

28 October 2022

Disability Act Review, Disability and Communities Branch
Department of Families, Fairness and Housing
Level 20, 50 Lonsdale Street, Melbourne VIC 3000

By email: disabilityactreview@dffh.vic.gov.au

To Whom It May Concern

Submission to the Disability Inclusion Bill Exposure Draft

Thank you for providing the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) with an opportunity to consult on the Disability Inclusion Bill Exposure Draft (**the Bill**).

VEOHRC supports the purposes and objectives of the Bill, which are in line with our vision for a fair, safe and inclusive Victoria where every person is respected and treated with dignity.

This letter addresses the main components of the Exposure Draft Overview Paper and sets out VEOHRC's position.

Duty to promote disability inclusion

As Victoria's independent statutory human rights authority, VEOHRC welcomes the proposed introduction of a duty for defined entities to actively promote disability inclusion.

The proposed duty would complement the existing positive duty to eliminate discrimination contained in section 15 of the *Equal Opportunity Act 2010* (Vic) (**EOA**). VEOHRC considers that in practice, these duties would commonly intersect, with actions to eliminate disability discrimination likely to be important steps in promoting disability inclusion. However, the duty to promote disability inclusion and the duty to eliminate discrimination would also operate distinctly, particularly in circumstances where duty holders would be required to take further steps to promote disability inclusion beyond the elimination of discrimination within the meaning of the EOA. There may also be circumstances in which duty holders may not be required to comply with the section 15 duty because their actions may fall outside one of the protected areas of public life under the EOA. In those instances, VEOHRC considers that the broader requirement for defined entities to promote inclusion would support equality for people with disability.

VEOHRC supports the proposed introduction of enforcement powers for the Commissioner for Disability Inclusion in relation to preparing and implementing a disability action plan. However, we consider that these enforcement options should be extended to also apply to the new positive duty to promote disability inclusion, to entrench systemic change and improve the lives of people with disability.

VEOHRC considers that broadening the enforcement powers of the proposed Disability Inclusion Commissioner to also be used in relation to the positive duty to promote inclusion would increase the Bill's effectiveness. Similar to the powers relating to disability action plans, such enforcement powers would enable the proposed Disability Inclusion Commissioner to issue compliance notices and enforcement orders for promoting disability inclusion. VEOHRC considers this would be beneficial in that:

- compliance with the new duty would be increased because of the potential for non-compliance sanctions to be issued;
- greater compliance would reduce instances of disability discrimination, resulting in a decreased number of people with disability needing to enforce their rights under the EOA; and
- the existing enforcement burden on individual victims of discrimination would be reduced, as duty holders would be encouraged to implement effective disability inclusion policies.

Enhanced enforcement powers for the proposed Disability Inclusion Commissioner in relation to the position duty to promote disability inclusion, would be consistent with the positive duty enforcement model contained in the original form the EOA as passed in 2010, which required duty holders to 'take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.' This model was repealed before the EOA came into force, but would have enabled VEOHRC to enter into enforceable undertakings and issue compliance notices in relation to the positive duty to eliminate discrimination. While VEOHRC does have some powers to enforce the positive duty to eliminate discrimination through its investigation and reporting functions, VEOHRC has limited ability to engage with non-compliant organisations.

The operation of both the proposed positive duty to promote disability inclusion and the existing EOA duty to eliminate discrimination, would be significantly improved by statutory powers to issue compliance notices, enter into enforceable undertakings and seek enforcement orders at the Victorian Civil and Administrative Tribunal (**VCAT**). VEOHRC considers that creating these powers would provide a greater incentive for defined entities develop and implement effective policies to prevent disability discrimination and promote inclusion.

Finally, VEOHRC supports the proposed wording that duty holders must take 'reasonable and proportionate measures' to implement the new duty, as contained in the original EOA and also in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Cth).

The Commissioner for Disability Inclusion

We welcome the proposed establishment of a Commissioner for Disability Inclusion and the introduction of powers enabling the proposed Commissioner to monitor and enforce compliance with the Bill. The Commissioner for Disability Inclusion will play an important role in advancing visibility of and advocacy for disability inclusion in Victoria. However, there is a risk that, if not set up efficiently, the new role would add a layer of bureaucratic complexity and create an extra burden on both people with disability and organisations without achieving the desired results.

People with disabilities already face a multitude of options when seeking redress for unfair treatment. For instance, a person with a disability facing an issue of disability discrimination in employment may pursue redress or complaints options through VEOHRC, VCAT, the Australian Human Rights Commission or the Fair Work Commission. The Disability Services

Commissioner, the Office of the Public Advocate or the Victorian Disability Worker Commission also provide redress pathways in certain situations. These avenues are in addition to seeking legal advice from Victoria Legal Aid, a community legal service or a private legal practitioner.

Creating the Commissioner for Disability Inclusion as a new entity risks adding further confusion and will overwhelm people as they seek redress.

We consider that the proposed Commissioner for Disability Inclusion role would be most effective if housed within VEOHRC as an additional commissioner with the disability inclusion functions. This is because:

- the roles and functions of the proposed Commissioner for Disability Inclusion align with VEOHRC's functions and areas of expertise. In particular, VEOHRC already oversees the positive duty to eliminate disability discrimination and the proposed duty to promote disability inclusion would be complementary to this (as outlined above);
- the Commissioner for Disability Inclusion will have fundamental responsibility that must be applied through a broader lens of the human rights and social models of disability;
- VEOHRC is well placed to assess matters with an intersectional lens, given we provide information, education, research and dispute resolution on the full range of attributes protected by the EOA. Matters that come before us often involve multiple, compounding forms of discrimination;
- creating a separate office for the new Commissioner would create inefficiencies and increase risk around overlapping functions; and
- VEOHRC has existing credibility as a place for people with disability to seek assistance. Our enquiry line fields thousands of calls relating to disability each year. Many do not fall under the remit of the EOA and are referred to the appropriate body or agency. VEOHRC is in an excellent position to facilitate an immediate assessment of whether the proposed Commissioner for Disability Inclusion would be the appropriate pathway for an enquiry relating to disability inclusion.

We note that that there would need to be a clear exception added to the secrecy provision of the Bill to enable the Commissioner for Disability Inclusion to be housed within the Commission and work effectively within VEOHRC's functions, as well as a provision that clearly enables information sharing within the Commission.

Definitions

VEOHRC supports definitions informed by the expertise of people with disability, which are based on the human rights and social models of disability, and which recognise and comply with Victoria's human rights obligations, including:

- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- Convention on the Rights of Persons with Disabilities (**CRPD**)
- United Nations Declaration on the Rights of Indigenous Peoples and the Optional Protocol on the Convention Against Torture.

In particular, VEOHRC welcomes the Bill's focus on intersectionality and associated definition. This is an important concept to address entrenched disadvantage of people with disability. It is

clear from VEOHRC's day-to-day operations that people with disability are subject to overlapping forms of discrimination and that this can exacerbate disadvantage.

The proposed definition of intersectionality is 'the interconnected nature of protected attributes of a person or group of persons that create overlapping and interdependent systems of disadvantage or discrimination'. VEOHRC considers that limiting the definition of 'intersectionality' to 'protected attributes' fails to recognise the complex reasons that contribute to disadvantage. For instance, a person with a disability may experience interdependent factors of disadvantage because of where they live, their socio-economic background or whether they are experiencing family violence or homelessness. These attributes or identities are not currently protected under the EOA but should still be weighed up when addressing the disadvantage faced by people with disabilities. The words 'attributes' and 'identities' would suffice for the purposes of the Bill.

Objectives

VEOHRC welcomes the general themes reflected by public consultation on the Bill.

We note that each theme identified must be addressed from the perspective of a human rights and social models of disability. As outlined in 'Inclusive Victoria: state disability plan 2022-2026':

*"The United Nations Convention on the Rights of Persons with Disabilities definition of disability...describes people with disability as people who have long-term physical, mental, intellectual or sensory differences that, when interacting with inaccessible communities and environments, prevent full and equal community participation. This is often called the social model of disability. The social model of disability is an important way of perceiving inequality because it views disability as stemming from communities, services and spaces that are not accessible or inclusive. In the social model of disability, it is society that places limits on a person, not their disability."*¹

This is an important distinction to make between the medical or charity models, which places the burden on people with disabilities themselves and sees them in need of help.²

As such, VEOHRC supports a reference to these models of thinking within the first objective. VEOHRC suggests the updated objective could be modified to:

"Support and further promote the purpose and principles of the CRPD, including from a perspective that views disability as stemming from communities, services and spaces that are not accessible or inclusive."

While this is addressed further under the inclusion principles, it is important to include this in the objectives.

Other areas of the Bill

VEOHRC also supports the proposals in the Bill relating to:

- inclusion principles;
- disability impact assessments;

¹ [The social model of disability | Victorian Government \(www.vic.gov.au\)](http://www.vic.gov.au)

• ² [Youth Affairs Council Victoria | Four models of disability \(yacvic.org.au\)](http://yacvic.org.au)

- a state disability plan; and
- disability action plans.

We note that the principles of co-design and adequate funding of resources are crucial to the successful implementation of the Bill.

Thank you again for providing VEOHRC with an opportunity to input into the development of the proposed Bill. If you would like to discuss any of these points further, please contact me on commissioner@veohrc.vic.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ro Allen', written in a cursive style.

Ro Allen

Victorian Equal Opportunity and Human Rights Commissioner