
Issues paper – Content of a duty to eliminate discrimination

One implication of a positive duty is that duty holders would need to be more proactive in relation to their compliance with the Act. This may cause greater expense and increased management time for duty holders. If the legislation lacks specificity surrounding its application, it risks overburdening and negatively affecting duty holders, particularly smaller organisations. In order to mitigate any potential practical difficulties, it would be important to ensure that the Act clearly and thoroughly stipulates both the content of the duty and when it arises.

This was exemplified in the United Kingdom when a positive duty was first introduced in the *Race Relations Act 1976* (UK). Due to its vague expression and the notable lack of enforcement measures, the duty was proven to be ineffective. To address these issues, the UK introduced a strengthened positive duty for public authorities, which is supplemented by specific duties detailing how those authorities should perform their obligations.

The Victorian Act has taken a similar approach by specifying factors that must be considered in determining whether a measure taken to eliminate discrimination is reasonable and proportionate (as summarised in section 4.7 of the Discussion Paper).

The Commission would benefit from submissions as to whether a positive duty should be limited and, if so, whether that limitation would be best formulated as a duty to take 'reasonable and proportionate' measures. The Commission invites submissions on whether there would be a more preferable formulation that limits the duty. In addition, the Commission seeks submissions as to whether this duty should not apply in respect of any Grounds or prohibitions under the Act.

A full discussion of these issues is in the Discussion Paper at page 156.