

The Equal Opportunity Act 2010 intervention and amicus curiae functions

This document explains how the Victorian Equal Opportunity and Human Rights Commission will exercise its functions under the *Equal Opportunity Act 2010* to intervene or assist as amicus curiae in matters before courts and tribunals.

A. Background

The role of the Commission

The Victorian Equal Opportunity and Human Rights Commission (the Commission) has a number of functions under the *Equal Opportunity Act 2010*. Under sections 159 and 160 of the Equal Opportunity Act, the Commission may intervene in cases or appear as amicus curiae, to assist a court or tribunal considering equal opportunity issues. The Commission has a discretion about when it gets involved in a matter and can only exercise these functions when the relevant court or tribunal agrees.

The key difference in the two roles is that an intervener can be made a party to the court or tribunal proceedings. An amicus curiae, or friend of the court, is someone who volunteers or is invited by the court to give advice or make submissions to the court on some matter before it. An amicus curiae has no rights in the case and cannot file proceedings, motions or appeals.

In performing these functions, the Commission does not represent any of the parties to a dispute. The Commission's role is to advocate for the objectives of the Equal Opportunity Act and to be of assistance to the court or tribunal. The Explanatory Memorandum to the Equal Opportunity Act acknowledged the significance of these new functions:

The expansion of the Commission's role in relation to court or tribunal proceedings will enable the courts and tribunal to benefit from the Commission's specialist knowledge and promote a consistent approach to the interpretation of the [Act].

...

This function emphasises the importance of the jurisprudence to the development of the law and to progressing the objectives of the [Act].

Unlike other legislation providing a statutory right to intervene, the Equal Opportunity Act does not include a provision for costs orders against the Commission where it exercises its rights under section 159 or section 160.¹ Ultimately, of course, an order for costs remains a matter for determination by the courts.

¹ Subsection 73(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides the Attorney-General with a right to intervene whilst section 110 specifies that the Attorney-General may have costs orders made against him. Section 427 of the *Co-operatives Act 1996* (Vic) provides the Registrar with a statutory right to intervene and specifies that it "has all the rights, duties and liabilities" of other parties to the proceedings (emphasis added).

The Commission will not ordinarily seek a costs order against a party in a proceeding in which the Commission has intervened.

Equal Opportunity Act-related matters in courts and tribunals

Equal opportunity, discrimination, sexual harassment and victimisation are relevant to the work of Victorian courts and tribunals in a number of ways. Most frequently, cases will arise when complaints under the Equal Opportunity Act itself are brought before the Victorian Civil and Administrative Tribunal (**VCAT**), or are on appeal from VCAT to a higher court. Parties may also apply to VCAT for an exemption from the operation of the Equal Opportunity Act in particular circumstances. Equal opportunity issues may also occasionally arise in the context of other types of proceedings.

B. Contacting the Commission

There is no requirement under the Equal Opportunity Act for parties to notify the Commission about a matter. However, if you want to let the Commission know about a case that may fall within these guidelines, you can contact us by:

Telephone: 1300 891 848

Email: legal@veohrc.vic.gov.au

Fax: 1300 286 834

Please provide information about:

- the facts of the case
- if already before a court or tribunal, the name of the proceedings, the court/tribunal it is before
- the equal opportunity issues that are being raised
- any submissions that have already been made
- any court or tribunal timetable or other relevant directions that have been set.

C. Guidelines: Invention and amicus curiae function

1. The Commission may intervene in proceedings involving issues of equality of opportunity, discrimination, sexual harassment or victimisation with the agreement of the relevant court or tribunal.² In addition, the Commission may seek to act as amicus curiae, with the leave of the relevant court or tribunal, in proceedings where:³
 - a. there is a likelihood that orders sought may significantly affect the right to protection against discrimination of persons who are not parties to the proceedings
 - b. there is a likelihood that the proceedings will have significant implications for the administration of the Equal Opportunity Act, or

² *Equal Opportunity Act 2010* (Vic), s 159.

³ *Equal Opportunity Act 2010* (Vic), s 160.

- c. the Commission is satisfied that it would be in the public interest for the Commission to assist the court or tribunal.
2. The Commission will consider intervening in proceedings where:
 - a. the equal opportunity issues are significant and not peripheral to the proceedings,
 - b. the orders that could be made in the proceedings may significantly affect the equality rights of persons who are not parties to the proceedings,
 - c. the proceedings may have significant implications for the ongoing interpretation or operation of the statutory provision being interpreted, and/or
 - d. the proceedings may have significant implications for the ongoing application, implementation and/or operation of the Equal Opportunity Act.
 3. Factors that the Commission will take into account in deciding whether to exercise its functions generally include (but are not limited to):
 - a. Whether the Commission would be likely to be granted leave to intervene or appear as an amicus curiae, i.e.
 - i. Does the Commission propose to present arguments or facts that the other parties will not be canvassing?
 - ii. Will the Commission's involvement contribute to the decision-maker reaching an informed decision?⁴
 - b. Whether the case involves a new or unsettled area of the law.
 - c. Whether the case would clarify a disputed interpretation of the law.
 - d. Whether the case has significant ramifications beyond the parties to the proceedings.
 - e. Whether the relevant court or tribunal has asked the Commission to be involved.
 - f. Whether any party has asked the Commission to be involved and whether any party would or does oppose such a role.
 - g. Whether any other person or organisation is seeking leave to intervene/appear.
 - h. The likely impact of the Commission's role on the individuals involved in the litigation.⁵
 - i. Whether the issue is an intermediate one or will result in a final determination of the issues.
 - j. The resource or other administrative implications of the Commission joining the litigation in the context of all its other functions.
 - k. Any broader strategic issues relating to the role, function or reputation of the Commission.
 - l. Whether the case involves issues that are a strategic priority of the Commission.
 - m. Whether the parties have legal representation.

⁴ *Levy v Victoria* (1997) 189 CLR 579 per Brennan CJ at 603.

⁵ The Commission is mindful that in promoting the objectives of the Equal Opportunity Act it cannot make intervention decisions without considering the impact of its activities on the individuals involved. This will require a consideration of the social, cultural and political context of the intervention and any other impact that intervention may have on the parties.

4. The Commission's role is to advocate for the objectives of the Equal Opportunity Act. The Commission does not represent individuals.
5. The Commission's submissions will generally focus on questions of law, policy and issues of broader public interest rather than detailed arguments about the facts of a particular case, except to the extent that those facts are relevant to systemic issues.
6. Through its intervention or amicus curiae role, the Commission aims to advocate for interpretations of the law that fulfil the objectives of the Equal Opportunity Act:
 - a. To eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent
 - b. To further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities (**Charter**)
 - c. To encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
 - d. To promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that –
 - i. discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society
 - ii. equal application of a rule to different groups can have unequal results or outcomes
 - iii. the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures
 - e. To enable the Victorian Equal Opportunity and Human Rights Commission to encourage best practice and facilitate compliance with this Act by undertaking research, educative and enforcement functions
 - f. To enable the Commissioner of the Victorian Equal Opportunity and Human Rights Commission to resolve disputes about discrimination, sexual harassment and victimisation in a timely and effective manner, and to also provide direct access to the Victorian Civil and Administrative Tribunal for resolution of such disputes
7. The Commission may initiate an appeal in proceedings where it has intervened in a proceeding. Factors that the Commission considers relevant to its consideration of whether to initiate an appeal generally include:
 - a. the factors outlined in paragraph 3 above; and
 - b. the merits of the appeal.
8. There may be occasions in which a proceeding raises matters under the Equal Opportunity Act *and* the Charter, and the Commission may intervene as of right under the Charter.
9. The Commissioner or a delegate of the Commissioner can make a decision about whether or not to intervene in proceedings.

D. Relevant sections from the Equal Opportunity Act

Section 159 of the Equal Opportunity Act provides that:

The Commission may, with the leave of the court or a tribunal, intervene in and be joined as a party to proceedings in the court or tribunal that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation.

Section 160 of the Equal Opportunity Act provides that:

The Commission may, with the leave of the court or tribunal, assist a court or tribunal, as amicus curiae, in the following proceedings:

- a) Proceedings in which the Commission considers that the orders sought, or likely to be sought, may significantly affect the right to protection against discrimination of persons who are not parties to the proceedings;*
- b) Proceedings that, in the opinion of the Commission, have significant implications for the administration of this Act;*
- c) Proceedings where the Commission is satisfied that it would be in the public interest for the Commission to assist the court or tribunal as amicus curiae.*

E. Review of the Guidelines

These guidelines will be subject to regular review. We invite your feedback about these guidelines and the use of our functions more generally.

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Email: legal@veohrc.vic.gov.au