of Appeal in *Kapoor* is correct and not distinguishable and that the Tribunal is bound by that decision and must follow it.

FINDINGS IN RELATION TO WHETHER MR KUYKEN'S FACIAL HAIR WAS A SUBSTANTIAL REASON FOR THE PROPOSED TREATMENT

- 142 I accept the Commission's submission that *Kapoor* can be distinguished in circumstances where the reason for the action is so inextricably linked to the protected attribute that it is artificial to make a distinction between the true reason and the cause of that reason. In this case, the reason for the action (the threat of disciplinary action) is Mr Kuyken's non-compliance with the new Grooming Standard, which is entirely due to his facial hair. The two matters are inextricably linked and it is not possible to separate Mr Kuyken's facial hair from the new Grooming Standard.
- 143 In *Kapoor*, the Court of Appeal, after considering all of the surrounding circumstances, found "[o]n its true characterisation, the *reason* for the non-renewal of the contract of employment was that the employee (the appellant) was not capable of doing the job required of her".⁷¹ It also found that the appellant's reserved nature, which was said to be a characteristic of her race, was "a *cause* of the appellant's unsuitability but not the *reason* for deciding that the appellant's contract should not be renewed.
- 144 I do not consider the facts in this case to be analogous to the facts in *Kapoor*. In this case, after considering all of the surrounding circumstances, I am satisfied that the reason for threatening Mr Kuyken with disciplinary action is the fact he has a goatee, which does not comply with the new Grooming Standard.
- 145 I also accept the Commission's submission that applying *Kapoor* in these circumstances would lead to an absurd result, unintended by Parliament, whereby employers could subject their employees to detrimental disciplinary action or termination on the basis of a protected attribute, but be effectively exempted from the application of the EOA 2010 by claiming the "real reason" was failure to follow company policy.
- 146 Accordingly, I find that Mr Kuyken's facial hair was a substantial reason for the proposed treatment, being the threat of disciplinary action.
- 147 I also find that it was the reason for the comments made by Commander Forti in his email dated 31 August 2012 that I have found imply that Mr Kuyken does not present a professional, consistent and well-groomed appearance that maintains the public's confidence, trust and respect.
- 148 Accordingly, I find that Chief Commissioner Lay has discriminated against Mr Kuyken.

⁷¹ *Kapoor v Monash University* [2001] VSCA 247 at [40].

IF CHIEF COMMISSIONER LAY HAS DISCRIMINATED AGAINST MR KUYKEN, WAS IT PERMITTED UNDER SECTION 75 OF THE EOA 2010 BECAUSE IT WAS AUTHORISED BY SECTION 5(2) OF THE PR ACT?

149 Section 75 of the EOA 2010 provides that:

(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by:

- (a) a provision of an Act, other than this Act;
- (b) an enactment, other than an enactment under this Act.

(2) It is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

150 Chief Commissioner Lay says that the alleged discrimination is authorised by section 5(2) of the PR Act.

151 Section 5 of the PR Act gives the Chief Commissioner the superintendence and control of Victorian Police, and without limiting that power, section 5(2) of the PR Act gives the Chief Commissioner the power to determine:

- (a) the type or design of any uniform or equipment to be worn or carried by members of the force, police recruits, police reservists and protective services officers; and
- (b) the conditions under which any uniform or equipment is to be worn or carried; and
- (c) standards of grooming and acceptable clothing accessories for members of the force, police recruits, police reservists and protective services officers, which may –
 - (i) differ based on sex, gender identity, physical features or religious belief or activity; and
 - (ii) provide for certain exceptions based on genuine medical, cultural or religious grounds.

152 Section 17 of the PR Act provides that the Chief Commissioner may embody his determinations in standing orders or instructions. Members are required to comply with standing orders and instructions.⁷² The VPM, which contains the new Grooming Standard, is a standing order made under section 17 of the PR Act.

SUBMISSIONS OF THE COMMISSION IN RELATION TO WHETHER THE DISCRIMINATION WAS PERMITTED UNDER SECTION 75 OF THE EOA 2010 BECAUSE IT WAS AUTHORISED BY SECTION 5(2) OF THE PR ACT

General principles of interpreting exceptions

153 The Commission submitted that the Tribunal should have regard to *H J Heinz Company Australia Pty Ltd v Turner*,⁷³ which indicates that concepts

⁷² Section 69 of the PR Act.

⁷³ [1988] 4 VR 872.

of authority and necessity in section 75 must be construed narrowly so that the discriminatory conduct exempted by the provision is appropriately designed to secure something necessitated by a statutory provision.⁷⁴

- 154 In *Hall v Victorian Amateur Football Association*⁷⁵ the Tribunal noted that its preference there was to interpret an exception “according to its purpose and according to the nature of the ordinary meaning of its words”.
- 155 However, in interpreting exceptions the Tribunal must also take into account the beneficial nature of Equal Opportunity legislation,⁷⁶ as well as the express objectives of the Act to eliminate discrimination to the greatest possible extent.
- 156 The Commission submitted that this approach does not call for new rules of statutory interpretation. It calls for discipline when dealing with provisions that remove people’s right to equality.

Scope of section 75

- 157 The Commission submitted that a statutory provision could be said to authorise conduct under section 75 if it requires the relevant conduct, or expressly or by necessary implication, permits specific acts of discrimination. It is not enough if a statutory provision gives a broad discretion or simply permits discrimination in a general sense.
- 158 The Commission referred the Tribunal to the decision in *Wojcik v Roads Corporation (Wojcik)*, in which the Tribunal considered the scope of the exception.⁷⁷ In this case, the Tribunal found that the exception not only covers conduct that is strictly necessary to comply with the relevant statutory provision, but it also extends to cover a case where the relevant statutory provision can be said to authorise relevant conduct.
- 159 The ordinary meaning of the statutory exception described in *Wojcik* was cited with approval in *Aitken & Ors v State of Victoria (Department of Education & Early Childhood Development)*:

The ordinary meaning of the statutory authority exception in the Equal Opportunity Acts extends to conduct permitted by an Act. Section 32(1) of the Charter, which is applicable to conduct after 1 January 2008, does not require that that ordinary meaning be departed from. Conduct expressly permitted by a statute is within the ordinary meaning of the exception. The express permission of conduct must also include within the permission, conduct necessary to enable the permitted conduct to occur.⁷⁸

⁷⁴ *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872, 882.

⁷⁵ [1999] VCAT 627.

⁷⁶ *Waters v Public Transport Corporation* [1991] HCA 49, (1991) 173 CLR 349; Also see *Tanevski v Fluor Australia Pty Ltd* [2008] NSWADT 217 [75]-[78].

⁷⁷ [1997] VADT 75. The Tribunal considered section 69(1) of the EOA 1995 that was the predecessor to section 75 of the EOA 2010 and in similar terms.

⁷⁸ *Aitken & Ors v State of Victoria (Department of Education & Early Childhood Development) (Anti-Discrimination)* [2012] VCAT 1547 [542]-[543] (Ginnane J).

Application of section 75

- 160 The Commission submitted that in order to determine whether Chief Commissioner Lay can rely on section 75 to defend its conduct, the Tribunal must determine what conduct section 5(2) of the PR Act authorises or necessitates, and whether that conduct is what Mr Kuyken says has resulted in the breach of the EOA. In other words, section 5(2) of the PR Act might authorise Chief Commissioner Lay to issue standards of grooming and acceptable clothing and accessories that discriminate on particular grounds, but may not authorise Chief Commissioner Lay to discriminate when applying that policy.
- 161 The Commission submitted that section 5(2) of the PR Act is limited to authorising the determination and issuing of standards relating to uniform, grooming, clothing and accessories (which is defined in section 5(3) of the PR Act to include jewellery, headgear, sunglasses and make-up). It does not authorise Chief Commissioner Lay to otherwise subject Mr Kuyken to detriment.

SUBMISSIONS OF CHIEF COMMISSIONER LAY IN RELATION TO WHETHER THE DISCRIMINATION WAS PERMITTED UNDER SECTION 75 OF THE EOA 2010 BECAUSE IT WAS AUTHORISED BY SECTION 5(2) OF THE PR ACT

- 162 Chief Commissioner Lay submitted that even if the Tribunal found that Mr Kuyken had been discriminated against, that discrimination is expressly authorised by sections 5(2)(c) and 17 the PR Act and accordingly permitted under sections 13 and 75 of the EOA 2010.
- 163 Chief Commissioner Lay submitted that determining the content of any grooming standards that must be observed by members involves questions of judgment and degree. That judgment is deliberately given to the Chief Commissioner, as part of his powers of control over the force. There is nothing in the PR Act that requires those grooming standards to be fixed by reference to some objective standard. No such standard exists. The purpose of the power is to allow the Chief Commissioner to make enforceable standards as to the uniform and appearance of members. That grant of power does not assume the existence of a single and appropriate standard of grooming.
- 164 Chief Commissioner Lay also submitted that any uniform and grooming standard reduces the area of choice given to members in the field of its operation. He submitted that there is an evident and powerful consideration that mandates the ability to prescribe such standards, that is, the ability to identify a uniform and consistent force. He submitted that the evidence of Mr Forti should be accepted on this issue, which I do.
- 165 Chief Commissioner Lay submitted that Mr Kuyken did not dispute the existence of the power, its purpose to foster professional appearance or the desirability of its exercise. Rather, he submitted that the dispute turns on the

precise content of one or two aspects of the standard. Mr Kuyken's evidence confirmed this.

FINDINGS IN RELATION TO WHETHER THE DISCRIMINATION WAS PERMITTED UNDER SECTION 75 OF THE EOA 2010 BECAUSE IT WAS AUTHORISED BY SECTION 5(2) OF THE PR ACT

- 166 I find that the discrimination was permitted under section 75 of the EOA 2010, because it was authorised by section 5(2) of the PR Act. Section 5(2)(c) gives Chief Commissioner Lay the power to determine standards of grooming and acceptable clothing accessories for members of Victoria Police, which may differ based on sex, gender identity, physical features or religious belief or activity.
- 167 I also find that the discrimination was permitted under section 75 of the EOA 2010, because it was authorised by section 17 of the PR Act, which enables Chief Commissioner Lay to enforce his determinations by embodying them in the VPM, which Victoria Police members must comply with in accordance with section 69 of the PR Act. This means that both the introduction and the enforcement of the new Grooming Standard through disciplinary action for non-compliance with the VPM is authorised by the PR Act.

IF CHIEF COMMISSIONER LAY HAS DISCRIMINATED AGAINST MR KUYKEN, WAS IT PERMITTED UNDER SECTION 75 OF THE EOA 2010 PRIOR TO 14 JUNE 2012, WHICH WAS WHEN SECTION 5(2)(C) OF THE PR ACT WAS INTRODUCED?

- 168 The Commission submitted that even if the discrimination is now authorised by section 5(2) of the PR Act, there is no evidence that section 5(2)(c) applies retrospectively and that prior to 14 June 2012, the PR Act did not specifically authorise the Chief Commissioner to determine standards of grooming in a discriminatory way. Prior to 14 June 2012, Chief Commissioner Lay's power was limited to determining the type and design of uniform and conditions under which the uniform is to be worn or carried under sections 5(2)(a) and (b) of the PR Act. Accordingly, any discrimination that took place between December 2011 and 14 June 2012 would not be covered by the exception.
- 169 In his particulars of defence, Chief Commissioner Lay admitted that section 5(2)(c) was inserted into the PR Act by section 9 of the *Police and Emergency Management Legislation Amendment Act 2012* (Vic) and came into operation on 14 June 2012. However, he submitted that the amendment to the PR Act simply "confirmed" Chief Commissioner Lay's power to introduce and promulgate the new Grooming Standard on 1 January 2012, even if the Tribunal found this conduct discriminatory.
- 170 I reject this submission. Sections 5(2)(a) and (b) of the PR Act do not mention hair, facial hair or grooming standards or give the Chief Commissioner the power to determine grooming standards in a

discriminatory way. Whilst I accept that the Chief Commissioner of Victoria Police has set standards about these matters over the years, there was clearly no statutory authorisation for the discrimination prior to 14 June 2012. Prior to 14 June 2012, the PR Act only authorised Chief Commissioner Lay to determine and implement standards relating to the type and design of uniform and conditions under which the uniform may be worn or carried.⁷⁹

- 171 The particulars of defence are also inconsistent with the concession made by Senior Counsel for Chief Commissioner Lay on the last day of the hearing that Chief Commissioner Lay sought the amendment of the PR Act to address any inconsistency between the EOA 2010 and the new Grooming Standard.
- 172 However, my finding that Chief Commissioner Lay has discriminated against My Kuyken relates only to the threat of disciplinary action and the comments that imply that Mr Kuyken does not present a professional, consistent and well-groomed appearance that maintains the public's confidence, trust and respect, which are contained in Commander Forti's email dated 31 August 2012. I have not found that Chief Commissioner Lay discriminated against Mr Kuyken before this date. Accordingly, whilst it would have been preferable that the PR Act was amended before the introduction of the new Grooming Standard and before Mr Kuyken made a complaint to the Commission, it does not alter my finding that the discrimination was permitted under section 75 of the EOA 2010.

VICTIMISATION

- 173 Victimisation is prohibited by section 103 of the EOA 2010. A person victimises another person if he or she subjects or threatens to subject the other person to any detriment, because the other person has exercised a right to bring a dispute or make an application under the EOA 2010.⁸⁰

SUBMISSIONS OF THE COMMISSION IN RELATION TO VICTIMISATION

- 174 The Commission submitted that the detriment referred to in section 103 of the EOA 2010 takes the same meaning as under section 18(d) of the EOA 2010, as including humiliation and denigration.
- 175 In *Tan v McArdle and Anor*⁸¹ the Tribunal considered that to prove victimisation, an applicant must establish:
- (a) the alleged victimiser has subjected the applicant to conduct which constitutes a "detriment" within the meaning of the EOA 2010
 - (b) the action must be directed at and affect the applicant by way of detriment, and

⁷⁹ Sections 5(2)(a) and (b) of the PR Act 1958 (Vic).

⁸⁰ Section 104 of the EOA 2010.

⁸¹ [2010] VCAT 248.

- (c) the alleged victimiser must have engaged in the conduct for one of the reasons set out in section 104.⁸²

- 176 The Commission submitted that this may be relevant to the Tribunal's consideration of allegations of victimisation, but also may be relevant to other allegations made by Mr Kuyken, for example that his colleagues have made jokes at his expense because he brought his complaint to the Commission or after making this application.
- 177 As discussed in paragraph 28 above, any alleged victimisation by other members of Victoria Police does not form part of Mr Kuyken's claim.

SUBMISSIONS OF CHIEF COMMISSIONER LAY IN RELATION TO VICTIMISATION

- 178 Chief Commissioner Lay submitted that the evidence given by Commander Forti in relation to his direction on 4 October 2012 establishes that his reason for giving the direction was not, as Mr Kuyken alleges, to victimise him because he had made discrimination claims in the Tribunal. He also submitted that the evidence demonstrates that Chief Commissioner Lay and Commander Forti took many steps to ensure that Mr Kuyken:
- (a) was free to pursue his EOHRC and VCAT claims, and (through Mr Kuyken's superintendent) allowed him to take leave to do so,
 - (b) was exempt from the operation of the relevant part of the new Grooming Standard pending hearing and determination of his EOHRC and VCAT claim,
 - (c) could rely on emails from Commander Forti as evidence that he was exempt from the new Grooming Standard while he pursued his rights to pursue the EOHRC and VCAT proceedings.
- 179 In relation to the claim of victimisation arising out of the amendment to the PR Act, Chief Commissioner Lay accepted that he sought an amendment to the Pr Act from the Victorian Government:
- (a) after the introduction of the new Grooming Standard,
 - (b) after some members had made complaints to the Commission, and
 - (c) for the purposes of addressing any conflict between the new Grooming Standard and the provisions of the EOA 2010.
- 180 However, Chief Commissioner Lay submitted that the seeking of legislative reform was not a detriment for the purposes of section 104 of the EOA 2010. This is because seeking legislative reform is permissible and the decision to amend the PR Act was that of the Parliament rather than that of the Chief Commissioner.

⁸² [2010] VCAT 248 at [25]-[28].

- 181 In summary, Chief Commissioner Lay submitted that there can be no victimisation if there is no detriment and for these reasons, there has been no contravention of section 103 of the EOA 2010.

FINDINGS IN RELATION TO WHETHER CHIEF COMMISSIONER LAY VICTIMISED MR KUYKEN WHEN HE INSTRUCTED HIM TO ATTEND AND MANAGE OR CONDUCT THESE PROCEEDINGS WHILE OFF DUTY

- 182 I accept Commander Forti's evidence that members of Victoria Police are not entitled to be paid whilst they are conducting legal proceedings in their personal capacity and there is no practice of doing so within Victoria Police. This means that members of Victoria Police who are conducting legal proceedings in their personal capacity must do so whilst off duty. Mr Kuyken did not provide the Tribunal with any evidence to the contrary.
- 183 Whilst Mr Kuyken's claim relates to his employment with Victoria Police, there is no doubt that he has made the claim in his personal capacity. Accordingly, I find that Commander Forti's direction to attend and manage or conduct these proceedings while off-duty, which was contained in his email dated 4 October 2012, did not disadvantage Mr Kuyken and does not amount to a detriment. Mr Kuyken has been treated in the same manner as any other member of Victoria Police who is conducting legal proceedings in his or her personal capacity.
- 184 For these reasons, Mr Kuyken has not been subjected to any detriment and the direction to conduct these proceedings whilst off duty does not contravene section 103 of the EOA 2010.

FINDINGS IN RELATION TO WHETHER CHIEF COMMISSIONER LAY VICTIMISED MR KUYKEN WHEN HE INSTRUCTED HIM NOT TO ATTEND THE TRIBUNAL OR MEETINGS REGARDING THE PROCEEDINGS, WHILE IN VICTORIA POLICE UNIFORM

- 185 I accept Commander Forti's evidence that members of Victoria Police are not permitted to wear a Victoria Police uniform when off duty.⁸³ As Mr Kuyken was required to be off duty whilst conducting these proceedings, Commander Forti's direction to not attend and manage or conduct these proceedings while in Victoria Police uniform, which was contained in his email dated 4 October 2012, did not disadvantage him and does not amount to a detriment.
- 186 For these reasons, Mr Kuyken has not been subjected to any detriment and the direction to not to conduct these proceedings in Victoria Police uniform does not contravene section 103 of the EOA 2010.

⁸³ As set out in clause 2.4 of the Appearance Policy contained in the VPM.

FINDINGS IN RELATION TO WHETHER CHIEF COMMISSIONER LAY VICTIMISED MR KUYKEN WHEN HE INSTRUCTED HIM NOT TO USE ANY VICTORIA POLICE VEHICLE TO ATTEND THE TRIBUNAL OR MEETINGS REGARDING THE PROCEEDINGS

- 187 Commander Forti gave evidence that there are limited circumstances in which a Victoria Police vehicle can be used by a member for non-official Victoria Police business.⁸⁴ He also gave evidence that conducting legal proceedings in a personal capacity does not come within these limited circumstances. In addition, approval must be sought to use a Victoria Police vehicle for non-official Victoria Police business, which was not done by Mr Kuyken.
- 188 I accept Commander Forti's evidence about these matters. Accordingly, I find that Commander Forti's direction to not use a Victoria Police vehicle to attend the Tribunal or meetings in relation to this proceeding, which was contained in his email dated 4 October 2012, did not disadvantage Mr Kuyken and does not amount to a detriment.
- 189 For these reasons, Mr Kuyken has not been subjected to any detriment and the direction to not use a Victoria Police vehicle whilst conducting this proceeding does not contravene section 103 of the EOA 2010.

DID CHIEF COMMISSIONER LAY VICTIMISE MR KUYKEN WHEN HE SOUGHT TO HAVE PARLIAMENT CHANGE THE PR ACT TO CONFIRM THE POWER TO MAKE THE NEW GROOMING STANDARD?

- 190 I agree with Chief Commissioner Lay's submission that seeking legislative reform is not a detriment for the purposes of section 104 of the EOA 2010. The EOA 2010 contemplates that legislation may be enacted to authorise discrimination in certain circumstances as set out in sections 13 and 75. Seeking to have Parliament consider enacting lawful legislation contemplated by the EOA 2010 cannot amount to a detriment.
- 191 Accordingly, I find that Chief Commissioner Lay did not victimise Mr Kuyken when he sought to have Parliament consider changing the PR Act to confirm the power to make the new Grooming Standard.

THE CHARTER

- 192 In *Director of Housing v Sudi*, Weinberg JA stated that:

There is no reason to doubt that VCAT, which deals with the overwhelming majority of legal proceedings in this State, is obliged to have regard to the Charter.

Plainly, VCAT is obliged by s 32(1) of the Charter to interpret all statutory provisions 'in a way that is compatible with human rights', so far as it is possible to do so consistently with their purpose.

⁸⁴ As set out in clauses 5.1 and 5.2 of the Policy Rules – Police vehicles contained in the VPM – "JSF-18" of Exhibit R1.

In addition, VCAT can determine Charter issues in other ways. For example, such issues can arise directly in the course of proceedings. The question whether a public authority has acted unlawfully may be central to the resolution of a dispute where the lawfulness or otherwise of such conduct is an element of the cause of action in the proceeding. Alternatively, illegality on the part of that public authority may be the defence to that cause of action. In each case, the Charter issue arises directly in the course of the proceeding and must be resolved according to law.⁸⁵

...

In my opinion, s39(1) cannot be invoked as the source of VCAT's power to engage in collateral review on Charter grounds. There are two reasons for this. First, as is plain, the section does not confer upon VCAT any power of judicial review. Secondly, the section does not expand any power of collateral review that VCAT might have under ordinary common law principles...

Indeed, it can be argued that the legislative intention disclosed by s 39 is that Charter unlawfulness can be relied upon as a ground in – and only in – a proceeding the object of which is to seek 'relief or remedy in respect of an act or decision of a public authority on the ground that...[it] was unlawful'. That would, by definition, confine such relief to a direct challenge before VCAT, and would exclude any possibility of collateral review.⁸⁶

- 193 In *Caripis v Victoria Police*,⁸⁷ Senior Member Steele interpreted the decision in *Sudi* as allowing that the Tribunal has jurisdiction to consider Charter unlawfulness when the lawfulness of the decision itself is before the Tribunal. In *Slattery v Manningham City Council*⁸⁸, Senior Member Nihill agreed with Senior Member Steele's interpretation of the decision in *Sudi*.
- 194 In this case, Mr Kuyken claims that Chief Commissioner Lay's decision to introduce and enforce the new Grooming Standard is unlawful. The lawfulness of the decision itself is therefore before the Tribunal. Mr Kuyken also claims that the rights set out in section 15 of the Charter have been engaged.

IS FACIAL HAIR A FORM OF PROTECTED EXPRESSION UNDER SECTION 15 OF THE CHARTER?

195 Section 15 of the Charter provides:

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-

⁸⁵ [2011] VSCA 266 at [150]-[152].

⁸⁶ [2011] VSCA 266 at [281]-[282].

⁸⁷ [2012] VCAT 1472.

⁸⁸ [2013] VCAT 1869 at paragraph 160. See also the decision of Deputy President McKenzie in *McAdam v Victoria University & Ors* [2010] VCAT 1429.

- (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-
- (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

MR KUYKEN'S SUBMISSIONS IN RELATION TO WHETHER FACIAL HAIR IS A FORM OF PROTECTED EXPRESSION UNDER SECTION 15 OF THE CHARTER

- 196 Mr Kuyken made lengthy submissions in relation to the relationship or “interplay” between the Charter and the EOA 2010 and in relation to whether the introduction of the new Grooming Standard by Chief Commissioner Lay was a permissible restriction on the grounds of public order under section 15(3)(b) of the Charter or a reasonable limitation under section 7(2) of the Charter. In summary, Mr Kuyken submitted that the two acts should be read together and that the introduction of the new Grooming Standard breached the Charter because:
- (a) the new Grooming Standard discriminates against members of Victoria Police
 - (b) the new Grooming Standard facilitates prejudice and intolerance of diversity by disregarding the EOA 2010 and the Charter for the sake of consistency of appearance
 - (c) the new Grooming Standard was not assessed in light of the Charter until after it had been introduced
 - (d) Chief Commissioner Lay did not need to introduce the new Grooming Standard in order to improve appearance standards and the level of consistency and professionalism within the force – he could have simply required that the old Grooming Standard be properly enforced
 - (e) the consultation process that took place before the introduction of the new Grooming Standard was not extensive.
- 197 Mr Kuyken also submitted that section 5(2)(c) of the PR Act does not authorise legislation that is incompatible with the Charter and is merely an attempt to circumvent the Charter. He concluded his submissions by stating that the previous Grooming Standard should be reinstated.

- 198 However, in order to be engaged section 15(2) of the Charter, Mr Kuyken must first establish that the new Grooming Standard is incompatible with right of freedom of expression set out in section 15(2).
- 199 Mr Kuyken submitted that his choice to have a goatee is a form of expression consistent with the right to freedom of expression under section 15. He submitted that his goatee expresses his right to be an individual rather than “an automaton”. He submitted that this right extends to his right to be an individual whilst he is off duty.

CHIEF COMMISSIONER LAY’S SUBMISSIONS IN RELATION TO WHETHER FACIAL HAIR IS A FORM OF PROTECTED EXPRESSION UNDER SECTION 15 OF THE CHARTER

- 200 Chief Commissioner Lay submitted that the introduction of the new Grooming Standard did not contravene the Charter because having beards or particular hairstyles is not a form of protected expression under section 15 of the Charter.
- 201 Chief Commissioner Lay submitted that whilst freedom of expression is a broad concept, it only protects conduct or acts that have expressive content. Usually that conduct will be verbal although it may be accepted that some non verbal conduct can have expressive content. The nature of the expressive content is relevant to the question of whether there is interference with a freedom protected by section 15(2) and whether any limitation on that freedom is justified either under section 15(3) or under section 7(2).
- 202 Chief Commissioner Lay submitted that the essential aspect of expression is its ability to convey meaning. In international jurisprudence the taxonomy of political, artistic and commercial expression have been used to describe the types of expression that are protected. Chief Commissioner Lay accepted that those categories may not be exhaustive and the extent to which an interference might be justified depends on the nature of the expression and the level of interference.
- 203 Chief Commissioner Lay submitted that grooming, including the length of a person’s hair, or whether a person is clean shaven, is not an “*activity that conveys or attempts to convey meaning*”.⁸⁹ He submitted that the having a beard does not of itself convey any meaning because it is not expressive of an idea or information to the observer, not a form of protest and does not convey any particular message to anyone. Grooming is not a mode of communication.
- 204 Chief Commissioner Lay also submitted that the fact that a person has a beard or hair of a particular length could never constitute expression without some specific context that enables a message or meaning to be conveyed.

⁸⁹ *Magee v Delaney* [2012] VSC 407 at [56].

FINDINGS IN RELATION TO WHETHER FACIAL HAIR IS A FORM OF PROTECTED EXPRESSION UNDER SECTION 15 OF THE CHARTER

- 205 Under section 15 of the Charter, the right to freedom of expression includes “the freedom to seek, receive and impart information and ideas of all kinds”. In theory, the right to freedom of expression could include the right to have a goatee in order to impart information and ideas. As Justice Kyrrou observed in *Magee v Delaney*, “the threshold for establishing whether an act falls within the words ‘impart information and ideas’ in s15(2) of the Victorian Charter is very low”.⁹⁰
- 206 However, Justice Kyrrou also held that:
- ...whether an act is capable of imparting information or ideas is to be judged by its impact on reasonable members of the public who are exposed to it, without the benefit of any extraneous information about the purposes of the person who committed the act.
- 207 As stated in paragraph 76 above, Mr Kuyken gave evidence that he likes the appearance of his goatee and feels it gives him the appearance and sense of individuality while at the same time allowing him to maintain a well-groomed and professional standard of appearance. Mr Kuyken told the Tribunal that his goatee is part of his character and an integral part of his identity.
- 208 I am not satisfied that a reasonable member of the public would consider that Mr Kuyken’s goatee imparts any information or ideas such as his desire to be an individual rather than an automaton, without the benefit of any extraneous information about what meaning Mr Kuyken is attempting to express. I am not satisfied that having a goatee imparts any information or ideas, or conveys any meaning at all.
- 209 For these reasons, I am not satisfied that Mr Kuyken’s goatee is a form of protected expression under section 15 of the Charter. Section 15(2) of the Charter does not protect a person’s right to “individuality”, it protects the right to freedom of expression, which includes imparting information and ideas. Mr Kuyken has not established on the facts of this case that he has been prevented from imparting any information or ideas.
- 210 For these reasons, I find that facial hair is not a form of protected expression under section 15 of the Charter and that the Charter has not been engaged.
- 211 In light of this finding, I do not need to consider whether the introduction of the new Grooming Standard by Chief Commissioner Lay was a permissible restriction on the grounds of public order under section 15(3)(b) of the Charter or a reasonable limitation under section 7(2) of the Charter.

⁹⁰ *Magee v Delaney* [2012] VSC 407 at [64].

212 For these reasons I make the orders set out above.

J. Grainger
Member