VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS LIST

Slattery v Manningham City Council (A12/2013)

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

A. INTRODUCTION

1. The Tribunal granted the Victorian Equal Opportunity and Human Rights Commission (**Commission**) leave to intervene in this matter pursuant to s 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) in its Orders dated 18 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. Since the complaint alleges discrimination on the basis of disability in access to public premises, goods and services, and by councillors, the substantive application raises issues of equality of opportunity and discrimination.

3. As an intervener, the Commission will act as an independent party, exercising its functions under s 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.

4. The Commission seeks to assist the Tribunal by making submissions on:

   (a) the definition of 'disability';

   (b) the interpretation of 'direct discrimination' (s 8). In particular, these submissions discuss the element of 'unfavourable treatment' in the definition, compared to the requirement of 'less favourable treatment' in s 8 of the *Equal Opportunity Act 1995* (**EOA 1995**);

   (c) the interpretation of 'services' (s 4);

(d) discrimination in the area of goods and services (s 44), access to public premises (s 57) and by councillors (s 73);

(e) the obligation to provide reasonable adjustments for a person with a disability (s 45);

(f) the interpretation of 'indirect discrimination';

(g) the interpretation of the statutory authority exception (s 75);

(h) the interpretation of the exception for the protection of health and safety (s 86);

(i) the remedies available, including the Tribunal's power to make orders to prevent future breaches of the EOA 2010 and the positive duty; and

(j) the application of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) to these proceedings.

B. 'DISABILITY' AS A PROTECTED ATTRIBUTE

5. The EOA 2010 provides protection from discrimination on the basis of 'disability'. 'Disability' is defined in s 4 of the EOA 2010 to mean:

> (a) Total or partial loss of a bodily function; or
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> (b) The presence in the body of organisms that may cause disease; or
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> (c) Total or partial loss of a part of the body; or
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> (d) Malfunction of the body, including –
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> (i) *a mental or psychological disease or disorder*;
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> (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or
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> (e) Malformation or disfigurement of a part of the body –
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> and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) *and, to avoid doubt, behaviour that is a symptom or manifestation of a disability*. (our emphasis)

6. Unlike the definition of 'impairment' under the EOA 1995, which implicitly covered manifestations of an impairment, the definition of 'disability' explicitly includes behaviour that is a symptom or manifestation of a disability. The amendment was a point of clarification rather than a change to the law. It also aimed to address issues raised in *Purvis v New South Wales (Department of*

Education), [1] which considered whether a person's behaviour – which was described as a symptom or manifestation of a disability – fell within the meaning of 'disability' for the purpose of the *Disability Discrimination Act 1992* (Cth).[2]

7. It is also unlawful to discriminate against a person on the basis of a characteristic generally appertaining or imputed to a person with a disability. Section 7(2) of the EOA 2010 provides that discrimination on the basis of an attribute includes discrimination on the basis:

   (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;

   (b) of a characteristic that a person with that attribute generally has;

   (c) of a characteristic that is generally imputed to a person with that attribute;

   (d) that a person is presumed to have that attribute or to have had it at any time.

8. The Applicant has multiple disabilities – including a hearing impairment,[3] Acquired Brain Injury (**ABI**), Bipolar Disorder, Attention Deficient Hyperactivity Disorder, and Post Traumatic Stress Disorder – that manifest themselves in complex ways.

9. The Commission submits that behaviour that is a symptom or manifestation each disability, as well as the Applicant's combination of disabilities, will fall within the definition of 'disability'. The Commission submits that speaking loudly may, for example, constitute a characteristic appertaining to a person with a hearing impairment. Furthermore, because people with ABI commonly experience 'increased fatigue (mental and physical) and some slowing down in how fast they can process information, plan and solve problems… changes to their behaviour and personality, physical and sensory abilities, or thinking and learning,' [4] sudden outbursts as a change in behaviour could be characterised as a symptom or manifestation of an ABI. The combination of these disabilities, including the after effects of a stroke and obstructive sleep apnoea, may exacerbate the symptoms other psychiatric disabilities.[5] Given the complex interrelationship between these

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[1] *Purvis v New South Wales (Department of Education)* [2003] HCA 62.
[2] The High Court in *Purvis* concluded that the definition of disability includes behaviour resulting from that disability. *Purvis v New South Wales* [2003] HCA 62, [27], [80], (McHugh and Kirby JJ), [209]-[212] (Gummow, Heyne and Haydon JJ).
[3] Applicant's Response to Strike Out Application dated 2 April 2013, [1]-[4]. Respondent's Particulars of Defence dated 20 May 2013, [3].
[4] Better Health, *Acquired Brain Injury,* <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Acquired_brain_injury?
[5] Applicant's Evidence, Report of Dr Frybach, 13 June 2013.

disabilities, the Commission submits that the manifestations of these disabilities should be looked at broadly and holistically.

C. MEANING OF 'SERVICES' UNDER THE EOA 2010

10. The EOA 2010 prohibits discrimination in the provision of services. Specifically, it prohibits: a discriminatory refusal to provide services; discrimination in the terms on which services are provided; or discrimination 'in connection with' the provision of services (s 44(1)). This is obviously a broad prohibition.

11. Relevantly, the EOA 2010 definition of 'services' includes:

    (a) access to and use of any place that members of the public are permitted to enter;[6] and

    (b) provision of entertainment, recreation or refreshment;[7]

    (c) services provided by a … municipal council.[8]

12. The term 'services' is given an open definition in section 4 of the EOA 2010 by reference to a number of examples of what a service is. The examples in the Act are not an exhaustive list. This means that 'services' are not limited to those falling within the categories listed in the definition of s 4 of the EOA 2010. 'Services' should be given its ordinary, literal meaning.[9]

13. The Macquarie Dictionary definition of 'services', which was cited with authority in *IW v City of Perth*,[10] states:

> The term "services" has a wide meaning. The Macquarie Dictionary relevantly defines it to include "an act of helpful activity"; "the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance"; "the organised system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public"; "the supplying or the supplier of water, gas, or the like to the public"; and "the duty or work of public servants".[11]

14. The EOA 2010 is beneficial legislation designed to promote equality, eliminate discrimination as far as possible and provide redress for people who have been discriminated against.[12] When interpreting the word services, the Tribunal should

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[6] *Equal Opportunity Act 2010* (hereafter referred to as the **EOA 2010**), s 4, definition of 'Services', (a).
[7] EOA 2010 s 4, definition of 'Services', (c).
[8] EOA 2010, s 4, definition of 'Services', (f).
[9] *IW v City of Perth* (1997) 191 CLR 1, 23.
[10] Ibid, per Brennan CJ and McHugh J, 11.
[11] Ibid.
[12] EOA 2010, 3(b)-(c).

take into account the beneficial and remedial objectives of the Act as equal opportunity legislation.[13]

15. In their joint judgment in *IW v City of Perth*, Dawson and Gaudron JJ said the following about the breadth of the definition of 'services' in the context of equal opportunity legislation:

> In construing legislation designed to protect basic human rights and dignity, the courts "have a special responsibility to take account of and give effect to [its] purpose". For this reason, the provisions of the Act concerned with discrimination in the provision of goods or services, including s 66K(1), should be construed as widely as their terms permit. **In particular, "services", a word of complete generality, should not be given a narrow construction** unless that is clearly required by definition or by context.[14] (emphasis added).

D. IS THE COUNCIL'S BAN IN THE PROVISION OF 'SERVICES'?

16. In relation to an allegation of direct discrimination in the provision of goods and services, there are two steps to take before a contravention can be established.

17. The first step is to determine what 'treatment' the Applicant has received (EOA 2010 s 8). In particular, was there one instance (or course) of unfavourable treatment, or many? The second step is to ask whether the treatment identified relates to 'services' within the meaning of the EOA 2010, such that the prohibition in s 44 is engaged.

18. In this case, one view is that the Respondent has made a single decision (having continuing operation) to ban the Applicant from having direct dealings with the Respondent. This decision was reaffirmed in the Respondent's letter to the Applicant dated 16 November 2012. The Commission submits that the ban and the subsequent refusal to review the ban constitute a single form of unfavourable 'treatment' under section 8, albeit that it has a number of different implications, which flow naturally from the ban. For example, in the Respondent's reasoning, it is clear that because the Applicant is not permitted to enter Council buildings, his membership of the Access Committee (which presumably meets in Council buildings) cannot continue, and so he has been formally expelled from that committee.

19. If the Respondent's decision is seen as a single instance of discriminatory 'treatment', then it clearly relates to the provision of services. This is because,

[13] *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Mason and Gauldron JJ, 359.
[14] *IW v City of Perth* (1997) 191 CLR 1, per Dawson and Gaudron JJ, 22.

characterised as a whole, the Respondent's decision relates to its role in providing helpful assistance to the Applicant as a member of the local community, including in providing him with:

(a) entertainment and recreation services, such as access to libraries and swimming pools;

(b) access to public places, including the public areas of the Respondent's buildings (and including any place where the Respondent is meeting in open session: *Local Government Act 1989* (Vic)(**LG Act**) s 89); and

(c) other municipal services, including the provision of free advice and information by the Respondent (without being mediated by lawyers).

20. If this approach is taken, it is not necessary to examine each Council activity from which the Applicant is banned from accessing and deciding whether that activity is a 'service'.

21. The conclusion that there is a single 'treatment' in this case is reinforced by the fact that all of the unfavourable consequences for the Applicant flow from a single decision of the Respondent, taken on 31 March 2009, reinforced when the Respondent refused to review its decision to Declare the Applicant a Proscribed Prohibited Person,[15] and continued since that date.

22. If the Tribunal decides to analyse the Respondent's ban and subsequent denial of access and services item by item, then we make two further submissions to clarify the operation of these provisions.

23. The first alternative submission is that, in our view, each aspect of the Respondent's ban is a ban or restriction on a 'service' provided by the Respondent under the EOA 1995 and/or the EOA 2010.

24. This includes the expulsion of the Applicant from the Access Committee, and the ban on him attending Council meetings. We do not think it can be said that these decisions relate to the 'governmental' activities of the Respondent in a way that takes them outside the scope of the EOA 2010.

25. First, in *IW v City of Perth*, five of the seven Justices were prepared to regard a government function (administering a planning scheme) as a service. While it is

[15] Letter from Manningham City Council to Paul Slattery, 16 November 2012.

true that Brennan CJ and McHugh J held that the legislative and quasi-judicial functions of a council are not 'services', in our submission decisions as to who may attend Council meetings or serve on Council committees are neither legislative nor quasi-judicial decisions. They are operational decisions made in the course of providing the service of local government to the community generally.

26. This point is clearly illustrated by comments made by Sundberg J in *Rainsford v Victoria*,[16] regarding the nature of government services:

> The judgments in *IW* are clearly dependent on the particular fact situation of that case, but some general propositions can be identified. First, not all government functions are services, although some undoubtedly are. Second, as the difference between Dawson, Gaudron and Gummow JJ on the one hand, and Toohey and Kirby JJ on the other hand demonstrates, the way in which the service is identified is crucial. It is a question of fact to be determined by the situation of the particular case.[17]

27. Secondly, in *Byham v Preston City Council,*[18] the ability to attend council meetings was explicitly were held to be a 'service' provided by the council for the purpose of the *Equal Opportunity Act 1985* (Vic).

28. While the services in question may not have been clearly framed in the original application, the Commission notes that the Tribunal should have regard to the fact that the Applicant was unrepresented at the time.[19]

29. The second alternative submission is that even if the Respondent's ban, his expulsion from the Access Committee and the refusal to review that decision are not decisions relating to the provision of 'services', those decisions would appear to fall within s 67 of the EOA 1995 and 73 of the EOA 2010 relating to discrimination in local government.

30. Further, the effect of the ban in individual decisions to deny the Applicant access to Council premises can also fall within the scope and section of s 57 of the EOA 2010, which prohibits discrimination in access to public premises.

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[16] (2007) 242 ALR 128.
[17] Ibid, [72].
[18] *Byham v Preston City Council* (1991) EOC 92-377.
[19] *Molony v State of Victoria* [2000] VCAT 1089 (31 May 2000); *ACT Department of Education & Training v Prendergast* [2000] ACTDT 6 (29 December 2000).

E. INTERPRETING DIRECT DISCRIMINATION: EXTRINSIC MATERIALS

31. Section 8(1) of the EOA 2010 provides that 'direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'.

32. The Macquarie Dictionary defines '*unfavourable*' as 'not favourable; not propitious; disadvantageous; adverse.'[20]

33. The definition of direct discrimination in the EOA 1995 (now repealed) relevantly provided as follows:

> (1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute *less favourably than the person treats or would treat someone without that attribute*, or with a different attribute, *in the same or similar circumstances* (emphasis added).

34. The definition of direct discrimination in the EOA 2010 has some key differences from the test in the EOA 1995, which will need to be considered by the Tribunal applying the legislative test.

35. When determining the purpose and object of a legislative provision, it is appropriate to have regard to explanatory memoranda or other documents laid before, or otherwise presented to, any House of Parliament.[21] The relevant passage from the Explanatory Memorandum for the EOA 2010 provides:

> Clause 8 differs from section 8 of the Equal Opportunity Act 1995 as it removes the requirement to prove that the treatment was less favourable than the person would treat someone without the attribute or with a different attribute, in the same or similar circumstances and replaces that "comparator test" with a new test based on unfavourable treatment. The intention of the new definition is to overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing whether direct discrimination has occurred.[22]

36. In the Second Reading Speech for the EOA 2010, the then Attorney-General emphasised that the changes to the definitions of discrimination in the EOA 2010 are intended to remove legal and technical barriers to establishing discriminatory conduct. Relevantly:

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[20] *The Macquarie Dictionary*, 5th edn, Macquarie University, Sydney, NSW, 1795.
[21] *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iii).
[22] Explanatory Memorandum, *Equal Opportunity Bill 2010*, 12-13.

> [The definition of direct discrimination] removes the technical difficulties associated with the current requirement to compare the treatment of the person with a person in the same or similar circumstances …[23]

37. These changes in the EOA 2010, and the emphasis on substantive equality, reasonable adjustments and the positive duty to take steps to eliminate discrimination as far as possible, specifically move the legal framework away from a comparator test of whether someone without a disability, who behaved in same way as the applicant, would have been subject to the same ban. This is no longer the right question to ask. The focus is instead on whether there has been unfavourable treatment of the applicant because of his disability, and on the steps that can be taken to ensure people with disabilities have an equal opportunity to participate in the social and economic life of the community. This can require different responses and accommodation of people's needs.

38. In particular, in determining whether treatment is 'unfavourable', the Tribunal can simply look to whether the treatment was bad or unfair in a general sense, or else whether it was adverse to the person's interests in the particular context. It does not need to compare the treatment to how others have been treated in a similar situation, although in some cases doing so may help in reaching the conclusion that the treatment in the particular case was bad or unfair.

F. INTERPRETING DIRECT DISCRIMINATION: COMPARATIVE JURISDICTIONS

39. The test for 'direct' discrimination in s 8 of the *Discrimination Act 1991* (ACT) (**ACT Act**) is worded in similar terms to s 8 of the EOA 2010.[24] The relevant wording in the ACT Act is as follows:

> **What constitutes discrimination**
>
> (1) For this Act, a person discriminates against another person if—
>
> (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in s 7;
>
> …

[23] Hansard, *Legislative Assembly*, 10 March 2010, 784.
[24] 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.

40. In the case of *Prezzi v Discrimination Commissioner*,[25] the (former) ACT Administrative Appeals Tribunal (now the ACT Civil and Administrative Tribunal) considered the definition of direct discrimination in the ACT Act and held that the term 'unfavourably' does not import a comparator test from other Australian jurisdictions where the term 'less favourably' is used, but rather requires a Tribunal to assess whether a complainant has been treated adversely, or whether certain treatment causes, has caused, or will cause some disadvantage (to a complainant). The Tribunal provided the following exposition of the definition of direct discrimination and the meaning of the term 'unfavourable':

> The ACT *Discrimination Act* does not include any like definition, or any definition at all, of unfavourable treatment. Thus it does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. 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 of the treatment 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.
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> While the term "disadvantage" might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent. The Macquarie Dictionary defines "disadvantage" as "absence or deprivation of advantage; any unfavourable circumstance or condition". The primary meaning of "advantage" does not import comparison; the same dictionary gives it as "any state, circumstance, opportunity or means specially favourable to success, interest or any desired end". The *Discrimination Act* is therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess….
>
> It is thus unnecessary to inquire whether a complainant with a particular attribute has been dealt with less favourably, because of that attribute, than persons without that attribute. All that is required is whether the consequences of the dealing with the complainant are favourable to the complainant's interests or are adverse to the complainant's interests, and whether the dealing has occurred because of a relevant attribute of the complainant.[26]

41. 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*.[27] The key issue for determination in that matter was whether the proposed conduct constituted indirect discrimination

[25] *Prezzi, Patricia Anne and Discrimination Commissioner* [1996] ACTAAT 132.
[26] Ibid, 22 – 24.
[27] *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379, [54].

within the meaning of ss 8(2) of the ACT Act. In regards to the definition of direct discrimination, Beaumont ACJ commented that:

> First, where a person is treated unfavourably by another because of an attribute. 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.

42. The Commission submits that the guiding jurisprudence from the ACT is helpful in scoping the test for direct discrimination in the EOA 2010. In particular, the Commission agrees that the term 'unfavourable' should be given its ordinary dictionary meaning, with the result that the term encompasses treatment that is adverse to the complainant or that causes disadvantage (without the requirement of assessing other treatment to scope that disadvantage).

G. DISCRIMINATION IN GOODS AND SERVICES

43. Section 44(1) of the EOA 2010 provides that:

> A person must not discriminate against another person-
>
> (a) by refusing to provide goods and services to the other person; or
>
> (b) in the terms on which the goods or services are provided to the other person;
>
> (c) by subjecting the other person to any other detriment in connection with the provision of services to him or her.

44. The meaning of 'detriment' in the context of equal opportunity legislation was considered by the Tribunal in *Aitken & Ors v State of Victoria*[28] at [411]-[412]:

> any detriment of substance is sufficient in the application of the direct discrimination provisions. Whether a person has been treated less favourably or unfavourably, or been subject to a detriment is to be determined objectively.

45. Whether there has been a detriment is to be answered on an objective basis by considering all the relevant evidence. Here, the Applicant was treated in an adverse way.

46. The Commission submits that the Respondent's conduct may be characterised as discrimination under s 44(1) in several ways. Firstly, the Respondent's Declaration

[28] *Aitken & Ors v The State of Victoria (Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547. Note that the application for leave to appeal in A*itken & Ors v State of Victoria* [2013] VSCA 28 was refused.

– being a perpetual, unilateral ban from accessing the buildings that are owned, occupied or controlled by the Respondent – constitutes an ongoing refusal to provide services to the Applicant. Secondly, by restricting the Applicant's engagement with the Respondent to correspondence via a legal representative, the Respondent continues to discriminate against the Applicant in the terms on which the services are provided to the Applicant. Thirdly, by denying the Applicant's enjoyment of his human rights, including his right to equality and freedom from discrimination,[29] and right to take part in public life,[30] and right to freedom of expression,[31] the Respondent has subjected the Applicant to a detriment in the connection with the provision of services. (These rights are considered below at [122]-[147]).

H. DISCRIMINATION IN ACCESS TO PUBLIC PREMISES

47. Section 57 of the EOA 2010 explicitly prohibits discrimination on the basis of disability in relation to access to, or the use of, any premises that the public, or section of the public, is allowed to use.

48. Relevantly, this includes discrimination by refusing to allow access to, or use of, the premises or any facilities in the premises,[32] and requiring the person to leave or cease use of any facilities in the premises.[33]

49. The definition of 'premises' includes a structure, building, vehicle, vessel, a place, and a part of premises. The Commission submits that this broad definition includes buildings owned, occupied or controlled by the Respondent that are open to a section of the public.

I. REASONABLE ADJUSTMENTS

50. The EOA 2010 now imposes express obligations to make reasonable adjustments for a person with a disability in the provision of goods and services.[34] While these obligations were implicitly required by the EOA 1995 in the practical application of the indirect discrimination provision, the duty is now explicit. Relevantly, section 45 applies if a person with a disability requires adjustments to be made to the

[29] *Charter of Human Rights and Responsibilities Act 2006* (Vic) (hereafter referred to as the **Charter**), s 8.
[30] Charter, s 18.
[31] Charter, s 15.
[32] EOA 2010, s 57(1)(a).
[33] EOA 2010, s 57(1)(f).
[34] EOA 2010, s 45.

provision of a service in order to participate in or access the service or derive any substantial benefit from the service.[35]

51. Because the obligation is a stand-alone provision,[36] a contravention of the provision constitutes unlawful discrimination without the need to prove direct or indirect discrimination. Further, the failure to provide reasonable adjustments can constitute a separate head of claim for a complaint to the Commission or Tribunal, and can be brought without a complaint of discrimination on the grounds of disability.

52. Section 45 contains examples of practical steps that may constitute 'reasonable adjustments', including installing access ramps for wheelchairs, and including sub-titles in audio-visual presentations. These examples are not an exhaustive list, and the obligation needs to be interpreted in light of the positive duty to eliminate discrimination.[37]

53. In determining whether an adjustment is reasonable, s 45(3) requires all relevant facts and circumstances to be considered which includes balancing individual rights that may be affected and supported by the adjustments. As a public authority within the meaning of the Charter, the Respondent should also take relevant human rights into account in making a determination under s 45 which will affect what is reasonable in the context (see the obligation to properly consider human rights below at [119]-[121]). For example, in this context, a public authority considering the 'the consequences for the person of the service provider not making the adjustment' pursuant to s 45(3)(f), would need to consider the impact on the rights of the person to participate in public life (s 18) and the right to freedom of expression (see outlined below at [122]-[137]]).

54. Having regard to the s 45(3), the Commission submits that providing a hearing loop to enable a hearing impaired person to participate in Council meetings, and developing strategies to enable the Applicant's engagement with Council, would constitute reasonable adjustments in the circumstances.

J. INDIRECT DISCRIMINATION

55. The facts raised by the Applicant may also prompt the Tribunal to consider whether there has been 'indirect discrimination'.

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[35] EOA 2010, s 45(1)(a).
[36] EOA 2010,s 7(1)(b).
[37] EOA 2010, s15.

56. Section 9 of the EOA 2010 provides that indirect discrimination occurs if a person imposes a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attributes, and is not reasonable.

57. Unlike s 9 of the EOA 1995, the test for indirect discrimination under the EOA 2010 does not require the applicant to demonstrate that he or she could comply with the requirement, condition or practice, and that a substantially higher proportion of people with the particular attribute could comply.

58. Further, under the EOA 2010, the respondent has the burden of proving that a defence to indirect discrimination applies – namely that the requirement, condition or practice is reasonable.

59. The terms 'requirement', 'condition' and 'practice' are not defined, but have been interpreted by courts in a broad manner to encompass 'any form of qualification or pre-requisite demanded'.[38]

60. Relevantly, in *Byham v Preston City Council,*[39] a council was found to have indirectly discriminated against the complainant on the basis of his disability under the EOA 1995 by failing to install a lift that would enable him to participate in council meetings, which were held on the first floor. Similarly, a requirement that a person not interject at council meetings, irrespective of whether this is a manifestation of their disability, or participate in council meetings without access to a hearing loop, may constitute indirect discrimination.

61. The Commission notes that the Tribunal is not bound by a formulation of a requirement, condition or practice. Rather, the Tribunal must ascertain the true factual position as to the formulation and existence of a requirement, condition or practice. It may decide that the requirement, condition or practice did not exist, or that a different one applied, based on all the facts and circumstances.[40]

62. In *Catholic Education Office v Clarke*, the Full Court of the Federal Court of Australia stated that the expression 'requirement or condition should be construed broadly to include any form of qualification or pre-requisite, although the actual

[38] *Australian Iron and Steel v Banovic* [1989]HCA 56 [10]; (1989) 168 CLR 165, 185 (Dawson J); cited with approval in *Waters v Public Transport Corporation* [1991] HCA 49; (1992) 173 CLR 349, 393 (Dawson and Toohey JJ).
[39] *Byham v Preston City Council* (1991) EOC 92-377.
[40] *State of NSW v Amery* [2006] HCA 14 [2008] Callinan J; *McDougall v Kimberley Clark Australia Pty Ltd* [2006] VCAT 2211 (10 November 2006), [35].

formulation of the requirement or condition should be formulated with some precision'.[41] The Court went on to say '…the legislation should be given a generous interpretation and alleged discrimination should not be permitted to evade the statutory definition…by defining its services so as to include the alleged requirement or condition'.

K. INTERPRETING EXCEPTIONS TO DISCRIMINATION

63. If the Tribunal is satisfied that the Respondent has discriminated against the complainant, the Tribunal must then consider whether the following exceptions apply:

    (b) Section 86 – exception for the protection of health, safety and property; and

    (c) Section 75 – exception for things done with statutory authority.

64. The Respondent bears the onus of establishing that the exception applies based on the evidence.[42] They must demonstrate that all of the elements of the exceptions are clearly satisfied and the exceptions operate to limit the Applicant's rights in a manner consistent with the Charter.

L. PROTECTION OF HEALTH, SAFETY AND PROPERTY EXCEPTION

65. Relevantly, ss 86(1)(a) of the EOA 2010 provides that a person may discriminate against another person on the basis of disability if the discrimination is 'reasonably necessary to protect the health or safety of any person (including the person discriminated against) or of the public generally'.

66. The test for 'reasonably necessary' is an objective one.[43] As noted in *Hall v Victorian Amateur Football Association*:[44]

> The belief of the person who seeks to rely on s.80(1), at the time when the relevant conduct took place, as to whether or not the conduct was reasonably necessary for the specified purpose, and the enquiries (if any) reasonably made by that person and the information reasonably available to that person about whether or not the conduct was reasonably necessary for that purpose, are also relevant. It is not enough if the respondent believes the ban is necessary for the specified purpose if the ban is not, on a reasonable judgment, necessary for that purpose.

[41] [2004] FCAFC 197, 86 [103].
[42] EOA 2010, s13(2).
[43] *Hall v Victorian Amateur Football Association* [1999] VICCAT 333; EOC 92-997, [79361].
[44] Ibid.

67. The Commission submits that whether conduct is 'reasonably necessary' is not determined by reference to whether conduct is required by a Declaration by the Respondent; rather the sole focus is whether the conduct is reasonably necessary to protect health and safety.

68. In *Hall v Victorian Amateur Football Association*,[45] the Tribunal found that the following circumstances are relevant to whether s 86(1)(a) applies:

(1) What is the class whose health and safety are to be protected? What is the size of that class?

(2) What is the risk from which that class is being protected? What is the magnitude of that risk? What are the consequences to the class to be protected if the risk becomes reality?

(3) To what degree will the ban protect the health and safety of the class? Will it eliminate or reduce the risk to the health and safety of that class?

(4) Does the ban contain within itself any risk to the health and safety of the class?

(5) Are there measures currently in place to protect the health and safety of the class from that risk? Are they effective to protect the health and safety of that class from that risk? Will the ban give that class a protection from that risk of a kind or degree that those current measures do not give?

(6) Are there non-discriminatory alternatives that will give the class protection from the risk that is equal to or better than the ban? If there are, is there any reason why it may be impracticable for the respondent to adopt these alternatives?

(7) Did the respondent, at the time of the ban, believe that the ban was reasonably necessary to protect the health and safety of the class? On what information or enquiries was this belief based? What information on the matter was reasonably available to the respondent?

69. These factors must be balanced against each other to arrive at a decision of whether or not, in all the circumstances, the ongoing ban is reasonably necessary to protect the health and safety of the class.

70. The Commission submits that the perpetual ban preventing the Applicant from:

(a) entering Council owned, occupied or controlled buildings;

(b) making direct contact with Council except through a legal practitioner (together the **Conduct**); and

is not reasonably necessary to protect the health and safety of any person pursuant to s 86 (1), as the Applicant does not pose any real safety risk. Alternatively, if he does, the Conduct is a wholly disproportionate response to the risk and, further, is not engaged in as a genuine response to any risk (but rather than as a means of

[45] Ibid, 79362.

retaliating against a serial complainant and/or as a means of preventing him from making further complaints).

71. The Respondent claims that the ongoing ban is needed to protect the health, safety and welfare of its staff on the basis that the Applicant engaged in acts including threatening to harm staff, making derogatory and insulting comments and threatening gestures towards the Mayor.[46]

72. The Commission submits that the Conduct is not proportionate to the risk to safety posed by the Applicant's alleged inappropriate behaviour, as it applies to all Council owned, occupied or controlled buildings without an assessment of the Applicant's behaviour at these premises or the risk he presents.

73. Having regard to the non-discriminatory alternatives available, and the sheer breadth of the ban, the Commission submits that the Respondent's alleged conduct is not reasonably proportionate to the danger sought to be prevented. By its terms, it is too excessive to fall within s 86(1) indefinitely.

M. STATUTORY AUTHORITY EXCEPTION

74. If the Tribunal is satisfied that the Respondent has discriminated against the Applicant, the Tribunal must also consider whether the exception for acts done with statutory authority applies. 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.

75. The scope of the exception in s 69(1) of the EOA 1995 (which was the predecessor to s 75 of the EOA 2010 and is in similar terms) was considered by the Tribunal in *Wojcik v Roads Corporation.*[47] In this case, the Tribunal found that the exception not only covers conduct that was strictly necessary to comply with the relevant statutory provision. It also extends to cover a case where the relevant statutory provision can be said to authorise relevant conduct. A statutory provision can be said to do this if it requires the relevant conduct, or expressly or by necessary

[46] Manningham City Council, Summary of Evidence, Steve Goldsworthy, [4]-[6].
[47] [1997] VADT 75 (10 September 1997).

implication, permits the discrimination. It is not enough if a statutory provision gives a broad discretion simply permits discrimination.

76. The ordinary meaning of the statutory exception described in *Wojcik v Roads Corporation*[48] was cited with approval by Ginnane J in *Aitken & Ors v State of Victoria*[49] at [542]-[543]:

> 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.

77. In *Hall Matthew v Victorian Amateur Football Association,*[50] 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'. In that context, considering the health and safety exception, the Tribunal said that '[i]t is clear from s.12 of the Act that Parliament did not intend to prohibit conduct to which the exception provision applies'.

78. However, it is still possible to do this and take into account the beneficial nature of Equal Opportunity legislation,[51] as well as the express objectives of the Act to eliminate discrimination to the greatest possible extent and to promote and protect the right to equality in the Charter.

79. Section 75 of the EOA 2010 says that 'the discrimination' must be 'authorised by' an Act for the exception to apply. This is a more stringent requirement than merely a broad statutory discretion permitting a range of conduct. The Explanatory Memorandum to the *Equal Opportunity Bill 2010* says that '[c]lause 75 is intended to preserve discriminatory provisions in other Acts or enactments but only applies where the discrimination is authorised by or necessitated by that Act or enactment'. While subsection 75(2) says that the enactment does not need to specifically refer to 'discrimination', it does need to necessitate or authorise the relevant conduct, that is, *the discrimination.*

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[48] *Wojcik v Roads Corporation* [1997] VADT 75 (10 September 1997).
[49] *Aitken & Ors v The State of Victoria (Department of Education & Early Childhood Development) (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012).
[50] *Hall Matthew v Victorian Amateur Football Association* [1999] VICCAT 333 (23 April 1999).
[51] *Waters v Public Transport Corporation* [1991] HCA 49; [1991] 103 ALR 513.

80. This cannot be equated with a general 'permission to perform any act'. If taken to its logical conclusion, such reasoning would remove most public sector activity from the operation of Victoria's anti-discrimination laws. For example, councils provide services to the public under legislative authority, schools provide education under legislative authority, and Victorian Public Servants are employed under statutory authority. It would be an absurd reading of section 75 to conclude that any discretion, power or function conferred by legislation can be exercised without reference to anti-discrimination laws and it would make the right to equality in section 8 of the Charter, which applies to public authorities, almost meaningless. This was clearly not the intent of Parliament. The interaction with the public sector is relevant and referenced throughout the Act, for example: the EOA 2010 is intended to support the realisation of the right to equality in the Charter (section 3, EOA 2010), the definition of 'employee' in section 4 of the EOA 2010 includes a person employed under the *Public Administration Act 1994*; subsection 25(2) says an exception does not apply to employment under the *Education and Training Reform Act 2006*, and discrimination in local government is a specific area covered in Division 8 of the EOA 2010.

81. The statutory authority for councils to issue a banning notice is not authority to undertake that action in a discriminatory way - just as public servants cannot be employed in a discriminatory way, or education cannot be delivered in a discriminatory way, where that discrimination is not specifically authorised.

82. *H J Heinz Company Australia Pty Ltd v Turner*[52] indicates that concepts of authority and necessity in s 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.

83. The approach to reading exceptions narrowly set out in *Waters v Public Transport Corporation*,[53] does not call for new rules of statutory interpretation. It calls for discipline when dealing with provisions that remove people's right to equality. In this case, it is the *discrimination* that must be necessitated or authorised. This requires more than a power to undertake a general activity. Furthermore, the exception is narrowed by a public authority's obligations in section 38 of the Charter at every stage that the discretion is exercised.

[52] *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872, 882.
[53] *Waters v Public Transport Corporation* (1991) 173 CLR 1, 369.

84. The Respondent relies on section 3C of the LG Act. With respect, section 3C is a motherhood provision, setting out in an aspirational sense the goals that councils should strive to achieve. It does not mandate, require or authorise any council to perform any specific function or activity. It certainly does not require a council to perform any specific act (in the sense that mandamus would lie to compel the council to perform it). In those circumstances, section 3C can have no bearing on the case at hand.

85. Similar things can be said about s 21 of the *Occupational Health and Safety Act 2004* (**OHS Act**). While that section does establish a positive duty to provide a safe workplace, the duty only extends 'so far as is reasonably practicable'. In other words, the section does not mandate a particular course of action, but leaves an employer free to choose the means to secure the mandated outcome. Where there is a choice, the EOA 2010 required the Respondent to meet its obligations under the OHS Act without discriminating against the Applicant. These provisions do not mandate or compel discrimination. Neither do they permit employers to make exaggerated claims of risks to safety to cloak action that has a discriminatory purpose or effect.

N. REMEDIES AND THE POSITIVE DUTY

86. If the Tribunal finds that a person has breached the EOA 2010, it may make any orders it thinks fit that will stop further breaches of the Act.[54] Section 125(a)(i) is not limited to breaches in particular Parts of the Act and it is not limited by the qualifier of 'contraventions of this Act in relation to the complainant' as the equivalent provision in s 136 of the EOA 1995 was. The Commission submits that orders of the Tribunal can therefore include orders to prevent further breaches of the positive duty to take reasonable and proportionate measures to eliminate discrimination and victimisation as far as possible.[55]

87. The Tribunal may also make orders to address any loss or damage suffered by the applicant as a result of the discrimination.[56] This can include special damages to address economic or financial loss and general damages relating to non-economic loss.

[54] EOA 2010, s 125(a)(i).
[55] EOA 2010, s 15.
[56] EOA 2010, s 124(a)(ii) and (iii).

General damages

88. Non-economic loss is often harder to calculate and these submissions will briefly address some of the key considerations involved.

89. Non-economic loss includes compensation for hurt, humiliation and injury to feelings or psychological injury that have been caused or exacerbated by the discriminatory treatment.

90. The principle that the Tribunal and courts apply to assess hurt and humiliation was recently summarised by Member Dea in *Galea v Hartnett – Blairgowrie Caravan Park:*[57]

> The starting position in relation to awards for prohibited discrimination for injury to feelings (also referred to an non-economic loss), is that the amount should not be minimal, as that would trivialise or diminish respect for the public policy to which the Equal Opportunity Act gives effect. On the other hand, awards ought not be excessive, as that would also damage respect for that public policy.

91. In *GLS v PLP*[58] Justice Garde has also held that an award of general damages should be made 'as appropriate for the individual case having regard to the facts and circumstances and the contraventions proved'.

92. A number of factors can be relevant in assessing this, including the respective positions of power, whether the unlawful conduct occurred in a public place and resulted in public humiliation, whether other rights were breached, and if the unlawful conducted affected the person's health.

Taking the person as you find them

93. In assessing damages, the applicant must be taken as the respondent finds them. The application of the 'eggshell skill rule' in this context was reinforced by Deputy President McKenzie in *Styles v Murray Meats Pty Ltd*[59] where the complainant was awarded $8,000 in general damages for embarrassment, loss of self-esteem, stress and the aggravation of previous medical conditions.

94. Where a complainant has a pre-existing condition that makes them more sensitive, vulnerable or pre-disposed them to developing psychological injury, this cannot be held against them in calculating damages for the unlawful conduct.

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[57] [2012] VCAT 1049 [at 83].
[58] [2013] VCAT 221 [at 274].
[59] [2005] VCAT 914 [at 99].

Examples

95. The Tribunal must make any assessment of damages in light of the injury and loss of opportunity to the applicant in his particular circumstances. The following cases provide examples of how other courts have undertaken this assessment of general damages in discrimination matters.

96. In the context of a successful claim of unlawful disability discrimination in the Federal Court of Australia, *Gordon v Commonwealth*[60], Heerey J awarded the applicant $20,000 for non-economic loss. His Honour noted that the applicant 'has suffered substantial mental anguish. Perhaps he does not have a particularly stoic makeup, but, to apply the aphorism of the common law, the unlawful discriminator must take the plaintiff as it finds him'.

97. In *House & Anor v Queanbeyan Community Radio Station,*[61] Neville FM ordered $6,000 in general damages to each of the complainants. In that case, there was no economic loss and no evidence of medical evidence of psychological harm.

98. In *Trindall v NSW Commissioner for Police*[62] Driver FM awarded $10,000 general damages in a case where there was both substantial evidence of 'significant injury to his [the applicant's] feelings and emotional and psychological distress, hurt and humiliation'.

99. In *Rawcliffe v Northern Sydney Central Area Health Service & Ors*, Smith FM found that:

> [t]he immediate distress suffered by the applicant was clearly demonstrated …To a real extent these distressing thoughts are still present, and have been revived in the course of this proceeding… Taking into account all his circumstances, and mitigating my award to take into account unquantifiable contributions to the applicant's long term mental distress from events other than the unlawful discrimination found by me, I consider that an appropriate award of compensation is $15,000.[63]

100. In *Wiggins v Department of Defence – Navy,*[64] McInnis FM states that a significant amount of damages was appropriate because the respondent's policy operated to permit the unlawful discrimination and as a person suffering from depression is

[60] [2008] FCA 603.
[61] [2008] FMCA 897.
[62] [2005] FMCA 2 [at 57].
[63] *Rawcliffe v Northern Sydney Central Coast Area Health Service & Ors* [2007] FMCA 931, [105].
[64] (2006) 200 FLR 438, 481-482, [202].

more vulnerable, the consequences of discrimination can be regarded as more significant. His Honour further held that the applicant continued to suffer for a significant period after his resignation from the Navy. The Court awarded $25,000 for the hurt, humiliation and upset caused by discriminating against the applicant by demoting her whilst she was on sick leave.

O. THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT

101. The Charter is relevant to the proceedings in a number of ways.

102. Under s 32(1) of the Charter the Tribunal must interpret all Victorian statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. To do this, where the words of a statutory provision are capable of more than one meaning, the Tribunal should give them 'whichever of those meanings best accords with the human rights in question.'[65]

103. The Charter is also relevant to these proceedings because in considering whether the conduct of the Respondent complies with the EOA 1995 or EOA 2010, the Tribunal should be mindful that the Council is a public authority within the meaning of s 4(1)(e) of the Charter and the Applicant is a rights-holder in his interactions with the Council. Section 4(1)(e) of the Charter provides that, '[f]or the purposes of the Charter a public authority is - … (e) a Council within the meaning of the LG Act and Councillors and members of Council staff within the meaning of that Act'. The Council has therefore been bound since 1 January 2008 to act in accordance with s 38 of the Charter in making any decision and taking any action.

104. Section 38 of the Charter imposes human rights compliance obligations on public authorities, making it unlawful for a public authority to act incompatibly with a human right (substantive obligation) or to fail to give proper consideration to a human right (procedural obligation). It provides:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made under an Act of the Commonwealth or otherwise under law, the public authority could not have acted differently.

[65] *Slaveski v Smith* [2012] VSCA 25 at [24].

105. The Commission submits that the Tribunal should have regard to the Respondent's obligations as a public authority in determining whether there has been unfavourable treatment or a disadvantage to the Applicant, and whether the Respondent acted in a way that was 'reasonable' in accordance with its obligations under the EOA 2010 and EOA 1995.

106. These submissions consider:

(b) the jurisdiction of the Tribunal to consider Charter issues;

(c) when the conduct of a public authority will be unlawful under s 38(1) (when a public authority will be acting incompatibly with a human right and the requirement to give proper consideration); and

(d) the scope and application of the human rights relevant to these proceedings.

Jurisdiction of the Tribunal to consider Charter issues

107. Section 39(1) of the Charter provides:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

108. Section 39 of the Charter has been described as having 'an operation which is both conditional and supplementary.'[66] While s 39 does not confer an independent cause of action, if there is a proceeding on foot claiming that the act or decision of a public authority is unlawful, that act or decision may also be challenged as unlawful because of the Charter.[67]

109. The Court of Appeal in *Director of Housing v Sudi*[68] held that, in possession order proceedings under the *Residential Tenancies Act 1997*, the Tribunal had no jurisdiction to review the validity of the Director of Housing's administrative decision to apply for a possession order because that decision was collateral to the issues in the possession proceeding. The Court of Appeal found that 39(1) of the Charter does not confer any power of judicial review on the Tribunal and 'cannot be invoked as the source of the Tribunal's power to engage in collateral review on

[66] *Director of Housing v Sudi* [2011] VSCA 266 at [96].
[67] *McAdam v Victoria University & Ors* (Anti-Discrimination) [2010] VCAT 1429 at [58].
[68] *Director of Housing v Sudi* [2011] VSCA 266 ('*Sudi*').

Charter grounds'.[69] However, the *Director of Housing v Sudi* decision does not prevent the Charter from being raised in proceedings at the Tribunal where the public authority's conduct arises directly in a proceeding. Justice Weinberg stated:[70]

> 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. … 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.

110. The Charter was recently considered by the Tribunal in the privacy matter of *Caripis v Victoria Police*.[71] In *Caripis v Victoria Police*, the Tribunal considered that the complaint (that Victoria Police's retention of protest footage containing images of the complainant was an interference with privacy under the *Information Privacy Act 2001*) was a complaint that the act was unlawful, so a Charter ground could be added to it. The Tribunal rejected the argument that following *Sudi* it lacked jurisdiction to review the lawfulness of the Respondent's actions under s 38:[72]

> In *Sudi*, the Director's decision to bring the proceeding was not a matter which the Tribunal could review because the decision was collateral to the proceeding itself. In the present case, the Respondent's decision to retain images of the Complainant is being directly considered by the Tribunal. The lawfulness of that retention is under review because it is said to be "unlawful" under s 14 of the IP Act.

111. In this proceeding, the lawfulness of the Respondent's conduct and impact of its decision and conduct on the Applicant's human rights have a direct bearing on the Tribunal's decision-making under the EOA.

112. For example, an unlawful limitation of Charter rights can be evidence of 'unfavourable' treatment under the definition of direct discrimination in s 8 of the EOA 2010.

113. If the Tribunal considers that there is an indirect discrimination element to the claim, the EOA 2010 guides the Tribunal to consider whether there was a 'disadvantage' and whether the requirement, condition or practice is reasonable in the circumstances (s 9(3)). This includes consideration about whether an unlawful

[69] Ibid at [281]-[282] (Weinberg J).
[70] Ibid at [150]-[153].
[71] *Caripis v Victoria Police* [2012] VCAT 1472 ('*Caripis*') at [94]-[100].
[72] *Caripis* at [99].

action is reasonable and whether in the Tribunal's view, the nature and extent of the disadvantage is proportionate when the extensive impact on the Applicant's rights is considered as part of the disadvantage to him.

114. Similarly, if the Tribunal considers whether there have been reasonable adjustments for a person with a disability under s 45 of the EOA 2010, the Act asks the Tribunal to turn its mind to 'the consequences for the person of the service provider not making the adjustment' (sub-s 45(3)(f)).

115. Relevant human rights include the Applicant's right to freedom of expression (s 15 of the Charter), right to participate in public life (s 18 of the Charter) and equality rights (s 8). These are considered below.

Section 38

116. Section 38 of the Charter imposes human rights compliance obligations on public authorities, making it unlawful for a public authority to act incompatibly with a human right (substantive obligation) or to fail to give proper consideration to a human right (procedural obligation). It provides:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made under an Act of the Commonwealth or otherwise under law, the public authority could not have acted differently.

When will a public authority be acting incompatibly with a human right

117. The Charter recognises that human rights are not absolute and may be limited, 'but only according to the strict standard of justification in s 7(2).' [73] What is 'incompatible' with a human right is accordingly assessed with reference to s 7(2) of the Charter, which has been described as 'an expression of the doctrine of proportionality'.[74] It provides that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and

[73] *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 at [332].
[74] *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37 at fn 214.

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

118. To consider whether the Respondent has unlawfully limited the Applicant's human rights the Tribunal should:

(a) Consider each relevant act of the Respondent and identify the human rights engaged by those acts. Human rights are to be interpreted purposively and 'in the broadest possible way'[75] and are engaged where the act limits, restricts or interferes with a right.

(b) Consider whether the limit on the Applicant's human right is a lawful and reasonable limit that can be justified in accordance with s 7(2) of the Charter. The onus rests on the party invoking s 7(2)[76] and that onus should be discharged by reference to cogent and persuasive evidence.[77]

(c) If the Respondent's conduct limits the right and cannot be justified under s 7(2) or any internal limit on the right, the conduct will be incompatible with human rights and will be unlawful under s 38, unless the Tribunal considers that the Respondent, could not have acted differently pursuant to s 38(2). Section 38(2) states that s 38(1) does not apply if "as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision." Section 38(2) will not apply to the Respondent's actions if the Tribunal considers there were other possible courses of action that were reasonably open to it that would not be incompatible with human rights.

The obligation to give proper consideration to a relevant human right

119. The obligation to give proper consideration to any relevant human right requires a public authority to consider the impact of its decision on the rights of affected individuals in 'a practical and common-sense manner.'[78] In *Castles v Secretary to the Department of Justice*[79] Emerton J recognised that the procedural obligation has

[75] *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [42].
[76] *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147] cited with approval in *R v Momcilovic* (2010) 25 VR 436 at [144].
[77] *R v Momcilovic* (2010) 25 VR 436 at [146].
[78] *Patrick's Case* [2011] VSC 327 at [311].
[79] [2010] VSC 310.

the potential to apply across a wide range of decisions across all levels of government. Her Honour found that 'proper consideration of human rights should not be a sophisticated legal exercise' and need not include a detailed analysis:[80]

> Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made…
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

120. For example, in *Castles v Secretary to the Department of Justice*, Emerton J was satisfied that that the Secretary to the Department of Justice had given proper consideration to Ms Castles' human rights because of the detailed way in which the different public interests engaged in the decision to deny Ms Castles' access to IVF treatment in prison had been weighed, and because of references that the Secretary had considered human rights in making her decision.[81]

121. In the context of local government decisions, the question of whether city councils have given proper consideration to human rights in making decisions has been considered by the Tribunal in the context of city council planning decisions. For example, in *Smith v Hobsons Bay City Council & Ors*[82] the Tribunal considered a planning application to remove a condition from a planning permit granted by the council, which had required a screen to be attached at the property to prevent it overlooking the neighboring property of Mr Davey.[83] Mr Davey claimed his right to privacy in s 13(a) would be breached if the screen was not attached. On the question of whether the Respondent had failed to give proper consideration to relevant rights, Deputy President Dwyer considered that the councils planning scheme and the framework was such that compliance with it would amount to proper consideration. This was because the framework balanced public and private

[80] Ibid at [185].
[81] Ibid at [187].
[82] *Smith v Hobsons Bay CC* [2010] VCAT 668.
[83] This approach was also adopted in *Magee v Boroondara City Council and Anor* [2010] VCAT 1323 in considering whether the Council gave proper consideration to s 13(a) and s 24(1) of the Charter. The Tribunal held that there was not failure to give proper consideration.

rights and sought to provide for fair, orderly and sustainable land use by placing certain restrictions on development that most would consider to be justified. Accordingly, he concluded that a decision that properly considered all relevant planning considerations in the framework 'would represent a reasonable, proportionate and justifiable limitation on Mr Davey's right to privacy.' [84]

Relevant human rights

Right to freedom of expression

122. The right to freedom of expression in s 15(2) of the Charter protects the freedom to seek, receive and impart information and ideas of all kinds. It has been described as 'one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community.'[85]

123. The right to freedom of expression in s 15(2) of the Charter is broader than the implied Commonwealth constitutional freedom of political communication, which has been the subject of recent High Court decisions,[86] as it is not limited to communication concerning political or government matters and is an individual right rather than a limitation on legislative power.

124. The expression that is protected by s 15(2) is broad and embraces 'any act which is capable of conveying some kind of meaning'.[87] In *VPOL v Anderson & Ors* the Victorian Magistrates' Court explained (with reference to English and European case law on the comparative right in Article 10 of the *European Convention on Human* Rights) that freedom of expression 'is applicable not only to information or ideas that are favourably received as inoffensive, or as a matter of indifference, but also to those that offend, shock or disturb.' [88] Importantly:[89]

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[84] *Smith v Hobsons Bay CC* [2010] VCAT 668 at [36].
[85] *Magee v Delaney* [2012] VSC 407 at [181]. Similarly in *XYZ v Victoria Police* [2010] VCAT 255 at [554] the right to freedom of expression was described as "essential to democracy, the rule of law and the social and cultural development of the individual in society, as well as society collectively."
[86] See, eg, *Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors* [2013] HCA 3 and *Monis v The Queen* [2013] HCA 4.
[87] *Magee v Delaney* [2012] VSC 407 at [62].
[88] *VPOL v Anderson & Ors (Criminal)* [2012] VMC 22 (23 July 2012) quoting from *Sunday Times v United Kingdom* (No 2) [1992] 14 EHRR 123 (also referred to in *Hammond v DPP* [2004] EWHC 69, *Redmond-Bate v DPP* [1999] EWHC 732.).
[89] *Redmond-Bate v DPP* [1999] EWHC 732 at [20] as referred to in *VPOL v Anderson & Ors (Criminal)* [2012] VMC 22.

> …free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind expected by the law in the conduct of those who disagree, even strongly, with what they hear.

125. The right to freedom of expression is limited by a decision or conduct that prevents the Applicant from accessing Council buildings and participating in public meetings and the activities of local government on Council premises. Preventing the Applicant from such access and participation limits not only the Applicant's right to impart information, but also his ability to seek and receive information and ideas.

126. The right is not absolute and the central issue is whether the limitation can be justified. Section 15(2) is subject to the qualification in s 15(3), which provides:

> (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.

127. The rights of others in s 15(3)(a) includes human rights not protected by the Charter[90] and s 15(3)(b) 'focuses on the collective welfare of society rather than the rights of individuals' recognising that 'individual rights may need to be subordinated to the needs of society for the greater public good'.[91] The protection of 'public order' in s 15(3) has been described as 'giving effect to rights or obligations that facilitate the proper functioning of the rule of law.'[92] It is 'a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime.' In *Magee*, Kyrou J gave the example of a lawful restriction on the basis of public order as 'laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person and property.'[93] However, the conduct must be sufficiently serious to amount to a disruption of public order. For example, in New Zealand case of

[90] *Magee v Delaney* [2012] VSC 407.
[91] Ibid.
[92] Ibid at [15].
[93] Ibid.

Brooker v Police,[94] Mr Brooker who was convicted of disorderly behaviour when making a public protest in the street outside the house of a police officer contrary to s 4(1)(a) of the *Summary Offences Act 1981*. On appeal, the Supreme Court held that his protest amounted to behaviour protected by the right to freedom of expression in s 14 of the *New Zealand Bill of Rights Act 1990* and the public order exception did not apply. The Court considered that freedom of expression should be restricted for reasons of public order only where there is a clear danger of disruption rising far above annoyance.[95]

128. Section 15(2) is also subject to the reasonable limits test in s 7(2).

129. In these proceedings, the Respondent has gone further than what is necessary or reasonable to protect the rights of others and to protect public order (in s 15(3)) and does not amount to a reasonable limitation on his right to freedom of expression (under s 7(2)). The nature and extent of the limitation is significant in its imposition of a blanket exclusion on the Applicant from entering Council premises and expressing his views to Council members or at Council meetings. The extensive restrictions imposed on the Applicant that limit his freedom of expression – including his right to impart, seek and receive information and ideas – go further than required to protect the Respondent's stated purpose to protect the health and safety of Councillors and staff. There are less restrictive means to achieve these purposes without imposing such far-reaching limitations on the Applicant's right.

Right to participate in public life

130. Section 18 protects the right of every person in Victoria to have the opportunity, without discrimination, to participate in the conduct of public affairs (s 18(1)).

131. The right is based on Article 25(a) of the ICCPR to participate in public affairs. The term 'public affairs' is not defined in the Charter. However, the United Nations Human Rights Committee General Comment on Article 25(a) of the ICCPR, upon which s 18(1) is modeled, explains that it is a broad concept that encompasses the activities of all forms of government, including local government.[96] The General Comment also explains the connection between this right and the right to freedom of expression, stating that: 'Citizens also take part in the conduct of public affairs

[94] [2007] NZSC 30.
[95] [2007] NZSC 30 at [42]-[43] (Elias J). See also [56]-[59] (Blanchard J) and [90] (Tipping J).
[96] UN Human Rights Committee*, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service* (1996) at [5].

by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.'[97]

132. The right is limited by conduct that prevents the Applicant from accessing and participating in public meetings and the activities of local government on Council premises. As with the limits on the right to freedom of expression, the Respondent must demonstrate that the limit on the right is necessary to achieve the purpose sought. If there are alternative options reasonably available to the Respondent that would be less restrictive than the blanket exclusion of the Applicant from Council premises, the Respondent's action will not be justified under s 7(2) and will be incompatible with the right.

The right to equality before the law (s 8(3)) and the right to enjoyment of human rights without discrimination (s 8(2))

133. The equality rights in the Charter have been described as 'the keystone in its protective arch'.[98] The right to equality before the law has three elements: equality before the law, the right to the equal protection of the law without discrimination and the right to equal and effective protection against discrimination.[99]

134. The fundamental value of the equality rights is the equal dignity of every person. Justice Bell in *Patrick's Case* explained the harm to human dignity caused by the different treatment of people with a disability:[100]

> The different treatment of people because of their disability and not their individual needs gives rise to a grievous loss of dignity and personal self-worth, as well as a deep sense of grievance. People who are treated to their disadvantage by reference to their disabled attribute and not as valuable individuals are thereby made to feel reduced and stigmatised. The harm which this causes to the individual was explained by Iacobucci J in *Law v Canada*:
>
> > Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when

[97] Ibid at [12].
[98] *Lifestyle Communities (No 3) (Anti Discrimination)* [2009] VCAT 1869 at [277]; *Aitken & Ors v The State of Victoria (Anti-Discrimination)* [2012] VCAT 1547 (18 October 2012) at [91].
[99] *Lifestyle Communities (No 3) (Anti Discrimination)* [2009] VCAT 1869 at [127].
[100] *PJB v Melbourne Health & Anor* (*Patrick's case*) [2011] VSC 327 at [33].

> individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within ... society.

135. Section 3 of the Charter defines 'discrimination' for the purposes of s 8 by reference to the EOA 2010. In this way it operates to strengthen Victoria's anti-discrimination legislative framework.[101] If the Tribunal finds that that the Respondent's conduct amounts to discrimination against the Applicant under the EOA 2010, the conduct will limit the rights in s 8(3).

136. Section 8(2) is a positive right to enjoy the human rights in the Charter without discrimination. If the Tribunal finds that the Respondent's conduct limits the Applicant's rights to freedom of expression, right to participate in public life, or the right not to have his privacy and family interfered with, and also finds that conduct is discriminatory within the meaning of the EOA, s 8(2) will be limited.

137. As with the other rights, the equality rights are not absolute. The Respondent's conduct will be incompatible with these rights if it cannot be demonstrably justified in accordance with s 7(2).

Other rights

138. There is also an argument that the Respondent has infringed the Applicant's right not to have his privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13(a)) and his right to free movement (s 12) on public roads, lands and property. The right to freedom of movement includes the freedom to enter into public places and areas of public space. Restrictions on the Applicant's right to enter public areas restrict his right to freedom of movement and must be justified in accordance with s 7(2) of the Charter.

24 June 2013

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[101] Ibid at [10].