AN EVALUATION OF THE MECHANISMS DESIGNED TO PROMOTE SUBSTANTIVE EQUALITY IN THE *EQUAL OPPORTUNITY ACT 2010* (VIC)

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As a society, we have learnt a great deal about the nature of discrimination in the four decades since it was first prohibited, yet our laws have not evolved despite being criticised for aiming at formal equality and failing to address discrimination on a systemic level. In 2010, Victoria enacted legislation aimed specifically at promoting substantive equality and targeting systemic discrimination. Using doctrinal and empirical methodologies, this article assesses the impact of the novel mechanisms in the Equal Opportunity Act 2010 *(Vic) which were designed to promote substantive equality: the objects clause; the definitions of direct and indirect discrimination; the obligation to make reasonable adjustments; special measures; and the duty to eliminate discrimination, sexual harassment and victimisation.*

CONTENTS

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I Introduction

There is no doubt that anti-discrimination laws have had a significant impact on how we behave in workplaces and schools and in how goods and services are delivered. Blatant examples of discrimination are uncommon. Today, an employer is unlikely to proclaim that a woman cannot train to be a pilot because she might become pregnant,[1] and a bartender cannot refuse to serve women.[2] Yet discrimination still exists as recent reports by the Australian Human Rights Commission ('AHRC') on pregnancy discrimination and sexual harassment show,[3] and various forms of discrimination are still hotly contested, as recent debates about the *Religious Discrimination Bill 2019* (Cth) revealed.[4]

[1] In a letter to the Women's Electoral Lobby explaining why national airline Ansett would not hire female pilots, owner Reg Ansett wrote that the airline was 'concerned with the provision of the safest and most efficient air service possible [and so] we feel that an all male pilot crew is safer than one in which the sexes are mixed': Chris Ronalds, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (Pluto Press, 2nd ed, 1991) 123. See also *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

[2] In one of the most famous instances, Merle Thornton and Rosalie Bogner protested by chaining themselves to the bar at the Regatta Hotel in Brisbane in 1965 when the bartender would not serve them because they were female: Merle Thornton, 'I'll Have What He's Having' (18 April 2020) *The Weekend Australian Magazine* 20.

[3] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, July 2014) ch 2; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) ch 3.

[4] See, eg, Paul Karp, 'Coalition's Religious Discrimination Bill Condemned by State and Territory Commissions', *The Guardian* (online, 15 October 2019) <https://www.theguardian.com/world/2019/oct/15/coalitions-religious-discrimination-bill-condemned-by-state-and-territory-commissions>, archived at <https://perma.cc/B2LA-

One explanation for why anti-discrimination laws have failed to address ongoing, systemic discrimination is that they contain few mechanisms designed to proactively address inequality. Anti-discrimination laws deal with discrimination after the fact rather than requiring employers or service providers to anticipate the discriminatory effect of their behaviour and do something about it. Despite these shortcomings, anti-discrimination laws have remained much the same since they were introduced[5] with some occasional tinkering to prohibit new grounds of discrimination,[6] permit exceptions,[7] change enforcement procedures,[8] and in response to unfavourable court decisions.[9]

In April 2010, following extensive community consultation and inquiry, new anti-discrimination legislation was enacted in Victoria. It remains the only jurisdiction to have overhauled its anti-discrimination laws in the last two

QD9E>; Tom Stayner, 'Religious Discrimination Bill Debated as the Measure Splits Public Opinion', *SBS News* (Web Page, 9 October 2019) <https://www.sbs.com.au/news/religious-discrimination-bill-debated-as-the-measure-splits-public-opinion>, archived at <https://perma.cc/4LNF-N8WF>.

[5] The Rudd–Gillard government abandoned the most recent attempt to consolidate and update the five federal anti-discrimination laws after it had spent three years consulting the community about it and drafting legislation: see Daniel Hurst, 'Discrimination Laws Go Back to the Drawing Board', *The Sydney Morning Herald* (online, 20 March 2013) <https://www.smh.com.au/politics/federal/discrimination-laws-go-back-to-the-drawing-board-20130320-2genj.html>, archived at <https://perma.cc/LUU8-4W4Q>.

[6] See, eg, *Age Discrimination Act 2004* (Cth) ('*ADA*'); *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1 pt 1 item 17, inserting *Sex Discrimination Act 1984* (Cth) ('*SDA*') ss 5A–5C to prohibit discrimination on the basis of sexual orientation, gender identity, and intersex status.

[7] See, eg, *Equal Opportunity Amendment Act 2011* (Vic) ss 18–19, amending *Equal Opportunity Act 2010* (Vic) ss 82–3 ('*EOA 2010*').

[8] See, eg, *Human Rights Legislation Amendment Act 2017* (Cth) sch 2 item 39, amending the *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b) to reduce the time limit by which a complaint must be lodged without risking termination of the complaint from 12 months to 6 months.

[9] For example, s 10 of the *Equal Opportunity Act 1995* (Vic) ('*EOA 1995*') stated that it is not necessary to prove that a person had the motive to discriminate. This was included in response to the Supreme Court's decision in *Department of Health v Arumugam* [1988] VR 319: Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Jan Wade, Attorney-General). See also s 5(2) of the *Disability Discrimination Act 1992* (Cth) ('*DDA*') which includes a positive obligation to make 'reasonable adjustments' for people with a disability, and was introduced in response to the High Court decision of *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*'): Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).

decades.[10] The *Equal Opportunity Act 2010* (Vic) ('*EOA 2010*') features a number of dynamic provisions which are not replicated elsewhere in the country. They were included in an attempt to address systemic discrimination and promote substantive, rather than formal, equality.[11] Introducing the Equal Opportunity Bill 2010 (Vic), Attorney-General Rob Hulls said:

> As much as we may champion the equal opportunity reforms of 30 years ago, our understanding of the way discrimination operates has changed. We now understand that we cannot satisfy the fair go by merely reacting to discrimination once it has occurred — that we must instead be positive and proactive about tackling it in all its various forms.[12]

The purpose of this article is to assess the impact of the novel mechanisms in the *EOA 2010* that were designed to promote substantive equality and target systemic discrimination: the Act's objects, which include: substantive equality; the definitions of direct and indirect discrimination; the obligation to make reasonable adjustments;[13] the definition of special measures; and the duty to eliminate discrimination, sexual harassment and victimisation.[14]

[10] The ACT amended the *Discrimination Act 1991* (ACT) in 2016 but it did not comprehensively change it in the same way as Victoria: see *Discrimination Amendment Act 2016* (ACT). The Northern Territory conducted a review of its legislation in 2017 but has yet to introduce any reforms: Department of the Attorney-General and Justice (NT), 'Modernisation of the *Anti-Discrimination Act*' (Discussion Paper, September 2017). The Western Australian government announced a review of the *Equal Opportunity Act 1984* (WA) in 2018 and the Western Australian Law Reform Commission has published terms of reference for that review but at the time of writing, it had yet to commence: 'Review Terms of Reference Released', *Government of Western Australia*, (Web Page, 21 April 2020) <https://www.wa.gov.au/government/announcements/review-terms-of-reference-released>. It is noted that, at the federal level, the *ADA* (n 6) came into force during this time frame but it is the same, in form and substance, to the existing federal Acts. The most significant change at the federal level was the introduction of s 351 of the *Fair Work Act 2009* (Cth) which prohibits discrimination in the workplace. Prior to this, only termination because of a listed attribute was unlawful. Section 351 is quite different from 'traditional' anti-discrimination laws, and as such it is not considered further.

[11] Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 2.

[12] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 789.

[13] A similar requirement already existed for employees with family responsibilities. It is now found in s 19 of the *EOA 2010* (n 7).

[14] Section 122 of the *EOA 2010* (n 7) also introduced a new dispute resolution model which, uniquely in Australia, allows the complainant to lodge their claim at the Victorian Civil and Administrative Tribunal ('VCAT'). Elsewhere, the equal opportunity agency must be given the opportunity to conciliate the claim first. As this article is concerned with the substantive law, this process will not be considered.

Part II explains the theoretical concepts which underpin the discussion of the *EOA 2010*: formal equality, substantive equality, reasonable adjustments and special measures. Part III outlines the framework of anti-discrimination laws and identifies the problems with these laws. It contains a brief history of the evolution of Victoria's anti-discrimination law, including the circumstances which led to the enactment of the *EOA 2010*. Part IV examines how well the novel mechanisms in the *EOA 2010* have achieved the government's stated aims, drawing on interviews with lawyers practising in Victoria and staff at the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), and case analysis. Part V shows that the revised definitions of discrimination have made it simpler to establish direct and indirect discrimination, and that courts have used the objects clause to interpret the Act beneficially. However, there is a general lack of awareness and understanding about the proactive aspects of the Act. Reasonable adjustments, while seen as a positive feature, are difficult to apply in practice, as are special measures, despite the Victorian Civil and Administrative Tribunal ('VCAT') having set out how they are to be applied. The duty to eliminate discrimination, sexual harassment and victimisation has not had any impact because it is not enforceable but, as Part VI sets out, that could be improved by giving the VEOHRC the power to enforce this provision.

II Conceptual Underpinnings

Equality is a fundamental idea of modern liberal democratic theory that traces its origins to early Greek philosophers, such as Aristotle.[15] Equality formed the foundation of new orders, such as the United States where it was enshrined in the *United States Declaration of Independence*. More recently, it was seen as fundamental to establishing democracy in South Africa.[16] Equality is included in international human rights documents, such as the *Universal Declaration of Human Rights*,[17] the *International Covenant on Civil and Political Rights*,[18] and

[15] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 9 ('*The Liberal Promise*').

[16] Equality is the first right in South Africa's Bill of Rights: C*onstitution of the Republic of South Africa Act 1996* (South Africa) s 9 ('*South African Constitution*').

[17] *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) art 1.

[18] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

the European Union's *Charter of Fundamental Rights*.[19] National bills of rights often contain an equality guarantee.[20]

There is a wealth of literature on the idea of equality and what it requires of judges, policymakers and society.[21] The following discussion has a modest aim. It defines the concepts of formal and substantive equality and locates four fundamental ideas of anti-discrimination law — direct discrimination, indirect discrimination, affirmative action and reasonable adjustments — within those definitions. This provides a context for the ensuing examination of the *EOA 2010* in Part III, particularly how it attempts to embrace substantive equality and avoid the conceptual problems which have plagued Australia's anti-discrimination laws.

A *Formal Equality*

In its simplest form, equality is the idea postulated by Aristotle — that everyone is equal and likes must be treated alike.[22] It follows that any act which attempts to distinguish between two like people is prohibited. Legislative definitions of direct discrimination encapsulate this approach by prohibiting less favourable treatment of a person based on certain attributes.[23] Direct discrimination occurs when likes are *not* treated alike. As a concept, formal equality has the advantage of being simple[24] and widely applicable, so it can be extended to other attributes as necessary. For instance, Victoria's anti-discrimination law originally prohibited discrimination based on two attributes: sex and marital status.[25] It now applies to 18 attributes.[26]

[19] *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 20.

[20] See, eg, *United States Constitution* amend XIV s 1; *Canada Act 1982* (UK) c 11, sch B pt I s 15(1) ('*Canadian Charter of Rights and Freedoms*'); *South African Constitution* (n 16) s 9.

[21] See, eg, Thornton, *The Liberal Promise* (n 15) ch 1; Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) ch 1; Catharine A MacKinnon, *Sex Equality* (Foundation Press, 2001) ch 1; Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537.

[22] Aristotle, *Nicomachean Ethics*, eds JL Ackrill and JO Urmston, tr David Ross (rev ed, Oxford University Press, 1980), cited in MacKinnon (n 21) 5–6.

[23] See, eg, *SDA* (n 6) s 5(1).

[24] Reg Graycar and Jenny Morgan, 'Thinking about Equality' (2004) 27(3) *University of New South Wales Law Journal* 833, 834.

[25] *Equal Opportunity Act 1977* (Vic) s 16(1).

[26] *EOA 2010* (n 7) s 6.

Formal equality encourages neutrality and assumes that individuals can be divested of their attributes.[27] This requires conformity which, in the past, has meant conformity with the Anglo-Celtic, able-bodied, heterosexual, Christian, male norm.[28] Formal equality insists that a person should be judged on merit alone, not by irrelevant characteristics related to their group membership, such as their race or sex. For this reason, formal equality is described as equal treatment, or a gender-neutral or colourblind approach.[29] However, this approach is limited because it requires conformity and consistency; it assumes that differences are always irrelevant. Moreover, if formal equality means likes must be treated alike, then the following, difficult, question must be: alike in what way? What does formal equality mean for people who are not alike; who start the race from different points? Consider, for example, a person with a disability compared with someone without. In this instance, same treatment will not necessarily enable the disabled person to participate fully and equally in society.

B *Deviating from Equal Treatment*

One way to overcome the limits of formal equality is to decide that strict adherence to equal treatment is not always required. Professor Hugh Collins identifies three instances where it is permissible to deviate from equal treatment.[30] The first is affirmative action or special measures, as discussed below.[31] The second is where the comparators are not actually alike, such as the disabled person in the example above. Collins provides the example of a pregnant woman compared with a man as another example of permissible deviation.[32] Finally, Collins says, equal treatment is not permissible when it disproportionately disadvantages one group compared with another: so-called indirect discrimination.[33]

Indirect discrimination occurs when a policy or practice which is facially neutral has an unequal effect on members of marginalised groups compared to non-members and is not reasonable. Indirect discrimination moves beyond equality of opportunity by looking at the outcome or impact of a seemingly

[27] Sandra Fredman, *The Future of Equality in Britain* (Working Paper Series No 5, Equal Opportunities Commission, 2002) 4.

[28] Thornton calls him the 'benchmark figure': Thornton, *The Liberal Promise* (n 15) 1.

[29] Fredman, *The Future of Equality in Britain* (n 27) iii.

[30] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *Modern Law Review* 16, 16–17.

[31] Ibid 17. See also below Part II(D).

[32] Collins (n 30) 16.

[33] Ibid 16–17.

neutral policy or practice on group members.[34] Professor Bob Hepple describes indirect discrimination as a 'half-way idea between "equality of opportunity" and the narrower usage of "discrimination"'.[35] He says that the adverse impact of the seemingly neutral requirement on the individual relates to equality of opportunity, while the defence of 'reasonableness' turns the inquiry to the '"merit" principle'.[36] Reasonableness means that the respondent must take account of the disadvantaged group's needs but only to the extent that it would not harm the respondent, such as, Hepple suggests, by hiring unqualified staff.[37] Professor Paul Gewirtz argues that indirect discrimination is limited in addressing inequality because it does not require difference to be accommodated; it only requires the respondent to change the neutral practice or requirement when it cannot be regarded as reasonable.[38]

C *Substantive Equality*

The discussion of the limits of formal equality suggests that an effective concept of equality must do more than remove formal barriers and ensure consistency; it must be flexible enough to deviate from equal treatment when needed and accommodate difference. Substantive equality requires equalising the starting point or the outcome, unlike equality of opportunity, which is a procedural requirement.[39] Conceptually, the former does not sit comfortably with liberalism due to the amount of control the state must wield to achieve the same outcome,

[34] Bob Hepple, 'Discrimination and Equality of Opportunity: Northern Irish Lessons' (1990) 10(3) *Oxford Journal of Legal Studies* 408, 413.

[35] Ibid. See also Fredman who says equality of opportunity 'steers a middle ground': Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001) 9, 20 ('Combating Racism with Human Rights').

[36] Hepple describes this as the employer being allowed to show whether a requirement is 'justifiable' in the British and Northern Irish context: Hepple (n 34) 413.

[37] Ibid. See also Fredman's discussion of how the merit principle and diversity have been resurrected as part of 'the business case' for equality: Fredman, *The Future of Equality in Britain* (n 27) 7–10. On the merit principle, see generally Christopher McCrudden, 'Merit Principles' (1998) 18(4) *Oxford Journal of Legal Studies* 543.

[38] Paul Gewirtz, 'The Triumph and Transformation of Antidiscrimination Law' in Austin Sarat (ed), *Race, Law, and Culture: Reflections on Brown v Board of Education* (Oxford University Press, 1997) 110, 120. Fredman also notes that this limits the ability of indirect discrimination to achieve equality of opportunity: Fredman, *The Future of Equality in Britain* (n 27) 6.

[39] Equality of opportunity does not require a particular standard of treatment, only the same treatment.

such as by ensuring workplaces are representative of the composition of society or by redistributing resources equally.[40] Equality of outcome sits closer to the goals of socialism, which puts it at odds with liberalism and democratic ideals.[41] However, equality of outcome is a useful diagnostic tool.[42] If equality of opportunity ensures the same rules apply to all players, equality of outcome examines the results of the competition and questions the rules of entry. If the same groups are always 'winning' and the same groups are always coming last, this is indicative of inequality.

While formal equality sees sex and race as irrelevant and unnecessary things to take into account in decision-making, substantive equality sees accommodating difference as essential to achieving equality.[43] A substantive approach recognises, for instance, that a disabled person starts in a different position from their able-bodied comparator and realises that it is necessary to accommodate that difference, whether that be in employment, education or the provision of goods and services, so that they can participate equally in society. Substantive equality encourages tailoring social policy to meet social realities.[44] However, the exact definition and aims of substantive equality are contested.[45] More importantly, it is not clear from this approach what an 'equal' society would look like or what indicators should be used to measure 'equality'.

D *Special Measures*

Accommodating difference is not an entire solution, particularly for overcoming systemic discrimination or the remnants of historic inequality. In those situations, it can be necessary to take proactive measures to equalise the starting

[40] See generally the fictitious example of a law faculty provided in Richard Delgado, 'Rodrigo's Fourth Chronicle: Neutrality and Stasis in Anti-Discrimination Law' (1993) 45(4) *Stanford Law Review* 1133, 1150. This has not meant that legislation targeted at results has not been introduced by liberal societies: see, eg, *Fair Employment (Northern Ireland) Act 1989* (NI) ss 36–7 ('*Fair Employment (Northern Ireland) Act*'); *Employment Equity Act*, SC 1995, c 44, s 2.

[41] See Fredman, 'Combating Racism with Human Rights' (n 35) 19.

[42] Ibid; Fredman, *Discrimination Law* (n 21) 15. Writing as his fictional character 'the Professor', Delgado queries why conservatives favour equality of opportunity over equality of results, stating '[i]f they were genuinely committed to neutrality, you would think that equal results would be the logical way to measure the effectiveness of racial programs': Delgado (n 40) 1148.

[43] Fredman, *Discrimination Law* (n 21) 25.

[44] Gewirtz (n 38) 124.

[45] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21(2) *South African Journal on Human Rights* 163, 167. Fredman proposes four substantive aims to move beyond equality of opportunity and results. She suggests that substantive equality should aim to break the cycle of disadvantage, promote equal dignity and worth, entail positive affirmation of identity, and facilitate full participation in society.

points of the marginalised group and the majority. Affirmative action, positive discrimination and (in international law and in Australia) special measures,[46] are all terms to describe measures that do more than simply remove barriers.

Special measures are the preferential treatment of a marginalised group and the allocation of preference based on a group characteristic. They can range from soft measures, such as recruitment programs designed to increase the representation of particular groups in an employment sector,[47] to harder forms, such as quotas,[48] which are more complex because they can be seen as 'reverse discrimination'.[49]

Special measures sit uncomfortably with formal equality. By definition, these measures offend formal equality because they treat people differently based on an attribute, despite the fact that their purpose is to correct historic disadvantage.[50] A substantive approach recognises that they are not an exception to equality but are one way of achieving equality.[51]

[46] Special measures are permitted by the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 2(2) and the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 4(1).

[47] See, eg, *Fair Employment (Northern Ireland) Act* (n 40) which required employers to take measures to ensure a fair proportion of Catholics and Protestants in their workforces. It has since been extended and altered: see *Fair Employment and Treatment (Northern Ireland) Order 1998* (NI) SI 1998/3162, pt VII.

[48] For example, a quota system was introduced to increase the representation of Catholics in the Northern Irish police force: *Police (Northern Ireland) Act 2000* (NI) s 46(1). In Australia, the Federal Court has permitted quotas so long as they are proportionate to the goal sought to be achieved: *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, 168 [60]–[62] (Crennan J).

[49] Although related to affirmative action, 'reverse discrimination' is a more controversial expression and refers to selecting a candidate from a designated group in preference to a better qualified candidate who is not from that group: Fredman, *Discrimination Law* (n 21) 249.

[50] To avoid this, most anti-discrimination laws provide that special measures are an exception to the prohibition of discrimination: see, eg, *SDA* (n 6) s 7D(2).

[51] For example, the *South African Constitution* (n 16) s 9(2) states: 'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' On the relationship of affirmative action to equality, see Fredman, *Discrimination Law* (n 21) ch 5.

E *Reasonable Adjustments*

Professor Colm O'Cinneide writes that in the context of disability, reasonable accommodation or adjustment provisions are a form of positive action which require due regard to be given to 'social norms, practices and expectations which disadvantage disabled people'.[52] Reasonable adjustment provisions require an employer or service provider to make adjustments for a person with a disability, rather than insisting on sameness and forcing them to meet the able-bodied norm.[53] The concept is central to the *Convention on the Rights of Persons with Disabilities*, which requires the reasonable accommodation of people with a disability so that they may fully enjoy their human rights.[54] By taking an attribute into consideration, rather than insisting on sameness, reasonable adjustments is a substantive equality concept.

The concept of reasonable adjustments has had limited use in Australia and is only found in the *Disability Discrimination Act 1992* (Cth) ('*DDA*') at the federal level, and at the state and territory level, in South Australia, the Northern Territory and, since 2010, in Victoria.[55] The South Australian and the Northern Territory Acts state that the failure to reasonably accommodate a disability amounts to discrimination if it is unreasonable.[56] The *DDA* says that the failure to make a reasonable adjustment for a person with a disability amounts to discrimination.[57]

[52] Colm O'Cinneide, 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005) 219, 220. O'Cinneide distinguishes them from positive duties which require disability rights to be considered from the outset, whereas reasonable accommodation only requires existing structures to be altered:.

[53] Ibid 219–20.

[54] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) arts 5, 24.

[55] The Australian Capital Territory recognises in the objects of its Act that achieving substantive equality may require reasonable adjustments and accommodation to be made but the Act does not otherwise refer to the concept: *Discrimination Act 1991* (ACT) s 4(d)(iii).

[56] *Equal Opportunity Act 1984* (SA) s 66(d); *Anti-Discrimination Act 1992* (NT) s 24.

[57] *DDA* (n 9) ss 5(2)(b), 6(2)(b). An adjustment is reasonable unless making it 'would impose an unjustifiable hardship' on the respondent: at s 4(1) (definition of 'reasonable adjustment'). For a comprehensive discussion of the approach in the *DDA* (n 9), see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 358–69. See generally Emma Purdue, 'Scoping Reasonable Adjustments in the Workplace: A Comparative Analysis of an Employer's Obligation to Accommodate a Worker's Disability under Australian and Canadian Laws' (2017) 30(2) *Australian Journal of Labour Law* 185.

F *Formal or Substantive Equality?*

There is scope for both formal and substantive concepts of equality in law and policymaking. Professor Sandra Fredman writes:

> The choice between different conceptions of equality is not one of logic but of values or policy. Equality could aim to achieve the redistributive goal of alleviating disadvantage, the liberal goal of treating all with equal concern and respect, the neo-liberal goal of market or contractual equality, and the political goal of access to decision-making processes.[58]

It is necessary to prohibit decision-making based on irrelevant characteristics, such as the colour of a person's skin or their sex, and to provide an individual victim with a remedy for unfair treatment. In other instances, it may be necessary to accommodate difference, such as a disability or religious observance, or to develop measures to overcome historic disadvantage, such as the disadvantage experienced by Australia's Indigenous peoples. Therefore, it is not necessary to choose one approach over the other; there is room to accommodate both. As Part III shows, when it introduced the *EOA 2010*, the Victorian government made a conscious attempt to redirect the law towards substantive equality, acknowledging that previous iterations of the law had not addressed ongoing, systemic discrimination.

III Victoria's Anti-Discrimination Laws

A *The Problems with Anti-Discrimination Laws*

Each Australian state and territory has enacted anti-discrimination legislation[59] operating in parallel to Commonwealth legislation.[60] By and large, these laws are much the same across the country. Direct and indirect discrimination are prohibited on a range of attributes in a number of areas.[61] That is not to say

[58] Fredman, *Discrimination Law* (n 21) 2–3.

[59] The first was South Australia which enacted the *Sex Discrimination Act 1975* (SA) and the *Racial Discrimination Act 1976* (SA), both of which have since been repealed and replaced with the *Equal Opportunity Act 1984* (SA). Tasmania was the last jurisdiction to prohibit discrimination with the *Anti-Discrimination Act 1998* (Tas).

[60] *Racial Discrimination Act 1975* (Cth) ('*RDA*'); *SDA* (n 6); *DDA* (n 9); *ADA* (n 6).

[61] For a list of the attributes and areas covered by each statute, see Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 296, 302, 308.

that the laws are consistent. There are variations in how discrimination is defined and which attributes are protected. Different forms of discrimination are permitted through exceptions to each Act and these vary across jurisdictions.[62] The state and territory Acts are not always consistent with the four Commonwealth Acts.[63] Procedurally, the laws are similar. In every jurisdiction there is a statutory equality agency that is responsible for receiving complaints and providing alternative dispute resolution services.[64] Claims that cannot be resolved this way are heard by civil tribunals or by the federal courts. None of the agencies can enforce the law.

Commentators have identified multiple problems with anti-discrimination laws and their enforcement. First, the definitions of direct and indirect discrimination have been interpreted technically and restrictively.[65] Second, in most instances the complainant bears the entire onus of proof and it is often difficult for them to obtain evidence to meet their burden.[66] This has resulted in jurisprudence that favours respondents.[67] Third, the body of case law is small. The vast majority of discrimination complaints do not reach a court hearing; they are settled or withdrawn earlier.[68] As will be discussed in the next Part, the changes introduced in the *EOA 2010* were intended to address some of these problems. The difficulties of proving discrimination are a factor in deciding to

[62] See generally Rees, Rice and Allen (n 57) 371–405.

[63] The state laws were initially held to be inconsistent with federal laws and invalid due to the operation of s 109 of the *Constitution*, which provides that where a Commonwealth and State law are inconsistent, the former prevails to the extent of the inconsistency: see *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447. Territory laws are not affected by s 109 of the *Constitution* because their legislatures are subordinate to the Commonwealth's, following their surrender by the states, under *Constitution* s 122: *Northern Territory v GPAO* (1999) 196 CLR 553, 580 [53] (Gleeson CJ and Gummow J), 636 [219] (Kirby J); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 466–7 [54], [56] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[64] Gaze and Smith (n 61) 176.

[65] A notable example is *Purvis* (n 9). On the interpretation of anti-discrimination law, see also Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 340–53. See also below Part IV which compares the older definitions in the *EOA 1995* (n 9) to the *EOA 2010* (n 7).

[66] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 582–3; Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 539.

[67] *New South Wales v Amery* (2006) 230 CLR 174, 200–2 [86]–[91] (Kirby J) ('*Amery*'). For a discussion of this problem at the federal level, see Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25(3) *Alternative Law Journal* 125, 126.

[68] Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 778 ('Behind the Conciliation Doors').

settle, as is the cost of litigating. For those complainants who are successful, compensation awards are not high and may not cover their legal fees.[69]

More broadly, the process of resolving a discrimination claim centres around the individual who experienced discrimination. They are required to lodge a claim at a statutory equality agency which will attempt to resolve the claim through conciliation. If conciliation is unsuccessful, the complainant can litigate.[70] This process is privatised in the sense that the dispute resolution process is confidential, the statutory agencies release very little information about the nature of claims or their settlement, and settlement agreements usually include a confidentiality clause.[71] This makes it difficult to assess whether the process is operating effectively and for the law to have what Emerita Professor Margaret Thornton terms a 'ripple' effect: addressing other instances of discrimination.[72]

Anti-discrimination laws impose very few obligations on employers and service providers either to address inequality or to anticipate the discriminatory consequences of their behaviour; they do not have to do anything until a successful claim has been made against them and even in that instance, they are most likely to be ordered to pay compensation rather than to make wider, structural changes.[73]

B *Victoria's Anti-Discrimination Laws*

Victoria's first anti-discrimination law, the *Equal Opportunity Act 1977* (Vic), prohibited direct discrimination on the basis of sex and marital status in the areas of employment, education, accommodation and the provision of goods and services.[74] In the 30 years that followed, the list of protected attributes was

[69] See ibid 786–8.

[70] See, eg, *EOA 2010* (n 7) s 122.

[71] Allen, 'Behind the Conciliation Doors' (n 68) 795.

[72] Margaret Thornton, 'Revisiting Race' in Zita Antonios (ed), *The Racial Discrimination Act 1975: A Review* (Australian Government Publishing Service, 1995) 81, 84.

[73] Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83, 99–104.

[74] *Equal Opportunity Act 1977* (Vic) ss 16, 18, 25–7.

expanded[75] but the aim of the law and its conceptual underpinnings were not altered, nor was the enforcement model.

In August 2007, the Brumby Labor government announced a Review of the *Equal Opportunity Act 1995* (Vic) ('*EOA 1995*').[76] The Review's terms of reference required it to consider whether 'technical' aspects of the legislation could be improved, ways to reduce the 'red tape' involved in making a complaint, options for addressing systemic discrimination and taking systemic approaches, and the VEOHRC's role, including whether it required additional powers or functions so that it could better address discrimination.[77] Announcing the Review, Attorney-General Rob Hulls said it was 'the government's intention to ensure that systemic discrimination, if and where it exists, can be appropriately dealt with by the [VEOHRC]'.[78] Hulls said that the Review would draw upon the experience of comparable jurisdictions which had 'introduced innovative ways to try to overcome discrimination that has become entrenched in policy and practice'.[79]

The impetus for reviewing the State's anti-discrimination laws arose from the introduction of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') and Labor's commitment during the 2006 election to enhance the State's anti-discrimination laws.[80] Section 8 of the *Charter* protects equality before the law, gives each citizen the right to equal protection of the law, guarantees the right to protection from discrimination and confirms that measures taken to assist or advance a group of disadvantaged people do not constitute discrimination. The *Charter* also requires statutes to be interpreted in a way that is compatible with human rights.[81]

[75] *Equal Opportunity (Discrimination against Disabled Persons) Act 1982* (Vic) s 3(1); *Equal Opportunity Act 1984* (Vic) ss 4(1) (definition of 'impairment'), 17(5), 21; *EOA 1995* (n 9) s 6; *Equal Opportunity (Breastfeeding) Act 2000* (Vic) s 3; *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) s 5; *Equal Opportunity Amendment Act 2007* (Vic) s 4.

[76] The Victorian Parliament's Scrutiny of Acts and Regulations Committee ('SARC') reviewed the exceptions and exemptions in the *EOA 1995* (n 9): Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (Final Report, November 2009) ('*SARC Report*'). See generally Margaret Thornton, 'Excepting Equality in the Victorian Equal Opportunity Act' (2010) 23(3) *Australian Journal of Labour Law* 240 ('Excepting Equality').

[77] Department of Justice (Vic), *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) 11 ('*Gardner Report*').

[78] 'Victoria Reviews Equal Opportunity Laws', *The Sydney Morning Herald* (online, 23 August 2007) <https://www.smh.com.au/national/victoria-reviews-equal-opportunity-laws-20070823-gdqxmq.html>, archived at <https://perma.cc/XN65-8AQ3>.

[79] Ibid.

[80] Ibid; *Gardner Report* (n 77) 11.

[81] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32 ('*Charter*').

The Review, conducted by former Public Advocate Julian Gardner, released its final report in June 2008.[82] Gardner recommended that the Act take a more proactive approach to tackling discrimination, explicitly articulate its goal of eliminating discrimination, and include measures to address systemic discrimination.[83] Systemic discrimination was defined as 'patterns or practices of discrimination that are the result of interrelated policies, practices and attitudes that are entrenched in organisations or in broader society [which] create or perpetuate disadvantage for certain groups'.[84] Gardner made 93 recommendations for how the Act could be improved and move beyond formal equality.[85] These recommendations included amending the Act's objects and definitions of discrimination, and changing the focus of the VEOHRC from an agency that primarily provides dispute resolution services to one that is an advocate for the Act.[86]

The *EOA 2010* contains five novel mechanisms designed to promote substantive equality: the objects clause; the definitions of direct and indirect discrimination; the obligation to make reasonable adjustments for persons with a disability; the definition of special measures; and the duty not to engage in discrimination, sexual harassment or victimisation.[87] They are explained in detail below in Part IV which examines their impact based on case analysis and interview data.

The government did not implement all of Gardner's recommendations. Notably, apart from introducing direct access to VCAT for complainants, the enforcement model was not changed.[88] The changes to dispute resolution are not considered herein as those changes were not made for the express purpose of

[82] *Gardner Report* (n 77).

[83] Ibid 12.

[84] Ibid 11.

[85] Ibid 14–19. The government's initial response was that it hoped to implement these recommendations: 'Vic Equal Opportunity Laws "Out of Date": Report', *ABC News* (Web Page, 31 July 2008) <https://www.abc.net.au/news/2008-07-31/vic-equal-opportunity-laws-out-of-date-report/459548>, archived at <https://perma.cc/DFU6-G2L4>. Immediate changes were made to the VEOHRC's governance: *Equal Opportunity Amendment (Governance) Act 2009* (Vic).

[86] *Gardner Report* (n 77) 16.

[87] Note that these changes were all recommended by the *Gardner Report* as a suite of measures aimed at achieving substantive equality: ibid 37.

[88] The VEOHRC was originally given new powers to enforce the Act but they were removed following a change in government before the Act came into force: *Equal Opportunity Amendment Act 2011* (Vic). The powers are discussed below in Part V.

promoting substantive equality; they were designed to make it simpler for an individual to bring a claim and reduce the VEOHRC's workload so that it could play a 'more active' role in eliminating discrimination.[89]

IV An Assessment of the Impact of the Novel Mechanisms in the *EOA 2010*

A *Research Methodology*

The purpose of this article is to assess the impact of the novel mechanisms in the *EOA 2010* which were designed to promote substantive equality and target systemic discrimination. The word 'novel' is used to describe these mechanisms because, apart from the definition of indirect discrimination, they were not found in other Australian anti-discrimination legislation in 2010. The impact of these changes was assessed using doctrinal, empirical, and documentary methodologies.

VCAT heard 188 cases under the *EOA 2010* between its first decision in September 2011 and December 2018. This article considers the 75 substantive decisions and the 43 exemption applications it heard during this period. It excludes strike out applications, costs orders and other procedural applications. The Supreme Court and the Court of Appeal heard 11 and 15 cases respectively about the *EOA 2010* during this period, which are also considered.

Most claims are settled confidentially either through conciliation at the VEOHRC or mediation at VCAT which means that what takes place at court is not the full story of how discrimination is experienced or addressed. The doctrinal analysis was supplemented with semi-structured interviews conducted with staff at the VEOHRC (namely conciliators, legal advisers, educators and policy officers) and solicitors and barristers practising in discrimination law in Victoria,[90] as shown in Table 1. The VEOHRC identified suitable interview participants from amongst its staff and invited them to participate. Solicitors and barristers were identified based on their expertise in the field, including their experience in appearing in *EOA 2010* claims. Participants also suggested practitioners they knew with expertise in the field who were then invited to participate.

[89] Gardner Report (n 77) 8.

[90] The research was approved by the Department of Justice (Victoria) Human Research Ethics Committee (Project No CF/16/23372) and Monash University Human Ethics Committee (Project No 8648).

Table 1: Interview Participants

Solicitors	19
Barristers	4
VEOHRC staff	12
Total	**35**

The interviews took place between mid-2017 and early 2019 as part of a broader study of the *EOA 2010*. Participants were asked a range of questions about the operation of the *EOA 2010*. This article reports on the questions designed to gauge the participants' opinion of the Act's novel mechanisms and their experience dealing with them at the VEOHRC and in legal practice. The interview questions were designed to explore the participants' opinions and experience, so the data has no quantitative explanatory power. Not every participant commented on every question; their answers depended on their experience. This was particularly so for the lawyers because some were engaged early in the process, whereas others (particularly the barristers) were not involved until a claim was filed at VCAT.

This Part considers the impact of the five novel mechanisms in the *EOA 2010*, in particular how effectively they are promoting substantive equality. They are considered in the following order: the objects clause; the definitions of direct and indirect discrimination; the obligation to make reasonable adjustments for a person with a disability; special measures; and the duty not to engage in discrimination, sexual harassment or victimisation.

B *The Act's Objects*

Over the decades, courts have interpreted anti-discrimination statutes increasingly narrowly. In his Honour's last decision in a discrimination case, Kirby J lamented that in early cases, the High Court's 'successive conclusions in these cases reflected the beneficial interpretation of the laws in question, ensuring they would achieve their large social objectives … [but now] [t]he wheel has turned'.[91] Professor Beth Gaze writes that although the High Court has said that the legislation is remedial and should be construed beneficially, it has found

[91] *Amery* (n 67) 200 [87]–[88].

reasons not to do so.[92] Thornton and Associate Professors Belinda Smith and Alysia Blackham have all documented how lower courts have taken a narrow approach to interpretation.[93]

Courts are required to interpret legislation in accordance with the objects clause when a provision's meaning is unclear and in a way that furthers the purpose or object of the Act,[94] not in isolation but in the context of the other provisions in the statute.[95] Gaze writes that judges have approached anti-discrimination statutes similarly to any other kind of statute and given effect to the words, rather than viewing them as the type of law with a higher status that required a different approach to interpretation.[96] She is also critical of their objects clauses, writing that they

> frequently repeat the motherhood statements of commitment to equality and elimination of discrimination, without addressing the harder issue of to what degree this commitment is to be enforced.[97]

Protecting the right to equality, identifying and eliminating systemic discrimination, and how to progressively achieve equality are included in the *EOA 2010*'s objects clause.[98] Section 3 states, in part, that the *EOA 2010*'s objects are:

> (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
>
> (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
>
> (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
>
> (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—

[92] Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 65) 332.

[93] Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31, 48–53; Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3, 19–23 ('From *Wardley* to *Purvis*'); Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760.

[94] *Interpretation of Legislation Act 1984* (Vic) s 35(a).

[95] *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

[96] Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 65) 332.

[97] Ibid 330.

[98] The *Gardner Report* (n 77) 35–7 recommended that the Act's objects should recognise the need to progressively achieve substantive equality.

> (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
>
> (ii) equal application of a rule to different groups can have unequal results or outcomes;
>
> (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures …

The new objects clause addresses Gaze's concern in that it identifies the degree to which discrimination is to be eliminated ('to the greatest possible extent') and acknowledges that equality will be achieved progressively. The other notable features of s 3 are that it recognises the Act's relationship with the *Charter* and that discrimination can have systemic causes; it acknowledges that equality is not about 'sameness' and that it will be necessary to take account of past practices to realise equality.

The Supreme Court has referred to the objects clause on one occasion. In *Owners Corporation OC1-POS539033E v Black* ('*Black*'), the Court said that the *EOA 2010*'s objectives 'are emphatic' and leave 'little if any room' to read down its provisions.[99] The applicant had argued that, although the Act is remedial legislation to be construed beneficially, it is too simplistic to require all of its provisions to be interpreted liberally.[100] The Court disagreed. Justice Richards said:

> [T]he [*EOA 2010*] should generally be interpreted to give the widest possible effect to provisions that prohibit discrimination and promote equality. Correspondingly, courts should be slow to read down general provisions in the [*EOA 2010*] by implication, in the absence of express words of limitation.[101]

[99] (2018) 56 VR 1, 19 [61] (Richards J) ('*Black*'). The VEOHRC was given leave to appear as an amicus curiae and argued that the *EOA 2010* (n 7) should be interpreted in accordance with the right to equality in the *Charter* (n 81): *Black* (n 99) 16–17 [51]–[53].

[100] Ibid 15 [46].

[101] Ibid 18 [57].

VCAT has described the *EOA 2010* as 'protective legislation'[102] and 'remedial legislation'[103] and said it should be interpreted broadly and beneficially.[104] The Tribunal has used the objects clause in only a handful of cases: to interpret direct[105] and indirect discrimination,[106] to ascertain whether an exception applies,[107] and to define 'disability'.[108] It is worth noting that Victoria Legal Aid represented the complainant in each of these four VCAT cases, and that it operates a specialist equality law practice.[109] Victoria Legal Aid briefed the same barrister in three of those cases.[110] Each was heard by a different VCAT member.[111] This suggests that VCAT is more likely to take the objects of the Act into account when it is invited to do so by lawyers who have a degree of sympathy for, and understanding of, the nature of the Act.

C *Defining Discrimination*

One of the criticisms of anti-discrimination law is that claims are hard to prove because the onus of proof rests on the complainant, the respondent controls most of the evidence, and courts are reluctant to draw an adverse inference based on the available evidence.[112] These difficulties are made worse by the legislative definitions of direct and indirect discrimination which are complex and

[102] *Dirckze v Holmesglen Institute* [2015] VCAT 1116, [12] (Member Dea) ('*Dirckze*').

[103] *Ferris v Department of Justice and Regulation* [2017] VCAT 1771, [87] (Harbison V-P) ('*Ferris*').

[104] *Arora v Melton Christian College* [2017] VCAT 1507, [136] (Member Grainger) ('*Arora*'). For example, in *Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd* [2015] VCAT 269 ('*Bevilacqua*'), VCAT was asked to determine whether severe morning sickness constituted a disability. Senior Member Proctor said that the *EOA 2010* (n 7) was to be interpreted in such a way that is favourable to those who were intended to benefit from it, which includes pregnant employees: at [198].

[105] *Slattery v Manningham City Council* [2013] VCAT 1869, [47] (Senior Member Nihill) ('*Slattery*').

[106] *Petrou v Bupa Aged Care Australia Pty Ltd* [2017] VCAT 1706, [106]–[107] (Harbison V-P) ('*Petrou*').

[107] *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936, [78] (Member Dea) ('*Ingram*').

[108] *Bevilacqua* (n 104) [198].

[109] The Equal Opportunity Legal Service was established in 2011 to provide legal advice and representation for complainants in discrimination, harassment and vilification matters: Victoria Legal Aid, *Seventeenth Statutory Annual Report 2011–12* (Report, 29 August 2012) 31.

[110] Sarala Fitzgerald appeared for Ms Bevilacqua, Mr Slattery and Ms Petrou.

[111] *Bevilacqua* (n 104); *Slattery* (n 105); *Petrou* (n 106); *Ingram* (n 107).

[112] Hunyor (n 66) 539; Allen, 'Reducing the Burden of Proving Discrimination in Australia' (n 66) 582–7.

have been interpreted in an overly technical manner by superior courts.[113] In the Victorian context, 'discrimination' in the *Charter* is defined by the *EOA 2010*[114] so its meaning has a broader impact.

One of the changes that the Gardner Review recommended to support the Act's objective of promoting substantive equality was to change the definitions of direct and indirect discrimination.[115] These recommendations were implemented, as discussed below, except for the suggestion that direct discrimination should be defined to reflect the Act's purpose and the aim of progressively achieving substantive equality.[116] The Gardner Review did not propose a definition. Direct discrimination is aimed at formal equality so it is difficult to conceive of how a definition of this kind would be worded. If the Act's objects are taken into account when determining a direct discrimination claim, this may well lead to a beneficial interpretation. By and large, however, the objects have not been used in this way, though they may be in future following the Supreme Court's 2018 decision in *Black*.

1 *Direct Discrimination*

To establish direct discrimination under the *EOA 1995*, the complainant had to prove that they were treated less favourably because of an attribute.[117] Two aspects of this definition were problematic.[118] First, the complainant had to show that a hypothetical person without the attribute was treated differently (the comparator). This is a conceptual problem — there must be a difference in treatment because equal treatment, even if it is poor treatment, is not discrimination. Courts devised the comparator as a tool to determine whether there was a difference in treatment, but since the High Court's decision in *Purvis v*

[113] The most notable is the High Court's decision in *Purvis* (n 9) which is discussed below in Part IV(C)(1). On the Court's approach to interpretation, see generally Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 65); Smith, 'From *Wardley* to *Purvis*' (n 93).

[114] *Charter* (n 81) s 3.

[115] *Gardner Report* (n 77) 85–9.

[116] Ibid 85–7.

[117] *EOA 1995* (n 9) s 8.

[118] This is not unique to Victoria. All of the statutes except the Australian Capital Territory's and the *RDA* (n 60) use a comparative test and all except the *RDA* (n 60) include the causation requirement: *ADA* (n 6) s 14(a); *DDA* (n 9) s 5(1); *SDA* (n 6) s 5(1); *Discrimination Act 1991* (ACT) s 8(2); *Anti-Discrimination Act 1977* (NSW) ss 7(1)(a), 24(1)(a), 38B(1)(a), 39(1)(a), 49B(1)(a), 49T(1)(a), 49ZG(1)(a), 49ZYA(1)(a); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 10(1); *Equal Opportunity Act 1984* (SA) s 6(3); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Equal Opportunity Act 1984* (WA) s 8(1).

New South Wales ('*Purvis*'), it has been construed restrictively and complainants have found it increasingly difficult to establish.[119] The second problem was proving that the less favourable treatment was because of the attribute (causation). While the complainant did not have to prove the respondent's motive,[120] they had to prove that the reason for the respondent's behaviour was the listed attribute.[121] In the absence of direct evidence, this is very difficult.

Section 8 of the *EOA 2010* defines direct discrimination as unfavourable treatment (or proposed treatment) that occurs because of an attribute. The Explanatory Memorandum said that the move from 'less favourable' to 'unfavourable' treatment removed the comparator requirement.[122] The causation requirement remains.[123]

VCAT has said that although it is not defined, unfavourable treatment bears 'its ordinary meaning which includes adverse treatment and humiliation'.[124] In *Slattery v Manningham City Council* ('*Slattery*'), Senior Member Nihill said that the change in wording from 'less favourable' to 'unfavourable' was 'significant' and 'a purposeful one, not an inadvertent one'.[125]

In *Aitken v Department of Education and Early Childhood Development (Vic)*, counsel for the applicant sought leave to appeal on the basis that whether or not a comparator was required 'was a matter of general or public importance'.[126] Referring to the Explanatory Memorandum, the Court of Appeal said it was 'doubtful' as to whether a comparison was required under the *EOA*

[119] See also Smith, 'From *Wardley* to *Purvis*' (n 93).

[120] *EOA 1995* (n 9) s 10.

[121] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 401 (McHugh J).

[122] Explanatory Memorandum (n 11) 12–13. The Australian Capital Territory already used 'unfavourable' treatment: *Discrimination Act 1991* (ACT) s 8(2).

[123] In *Obudho v Patty Malones Bar Pty Ltd* [2015] VCAT 1521 ('*Obudho*'), VCAT said that, while the complainant does not have to show that the attribute was the sole reason for the unfavourable treatment, it must be a substantial one and in order to show this, they must prove that there is 'a link between the conduct in issue and the attribute': at [51] (Member Dea). See also *Ingram* (n 107) [16] (Member Dea). The test was misstated in *Jemal v ISS Facility Services Pty Ltd* [2015] VCAT 103 ('*Jemal*'), where VCAT said that the test was 'whether there is a causal link between the actions of [the respondent] and the unfavourable treatment': at [117] (Member Phillips). There was insufficient evidence to establish race discrimination in that case, and the respondent was not aware of the complainant's disability, so he was also unable to establish disability discrimination: *Jemal* (n 123) [133]–[135]. Abandoning the comparator test has not led to VCAT placing greater weight on the causation test; it continues to operate in the same way.

[124] *Obudho* (n 123) [32]. See also *Dirckze* (n 102) [76] (Member Dea); *Aitken v Department of Education & Early Childhood Development* [2012] VCAT 1547, [156] (Ginnane V-P).

[125] *Slattery* (n 105) [38]–[39].

[126] (2013) 46 VR 676, 687 [43] (Neave and Priest JJA) ('*Aitken*').

2010 and that this was 'an unresolved question of law in Victoria'.[127] VCAT has said consistently that a comparator is not required. In *Kuyken v Chief Commissioner of Police (Vic)*, the Supreme Court said that VCAT had applied the correct test when it said that it was not necessary to identify a comparator.[128] In *Slattery*, Senior Member Nihill said that while it might be useful to engage in a comparative analysis, s 8 did not require her to do so.[129] It required 'an analysis of the impact of treatment on the person complaining of it'.[130] In that case, in response to Slattery's behaviours (a compulsion to complain, and aggressive, irrational and antisocial behaviour), the respondent Council indefinitely banned him from attending any building that it owned, occupied or managed. VCAT found that these behaviours were a manifestation of Slattery's disabilities.[131] Senior Member Nihill said that the new test asked her to consider whether the respondent treated the complainant unfavourably because of the symptoms of his disability or for other reasons.[132] She found that the treatment was unfavourable to Slattery because he could not participate in the Council's activities or access its services for an indefinite period.[133] Finding for the complainant, she said that the reasons that the Council ultimately banned Slattery

127 Ibid 687 [45]–[46]. The Court of Appeal said that assuming that a comparator is required under the *EOA 2010* (n 7), VCAT did not fail to take account of that and so it did not grant leave to appeal on this basis: at 687 [48], 688 [50].

128 (2015) 249 IR 327, 357 [98] (Garde J).

129 *Slattery* (n 105) [51]. The respondent had argued that it was impossible to show that a person had been treated unfavourably without a comparative analysis: at [50]. In *Obudho* (n 123), Member Dea said that although the complainant is not required to prove that they were treated unfavourably compared to a person without the attribute in question, a comparison may be a relevant factor when considering whether or not there has been unfavourable treatment: at [32].

130 *Slattery* (n 105) [53] (Senior Member Nihill). Although not binding, both the Court of Appeal in *Aitken* (n 126) 687 [46] and VCAT in *Slattery* (n 105) [43]–[45] referred to the Australian Capital Territory Administrative Appeals Tribunal's decision in *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729 ('*Prezzi*'). Section 8(2) of the *Discrimination Act 1991* (ACT) also uses 'unfavourable' treatment. In *Prezzi* (n 130) the Tribunal said that s 8(2) does not require a comparison, but rather '[a]ll 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': at 736 [24] (Curtis P, Members Attwood and Corkery).

131 *Slattery* (n 105) [80].

132 Ibid [84].

133 Ibid [57].

were complicated and although his disability was not the only reason for the treatment, it was a substantial one.[134]

Slattery clearly illustrates that the new test operates differently from earlier tests. Under the *EOA 1995*, VCAT would have had to ask how the respondent Council would have treated a person without the complainant's disabilities who behaved in the same way.[135] In Slattery's case, the comparator test would have posed a significant problem because, following the High Court's decision in *Purvis*, the manifestations of his disability (which were the reasons for his unfavourable treatment) are not considered as part of the disability. The High Court said that the appropriate comparator is a person who engaged in the same behaviour as the complainant but who did not have a disability.[136] If the respondent would also have banned that person, Slattery would not have been discriminated against.

The theme that emerges from the comments that the interview participants made about the new test for direct discrimination is 'simplicity'. Compared to its predecessor, s 8 was described as 'cleaner', a 'clearer test' and a 'more accessible definition'. A respondent solicitor said that 'to come up with a meaningful comparator, is a difficult and often artificial exercise' and 'diabolically difficult', so removing that element was a 'positive amendment'. A barrister said that 'the old comparator thing was a costly and difficult exercise. So it's just easier and simpler now'. Two complainant solicitors pointed out that the simplified test of direct discrimination meant that they were more likely to use the Victorian system than the federal one. One said that the new definition was 'a major reason to choose to go to VCAT' because it is 'almost impossible to be successful where there's a comparator'. The other said that the comparator test was 'one of the reasons why I don't really like operating in the federal jurisdiction'.

It was clear from what the participants said that the new definition has had a positive effect. Some of the lawyers, primarily those representing complainants, said that it had made it easier for the complainant to prove direct discrimination. A complainant solicitor said removing the comparator had 'reduced an unnecessary and artificial threshold'. A respondent solicitor thought that it was an improvement because 'it's very difficult [for complainants] to … have evidence or be able to disprove evidence around comparative style information'. Another respondent solicitor said that the new test made it easier for

[134] Ibid [119].

[135] Ibid [38].

[136] *Purvis* (n 9) 100–1 [11]–[12] (Gleeson CJ), 161 [224]–[225] (Gummow, Hayne and Heydon JJ). Cf McHugh and Kirby JJ who found that the child's behaviour was a manifestation of his disability and should be excluded from the construction of the comparator: at 134 [128]–[129], 137 [137].

complainants to establish their claim but thought that 'if that's at the expense of artificiality or conceptual complexity then I think that's probably a good thing'. However, a barrister said that they did not like the change much because, they said, 'it's really changed the landscape, trying to understand how do you defend it? … What's the metric for unfavourable? There's no comparator it's just … this broader landscape, it's just harder'.

Complainant and respondent lawyers both said that it is easier to provide advice because the test is clearer and 'easier to explain to clients'. A respondent lawyer said that the comparator test 'was tricky for everyone, not just applicants'. They said that now 'it is a little bit more predictable in terms of where we think the outcome might fall'. Similarly, a VEOHRC lawyer said that they had found that unfavourable treatment was an easier construct to explain because '"less favourable" suggests you need that comparator … less favourable than what? Whereas unfavourable is quite generic in the sense that it is just detrimental treatment'. Another VEOHRC lawyer thought that the removal of the comparator had made the *EOA 2010* more accessible, particularly for unrepresented litigants. The VEOHRC conciliators agreed that it is easier to explain the concept of direct discrimination using the new test.

Some of the lawyers said that a consequence of the test being simpler was that there is now more time to focus on the issues in the claim because they do not have to spend as much time on technicalities and debating who is the comparator. A complainant solicitor said the new test is 'less distracting from the major issues'. One of the barristers said that the new test has been 'very liberating. It's been much easier to conceive of the discrimination. You don't spend all of your time trying to mangle in or mangle up a comparator group and in some areas, it was very hard to think of'. A VEOHRC lawyer said that the new definition 'gets to the nub of the concern more than having a comparator used to [by] actually looking at the disadvantage that's experienced'.

However, a complainant solicitor thought that the change in definition had not made any difference because it was still necessary to use a comparator. They said the new test was 'just different words'. Similarly, two of the barristers said that although it is not required, it might be necessary to draw upon a comparator. One said 'there's some flavours of the comparator kind of still lurking there … in looking at whether the treatment is favourable or unfavourable and those things, there's still a little bit of how does it differ from another group'.

2 *Indirect Discrimination*

To establish indirect discrimination in the *EOA 1995*, the complainant had to prove the imposition of a requirement, condition or practice that persons with the attribute in question could not comply with, that a higher proportion of people without the attribute could comply with, and which was not reasonable having regard to all the circumstances.[137] Proportionality and unreasonableness were the most problematic elements.[138] The *EOA 1995* contained guidance for establishing reasonableness.[139]

Section 9 of the *EOA 2010* states that indirect discrimination occurs when a person imposes a requirement, condition or practice that has a disadvantaging effect on a person with an attribute, that is not reasonable. Proportionality is not included.[140] The onus of proving reasonableness rests on the respondent.[141] The previous Act listed factors for the court to consider when determining reasonableness, and they were expanded in the *EOA 2010*.[142] The Attorney-General said that the new definition recognises that 'the evidence about what is reasonable is usually controlled by the duty-holder, not the person being discriminated against'.[143] This change has not been controversial, as the cases and the comments from the lawyers reveal.

[137] *EOA 1995* (n 9) s 9.

[138] See *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165. For a comprehensive discussion of indirect discrimination in Australia, see, eg, Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992); Barbara Ann Hocking, 'Is the Reasonable Man the Right Man for the Job?' (1995) 17(1) *Adelaide Law Review* 77; Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12(1) *University of Tasmania Law Review* 88.

[139] *EOA 1995* (n 9) s 9(2).

[140] Proportionality was removed from the *SDA* (n 6) in 1995 and it was not included in the newest Commonwealth Act, the *ADA* (n 6). It was removed from the *DDA* (n 9) by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2 pt 1 item 17, and never formed part of the *RDA* (n 60). The proportionality test is still used in New South Wales, Queensland, South Australia and Western Australia: *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b), 38B(1)(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1)(b); *Equal Opportunity Act 1984* (SA) ss 29(2)(b)(i), 29(2a)(b)(i), 29(3)(b)(i), 29(4)(b)(i), 51(b)(i), 66(b)(i), 85A(b)(i), 85T(2)(b)(i), 85T(4)(b)(i), 85T(6)(b)(i); *Equal Opportunity Act 1984* (WA) ss 8(2)(a), 9(2)(a), 10(2)(a), 10A(2)(a), 35AB(3)(b)(i), 35A(2)(a), 35O(3)(a), 36(2)(a), 53(2)(a), 66A(3)(a), 66V(3)(a).

[141] This approach was already used in Queensland and in three of the federal Acts: *Anti-Discrimination Act 1991* (Qld) s 205; *DDA* (n 9) s 6(4); *SDA* (n 6) s 7C; *ADA* (n 6) s 15(2). The Gardner Review proposed that Victoria adopt this approach: *Gardner Report* (n 79) 88–9.

[142] *EOA 1995* (n 9) s 9(2); *EOA 2010* (n 7) s 9(3).

[143] *Parliamentary Debates* (n 12) 786.

In the cases to date, the respondent has produced evidence to show that the requirement they imposed was reasonable[144] or they challenged other elements of the claim.[145] This change, though, has not meant that complainants do not attempt to show that the requirement, condition or practice was unreasonable.[146] For example, in *Ferris v Department of Justice and Regulation*, the complainant argued that the condition that he work very long hours was not reasonable, based upon evidence from himself and his colleagues about the oppressive nature of their workload.[147] The respondent did not produce evidence to rebut this assertion, unsuccessfully arguing instead that there was no condition imposed on Mr Ferris or other staff in his department and even if there were, the evidence showed that the disadvantage it caused was to him as an individual, not to a group of people with his disability.[148]

The lawyers did not think that the changes to the definition of indirect discrimination had had much impact. This was partly because few indirect discrimination claims are heard so there is very little jurisprudence to draw upon. The other reason was that respondents who had legal advice produced evidence of reasonableness under the *EOA 1995* anyway, so the *EOA 2010* simply codified what prudent respondents were already doing. A respondent solicitor said that under the previous Act, if the complainant argued that a requirement was not reasonable, the respondent would contest the claim so 'the end point for the employer ends up being the same'. That appears to be what is happening now in regard to the complainant — a prudent complainant will argue that the requirement is unreasonable and, in effect, rebut the respondent's arguments.

The lawyers agreed that it made sense to place the onus for showing reasonableness on the respondent because it operates like a defence. A complainant solicitor said that 'shifting that onus is very useful to make sure that [everything has] to be put on the table by the respondent'. A respondent solicitor said the change to reasonableness had made things 'more difficult' for respondents but since the information 'is usually uniquely in the knowledge of the respondent', it would be difficult for the complainant if they had to show reasonableness. They had found that respondents accepted that they had to show that the

144 See, eg, *Arora* (n 104) [77]–[111] (Member Grainger); *Petrou* (n 106) [119]–[184] (Harbison V-P).

145 See, eg, *Ferris* (n 103) [88]–[89] (Harbison V-P).

146 See, eg, *Petrou* (n 106) [121].

147 *Ferris* (n 103) [12], [23], [85]. The indirect discrimination claim was not at issue on appeal: *Ferris v Victoria* [2018] VSCA 240.

148 *Ferris* (n 103) [88]–[89].

requirement they had imposed was reasonable. Another respondent solicitor said that 'a respondent who has actually done the right thing will not have any difficulty with [showing reasonableness]. So, if what it does therefore by extension is make it difficult for the employers who have done the wrong thing, then I'm all for it'.

A complainant solicitor said that in a conciliation session, they will draw the respondent's attention to this provision and remind them that they will be required to prove reasonableness if the claim proceeds to VCAT. This, therefore, becomes a tactic to procure a settlement. Similarly, a respondent solicitor thought that respondents were now more inclined to seek legal advice early to determine whether they can show reasonableness. One of the barristers thought that the new definition meant that 'respondents can see a bit more risk in indirect [discrimination] because they've got an onus'.

D *Reasonable Adjustments*

The *EOA 2010* places what the Attorney-General described as 'positive duties' on employers, educational authorities and service providers to make reasonable adjustments for a person with a disability.[149] Employers are required to make reasonable adjustments for a person with a disability who is offered employment or who is an employee.[150] The same obligation is imposed on partnerships,[151] educational authorities[152] and service providers.[153] In the Attorney-General's view, this approach was expected to 'more effectively address systemic discrimination experienced by people with disabilities'.[154]

The reasonable adjustments provision in the *EOA 2010* is not passive.[155] It imposes an obligation on duty-holders to make a reasonable adjustment. It uses strong language — '[t]he employer must make'.[156] The duty-holder is required to do something proactive, rather than waiting until a person with a disability has been discriminated against. The Supreme Court has described reasonable

149 *Parliamentary Debates* (n 12) 787. An express duty was recommended by the Gardner Review: *Gardner Report* (n 77) 93–4. See also *SARC Report* (n 76) 20.

150 *EOA 2010* (n 7) s 20.

151 Ibid s 33.

152 Ibid s 40.

153 Ibid s 45.

154 *Parliamentary Debates* (n 12) 787.

155 Compare *DDA* (n 9) s 6(2)(c); *Equal Opportunity Act 1984* (SA) s 66(d); *Anti-Discrimination Act 1992* (NT) s 24.

156 *EOA 2010* (n 7) s 20(2).

adjustments as a 'positive obligation'[157] which should have 'the broadest operation that their language permits'.[158] VCAT has described reasonable adjustments as an 'explicit requirement'[159] which is required 'to cater for the disability'.[160] The obligation is not passive. In *Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd*, the Tribunal said that once the complainant has established that they have a disability, if an adjustment is required then the employer must make reasonable adjustments.[161]

Lawyers, particularly those specialising in disability discrimination claims, said that the obligation to make reasonable adjustments is one of the Act's strengths. Complainant lawyers were asked to identify the primary reasons that they would decide to lodge a claim under the *EOA 2010* instead of the *DDA* or the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). In terms of the substantive law,[162] the obligation to make reasonable adjustments was the primary reason given.[163] This is significant because the complainant lawyers reported that in most disability discrimination claims, the failure to make reasonable adjustments will be an issue.[164] A barrister said that the introduction of reasonable adjustments had made a 'big difference' to the disability discrimination claims that they ran because they could 'point to' the failure to make a reasonable adjustment in their claim. However, the lawyers said that what triggers the obligation and what it requires of duty-holders is uncertain. There has been some guidance from VCAT which has said that '[w]hether or not an adjustment is "required" is a serious issue', and 'required' in this context means 'to have need of'.[165] The Tribunal has also said that it is for the person with the disability to

157 *Black* (n 99) 5 [14] (Richards J).

158 Ibid 19 [59].

159 *AB v Ballarat Christian College* [2013] VCAT 1790, [165] (Member Wentworth) ('*AB*').

160 *Bevilacqua* (n 104) [207] (Senior Member Proctor).

161 Ibid.

162 The cost of running a claim in the Federal Court and the risk of an adverse costs order if the claim fails were also significant factors in deciding which jurisdiction to use.

163 There is no obligation to make reasonable adjustments in the *Fair Work Act 2009* (Cth).

164 The VEOHRC does not report on how many complaints it receives about the failure to make reasonable adjustments. Presumably this is collated under 'disability'. Of the VCAT decisions captured in this study, 6 of the 75 substantive cases were about the failure to make reasonable adjustments (8%). Twenty-four cases were about disability discrimination, meaning the failure to make reasonable adjustments was an issue in one-quarter of those cases.

165 *Bevilacqua* (n 104) [207]–[208], quoting *Macquarie Dictionary* (4th ed, 2005) 'require'. In that case, although the complainant was advised by her doctor to reduce her work hours, this was

articulate that they require an adjustment, and that the obligation to make an adjustment only arises from that time.[166] Of course, an adjustment will not always be required. As the Tribunal has noted, an employee with a disability may be able to perform a role without any adjustment.[167]

Duty-holders are required to make an adjustment unless the person could not adequately perform 'the genuine and reasonable requirements' of the employment role,[168] or participate in or derive any substantial benefit from the educational program or service after the adjustment is made.[169] Duty-holders must therefore make a prediction about whether or not it is more probable than not that the person will not be able to do the job or use a service or participate in education once an adjustment is made.[170] To do this, the duty-holder needs information from the person with the disability about the nature of the disability and the type of adjustment that they might require. In *Dzuirbas v Mondelez Australia Pty Ltd*, Member Dea said that '[a]n assumption, based on no information or scant information, will not be enough'.[171] However, VCAT has also said that employers are not expected to be 'mind readers'.[172] Therefore employees — and by extension, students and consumers — need to articulate what they need to perform the job or to access education or a service.[173] For example, in *Testart v Phoenix*,[174] a student who was admitted into a hypnotherapy course did not advise the providers that she had a disability that would impact on her ability to complete the course. She did not raise this during her group interview prior to admission or in her admission documents. She requested an adjustment in the form of a note-taker immediately prior to the course commencing.[175] Vice-President Harbison said that one of the reasons that the dispute arose was that the complainant did not raise her need for an adjustment at the time of enrolment and when she did, she did not give the respondent adequate

not required and so VCAT found that the obligation to make reasonable adjustments did not arise: *Bevilacqua* (n 104) [214]–[216].

166 *Muller v Toll Transport Pty Ltd (2)* [2014] VCAT 472, [66] (Senior Member Megay) ('*Muller*').

167 *Bevilacqua* (n 104) [211].

168 *EOA 2010* (n 7) s 20(2).

169 Ibid ss 40(2), 45(2).

170 *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432, [143] (Member Dea) ('*Dziurbas*').

171 Ibid.

172 *Muller* (n 166) [51].

173 Ibid. See also *Dziurbas* (n 170) [140] in which Member Dea appears to agree that it is for the complainant to show that they required a reasonable adjustment.

174 [2014] VCAT 699.

175 Ibid [1]–[17] (Harbison V-P).

time to consider her request. The lateness of her request meant that what she requested was not reasonable.[176]

The *EOA 2010* states that in determining what is reasonable, the Tribunal must consider all relevant facts and circumstances such as the nature of the person's disability, the nature of the adjustment, the respondent's financial circumstances, and the consequences of making the adjustment.[177] VEOHRC staff said that organisations seek guidance about what is reasonable, particularly in terms of expense. Respondent solicitors said that their clients find this a difficult area because what is a 'reasonable' adjustment is unclear. A barrister said that from the respondent's point of view, it is quite difficult because it is contextual; what is 'reasonable' varies greatly depending on the nature of the disability and the respondent. VCAT has said that this is a balancing exercise and it is not about creating 'a perfect environment'.[178] In the context of employment, VCAT has said that an employer is not required 'to create a perfect working environment for every employee with a disability regardless of the nature and extent of the disability, and regardless of the cost or impact on the workplace or the business … [or] to create another job for the employee or to keep the employee in work'.[179]

One of the difficulties with reasonable adjustments is that they intersect with other obligations including the federal Disability Standards (which apply to transport, education, service providers and access to premises),[180] the *Fair Work Act*, and return to work obligations.[181] One of the barristers said that it was 'slowly seeping in' to the minds of employers that once they have met their return to work obligations for an injured employee, that was 'not the end of the story' and they still have separate obligations under the *EOA 2010*. This was considered in *Butterworth v Independence Australia Services*, where Member Wentworth found that the employer's focus was on meeting its obligations

176 Ibid [142]–[144].

177 *EOA 2010* (n 7) ss 20(3), 40(3), 45(3).

178 *AB* (n 159) [170]–[174] (Member Wentworth).

179 *Butterworth v Independence Australia Services* [2015] VCAT 2056, [208] (Member Wentworth) ('*Butterworth*').

180 These are found in legislative instruments made under *DDA* (n 9) s 31(1). See, eg, *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth); *Disability Services Act (National Standards for Disability Services) Determination 2014* (Cth); *Disability (Access to Premises — Buildings) Standards 2010* (Cth). One of the factors the Tribunal must consider in determining what is reasonable is any action plans formulated under the *DDA*: *EOA 2010* (n 7) ss 20(3)(i), 40(3)(g), 45(3)(g).

181 See, eg, *Butterworth* (n 179).

under the *Accident Compensation Act 1985* (Vic) in terms of developing a return to work program for the complainant following an injury at work, and that it did not turn its mind to whether an adjustment could be made so that the complainant could return to her pre-injury duties.[182]

A VEOHRC staff member who provides training said that they do not receive many specific requests for training on reasonable adjustments but they include it in their general training programs. Yet it was clear from what the conciliation staff reported that employers, in general, are not aware of the obligation to make reasonable adjustments.[183] This view was supported by some of the lawyers with the qualification that larger employers are aware of the obligation and other employers are aware of it but do not regard it as an obligation.

E *Special Measures*

Thornton writes that the *EOA 1995* gave 'short shrift' to positive action measures because apart from special needs associated with pregnancy or childbirth, it did not refer to special needs in employment.[184] Further, under that Act, special measures were considered to be an exception to the prohibition of discrimination, rather than as a means of achieving equality for a previously disadvantaged group.[185] The *EOA 2010* is far more progressive.

Section 12 of the *EOA 2010* states that special measures do not constitute discrimination if they are taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute. This understanding of special measures accords with a substantive equality approach, as described above in Part II, and was recommended by the Gardner Review and endorsed by the Scrutiny of Acts and Regulations Committee.[186] It is also consistent with how special measures are regarded in s 8(4) of the *Charter*. Special measures were included in Part 2 of the Act ('What Is Discrimination?'), not with the exceptions, which is where they are often found.[187] As noted in the

[182] Ibid [217].

[183] In *Dzuirbas* (n 170) [133] (Member Dea), two members of the respondent's human resources staff agreed in evidence that although two workplace policies contained detailed information about the *EOA 2010* (n 7), neither mentioned the obligation to make reasonable adjustments.

[184] Thornton, 'Excepting Equality' (n 76) 247.

[185] *EOA 1995* (n 9) s 82.

[186] *Gardner Report* (n 77) 33; *SARC Report* (n 76) 72–3.

[187] See, eg, s 105 of the *Anti-Discrimination Act 1991* (Qld) which appears in ch 2 pt 5 ('General Exemptions for Discrimination'); s 45 of the *DDA* (n 9) appears in pt 2 div 5 ('Exemptions').

Explanatory Memorandum, this placement makes it clear that special measures play a role in realising equality.[188]

The *EOA 2010* says that a special measure must be taken in good faith, be reasonably likely to achieve the purpose of promoting or realising substantive equality, be a proportionate means of doing so, and be justified on the basis that members of the group have a need for advancement or assistance.[189] The person who introduces the special measure bears the onus of proving it is one. Of this provision, the Attorney-General said:

> Special measures recognise that achieving equality is not about treating all people the same, but is about treating people differently in order to cater for different experiences and circumstances … Special measures are therefore an expression of equality, rather than an exception to it.[190]

To date, VCAT has only considered special measures in the context of an organisation seeking an exemption for what may otherwise constitute discrimination[191] such as women-only aquatic sessions[192] or advertising for and hiring only Indigenous people.[193] In considering these applications, VCAT has had regard to the purpose of s 12 and the Act's objects. In *Georgina Martina Inc*, Member Dea said that special measures 'seek to bring the members of the group up to equal standing with the wider community or make their standing less unequal in terms of the opportunities before them or the services they can access'.[194]

Special measures effectively operate as a defence to an allegation of discrimination. As Member Dea noted in *Waite Group*,[195] organisations prefer certainty about whether their proposed conduct is likely to be unlawful or not before they implement it. This is why they seek an exemption which effectively authorises the conduct.[196] The VEOHRC's view, expressed in its capacity as an

188 Explanatory Memorandum (n 11) 14.

189 *EOA 2010* (n 7) s 12(3).

190 *Parliamentary Debates* (n 12) 786.

191 The power to grant exemptions is found in *EOA 2010* (n 7) s 89. They have not been relied on as a defence to date.

192 *City of Casey — Casey Aquatic & Recreation Centre* [2012] VCAT 893.

193 *Cummeragunja Housing & Development Aboriginal Corporation* [2011] VCAT 2237 ('*Cummeragunja*').

194 [2012] VCAT 1384, [43] ('*Georgina Martina*').

195 [2016] VCAT 1258 ('*Waite Group*').

196 Ibid [26].

intervener in *Waite Group*, was that organisations would benefit from more guidance from the Tribunal about the operation of s 12.[197] However, Member Dea said that it was preferable that an organisation made its own assessment about whether a proposal constituted a special measure and, having done so, 'it simply gets on with engaging in that conduct.'[198] She went on to say that this would not only save 'the organisation time and resources but ensures that the [*EOA 2010*]'s purposes are given effect to without first involving an unnecessary legal process.'[199] Member Dea then set out eight broad questions for an organisation to answer when it is considering whether proposed conduct constitutes a special measure.[200] The questions are drawn from earlier decisions[201] and go towards considering whether the measure will promote substantive equality. Significantly, Member Dea said that an organisation needs to identify the inequality that the special measure seeks to address and its cause, noting that 'at the heart of special measures is conduct intended to promote or realise equality. Without inequality there will be no work for a special measure to do.'[202] Having done so, an organisation should then consider 'how the proposed conduct will promote or realise substantive equality by remedying the inequality and its cause'.[203] Moreover, it is necessary to justify the proposed conduct on the basis that the group in question (or members of that group) have a need for advancement or assistance.[204]

Despite the Tribunal's guidance, organisations have continued to apply for exemptions for conduct that may constitute a special measure.[205] This suggests that organisations prefer the certainty that this process provides as opposed to the uncertainty of whether or not their conduct will be challenged. In most instances, the Tribunal has struck out exemption applications after applying *Waite Group* and finding that they constitute a special measure.[206]

[197] Ibid [27].

[198] Ibid [28].

[199] Ibid.

[200] Ibid [30]–[71].

[201] See *Cummeragunja* (n 193); *Parks Victoria* [2011] VCAT 2238; *Georgina Martina* (n 194).

[202] *Waite Group* (n 195) [40].

[203] Ibid [46].

[204] Ibid [67].

[205] See, eg, *Centacare Diocese of Ballarat — Exemption* [2018] VCAT 1122 ('*Centacare Diocese*'); *Linfox Australia Pty Ltd — Exemption* [2018] VCAT 905 ('*Linfox Australia*').

[206] In such an instance, an exemption is not necessary: *EOA 2010* (n 7) s 90(a)(ii).

F *Duty Not to Engage in Discrimination, Sexual Harassment or Victimisation*

The Gardner Review recognised that an individual complaints system cannot adequately address systemic discrimination because it relies on the individual to lodge a complaint rather than placing an obligation on the respondent to comply.[207] It recommended including a specific duty to eliminate discrimination that is expressed in a positive way, rather than as a duty not to discriminate.[208] It recommended that the VEOHRC enforce the duty by conducting inquiries and issuing compliance notices.[209] What is often termed 'the positive duty'[210] is found in s 15 of the *EOA 2010*.

Section 15 requires employers, educational authorities and service providers to take 'reasonable and proportionate measures' to eliminate discrimination, sexual harassment and victimisation. What are 'reasonable and proportionate measures' will depend on the size and nature of the business, resources, the business' operational priorities, and the practicability and cost of the measure.[211] The Explanatory Memorandum stated:

> The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. It may involve organisations doing such things as—
>
> • identifying potential areas of non-compliance;
>
> • developing a strategy for meeting and maintaining compliance (such as undertaking training or establishing policies);
>
> • reviewing and improving compliance where appropriate.
>
> It is intended that, by stating the existing obligations in a positive and explicit way that does not rely on an individual dispute being brought, this duty will promote proactive compliance …[212]

[207] *Gardner Report* (n 77) 39.

[208] Ibid 38–41.

[209] Ibid 41.

[210] This is how the VEOHRC describes it: see 'Positive Duty', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <https://humanrightscommission.vic.gov.au/the-workplace/positive-duty>.

[211] *EOA 2010* (n 7) s 15(6).

[212] Explanatory Memorandum (n 11) 17.

If a duty-holder breaches the duty, this may be the subject of an investigation by the VEOHRC.[213] Following an investigation, if it finds that the duty has been breached, the VEOHRC can take any action that it thinks fit, including: entering into an agreement whereby an organisation will take action to comply with the *EOA 2010*, referring the matter to VCAT, and preparing a report to Parliament or the Attorney-General.[214]

When it was enacted, commentators were conflicted about how effective s 15 would be. Thornton wrote that it 'constitutes an important symbolic step away from the limitations of an individual complaint-based model … [and] [t]o this extent, it represents a notable attempt to modernise a model that has been in operation for more than 30 years'.[215] Associate Professor Paul Harpur went further, stating the duty was a 'breakthrough' and 'is not simply about adopting a few token proactive policies' because it 'requires duty holders to adopt a systematic approach to identifying and eliminating discrimination throughout their operations'.[216] By contrast, my concern was that s 15 does not require an organisation to do anything to comply – 'they are required not to engage in unlawful conduct but they are required to do that anyway'.[217] Further, I noted that the enforcement structure is weak. There is no individual cause of action if the duty is breached, nor can the VEOHRC take action against a noncompliant duty-holder; it can only investigate a breach.[218]

VCAT confirmed that s 15 is not enforceable on the first and only occasion that it was raised. In *Collins v Smith*, VCAT agreed that the respondent employer was under an obligation to comply with the duty but the Tribunal has no jurisdiction to hear an application that s 15 has been breached.[219] Given this, it is not surprising that the lawyers said that the lack of enforceability was the biggest problem with s 15.

Section 15 was described by a complainant solicitor as a 'tool of gentle persuasion'. Another said 'there's no reason why we can't draw people's attention to [s 15]' but that you 'don't get very far with it once people discover it's not enforceable and that you know the [VEOHRC]'s not going to do anything to you if you're not complying'. A respondent solicitor described s 15 as 'a toothless

213 *EOA 2010* (n 7) s 15(4).

214 Ibid s 139.

215 Thornton, 'Excepting Equality' (n 76) 248.

216 Paul Harpur, 'A Proactive Duty to Eliminate Discrimination in Victoria' (2012) 19(4) *Australian Journal of Administrative Law* 180, 180–1.

217 Dominique Allen, 'Victoria Paves the Way to Eliminating Discrimination' (2010) 23(4) *Australian Journal of Labour Law* 318, 323.

218 Ibid.

219 [2015] VCAT 1029, [45]–[46] (Jenkins V-P).

tiger'. Another said 'it's not a cause of action, perhaps it's a useful motherhood statement but … on the coalface it's very rarely discussed, in my experience'.

All of the barristers said that because it is unenforceable, they do not have occasion to use s 15. One said 'it has no effect in VCAT and it doesn't get used'. Another barrister said 'it's got no legs. It would be so great if it had — it's an invisible stick. You can't beat anyone with it. It's got no legal effect.' Another barrister recalled being quite excited by s 15 when they first read the provision before realising that it was not enforceable. They said 'so where do you go with that? In terms of my practice that's basically nowhere.'

The lawyers said that generally employers and service providers are not aware of s 15. A complainant solicitor said 'I think it is very hard to assess [its impact] because we don't hear it being referred to, we don't ever hear employers acknowledging that it exists'. A respondent solicitor said 'I think it's symbolic but I don't think many employers know about it and I don't think we would really advise on it'. Another respondent solicitor said that respondents were not aware of s 15 until they told them about it, noting that if employers were not made aware of their obligations by their lawyers, how else would they know about them? They said 'I haven't been inundated with material from the [VEOHRC] that tells employers these are your obligations, that you have a positive obligation to do these things'. A couple of solicitors had been involved in conciliations where the [VEOHRC] staff referred to s 15 but a respondent solicitor described it as 'more of a footnote rather than a main event'.

There was a disjuncture between the lawyers' perception of s 15 and the VEOHRC staff. While acknowledging that it has no teeth, a VEOHRC lawyer said: 'it's another great tool in our toolbox in terms of education around the Act's obligations and for us it helps when we're conciliating to bring people's attention to it, particularly respondents' obviously and again, even when you get to the pointy end of litigation, it's a really useful tool to have'. A conciliator said that they tell the respondent that it has a positive duty to eliminate discrimination but 'if they [the respondent] don't have a policy [about discrimination], they're not going to have done anything towards their positive duty'. Two conciliators thought that s 15 was underutilised by the VEOHRC and that they could be making more of it. The VEOHRC lawyers said that although the duty was not enforceable by an individual, noncompliance could be used as the basis for an investigation. They did not say whether it had been and this information is not publicly available.

VEOHRC staff said that they had found s 15 to be most useful in the training and education that they provide. One said that they use it to 'anchor' that work.

A staff member who conducts training sessions said that s 15 is a 'core part of our training … [and] we use it very, very deliberately … the positive duty is critical in the preventions piece, not just what you do with a complaint but how you can prevent and [implement] best practices'. Another said s 15, as a tool, 'is a great way for us to move employers beyond compliance to best practice'. They said 'being able to tie that to the positive duty's been really helpful because it's proactive, it's not reactive, you don't wait for a complaint to happen before you make changes'. A VEOHRC lawyer said it is 'quite inspirational … from an educational standpoint, it allows you to talk about discrimination in a really positive sense'.

V Taking Stock

By enacting the *EOA 2010*, the Victorian government clearly committed to producing a law that promoted substantive equality and targeted systemic discrimination. After a decade in operation, the question is: how far has the law come to achieving that objective?

The doctrinal and empirical analysis in this article shows that some of the novel mechanisms in the Act have been more successful than others. The Act's objects have had an impact on the interpretation of discrimination overall. The new definition of direct discrimination has made it simpler for complainants to establish their claim but the concept of a comparator still lingers and may well be part of the baggage that accompanies assessing whether someone has been treated unfavourably.[220] A strength of the *EOA 2010* is that the complainant is not required to identify a comparator but can choose to use the concept to bolster their claim if it is applicable. Changing who bears the onus of proving reasonableness reflects what was happening in practice and does not appear to require judicial interpretation; it is clear how s 9(2) operates from reading the statute and the change makes sense logically — the respondent is the party that imposes the condition and thus they are best placed to be able to justify it. This simple change is one that those jurisdictions which have not adopted would do well to consider.[221]

[220] See generally Dr Colin Campbell and Associate Professor Dale Smith's detailed consideration of whether, conceptually, a test for unfavourable treatment can actually avoid the need to use a comparator: Colin Campbell and Dale Smith, 'Direct Discrimination without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43(1) *Federal Law Review* 91.

[221] Northern Territory and Western Australia are the only jurisdictions which are currently reviewing their anti-discrimination laws: see above n 10. The Australian Human Rights Commission is looking into ways of improving the federal Acts: see 'Free and Equal: An Australian Conversation on Human Rights', *Australian Human Rights Commission* (Web Page, 31 May 2019) <https://www.humanrights.gov.au/free-and-equal>.

Imposing an obligation on employers and service providers to make reasonable adjustments for a person with a disability has clearly had a significant impact. It is such an important part of the Act that it is driving disability discrimination claims away from the federal jurisdiction, which is unfortunate because those claims have national application. The concept of reasonable adjustments is aimed at substantive equality because it does not assume that everyone is the same; it seeks to level the playing field by making an adjustment so that people with a disability can perform a job, participate in education, and access goods and services to the same degree as people without a disability. A strength of the *EOA 2010* is that it imposes an obligation for addressing inequality on the organisation because it is the body best placed to foresee the impact of its policies and practices on its workforce, students and customers. The cases to date show how this operates in practice but the interview data suggests that what is lacking is both public awareness that the obligation exists, and that it is a requirement, not simply a suggestion. One of the VEOHRC's functions is to provide education about the *EOA 2010*[222] and this may well be an area where more education and awareness-raising is needed if this mechanism is to be as effective as anticipated.

It is difficult to assess the impact of the new framing of special measures because the cases to date have concerned applications for an exemption for what would otherwise be unlawful conduct. VCAT has issued clear guidelines so that employers and service providers can decide in advance whether or not proposed conduct would constitute a special measure and feel empowered to proceed. This has not stopped organisations from seeking an exemption.[223] Until a measure is challenged and special measures is raised as a defence, the full impact of s 12 will not be known.

Finally, the impact of s 15 has been minimal. Section 15 is a symbolic statement, so in its current form, its effectiveness depends on how well the VEOHRC uses it as a promotional, preventative and educative tool. The comments from lawyers suggest that the VEOHRC could make greater use of it but even so, s 15 is unlikely to have much impact until it is framed as an enforceable obligation. Two changes would greatly improve s 15: reframing the obligation as a proactive one, and making it enforceable.

As it currently stands, s 15 places an obligation on a duty-holder to take reasonable and proportionate measures to eliminate discrimination, sexual

[222] *EOA 2010* (n 13) s 155(1)(a).

[223] See above Part IV(E).

harassment and victimisation. Subsection (6) contains guidance for assessing what reasonable and proportionate measures are but there is nothing else in the Act or in any regulations to operationalise it. Given that duty-holders are already required not to discriminate (and have been since 1977) presumably s 15 is geared towards duty-holders thinking about avoiding discrimination before it takes place,[224] but that is not clear from the wording of s 15. It does not say that duty-holders are *required* to assess the impact of policies and practices on discrimination, sexual harassment and victimisation before they are implemented and then take reasonable and proportionate measures to minimise the impact. However, this is what the government seems to have intended based on the two examples provided in the Act[225] and the Attorney-General's description of s 15 in his Second Reading Speech in which he said that it would require organisations to think proactively about addressing discrimination.[226]

In terms of enforceability, s 15 could be redrafted to create an individual cause of action but that would require an individual to gather evidence to show that a duty-holder did not take reasonable and proportionate measures to address discrimination before it implemented a policy or practice. This is likely to be extremely difficult given how hard complainants find it to meet their burden of proof in a discrimination claim.[227] Further, the individual complainant would still be responsible for addressing broader, structural problems.

The Gardner Review and the Brumby government envisaged moving beyond that approach with the *EOA 2010*. As the Act was originally enacted, the VEOHRC played a role in ensuring compliance with the law. Following an investigation, if it found that discrimination had occurred, it had a range of options available to it to address non-compliance. It could enter into an agreement with the respondent about what action it would take to address the situation or accept enforceable undertakings from the respondent or issue the respondent with a compliance notice which required it to comply with the *EOA 2010*.[228] However, before the *EOA 2010* commenced operation, the Liberal opposition won the November 2010 election and those post-investigation powers were

[224] This is how the positive duties pioneered in Northern Ireland and Great Britain work: see generally Fredman, *Discrimination Law* (n 21) 299–330.

[225] One of them reads: 'A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy': *EOA 2010* (n 7) s 15.

[226] *Parliamentary Debates* (n 12) 785.

[227] See above n 66.

[228] *EOA 2010* (n 7) ss 144–7, as enacted.

removed.[229] Labor was returned to power in 2014 but the Andrews government has not committed to reinstating the VEOHRC's enforcement powers.

The limits of the individual complaints model is not unique to Victoria and there have been persistent calls from academics and law reform inquiries to introduce measures to address the deficiencies of the model, such as positive duties, and give the statutory body the power to enforce the law.[230] It is beyond the scope of this article to explore this further but it is worth noting that Victoria has come closest to changing the regulatory model but that this was met with political resistance and ultimately defeat. The next stage of the law's development, however, will need to consider these ideas in more detail.

VI Conclusion

As a society, we have learnt a great deal about the nature of discrimination and the legal system's approach to addressing it since discrimination was first prohibited four decades ago. Yet other than in Victoria, anti-discrimination laws remain much the same as when they were enacted. With one eye on the current state of the law and the other looking at the future, this article has evaluated how effective the novel mechanisms in the *EOA 2010* have been in promoting substantive equality and addressing systemic discrimination. In doing so it has intended to offer insights for law reform in the other Australian jurisdictions, many of which have been waiting patiently for decades for a comprehensive overhaul and reform.[231]

The scope of this article was limited to evaluating the innovative changes introduced by the *EOA 2010* so it did not examine how effectively other aspects of the Act are working. For example, the *EOA 2010* requires employers to

[229] See above n 88. See also Rachel Ball, 'Baillieu Promised a Fairer Victoria, but It Looks like the Opposite', *The Sydney Morning Herald* (online, 15 February 2011) <https://www.smh.com.au/politics/federal/baillieu-promised-a-fairer-victoria-but-it-looks-like-the-opposite-20110214-1atky.html>, archived at <https://perma.cc/DZF5-BS8W>.

[230] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work–Family Conflict' (2006) 28(4) *Sydney Law Review* 689, 722–3; Gaze and Smith (n 61) 289–94; Dominique Allen, 'Barking *and* Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311; *Gardner Report* (n 77) ch 6; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) ch 10.

[231] The *Anti-Discrimination Act 1977* (NSW), for example, has not been reviewed since 1999: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999).

accommodate an employee's parental or caring responsibilities,[232] which is unique in the Australian landscape. As that obligation was found in the *EOA 1995*,[233] it was not considered but it is another example of a mechanism which — like the requirement to make reasonable adjustments — is aimed at proactively tackling inequality. Nor did this article consider the remedies that VCAT has awarded because the remedies provision was not changed in the *EOA 2010*.[234] The remedies that VCAT has at its disposal to tackle discrimination are individualised and compensatory.[235] It cannot order a remedy that would affect similarly situated individuals such as changing a policy or practice or modifying a building. No Australian jurisdiction has moved on from an individualised approach to remedies even though, reportedly, systemic remedies are negotiated at settlement.[236]

While anti-discrimination laws need to ensure that an individual can bring a claim and receive a remedy, they cannot stop there. If, as a society, we are committed to realising substantive equality, then we need to look at how the law can tackle discrimination more broadly and proactively. A proactive, enforceable duty to tackle discrimination and systemic remedies both play a role in this and need to be considered in future iterations of Victoria's anti-discrimination legislation.

232 *EOA 2010* (n 7) ss 17, 19, 22.

233 *EOA 1995* (n 9) ss 13A, 14A, 15A.

234 Ibid s 136; *EOA 2010* (n 7) s 125.

235 *EOA 2010* (n 7) s 125.

236 See Allen, 'Behind the Conciliation Doors' (n 68) 791.