

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

A168/2012 (and ors)

Applicant	Michael Kuyken (and others according to the Schedule)
Respondent	Ken Lay
Intervener	Victorian Equal Opportunity and Human Rights Commission

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Date of document: 30 July 2013

Filed on behalf of: Intervener

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A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought leave to intervene in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) by way of letter dated 17 June 2013.
2. Section 159 of the EOA 2010 empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation. These proceedings are claims of discrimination in the area of employment, on the basis of physical features, sex and religious activity, and therefore clearly involve issues of discrimination and equality of opportunity.
3. The Tribunal granted the Commission leave to intervene in the application by Michael Kuyken in its Orders dated 20 June 2013 and directed the Commission to file any written submissions by 30 July 2013. The Tribunal granted the Commission leave to intervene in the other 15 applications by way of Orders made for each on 28 June 2013, and directed that the Commission file and serve any written submission in those applications on or before 30 July 2013.

4. As an intervener, the Commission will act as an independent party, exercising its functions under section 155 of the EOA 2010. These functions include promoting and advancing the objectives of the EOA 2010 Act, and to act as an advocate for the EOA 2010.

5. **BACKGROUND**

6. This matter involves applications by 16 sworn members of Victoria Police, being heard together. Each member as named in the Schedule (the **Applicants**) alleges discrimination on the basis of physical features in the area of employment. The specific physical features claimed are long hair and facial hair. Four of the police officers also allege discrimination on the basis of sex in the area of employment,¹ and one police officer also alleges discrimination on the basis of religion in the area of employment² (the **Applications**).

7. The specific conduct the Applicants allege to be discrimination in their Particulars of Claim is, in summary:³

(a) The introduction of new grooming standards contained in the Victoria Police Manual (**VPM**) banning members of the police force from wearing any form of facial hair except a neatly trimmed moustache (the **Appearance Policy**);⁴

(b) The implementation of the Appearance Policy through proposing to subject the Applicants to disciplinary action unless they comply with the Appearance Policy by cutting their hair or shaving their facial hair, as indicated by the email from Superintendent Jeff Forti on 31 August 2012;⁵

(c) Damage to reputation, humiliation and/or denigration of the Applicants through:

(i) a “force-wide” email from the Respondent’s agent Superintendent Jeff Forti on 31 August 2012 which implies that because the Applicants have long hair or facial hair they are

¹ Haines, Particulars of Claim (**POC**) [3],[9]; Shields, POC [3],[9]; Twining, POC [8],[11] Ranik, POC [8],[11]

² Twining, POC [8], [14]-[20]

³ Note that this is a summary only and not all of the Applicants include each of these items in their POC.

⁴ Lloyd, POC [6]; Haines, POC [3]; Downes, POC [6]; Wise, POC [6]; Beale, POC [6]; Greenland, POC [6]; Hunter, POC [6]; Kelly, POC [6]; Garrison, POC [6]; Shields, POC [3]; Smith, POC [6]; Kuyken, POC [6]; Twining, POC [8]; Edwards, POC [6]; Ranik, POC [8]; Chrisant, POC [6]

⁵ Lloyd, POC [5],[9]; Haines, POC [6],[9]; Downes POC [5],[9]; Wise POC [5],[9]; Beale POC [5],[9]; Greenland, POC [5],[9]; Hunter, POC [5],[9]; Kelly, POC [5],[9]; Garrison, POC [5],[9]; Shields, POC [6],[9]; Smith, POC [5],[9]; Kuyken, POC [5],[9]; Twining, POC [7],[11]; Edwards, POC [5],[9]; Ranik, POC [3],[7],[11]; Chrisant, POC [5],[9]

unprofessional, do not take pride in their appearance and do not care about the community;⁶

- (ii) other “force-wide” emails from the Respondent which imply that because the Applicants’ wear long hair or facial hair, they are unprofessional, do not take pride in their appearance, and do not care about the community⁷(including on 9 December 2011, 29 December 2011, and 27 June 2012);⁸
- (iii) public comments by Police and Emergency Services Minister Peter Ryan which imply the Applicants are less worthy of the public’s confidence, trust and respect;⁹ and
- (iv) media articles describing the Applicants as “rebel police” and subsequent comments by the public, subjecting the Applicants to “effective ridicule in a public forum”.¹⁰
- (v) comments made on internal Victoria Police forums about the Applicants;¹¹

(d) Otherwise being subjected to detriment by:

- (i) being made to feel less professional;¹²
- (ii) being singled out from other members of the police force as being different or a trouble-maker;¹³
- (iii) being subjected to queries and jokes;¹⁴

⁶ Lloyd, POC [10]; Haines, POC [11]; Downes POC [11]; Wise POC [11]; Beale POC [11]; Greenland, POC [11]; Hunter, POC [14]; Kelly, POC [11]; Garrison, POC [11]; Shields, POC [11]; Smith, POC [11]; Kuyken, POC [11]; Twining, POC [12]; Edwards, POC [11]; Ranik, POC [13]; Chrisant, POC [11];

⁷ Haines, POC [10]; Downes POC [10]; Wise POC [10]; Beale POC [10]; Greenland, POC [10]; Hunter, POC [11]-[13]; Kelly, POC [10]; Garrison, POC [10]; Shields, POC [10]; Smith, POC [10]; Kuyken, POC [10]; Twining, POC [24]; Edwards, POC [10]; Ranik, POC [12]; Chrisant, POC [10]

⁸ Hunter, POC [11]-[13] and Hunter, witness statement, p2

⁹ Lloyd, POC [11]; Haines, POC [11]; Downes POC [11]; Wise POC [11]; Beale POC [11]; Greenland, POC [11]; Kelly, POC [11]; Garrison, POC [11]; Shields, POC [11]; Smith, POC [11]; Kuyken, POC [11]; Twining, POC [12]; Edwards, POC [11]; Ranik, POC [13]; Chrisant, POC [11]

¹⁰ Lloyd, POC [11]; Haines, POC [10],[19]; Downes POC [10],[19]; Wise POC [11],[19]; Beale POC [10]; Greenland, POC [10]; Hunter, POC [10]; Kelly, POC [10]; Garrison, POC [10],[19]; Shields, POC [10],[19]; Smith, POC [10],[19]-[20]; Kuyken, POC [10],[19]; Twining, POC [24],[27]; Edwards, POC [10],[19]; Ranik, POC [12],[21]; Chrisant, POC [10],[19]

¹¹ Haines, POC, [19]; Downes, POC [19], Wise, POC [19]; Garrison, POC [19] Shields, POC, [19], Smith, POC [20]; Kuyken, POC [19]; Twining, POC [27]; Edwards, POC [19], Ranik, POC [21]; Chrisant, POC [19]

¹² Haines, POC [18]; Downes POC [18]; Wise POC [18]; Beale POC [18]; Greenland, POC [17]; Hunter, POC [15],[21]; Kelly, POC [18]; Garrison, POC [18]; Shields, POC [19]; Smith, POC [18]; Kuyken, POC [18]; Twining, POC [25]; Edwards, POC [18]; Ranik, POC [20]; Chrisant, POC [18]

¹³ Beale, POC [21]

(iv) being embarrassed to be clean shaven because of a scar which the facial hair hides.¹⁵

8. As a result, the Applicants claim loss or damage in the form of:
- (a) damage to reputation;¹⁶
 - (b) stress, including from not knowing whether they will be subjected to disciplinary action;¹⁷
 - (c) their health being affected including through lack of sleep/sleep deprivation and/or emotional trauma;¹⁸
 - (d) loss of identity and self-esteem;¹⁹ and
 - (e) their relationships and home life being affected.²⁰
9. Each Applicant claims victimisation under section 104 of the EOA 2010²¹ and a breach of section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (the **Charter**) in respect of their right to freedom of expression under section 15 of the Charter.²²
10. The Respondent says in his Particulars of Defence in relation to each application that he does not admit that the attribute of physical features includes “hair or facial features”, and says that there has been no discrimination in breach of the EOA 2010 because:
- (a) there has been no unfavourable treatment or proposed unfavourable treatment;
 - (b) in the alternative, if there was proposed unfavourable treatment (which is denied) that the Applicants’ attributes were neither a reason nor a

¹⁴ Garrison, POC [19]

¹⁵ Lloyd, POC [18]

¹⁶ Downes, POC [19]

¹⁷ Haines, POC [19]-[20]; Wise, POC [18]-[19]; Beale, POC [19], Hunter, POC [23]; Kelly, POC [19], Garrison, POC [19]; Shields, POC [19]; Smith, POC [19],[21]; Kuyken, POC [19]; Twining, POC [27]; Edwards, POC [21]; Ranik, POC [22]

¹⁸ Wise, POC [18]-[19]; Greenland, POC [18]-[19], Hunter, POC [23]; Kuyken, POC [19]; Ranik, POC [22]

¹⁹ Greenland, POC [17], Hunter, POC [21]; Smith, POC [18]-[19]

²⁰ Lloyd, POC [19]

²¹ Lloyd, POC [14]-[16]; Haines, POC [15]-[17]; Downes, POC [15]-[17]; Wise, POC [15]-[17]; Beale, POC [15]-[17]; Greenland, POC [15]-[16]; Hunter, POC [18]-[20]; Kelly, POC [15]-[17]; Garrison, POC [15]-[17]; Shields, POC [15]-[17]; Smith, POC [15]-[17]; Kuyken, POC [15]-[17], Twining, POC [21]-[23]; Edwards, POC [15]-[17]; Ranik, POC [17]-[19]; Chrisant, POC [15]-[17]

²² Lloyd, POC [13]; Haines, POC [13]-[14]; Downes, POC [13]-[14]; Wise, POC [13]-[14]; Beale, POC [13]-[14]; Greenland, POC [13]-[14]; Hunter, POC [16]-[17]; Kelly, POC [13]-[14]; Garrison, POC [13]-[14]; Shields, POC [13]-[14]; Smith, POC [13]-[14]; Kuyken, POC [13]-[14], Twining, POC [4]; Edwards, POC [13]-[14]; Ranik, POC [15]-[16]; Chrisant, POC [13]-[14]

substantial reason for the proposed treatment and instead, the proposed treatment was because of non-compliance with the VPM; and

- (c) further and in the alternative, if there was proposed unfavourable treatment substantially because of the Applicants' attributes, then the conduct is not unlawful under section 75 of the EOA 2010, because it was authorised by section 5(2) of the *Police Regulation Act 1958* (Vic).²³

11. The Respondent 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 the Respondent 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 the Respondent is a reasonable limitation under section 7(2) of the Charter.²⁴

12. The Respondent also denies there has been victimisation of the Applicants.²⁵

Submissions of the Commission

13. The Commission does not seek to make submissions on each issue in the proceedings, but seeks to assist the Tribunal by making confined submissions on the following specific areas:

- (a) the legal framework for discrimination under the EOA 2010, including:
 - (i) interaction of legislative provisions in the EOA 2010;
 - (ii) the onus and standard of proof; and
 - (iii) particularisation of the claims;
- (b) the definition of "physical features" and "bodily characteristics" in section 4 of the EOA 2010;

²³ Particulars of Defence (**POD**) in respect of the applications by Lloyd, Haines, Downes, Wise, Beale, Greenland, Hunter, Kelly, Garrison, Shields, Smith, Kuyken, Edwards and Chrisant, [9]; POD in respect of the applications by Twining and Ranik, [11]

²⁴ POD in respect of the application by Lloyd, [13]; POD in respect of the applications by Haines, Downes, Wise, Beale, Greenland, Kelly, Garrison, Shields, Smith, Kuyken, Edwards and Chrisant, [13]-[14]; POD in respect of the applications by Hunter [16]-[17]; POD in respect of the applications by Ranik [15]-[16] POD in respect of the application by Twining [4]

²⁵ POD in respect of the application by Lloyd, [15]-[16]; POD in respect of the applications by Haines, Downes, Wise, Beale, Kelly, Garrison, Shields, Smith, Kuyken, Edwards and Chrisant, [16]-[17]; POD in respect of the application by Hunter [19]-[20]; POD in respect of the application by Ranik [18]-[19]; POD in respect of the application by Twining [22]-[23]; POD in respect of the application by Greenland [16]

- (c) interpretation of “direct discrimination” in section 8 of the EOA 2010, particularly relating to:
 - (i) the test for direct discrimination;
 - (ii) unfavourable treatment;
 - (iii) detriment; and
 - (iv) causation;
 - (d) the interpretation of the statutory authority exception (section 75);
 - (e) vicarious liability and victimisation; and
 - (f) remedies and the Tribunal’s power to make orders to prevent future breaches of the EOA 2010 and the positive duty.
14. The Commission’s submissions are made in respect of all the Applications being heard in the proceedings.

B. LEGAL FRAMEWORK FOR DISCRIMINATION

Interaction of legislative provisions

15. Discrimination is unlawful under the EOA 2010 when it occurs:
- (a) either directly (defined in section 8) or indirectly (defined in section 9);²⁶
 - (b) on the basis of a protected attribute in section 6;²⁷
 - (c) in a protected area of public life; and
 - (d) in one of a number of prohibited ways.
16. 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 provisions in Part 2 and the prohibited areas in Part 4 must be read together for a logical framework for discrimination under the EOA 2010.
17. Here, the Applicants claim direct discrimination on the basis of physical features (s6(j)), religious belief or activity (s6(n)) and sex (s6(o)), in the area of employment, by way of subjecting the Applicants to detriment (as summarised above).

²⁶ *Equal Opportunity Act 2010* (Vic) (EOA 2010) s7(1)

²⁷ See EOA 2010 ss8(1) and 9(1)

Onus and standard of proof

18. The Applicants each bear the onus of proving that discrimination occurred in relation to their claim.²⁸ If discrimination is found to have occurred, section 13(2) of the EOA 2010 provides that the Respondent bears the onus of proving that a lawful exception applied to their actions.
19. The standard of proof the Applicants must meet is the civil standard on the balance of probabilities.²⁹ The Applicants must each satisfy the Tribunal that “overall it is more probable than not that the events occurred as described and that the inferences sought to be drawn can reasonably be drawn from the facts as they have been found”.³⁰ The Commission submits that the same standard applies to the Respondent in proving their defence.
20. However, in discrimination proceedings the nature of the allegations influences the type of evidence that is required for the Tribunal to be satisfied that the standard of proof has been met.³¹ For example, where there are serious allegations, such as in sexual harassment or racial discrimination claims, the evidence must have a high probative value. This is not to be confused with a higher standard of proof – the standard remains the same but clearer evidence is required where more serious allegations have been made.
21. In *Clark v Stingel* [2007] VSCA 292, the Court of Appeal referred to the High Court case of *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170 and said in relation to this issue:

The majority in that case confirmed that the ordinary standard of proof required of a claimant in civil litigation is proof on the balance of probabilities even where the matter to be plead involves criminal conduct or fraud. Their Honours pointed out that statements in cases ‘that clear or cogent or strict proof is necessary’ before such serious conduct is to be found, relate to the strength of the evidence that is necessary to establish such a fact on the balance of probabilities. The strength of the evidence necessary to establish that matter may vary, their Honours said, according to the nature of what is

²⁸ *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)

²⁹ *GLS v PLP (Human Rights)* [2013] VCAT 221

³⁰ *Drew v Whitehorse City Council (Anti-Discrimination)* [2010] VCAT 372 [18] relying on *Morgan v Austin Health & Anor (Anti-Discrimination)* [2007] VCAT 2229 [22] (Harbison J)

³¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336

sought to be proved. But that does not bear upon what is the standard of proof – that remains the balance of probabilities.³²

22. The Commission submits that the Tribunal must therefore assess the seriousness of the allegations for each case to determine whether they require “clear and cogent” evidence. Justice Garde has noted in respect of this assessment that:

[t]he process of reasoning must necessarily be affected by the nature of the complaint, the nature of the subject matter, the gravity of the matters alleged and the consequences flowing from a finding of [unlawful conduct under the EOA].³³

Particulars of claim

23. While the Applicants do not specifically state in their applications that there has been an alleged breach of Part 4 of the EOA 2010, the Commission submits that the Tribunal is still able to consider the Applicants’ claims within the framework set out above.
24. Section 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), (**VCAT Act**) requires the Tribunal to conduct each proceeding with as little formality and technicality. While “particulars” are often ordered by the Tribunal, their purpose is for each party to be aware of and understand the case being made by the other. In *State of Victoria v Turner* [2009] VSC 66, the Supreme Court of Victoria has relevantly observed:

Section 98(1)(b) of the VCAT Act makes it clear that pleading rules do not apply to the Tribunal unless it chooses to adopt them. Determination of claims on their merits is a key feature of proceedings before the Tribunal and it would undermine this key feature if a party with a good claim on the merits were to fail before the Tribunal on the basis of a technical “pleading” point where there is no breach of the rules of natural justice.

It is obviously desirable that a complainant be held to the manner in which they define their complaint and conduct their proceeding before the Tribunal. Clearly, a complainant should not be permitted to deviate from their complaint if the deviation would cause the Tribunal to exceed its jurisdiction, result in a breach of the rules of natural justice or cause the Tribunal to commit some other error of law. Where, however, the issues before the

³² *Clark v Stingel* [2007] VSCA 292 [37]; cited in *GLS v PLP (Human Rights)* [2013] VCAT 221[38]; also followed in *Tan v Xenos (No 3) (Anti-Discrimination)* [2008] VCAT 584 [80]

³³ *GLS v PLP (Human Rights)* [2013] VCAT 221 [44]-[45]

Tribunal are well understood by the parties and the Tribunal, a dismissal of the complaint on the basis of the label that the complainant used to describe the complaint or a feature of the complaint should be avoided unless this is mandated by law.³⁴ (emphasis added)

25. The Commission submits that these principles are particularly relevant in circumstances where the applicant or applicants are unrepresented.
26. It is implicit in the Applications that the area of public life is employment and this is supported by the witness statements of each Applicant which state their length of service as employees of Victoria Police. Further, each application refers to “particulars of discrimination” outlining particular events they say amount to unfavourable treatment in their employment as well as additional “detriment” allegedly suffered by the Applicants. The Tribunal may therefore draw from the Applications that the Applicants are alleging a breach of section 18(d) of the EOA 2010 (subjecting the employee to any other detriment) in relation to their claims of direct discrimination by the Respondent.
27. If the Tribunal considers that the Applicants’ particulars of claim are unclear or lacking in detail, or the Applicant’s claims are not well understood from the material filed by each party to date, it could consider other options for the Applicants to better particularise their claims and the legal basis on which they are bringing their Applications.

C. PHYSICAL FEATURES

28. Each of the Applicants claims discrimination on the basis of the protected attribute of physical features, under section 6(j) of the EOA. Victoria is the only jurisdiction in Australia which protects against discrimination on the basis of this attribute, which was introduced the *Equal Opportunity Act 1995* (EOA 1995).
29. The definition of “physical features” in the EOA 2010 is unchanged from the EOA 1995, and is defined as “a person’s height, weight, size or other bodily characteristics”.³⁵ The Applicants say their beards, soul patches and goatees (**facial hair**), and their long hair are “physical features” within this definition.
30. The Tribunal must therefore address the question of whether facial hair and long hair fall is a “bodily characteristic”. If the Tribunal considers facial hair and/or

³⁴ *State of Victoria v Turner* [2009] VSC 66 [57]-[58] (Kyrou J), commenting on the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss97,98

³⁵ EOA 2010 s4

long hair are “bodily characteristics”, they will constitute a protected physical feature under the EOA 2010.

Approach to interpreting ‘bodily characteristic’

31. The Commission submits that the Tribunal should adopt the ordinary meaning of “physical features” and “bodily characteristic”. The dictionary definition of the relevant words can be used as a guide, and the Tribunal may also rely on case law which has already interpreted the phrase.
32. The Macquarie Dictionary provides the following definitions:³⁶
 - (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]”.
33. If there are competing interpretations of the words available, the Commission submits that the Tribunal must prefer a broad and liberal interpretation of “physical features” which promotes the objects of the EOA 2010 to one which does not.³⁷ In doing so, the words “bodily characteristics” must only be assigned an interpretation which “it can naturally bear”.³⁸

Bodily characteristics generally

34. In *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849 (*Jamieson*), the Tribunal considered a claim that tattoos were “bodily characteristic”. DP McKenzie 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 “other bodily characteristic” in that definition were qualified by the words which precede them. In her view, the references to height, weight and size within the definition of physical features “do little to take away from or limit the generality of the words “or other bodily characteristic””.

³⁶ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>

³⁷ *Waters v Public Transport Corporation* [1991] HCA 49, (1991) 173 CLR 349; *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106

³⁸ *Fratas 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.

35. This interpretive approach was also followed in the case of *Ruddell v DHS* [2001] VCAT 1510 (*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 which 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.”³⁹

Hair as a bodily characteristic

36. The Commission draws the Tribunal’s attention to the decision of *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) ¶EOC 93-038 (*Fratas*) which directly addresses the question of whether hair constitutes a bodily characteristic under the EOA 1995.
37. 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.
38. In *Fratas*, DP McKenzie held that hair was a bodily characteristic, as was baldness and facial hair.⁴⁰ 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”.⁴¹ Colouring (including artificial colouring) or arrangement (such as by cutting or combing) of hair are not bodily characteristics even though the hair itself remains a bodily characteristic.⁴² 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”.⁴³
39. 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

³⁹ *Ruddell v DHS* [2001] VCAT 1510 [54]-[55]

⁴⁰ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107-108

⁴¹ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107

⁴² *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107

⁴³ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107

pertaining to a part of the body” and are not included in the definition of physical features.⁴⁴

40. In making its decision, the Tribunal in *Fratas* referred to the dictionary definition of ‘bodily’ and ‘characteristic’.
41. The Commission submits that the Tribunal should follow *Fratas*, as clearly indicating that long hair and facial hair are both bodily characteristics within the definition of physical features in the EOA 2010.

Choice and control over bodily characteristics

42. In *Fratas*, the Tribunal considered whether “physical features” included only those features and bodily characteristics which the person had no control over. Pointing to the inclusion of weight in the definition, DP McKenzie noted that this was something which 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.”⁴⁵

43. 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

44. If the Tribunal considers that the meaning of “bodily characteristics” discussed above 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.

⁴⁴ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107-108

⁴⁵ *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 107

45. 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 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.⁴⁶

46. 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 not include 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.
47. The Commission submits 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

48. In summary, the Commission submits 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

⁴⁶ Hansard, *Legislative Assembly*, 4 May 1995, 1251; quoted in *Fratas v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038, 74 106

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.

49. The Commission further submits that there is clear guidance in *Fratas* that facial hair and long hair are bodily characteristic as claimed by the Applicants.

D. DIRECT DISCRIMINATION

Test for direct discrimination

50. In their amended particulars of claim, the Applicants have claimed they have been directly discriminated against by the Respondent.
51. 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.
52. There is no requirement for the Tribunal to consider or find treatment or their "net effect" was a "reasonably foreseeable disadvantage" as this appears to impermissibly import tests from tort law.⁴⁷
53. The test for direct discrimination must be read in conjunction with section 18(d) to amount to a breach of the EOA. Therefore, it is unlawful for the Respondent to treat or propose to treat the Applicants unfavourably because of their physical features, sex and/or religious belief or activity, by subjecting the Applicants to any detriment.

Unfavourable treatment

54. The EOA 2010 does not define the term 'unfavourable' for the purposes of direct discrimination. The Commission submits 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'.⁴⁸
55. The Commission submits 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

⁴⁷ Lloyd, POC [12]; Haines, POC [12]; Downes, POC [12]; Wise, POC [12]; Beale, POC [12]; Greenland, POC [12]; Kelly, POC [12]; Garrison, POC [12]; Shields, POC [12]; Smith, POC [12]; Kuyken, POC [12]; Twining, POC [13]; Edwards, POC [12]; Ranik, POC [14]; Chrisant, POC [12].

⁴⁸ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>

of the Applicant and other people without that attribute or with a different attribute may have been treated in a similar situation.

56. 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”.⁴⁹
57. Under the new test, the Tribunal has to consider whether the treatment was ‘unfavourable’ to each of the Applicants. This can be interpreted as an inquiry as to the particular circumstances of each of the Applicants, including the impact on them personally, whether they have been disadvantaged in a general sense by the actions of the Respondent, or whether the Respondent has acted adversely to the Applicants’ interests in their particular circumstances, on the basis of a protected attribute and in a protected area of public life.
58. Unfavourable treatment is not limited to the intended outcomes of a particular action or proposed action. It can also include unintended outcomes.
59. The Commission submits that this interpretation of ‘unfavourable treatment’ is supported by jurisprudence from the Australian Capital Territory (ACT) which has a similarly worded provision for direct discrimination in section 8 of the *Discrimination Act 1991* (ACT).⁵⁰
60. In particular, the former ACT Civil and Administrative Tribunal (ACT Tribunal) decision of *Prezzi v Discrimination Commissioner* [1996] ACTAAT 13 gave the term ‘unfavourable’ its ordinary dictionary meaning, and found that it does not import a comparator test like other Australian jurisdictions have which use the term ‘less favourably’. Rather:

All that is required is an examination of the treatment accorded to 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.⁵¹ (emphasis added)

⁴⁹ Explanatory Memorandum to the *Equal Opportunity Bill 2010*, pp12-13

⁵⁰ 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.

⁵¹ *Prezzi, Patricia Anne and Discrimination Commissioner* [1996] ACTAAT 132, [22]-[24]

61. The approach taken by the 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*.⁵²
62. Finally, 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.⁵³
63. The Applicants have stated that they have been employed satisfactorily for many years and have been meeting performance expectations, if not exceeding them, as evidenced by the receipt of service and ethical conduct medals.⁵⁴ However, the Applicants allege that they are now being threatened with disciplinary action because they have long hair or facial hair, which they say has no bearing on their performance or ability to do their job.
64. The Commission submits that if this evidence is accepted by the Tribunal, it should be a matter that is taken into account in determining whether the treatment of the Applicants is unfavourable for the purposes of direct discrimination.

Detriment

65. The term “detriment” is used in section 18(d) of the EOA 2010 in a broad manner, and is defined non-exhaustively in section 4 of the EOA to include humiliation and denigration. The Commission therefore submits that the term “detriment” should be given its ordinary meaning by the Tribunal.
66. Guidance can be drawn from the dictionary definitions of the relevant terms from the Macquarie Dictionary:⁵⁵
- (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”;

⁵² *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379, [54].

⁵³ Hansard, *Legislative Assembly*, 4 May 1995, 1251

⁵⁴ Lloyd, POC [20]; Haines, POC, [20]; Downes, POC, [19]; Wise, POC [20]; Beale, POC, [20]; Hunter, POC, [21]; Kelly, POC [20]; Garrison, POC [20]; Shields, POC [20]; Smith, POC [21]; Kuyken, POC [20]; Twining, POC [28]; Edwards, POC [20]; Ranik, POC [23]; Chrisant, POC [20]

⁵⁵ The Macquarie Dictionary Online (July 2013), <http://www.macquariedictionary.com.au>

- (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”.
67. The Commission submits 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, which defames or blackens their name or reputation; or which otherwise causes them loss, damage or injury to the person.
68. The Commission further submits that the detriment suffered must be real and not trivial, and must be a matter of substance.⁵⁶
69. Examples of circumstances found to be detriment by the Tribunal in the past are:
- (a) Public humiliation or ridicule of an employee;⁵⁷
 - (b) Requiring an employee to attend a painful and humiliating meeting about performance, resulting in a “black mark” against their employment record;⁵⁸
 - (c) Depriving an employee of quiet enjoyment of employment and interfering with an employee’s quiet enjoyment of employment;⁵⁹
 - (d) Being laughed at by other employees;⁶⁰ and
 - (e) Loss of status and responsibility.⁶¹

Causation

70. The test for direct discrimination under section 8 of the EOA 2010 requires the Applicant 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’.

⁵⁶ *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]

⁵⁷ *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.

⁵⁸ *Drummond v Telstra Corporation Ltd (Anti-Discrimination)* [2008] VCAT 2630 [67]; *Drummond v Telstra Corporation Ltd (Anti-Discrimination)* [2009] VCAT 2411 [25]

⁵⁹ *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

⁶⁰ *Packer v Vagg and the Department of Education* [2001] VCAT 2218 [22]

⁶¹ *King v Nike Australia Pty Ltd (Anti-Discrimination)* [2007] VCAT 70 [148]-[149]

71. That means the Applicants must show that the unfavourable treatment alleged occurred substantially ‘because of’ their protected attribute/s or, put another way, whether the protected attribute was 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.⁶²
72. There is no requirement for the Respondent to have intended to discriminate against the Applicants; rather, motive is irrelevant under section 10 of the EOA 2010.
73. The Respondent has stated in its Particulars of Defence for each claim that, if the Tribunal finds that the Respondent did treat the Applicants unfavourably (which is denied) then it further denies that each of the Applicants’ physical features and/or sex and/or religion were a substantial reason for the proposed treatment.
74. Instead, the Respondent says that any such proposed treatment was made because of each of the Applicants’ “potential non-compliance with the VPM and for reasons, alternatively substantial reasons, which did not include the Applicant’s [claimed attribute]”.⁶³
75. In *Kapoor v Monash University* [2001] VSCA 247 (*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 the respondent 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 the respondent 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.⁶⁴
76. In this way, the Court of Appeal drew a distinction between the “true reason” for the alleged discriminatory conduct of the respondent and the cause of the

⁶² *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]

⁶³ POD in respect of the applications by Lloyd, Haines, Downes, Wise, Beale, Greenland, Hunter, Kelly, Garrison, Shields, Smith, Kuyken, Edwards and Chrisant, [9.3]; POD in respect of the applications by Twining and Ranik, [11.3]

⁶⁴ *Kapoor v Monash University* [2001] VSCA 247 [40]

true reason. This is analogous to the argument made by the Respondent in these proceedings.

77. The Commission submits that the Tribunal can 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.
78. The Federal Magistrates Court (FMC) took this approach in *Wiggins v Department of Defence - Navy* [2006] FMCA 800 in a claim under the *Sex Discrimination Act 1982* (Cth) (SDA) and the *Disability Discrimination Act 1992* (Cth) (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.⁶⁵

79. Similarly in *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664 an employee was demoted and dismissed due to absences from work. The FMC, 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 employment, because the employee's absences were caused by his disability.⁶⁶
80. A Victorian example is *Stern v Depilation & Skincare Pty Ltd* [2009] VCAT 2725, 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 because she was pregnant.⁶⁷

⁶⁵ *Wiggins v Department of Defence - Navy* [2006] FMCA 800 [170]

⁶⁶ *Ware v OAMPS Insurance Brokers Ltd* [2005] FMCA 664 [113], [119]

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

81. Another example from the Victorian jurisdiction is *Oyekanmi v National Forge Operations Pty Ltd* (1996) EOC ¶92-797. In that case, the Victorian Equal Opportunity Board (**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
82. *Kapoor* can also be distinguished because in that case, the act by the Respondent of assessing the appellant’s suitability for renewing her contract was in itself a lawful step. In these proceedings, the Applicants claim that both the Appearance Policy itself and its implementation (including proposing disciplinary action for failure to comply) amount to unlawful discrimination.
83. The Commission submits 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 the Applications currently before the Tribunal, there could be situations that fall outside those provisions which the Tribunal needs to approach carefully.
84. For example, a retail employer might implement a policy all employees must weigh under 60kg to maintain the store’s image as youthful and fashionable. If an employee gains weight for some reason and they become heavier than 60kgs, they will be in breach of the policy and could be subject to disciplinary action which may put their employment in jeopardy. Following *Kapoor*, the employer could apparently defend a discrimination claim by arguing that the “true reason” for the disciplinary action is failure to comply with the policy even if the “cause” of the failure to comply is clearly a protected attribute. However, one cannot separate the protected attribute of the employee from the policy breach and for causation purposes, should be treated as one and the same.
85. The Commission submits that the intention of Parliament is relevant in relation to ascertaining the real reason for the conduct. As noted above, the Attorney-

⁶⁸ *Oyekanmi v National Forge Operations Pty Ltd* (1996) EOC ¶92-797, 78,896-897

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 light of this the Tribunal should consider, in determining the real reason for the Respondent's conduct, whether the Respondent has drawn an artificial distinction between the cause of the action being a breach of the Appearance Policy, and the reason for the breach of the Appearance Policy being the protected attribute.

E. STATUTORY AUTHORITY EXCEPTION

General principles of interpreting exceptions

86. If the Tribunal is satisfied that the Respondent has discriminated against the Applicants, the Tribunal must then consider whether an exception applies to the conduct of the Respondent. The Respondent bears the onus of establishing that an exception applies based on the evidence.⁷⁰
87. The Respondent has sought to rely on s75 in its Particulars of Defence in relation to each application. Section 75 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.
88. The Commission submits that the Tribunal should have regard to *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872 which indicates that concepts 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.⁷¹
89. In *Hall v Victorian Amateur Football Association* [1999] VCAT 627 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'.

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

⁷⁰ EOA 2010, s13(2).

⁷¹ *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872, 882.

90. However, in interpreting exceptions the Tribunal must also take into account the beneficial nature of Equal Opportunity legislation,⁷² as well as the express objectives of the Act to eliminate discrimination to the greatest possible extent.
91. 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

92. A statutory provision can 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.
93. The scope of the exception was considered by the Tribunal in *Wojcik v Roads Corporation* [1997] VADT 75 (*Wojcik*).⁷³ In this case, the Tribunal found that the exception not only covers conduct that was 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.
94. The ordinary meaning of the statutory exception described in *Wojcik* was cited with approval by in *Aitken & Ors v State of Victoria (Department of Education & Early Childhood Development) (Anti-Discrimination)* [2012] VCAT 1547:

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.⁷⁴

Application of section 75

95. The Respondent says that the alleged discrimination is authorised by section 5(2) of the *Police Regulation Act 1958* (Vic) (**PR Act**).

⁷² *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]

⁷³ The Tribunal considered s 69(1) of the EOA 1995 which was the predecessor to s 75 of the EOA 2010 and in similar terms.

⁷⁴ *Aitken & Ors v State of Victoria (Department of Education & Early Childhood Development) (Anti-Discrimination)* [2012] VCAT 1547 [542]-[543] (Ginnane J)

96. Section 5 of the PR Act gives the Chief Commissioner the superintendence and control of the Victorian Police Force, 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.

97. The Commission submits that in order to determine whether the Respondent can rely on s75 to defend its conduct, the Tribunal must determine what conduct s5(2) of the PR Act authorises or necessitates, and whether that conduct is what the Applicants say has resulted in the breach of the EOA. In other words, section 5(2) of the PR Act might authorise the Respondent to issue standards of grooming and acceptable clothing and accessories which discriminate on particular grounds, but may not authorise the Respondent to discriminate in application of that policy.

98. The Commission submits 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 the Respondent to otherwise subject the Applicants to detriment, make public statements about the Applicants which humiliates and denigrates them, nor does it authorise conduct which damages the Applicants' reputations. The Tribunal must therefore consider each particular detriment which has been found to have occurred in breach of the EOA 2010 and determine whether section 5(2) authorises that conduct so as to allow the Respondent to rely on section 75 of the EOA 2010 to defend his conduct.

99. Moreover, the Tribunal must have regard for when the provisions of section 5(2) were enacted. In the particulars of defence to each application, the Respondent admits that section 5(2)(c) relating to standards of grooming 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, the Appearance Policy was introduced into the VPM in December 2011 and became effective 1 January 2012.
100. Prior to 14 June 2012, section 5(2) only included the provisions relating to uniform in sections 5(2)(a) and (b) (set out above in paragraph 96(a) and (b)).
101. Even if the conduct is now authorised by section 5(2) of the PR Act, the evidence of the parties do not indicate there is retrospective application of section 5(2)(c), and any conduct found by the Tribunal to amount to discrimination between December 2011 and 14 June 2012 would not be covered by the exception. The Commission submits that the PR Act prior to 14 June 2012 did not specifically authorise that the Chief Commissioner may determine standards of grooming in a discriminatory way; only the power to determine the type and design of uniform, conditions under which any uniform is to be worn or carried.⁷⁵

F. VICARIOUS LIABILITY

102. In the event that the Tribunal finds the allegations proven but that the Respondent was not personally responsible or liable for the discrimination, the Tribunal may wish to consider whether the Respondent is in any event vicariously liable for actions of other members of the Victorian Police Force.
103. Section 109 of the EOA 2010 provides that if a person in the course of their employment or while acting as an agent (for their employer), contravenes a provision of Part 4 of the EOA (such as section 18), then both that person and their employer must be taken to have contravened the provision.
104. The Applicants have not brought their claims directly against other members of the Victorian Police Force whom they say in their particulars have breached the EOA 2010 such as Superintendant Forti or other employees who allegedly laughed at them. However, a person is entitled to bring an application to the Tribunal against either or both of those people, according to section 109 of the EOA 2010.

⁷⁵ Police Regulation Act 1958 (Vic) ss5(2)(a) and (b)

105. It is therefore open to the Tribunal to consider on the facts whether the Respondent vicariously liable under section 109 of the EOA 2010 for the actions of those employees as if he had done the relevant act, unless the Respondent can show that the exception in section 110 of the EOA is made out; namely, that the Respondent took all reasonable precautions to prevent the employee or agent from contravening the EOA 2010.

G. VICTIMISATION

106. Victimisation is prohibited by section 103 of the EOA 2010. A person victimises another person if they subject or threaten 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 2010.⁷⁶

107. Detriment takes the same meaning as under section 18(d) of the EOA 2010, as including humiliation and denigration.

108. In *Tan v McArdle and Anor* [2010] VCAT 248 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
- (c) The alleged victimiser must have engaged in the conduct for one of the reasons set out in section 104.⁷⁷

109. This may be relevant to the Tribunal’s consideration of allegations of victimisation, but also may be relevant to other allegations made by some Applicants, for example that their colleagues have made jokes at their expense after bringing their complaints to the Commission or after making the Applications.

H. REMEDIES AND THE POSITIVE DUTY

110. If the Tribunal finds that the Respondent has breached the EOA 2010, it may make any orders it thinks fit that will stop further breaches of the Act.⁷⁸ Section 125(a)(i) is not limited by the qualifier of “contraventions of this Act in relation

⁷⁶ EOA 2010 s104

⁷⁷ *Tan v McArdle and Anor (Anti-Discrimination)* [2010] VCAT 248 [25]-[28]

⁷⁸ EOA 2010, s125(a)(i)

to the complainant” as the equivalent provision in section 136 of the EOA 1995 was.

111. The Commission submits that orders of the Tribunal can therefore include orders to prevent further breaches of the EOA 2010 to take reasonable and proportionate measures to eliminate discrimination and victimisation as far as possible.⁷⁹

**Filed 30 July 2013
Amended 27 September 2013**

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⁷⁹ EOA 2010, s15

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION
HUMAN RIGHTS LIST

SCHEDULE OF APPLICANTS

1. Damon Hunter (A167/2012)
2. Michael Kuyken v Ken Lay (A168/2012)
3. Simeon Ranik v Ken Lay (A171/2012)
4. Ashley Wise v Ken Lay (A175/2012)
5. Keith Shields v Ken Lay (A176/2012)
6. Scott Edwards v Ken Lay (A177/2012)
7. Colin Greenland v Ken Lay (A178/2012)
8. Andrew Haines v Ken Lay (A179/2012)
9. Bradley Beal v Ken Lay (A180/2012)
10. Allan Lloyd v Ken Lay (A183/2012)
11. Lee Smith v Ken Lay (A182/2012)
12. Dean Kelly v Ken Lay (A184/2012)
13. Anthony Downes v Ken Lay (A185/2012)
14. Robert Twining v Ken Lay (A186/2012)
15. Vasilos Chrisant v Ken Lay (A193/2012)
16. Greg Garrison v Ken Lay (A200/2012)