

Equal Opportunity Amendment (LGBTI Equality) Bill 2016

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Equal Opportunity Amendment (LGBTI Equality) Bill 2016

A Bill for an Act to amend the **Equal Opportunity Act 2010**, to make consequential amendments to the **Victorian Civil and Administrative Tribunal Act 1998** and for other purposes.

The Parliament of Victoria enacts:

Part 1—Preliminary

1 Purposes

The main purposes of this Act are—

- (a) to amend the **Equal Opportunity Act 2010**—
 - (i) to include a new attribute of intersex status; and
 - (ii) to amend the definition of **gender identity**; and
 - (iii) to repeal certain exemptions for religious bodies, religious schools and religious beliefs; and
 - (iv) to restore the Commission’s powers to conduct public inquiries, issue compliance notices and enter into enforceable undertakings; and
- (b) to make consequential amendments to the **Victorian Civil and Administrative Tribunal Act 1998**.

2 Commencement

(A commencement date will be inserted here in the final version of the bill.)

3 Principal Act

In this Act, the **Equal Opportunity Act 2010** is called the Principal Act.



Part 2—Amendment of Equal Opportunity Act 2010

4 Definitions

In section 4(1) of the Principal Act—

(a) **insert** the following definition—

“intersex status means the status of having physical, hormonal or genetic features that are—

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male;”;

(b) for the definition of **gender identity substitute**—

“gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth;”.

5 Attributes

After section 6(f) of the Principal Act **insert**—

“(fa) intersex status;”.

6 Duty to eliminate discrimination, sexual harassment or victimisation

In section 15(4) of the Principal Act, after “investigation” **insert** “or a public inquiry”.

7 Definition of *religious body*

In section 81 of the Principal Act, for “sections 82 and 83” **substitute** “section 82”.

8 Religious bodies

Section 82(2) of the Principal Act is **repealed**.

9 Section 83 repealed

Section 83 of the Principal Act is **repealed**.

10 Section 84 repealed

Section 84 of the Principal Act is **repealed**.

11 What is victimisation?

In section 104(1)(d)(ii) of the Principal Act, after “investigation” **insert** “or public inquiry”.



12 Part 9 substituted

For Part 9 of the Principal Act **substitute**–

“Part 9—Investigations and public inquiries

Division 1—Commission may conduct investigation or public inquiry

127 When investigation may be conducted

The Commission may conduct an investigation into any matter relating to the operation of this Act–

- (a) that raises an issue that is serious in nature; and
- (b) that indicates a possible contravention of this Act; and
- (c) that relates to a class or group of persons–

if the investigation would advance the objectives of this Act.

Example

An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.

128 When public inquiry may be conducted

- (1) The Commission may recommend to the Attorney-General that the Commission conduct a public inquiry into a matter relating to the operation of this Act–

- (a) that raises an issue that is serious in nature; and
- (b) that relates to a class or group of persons–

if the Commission considers that it is in the public interest.

- (2) The Commission may commence a public inquiry with the consent of the Attorney-General.

129 Matters referred by Tribunal for investigation or public inquiry

The Tribunal may refer a matter (other than a matter that is the subject of proceedings before the Tribunal) to the Commission to consider–

- (a) whether the Commission should conduct an investigation;
- (b) whether the Commission should recommend to the Attorney-General that the Commission conduct a public inquiry.



Clause 12 continued:

Division 2—Conduct of investigations and public inquiries

130 Commission to conduct investigation or public inquiry as it thinks fit

- (1) Subject to this Part, the Commission may conduct an investigation or public inquiry in the manner it thinks fit.
- (2) In conducting an investigation or public inquiry the Commission is bound by the principles of natural justice, unless otherwise expressly provided in this Part.

131 Hearing for public inquiry to be held in public

- (1) If the Commission decides to hold a hearing for the purposes of conducting a public inquiry, the hearing must be held in public.
- (2) Despite subsection (1), the hearing may be closed if the Commission has made—
 - (a) a direction under section 136 prohibiting disclosure of a person’s identity or information that would be reasonably likely to identify a person; or
 - (b) a direction under section 137 prohibiting or limiting the publication of evidence, information or the contents of any document.

132 Power to compel production of information or documents

- (1) If the Commission reasonably believes that—
 - (a) a person is in possession of information or a document that is relevant to an investigation or public inquiry; and
 - (b) the information or document is necessary for the conduct of the investigation or public inquiry—

the Commission may by written notice require the person to provide the information or document or both.
- (2) A notice referred to in subsection (1) must specify that the person must do either or both of the following within a reasonable period specified in the notice, or on a reasonable date and at a reasonable time specified in the notice—
 - (a) give the Commission a document containing information required by the notice;
 - (b) produce to the Commission the documents specified in the notice.



Clause 12 continued:

- (3) A document referred to in subsection (2)(a) must be signed by the person or, in the case of a notice served on a body corporate, an officer of the body corporate.
- (4) If a document is produced to the Commission in accordance with a notice under this section, the Commission may—
 - (a) take possession of the document; and
 - (b) make copies of the document or take extracts from the document; and
 - (c) retain possession of the document for as long as is necessary for the purposes of the investigation or public inquiry to which the document relates.
- (5) The Commission must allow a document retained under this section to be inspected, at all reasonable times, by any person who would be entitled to inspect the document if it were not in the possession of the Commission.

133 Power to compel attendance

- (1) If the Commission reasonably believes that—
 - (a) a person has information that is relevant to an investigation or public inquiry; and
 - (b) the information is necessary for the conduct of the investigation or public inquiry—

the Commission may by written notice require the person to attend before the Commission, at a reasonable time and place, to answer questions.
- (2) A person who is required under this section to attend before the Commission—
 - (a) is entitled to be paid a reasonable sum for his or her attendance; and
 - (b) is entitled to have a legal or personal representative present.

134 Compliance with notice requiring attendance or production of documents

A person must not, without reasonable excuse, fail to comply with a notice of the Commission under section 132 or 133.

Penalty: 60 penalty units in the case of a natural person;
300 penalty units in the case of a body corporate.



Clause 12 continued:

135 Protection against self-incrimination

It is a reasonable excuse for a natural person to refuse to give information, answer a question or produce a document under this Act if the giving of the information, the answering of the question or the production of the document would tend to incriminate the person.

136 Disclosure of identity of persons who give information or documents

- (1) This section applies to a person who has given or who will give evidence, information or documents to the Commission as part of an investigation or public inquiry, whether or not the person is compelled to do so under section 132 or 133.
- (2) The Commission may give directions prohibiting the disclosure of the identity of the person or prohibiting the disclosure of information that would be reasonably likely to identify the person if the Commission considers that preservation of the person’s anonymity is necessary—
 - (a) to protect the person’s security of employment, privacy or any right protected by the Charter of Human Rights and Responsibilities; or
 - (b) to protect the person from victimisation.

137 Publication of evidence, information or documents

- (1) The Commission may give directions prohibiting or limiting the publication of—
 - (a) any evidence given before the Commission or any information given to the Commission as part of an investigation or public inquiry; or
 - (b) the contents of any document produced to the Commission as part of an investigation or public inquiry.
- (2) Subsection (1) applies whether or not a person was compelled to give the evidence or produce the information or document under section 132 or 133.
- (3) In deciding whether or not to give a direction under subsection (1), the Commission must have regard to the need to prevent such of the following as are relevant to the circumstances—
 - (a) prejudice to the relations between the Government and the Commonwealth Government or between the Government and the Government of another State or a Territory; or



Clause 12 continued:

- (b) the disclosure of deliberations or decisions of the Cabinet, or of a Committee of the Cabinet; or
- (c) prejudice to the proper functioning of the Government; or
- (d) the disclosure, or the ascertaining by a person, of the existence or identity of a confidential source of information in relation to the enforcement of the criminal law; or
- (e) the endangering of the life or physical safety of any person; or
- (f) prejudice to the proper enforcement of the law or the protection of public safety; or
- (g) the disclosure of information the disclosure of which is prohibited, absolutely or subject to qualifications, by or under another Act; or
- (h) the unreasonable disclosure of the personal affairs of any person; or
- (i) the unreasonable disclosure of confidential commercial information.

138 Tribunal may make interim orders to prevent prejudice to investigation or public inquiry

- (1) The Commission may apply to the Tribunal for an interim order to prevent any person from acting in a manner prejudicial to an investigation or public inquiry while the investigation or public inquiry is being conducted.
- (2) In making an interim order, the Tribunal must have regard to any possible detriment or advantage to the public interest in making the order.
- (3) An interim order applies for the period, not exceeding 28 days, specified in it and may be extended from time to time by the Tribunal.
- (4) The person against whom the order is sought is a party to a proceeding on an application under subsection (1).
- (5) Nothing in this section affects or takes away from the Tribunal's power under section 123 of the **Victorian Civil and Administrative Tribunal Act 1998** to make orders of an interim nature.

139 Investigation when other proceedings commenced

- (1) The Commission may commence or continue to conduct an investigation despite the fact that proceedings have commenced in any court or tribunal that relate to or are otherwise connected with the subject matter of the investigation.



Clause 12 continued:

- (2) If the Commission is or becomes aware that proceedings referred to in subsection (1) have commenced, the Commission must take all reasonable steps to ensure that the conduct of the investigation does not prejudice those proceedings.

Division 3—Outcomes of investigations and public inquiries

140 Outcome of an investigation

- (1) After conducting an investigation, the Commission may take any action it thinks fit.
- (2) Without limiting subsection (1), the Commission may—
 - (a) take no further action;
 - (b) enter into an agreement with a person about action required to comply with this Act;
 - (c) refer a matter to the Tribunal;
 - (d) make a report with respect to the matter to the Attorney-General;
 - (e) accept an enforceable undertaking under Division 4;
 - (f) issue a compliance notice to a person in accordance with Division 4.

141 Outcome of a public inquiry

After conducting a public inquiry, the Commission may provide a report on the public inquiry to the Attorney-General.

142 Registration of agreements after investigation

- (1) If—
 - (a) the Commission enters into an agreement with a person under section 140(2)(b); and
 - (b) the agreement provides for registration under this section—

any party to that agreement may lodge a copy of the signed agreement with the Tribunal for registration.
- (2) Subject to subsection (3), the Tribunal must register the agreement and give a certified copy of the agreement to each party.
- (3) If the Tribunal, constituted by a presidential member, considers that it may not be practicable to enforce, or to supervise compliance with, an agreement or part of an agreement the Tribunal—
 - (a) in the case of an agreement, may refuse to register the agreement; or



Clause 12 continued:

- (b) in the case of part of an agreement, may refuse to register the part of the agreement that it considers may not be practicable to enforce, or to supervise compliance with.
- (4) On registration, the registered agreement or registered part of the agreement must be taken to be an order of the Tribunal in accordance with its terms and may be enforced accordingly.
- (5) The refusal of the Tribunal to register the agreement or any part of the agreement does not affect the validity of the agreement.

143 Tribunal to conduct inquiry on matter referred by Commission

- (1) If a matter has been referred to the Tribunal under section 140(2)(c), the Tribunal must conduct an inquiry into the matter and, if satisfied that a person has contravened this Act in respect of the referred matter, may make either or both of the following orders—
 - (a) an order that the person refrain from acting in contravention of this Act;
 - (b) an order that the person do anything specified in the order with a view to eliminating future contravention of this Act or redressing circumstances that have arisen from the contravention.
- (2) Subject to this Act, the Tribunal may conduct an inquiry into a matter referred to it under section 140(2)(c) in the manner it thinks fit.
- (3) The Commission may be a party to any proceeding referred to the Tribunal under section 140(2)(c).
- (4) In addition to any other party, a person who is alleged to have contravened this Act in relation to the subject matter of the inquiry is a party to the inquiry.

144 Report of an investigation or a public inquiry

- (1) If the Commission provides a report to the Attorney-General under section 140(2)(d) or 141, the Attorney-General may cause a copy of that report to be laid before each House of Parliament.
- (2) If a report is received under subsection (1), the clerk must cause the report to be laid before the House on the day on which it is received or on the next sitting day of the House.
- (3) The Commission may publish a report on an investigation or a public inquiry, whether or not the report has been provided to the Attorney-General.



Clause 12 continued:

145 Content of reports

- (1) If the Commission believes there are grounds for making adverse findings about a person in the report of an investigation or a public inquiry, the Commission must give the person a reasonable opportunity to comment on the subject matter of the investigation or public inquiry and respond to the grounds for making the adverse findings before—
 - (a) providing the report to the Attorney-General; or
 - (b) publishing the report.
- (2) The Commission may exclude from the report any matter if it considers it desirable to do so, having regard to the factors set out in section 136(2) or 137(3).
- (3) If the Commission provides the report to the Attorney-General, the Commission must advise the Attorney-General about any matter excluded from the report under subsection (2) and the reasons for its exclusion.

146 Report on public inquiry not prohibited disclosure

Section 176 does not apply to a report published or provided to the Attorney-General under this Division.

Division 4—Enforceable undertakings and compliance notices

147 Definition

In this Division—

unlawful act means a contravention of section 15 or a provision of Part 4, 6 or 7.

147A Enforceable undertakings

If, following an investigation, the Commission believes that an unlawful act has occurred, is occurring or is likely to occur, the Commission may accept a written undertaking from a person under which the person undertakes to take certain actions or refrain from taking certain actions to comply with this Act.

147B Register of enforceable undertakings

The Commission may keep a register of enforceable undertakings that is available to the public.



Clause 12 continued:

147C Compliance notices

- (1) If, following an investigation, the Commission believes that an unlawful act has occurred or is occurring, the Commission may issue a compliance notice to a person responsible for the unlawful act.
- (2) A compliance notice must set out the following—
 - (a) the basis for the Commission’s belief that an unlawful act has occurred or is occurring;
 - (b) the provisions of this Act that the Commission believes the person has contravened;
 - (c) the date by which the person must remedy the unlawful act;
 - (d) the further action that the Commission may take if the unlawful act is not remedied;
 - (e) that the person may apply to the Tribunal for review of the issuing of the notice or any term of the notice.
- (3) A person may, within 28 days of receiving the compliance notice, apply to the Tribunal for a review of the issuing of the compliance notice or of any term of the compliance notice.

147D Failure to comply with enforceable undertaking or compliance notice

- (1) This section applies if—
 - (a) the Commission has accepted an enforceable undertaking from a person; or
 - (b) the Commission has issued a compliance notice to a person.
- (2) If the person fails to comply with the enforceable undertaking or the compliance notice—
 - (a) the Commission may apply to the Tribunal to enforce the undertaking or the notice; and
 - (b) the Tribunal may make an order requiring the person to comply with the undertaking or notice.”.



13 Functions of the Board

In section 162(1)(d) of the Principal Act, after “section 127” **insert** “or a public inquiry under section 128”.

14 Section 188A repealed

Section 188A of the Principal Act is **repealed**.

15 New Division 3 of Part 14 inserted

After section 196 of the Principal Act **insert**—

**“Division 3—Savings provisions—Equal Opportunity Amendment
(LGBTI Equality) Act 2016**

**197 Transitional provisions—Equal Opportunity Amendment
(LGBTI Equality) Act 2016**

(1) In this section—

commencement day means the day on which section 12 of the **Equal Opportunity Amendment (LGBTI Equality) Act 2016** commences.

(2) If, immediately before the commencement day, an investigation had been commenced under section 127 (as in force immediately before the commencement day) but not completed by the Commission, Divisions 1 and 2 of Part 9 and section 188A (as in force immediately before the commencement day) continue to apply on and after the commencement day in relation to the conduct of the investigation.

(3) Division 3 of Part 9, as substituted by the **Equal Opportunity Amendment (LGBTI Equality) Act 2016**, applies in relation to the outcomes of an investigation referred to in subsection (2).

(4) Part 9 and section 188A, as in force immediately before the commencement day, continue to apply on and after the commencement day to—

(a) an inquiry commenced under section 141 (as in force immediately before the commencement day) but not completed by the Tribunal immediately before the commencement day; and

(b) a report made under section 139(2)(d) or (e) (as in force immediately before the commencement day) but not tabled before the commencement day.”.



Part 3—Amendment of Victorian Civil and Administrative Tribunal Act 1998

16 Definitions

In section 3 of the **Victorian Civil and Administrative Tribunal Act 1998**—

- (a) for the definition of ***inquiry substitute***—

“inquiry means an inquiry conducted by the Tribunal under an enabling enactment;”;

- (b) for paragraph (a) of the definition of ***proceeding substitute***—

“(a) an inquiry conducted by the Tribunal; or”

17 New section 170 inserted

After section 169 of the **Victorian Civil and Administrative Tribunal Act 1998** insert—

“Savings provision—Equal Opportunity Amendment (LGBTI Equality) Act 2016

- (1) In this section—

commencement day means the day on which Part 3 of the **Equal Opportunity Amendment (LGBTI Equality) Act 2016** commences.

- (2) Despite the amendments made by Part 3 of the **Equal Opportunity Amendment (LGBTI Equality) Act 2016**, this Act as in force immediately before the commencement day continues to apply in relation to an inquiry under section 141 of the **Equal Opportunity Act 2010** (as in force immediately before the commencement day) commenced but not completed by the Tribunal before the commencement day.”.

18 Clause 23 of Schedule 1 repealed

Clause 23 of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998** is repealed.

