



VICTORIAN ALCOHOL AND DRUG ASSOCIATION

**Submission to the Equal Opportunity Act Review
Project Team (Victorian Department of Justice)**

EQUAL OPPORTUNITY REVIEW

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Victorian Alcohol and Drug Association

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Recommendations

1. That the concept of systemic discrimination should be expressly recognised and defined in the Equal Opportunity Act 1995.

2. That either
 - The 'impairment' attribute under s. 6 of the Equal Opportunity Act 1995 be amended to 'diagnosed medical status or engagement in treatment';
 - or
 - A new attribute 'diagnosed medical status or engagement in treatment' be introduced to s. 6 of the Equal Opportunity Act 1995.

3. That 'irrelevant criminal record' be included as a protected attribute under s. 6 of the Equal Opportunity Act 1995.

4. That Part 7 of the Equal Opportunity Act 1995 be amended to provide the Equal Opportunity Commission with the authority to investigate complaints under the Equal Opportunity Act.

5. That the Equal Opportunity Commission be granted new and enhanced powers in the area of research/inquiry, and advocacy/policy as described in the text of submission by the Victorian Alcohol and Drug Association to the Equal Opportunity Review.



The Victorian Alcohol and Drug Association

The Victorian Alcohol and Drug Association (VAADA) is the peak body for alcohol and other drug (AOD) services in Victoria. We provide advocacy, leadership, information and representation on AOD issues both within and beyond the AOD sector.

VAADA's membership comprises agencies working in the AOD field, as well as those individuals who are involved in, or have a specific interest in, prevention, treatment, rehabilitation, or research that minimises the harms caused by alcohol and other drugs.

As a state-wide peak organisation, VAADA has a broad constituency. Our membership and stakeholders include 'drug specific' organisations, consumer advocacy organisations, hospitals, community health centres, primary health organisations, disability services, religious services, general youth services, local government and others, as well as interested individuals.

VAADA's Board is elected from the membership and comprises a range of expertise in the provision and management of alcohol and other drug services and related services.

As a peak organisation, VAADA's purpose is to ensure that the issues for both people experiencing the harms associated with alcohol and other drug use, and the organisations that support them, are well represented in policy, program development, and public discussion

Acknowledgements

VAADA's submission to the Equal Opportunity Review is informed by its ongoing consultation work within the Victorian AOD sector. However, VAADA would particularly like to thank the following organisations for their input to this submission:

Fitzroy Legal Service

Association of Participating Service Users (APSU)

VIVAIDS

Job Watch



Executive Summary

VAADA thanks the Equal Opportunity Review Office for the opportunity to make a submission to the Equal Opportunity Review.

Discrimination affects a significant proportion of the people VAADA's membership works with. Discrimination against people who use alcohol and other drugs is widespread, and traps them in a cycle of disadvantage and marginalisation. VAADA believes the Equal Opportunity Review represents a significant chance to improve the relationship between people who use alcohol and other drugs and the wider Victorian community.

VAADA's submission to the Review first lists several recommendations that have arisen out of VAADA's analysis of the Review's *'Equal Opportunity Review: Discussion Paper'*. This analysis follows the recommendations, and is divided into four major sections:

- Discrimination faced by users of alcohol and other drugs,
- Problems with the existing law
- Reforming the discrimination law, and
- Ways to prevent and resolve discrimination - a Summary

Discrimination faced by users of alcohol and other drugs describes the various types of discrimination currently experienced by users of alcohol and other drugs in Victoria across a wide range of social activities. This section also describes some of the social and economic costs associated with the social exclusion faced by users of alcohol and other drugs due to discrimination.

Problems with the existing Law considers key aspects of the existing Equal Opportunity system and problems with the manner in which the law does and doesn't work. Of note is the lack of clarity in the law as it stands currently, problems in accessing the system – particularly accessible legal advocacy, and the view that the EOC as currently configured is not able to adequately deal with systemic discrimination.

Reforming the discrimination law describes several technical aspects of the Equal Opportunity Act 1995 (Vic) (EOA) which could be changed to ameliorate discrimination against people who use alcohol and other drugs, as well as other members of the Victorian community.

Ways to prevent and resolve discrimination describes potential functions and powers which could be assigned to the Equal Opportunity Commission (EOC) to enhance its ability to prevent and resolve discrimination, particularly systemic discrimination. This section also describes how a potential conflict of interest between these new proposed functions and the EOC's existing conciliation function could be avoided.

VAADA's submission does not strictly follow the questions set out in the Review's *Discussion Paper*. However, the issues discussed in this submission are substantively similar to those addressed by the *Discussion Paper*, and VAADA hopes that this failure to follow the question format strictly will not inconvenience the Review staff.



Discrimination faced by users of alcohol and other drugs

People who (mis)use alcohol and other drugs often encounter discrimination within the Victorian community. Examples of discriminatory treatment against drug users range from verbal abuse to physical violence, to limited access to the material and life opportunities that are taken for granted by the broader community. Instances of discrimination against people who use alcohol and other drugs occur across many areas of life and can occur either directly or indirectly.

Discrimination in employment and pre-employment

VAADA's consultations suggest that Victorians who use alcohol and other drugs face several forms of discrimination in employment and pre-employment. Some of the issues include

- People with a history of drug dependence are compelled to disclose this history at the interview stage of the employment process, when they are questioned about gaps in their work experience. This in turn often leads to exclusion from job selection on the basis of past history of drug use.
- People who are undergoing treatment for drug and/or alcohol dependency, particularly treatment by pharmacotherapies¹ or residential services, are very frequently discriminated against in employment, being perceived as potential problem employees:
- People undergoing treatment by pharmacotherapies are usually required to visit a pharmacy once a day in order to receive dosage. Access to treatment and reasonable flexible working hours remains problematic in many workplaces.
- People undergoing residential treatment services (residential rehabilitation, residential withdrawal, supported accommodation, etc) usually need to discontinue work for a period in order to complete treatment. Few workplaces accommodate this need to participate in treatment.

Through engagement in employment an individual's chance of recovery from drug dependence, greatly increases, through participation in various aspects of society. Such positive changes will benefit individual drug users, their families, and the wider Victorian community through;

¹ Throughout this submission the term 'pharmacotherapies' refers to pharmacological substitution



- Positive community participation
- Reducing the burden of problematic drug use on the Victorian community
- Increasing the capacity of the labour pool in a time of skills shortage

Drug testing in the workplace

There is some community concern at suggestions that drug-testing regimes should be introduced into workplaces more widely than at present. While it may be appropriate for drug-testing in workplaces where on-the-job intoxication would lead to injury, a broadened drug testing regime beyond some of the more obvious workplaces is considered as invasive and potentially discriminatory.

Current workplace practice would allow the removal of a worker who is incapable of performing his or her tasks. Disciplinary action could be taken on grounds of incapacitation or the inability to perform the inherent requirements of the job. Introducing drug-testing regimes more generally across workplaces is considered unnecessary, and could come with a range of unexpected consequences, including displacement to other more serious drugs.

Discrimination in education

Direct discrimination against users of alcohol and other drugs appears to be rarer in educational settings than in employment-related settings. However, VAADA's consultations suggest that there remains a considerable amount of indirect and systemic discrimination against drug users in these settings.

Indirect discrimination against drug users

In the course of consultations, VAADA interviewed a student who has previously been in treatment for drug dependency and has an extensive criminal record related to her history of drug use². As a condition of completing her course of studies, this student has been required to undertake placements in community treatment agencies. However, no treatment agency was willing to take the student on placement because of her criminal record.

The student interviewed by VAADA was offered placements through the university but aspects of the management of the placement process contributed to her being unable to obtain a place at any of these agencies:

- The university had an obligation to inform agencies about the student's criminal history, but did not fully inform the agencies.
- The student was provisionally accepted for placement at another treatment agency, but was later rejected by the agency's Human Resources department.

² Interview, 7/01/08. Participant not identified at participant's request.



Neither the agency nor the university gave the student any reason for being rejected for the placement

Following these unsuccessful attempts at placement, the university told the student that without a placement she would not be able to continue her studies.

In effect the university had placed a condition on the student for continuing study that was beyond her control. This indirect discrimination has negatively affected the student's ability to change her life and to make a positive contribution to society.

Discrimination in the provision of goods and services

The primary area in which users of alcohol and other drugs face discrimination in accessing goods and services is lies with medical service providers. Drug users experience discrimination from a range of medical and other treatment professionals.

Discrimination in patient selection

Participants in several consultations VAADA has undertaken among the Victorian AOD sector in recent years suggest that many GPs are reluctant to take on drug and alcohol dependent individuals as clients³ because they are viewed as chaotic and difficult. However not all such individuals are problematic or difficult, and are as entitled to secure medical services as anyone else in the community.

A consequence of this gradual erosion of acceptance by some in the medical field has created both direct and indirect discrimination. Furthermore, there are a range of issues related to individuals presenting within hospital, which echo those attending GP's. There is a concern that individuals with drug and alcohol problems are subjected to systemic responses which either intentionally, or unintentionally creates inequalities in healthcare.

Discrimination in the provision of pharmacotherapies

The Victorian pharmacotherapy system is currently in crisis, with far too few pharmacists available to dispense doses of pharmacotherapy to individuals requiring it. As with GP's and hospitals there is a perception that many of those who use alcohol and other drugs are chaotic and difficult. This perception limits and denies the availability of services through an extensive network of pharmacists who simply refuse to provide this much needed pharmacotherapy service.

While it is recognised that pharmacotherapies are one of the most cost-effective means of treating heroin dependency⁴ there is a reducing number of dispensing pharmacists in Victoria. Drug users in many parts of the State simply don't have access to these

³ VAADA, forthcoming.

⁴ Ritter et al, 2003.



services. This raises a range of issues in relation to claims of systemic discrimination as both governments and the pharmacy profession fail to adequately grapple with the issues.

The provision of pharmacotherapies is also associated with other forms of discrimination against drug users, including:

- GPs refusing to give pain relief to patients who are on pharmacotherapies,
- Pharmacists passing on non-treatment-related information about pharmacotherapy patients among themselves, in contravention of privacy laws

This issue as with the earlier one about Doctors and Hospitals raises concern about systemic issues which the EOC could be dealing with better given appropriate powers and resources..

Discrimination against drug users in prison

One of the areas where Victorian drug and alcohol users face particularly significant levels of discrimination is in the provision of medical treatment in prison. The Australian Government guarantees prisoners their human rights⁵; the Australian Government is also a signatory to the International Covenant on Economic, Social and Cultural Rights, and therefore

...recognize[s] the right of everyone to the enjoyment of the highest attainable standard of physical and mental health⁶.

However, prisoners who use or have used alcohol and other drugs cannot attain the highest standard of physical and mental health as there are a range of limitations on accessing appropriate healthcare in prison. Discriminatory restrictions on healthcare services to prisoners include:

- There are no needle and syringe programs (NSPs) in Victorian prisons, but these are available outside prison
- Given the very large number of prisoners who have Hepatitis C within the prison system the level of attention to the problem remains highly inadequate.
- Access to pharmacotherapies is even more limited within prison than outside it

The lack of NSPs and adequate access to Hepatitis C treatment in Victorians prisons has led to extremely high rates of Hepatitis C and other blood-borne viruses among Victorian prisoners. Upon release these prisoners will become a largely preventable burden on the Victorian healthcare system. Additionally, the lack of adequate treatment by pharmacotherapy in Victorian prisons may lead to prisoners becoming more prone to relapse upon release – which, in turn, increases the risk of recidivism, and prevents the reintegration of prisoners into the Victorian community.

⁵ See http://www.hreoc.gov.au/human_rights/prisoners/index.html.

⁶ International Covenant on Economic, Social and Cultural Rights (1966): Art. 12(1).



Discrimination by the police

The form of discrimination most frequently reported by users of alcohol and other drugs is discrimination committed against them by the police. The Association of Participating Service Users (APSU), the peak body for Victorians who use government-funded AOD treatment services, conducted consultations in 2006 and 2007 around alcohol and drug users' views on the Victorian Charter of Human Rights and Responsibilities. Participants in those consultations identified the following examples of police discrimination against alcohol and drug users:

- Physical brutality during searches and arrest resulting in serious injuries,
- Harassment and bullying by police and prison officers

Such targeting of individuals is not only immediately damaging to individuals concerned, but institutionalises the scrutiny AOD users are placed under thus increasing the likelihood of becoming more deeply enmeshed in the criminal justice system and an ongoing cycle of disadvantage.

Discrimination against friends and family of people who use alcohol and drugs

Members of the Victorian AOD sector consulted by VAADA report that family and friends of people who use alcohol and drugs often experience discrimination.

Participants in the APSU Charter of Human Rights and Responsibilities consultations reported that their associates were frequently harassed by the police for no other apparent reason other than their association with someone who has a drug or alcohol problem.

Problems with the existing law

It is VAADA's position that the lack of clear definition of the issue of '*Impairment*' in the existing legislation is one of the reasons Victorian anti-discrimination legislation is not effective in reducing discrimination for those with drug and alcohol problems. The only way to presently access the current law is through 'impairment' which confuses the public, and for some individuals, it is considered derogatory for them to take action on that basis.

In essence there are a number of areas of concern.

1. The law itself is unclear, throughout this paper we have recommended changes which could contribute to its improvement.
2. The complaints based system isn't appropriate or accessible for people with drug or alcohol problems, as many are not able to advocate for themselves through a lack of knowledge, confidence or capacity. These issues are compounded because of limited free legal assistance, and the lack of financial resources required to pay 'expert lawyers', a consequence of which is that there is little real



access to justice in this area. As such, more resourcing is required for legal support. Further, the establishment of improvements to the future complaints tribunal under the Commission and expansion of internal legal capacity could be of assistance.

3. Many instances of discrimination are the result of 'systemic discrimination'. Because of this, a totally different response and approach is required. eg., more assistance for test cases, development of codes, and actions by the EOC

Reforming the discrimination law

Some discrimination against people who use illicit drugs may be addressed under the 'impairment' attribute listed under s. 6 of the Equal Opportunity Act 1995 (Victoria). However, this may not always be the most appropriate response as there may be other ways to address the issues. VAADA believes that clarification of the areas where discrimination is prohibited under Part 3 of the EOA would help address discrimination against people who use alcohol and other drugs.

Discrimination against people who use alcohol and other drugs and the 'impairment' attribute

Under s 4(1) of the EOA impairment is defined as

- (a) *total or partial loss of a bodily function;*
- (b) *the presence in the body of organisms that may cause disease;*
- (c) *total or partial loss of a part of the body;*
- (d) *malfunction of a part of the body, including—*
 - (i) *a mental or psychological disease or disorder;*
 - (ii) *a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder;*
- (e) *malformation or disfigurement of a part of the body;*

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) defines two substance-related mental disorders: substance abuse and substance dependence⁷. The criteria for substance dependence describe a condition where there is a biological habituation to a substance accompanied by significant physical, psychological, or social impairment. The criteria for substance abuse, on the other hand, describe a condition where substance use is accompanied by social or interpersonal impairment, and/or where substance use occurs in a context of physical danger.

People who can demonstrate that they are experiencing substance dependence or a substance use disorder are therefore suffering 'impairment' as defined under the Act. They are therefore protected from discrimination under the 'impairment' attribute listed in s. 6 of the EOA.

⁷ APA, 1994: 181-183.



Changes to attributes protected under s. 6

Medical status

Despite the fact that broad protection from discrimination is afforded under Victorian and Federal law, few anti-discrimination actions have been taken by individuals who have experienced discrimination on the basis of illicit drug use⁸. It is conjectured that it is more than likely that very few if any legal actions have been taken within Victoria.

One reason why illicit drug users might be reluctant to use the impairment attribute to bring cases under discrimination law is that they find the description of drug dependence as an impairment/disability offensive. Further, the terminology used to define 'impairment' under the EOA is so unattractive that it may prevent people from identifying themselves as being impaired, and hence deter people from bringing self-initiated actions under the Act.

VAADA believes that the above problems may be addressed through introducing an attribute of 'diagnosed medical status or engagement in treatment' to s. 6 of the EOA.

Extending protection from discrimination on the basis of medical status

- Will protect people who have difficulty accessing treatment services because of discriminatory practices
- May be less likely to deter people from making self-initiated complaints than the 'impairment' attribute
- Will also cover people who are discriminated against because of drug use-related conditions such as Hepatitis B, Hepatitis C, and HIV/AIDS

VAADA also endorses the arguments contained within the Fitzroy Legal Service submission regarding inclusion of a "diagnosed medical status or engagement in treatment" attribute under s. 6. Given the above.

Recommendation:

That either

The 'impairment' attribute under s. 6 of the Equal Opportunity Act 1995 be amended to 'diagnosed medical status or engagement in treatment';

or

A new attribute 'diagnosed medical status or engagement in treatment' be introduced to s. 6 of the Equal Opportunity Act 1995.

Irrelevant criminal record

⁸ Wodak et al, 2004.



As described in the first section of this submission, much of the discrimination related to drug use is experienced by those who have acquired criminal records related to their history of drug use. VAADA's consultations suggest that discrimination on the basis of irrelevant criminal record most frequently occurs in the fields of employment and education.

VAADA recognises that some aspects of individuals' criminal records are relevant in pre-employment and employment contexts. However, we believe that the remedies for individuals refused or terminated from employment on the basis of irrelevant criminal record are inadequate. Further to this, VAADA endorses the submission of the Fitzroy Legal Service on the issue of discrimination on the basis of irrelevant criminal record.

The unfair exclusion of people with a criminal record from employment and educational opportunities

- Prevents people with a criminal record from fully participating in the Victorian community
- Hinders the rehabilitation and reintegration of people convicted of criminal offences into the community
- Contributes to the continuing marginalisation and disadvantage experienced by people convicted of criminal offences
- Represents a form of structural/systemic discrimination against people convicted of criminal offences

Recommendation:

That 'irrelevant criminal record' be included as a protected attribute under s. 6 of the Equal Opportunity Act 1995.

Note: VAADA notes that discrimination against drug users, with a criminal record in settings such as education often takes an indirect form. This is best addressed through the creation of guidelines and policies, and will be addressed further in the final section of this submission.

Changes to the definition of 'discrimination'

VAADA considers that much of the discrimination experienced by illicit drug users is systemic and tied up with issues of entrenched disadvantage. As described in the preceding section of this submission, illicit drug users often face reduced access to life opportunities. The inability of illicit drug users to access these opportunities – especially in employment and education – often leads to illicit drug users becoming socially and economically disadvantaged.

Additionally, illicit drug use is frequently an outcome of a reduction in socio-economic circumstances. This leads to increased discrimination on the basis of illicit drug use, and



escalating levels of disadvantage. VAADA's consultations with members of the Victorian AOD sector have repeatedly found that illicit drug use are amongst the most marginalised members of the Victorian community, and are associated with an intergenerational cycle of disadvantage and deprivation.

Given that illicit drug use by definition breaches Victoria's criminal law, VAADA recognises that it is not appropriate that 'illicit drug use' be a personal attribute protected under s. 6 of the EOA. However, VAADA believes that the Equal Opportunity Commission (EOC) could do much more to address the entrenched disadvantage faced by illicit drug users and their families. Accordingly, VAADA recommends

Recommendation:

That the concept of systemic discrimination should be expressly recognised and defined in the Equal Opportunity Act 1995.

The issue of systemic discrimination and how the EOC could better address it is discussed at more length in the following section of this submission.

Changes to the law describing the complaints process

As will be described at greater length in the final section of this submission, VAADA believes that the research/inquiry powers of the EOC need to be enhanced in order to better address issues of systemic discrimination.

At present the inquiry powers of the EOC are limited by the fact that its ability to investigate complaints is not provided for in legislation. As the power of the EOC to investigate complaints has no legislative basis, the EOC's investigators can obtain no evidence other than that willingly given by complainants and respondents, or gained through site inspections.

People who experience discrimination are almost exclusively less powerful than those who discriminate against them. Consequently

- People who experience discrimination may be less able to organise resources that support their case than those who discriminate against them
- People who experience discrimination may be subject to intimidation and victimisation during the course of investigation, causing them to withdraw or weaken their case

In effect, then, the lack of legislation giving stronger powers to the EOC investigators is very limiting. VAADA therefore recommends

Recommendation:



That Part 7 of the Equal Opportunity Act 1995 be amended to provide the Equal Opportunity Commission with the authority to investigate complaints under the Equal Opportunity Act.

Ways to prevent and resolve discrimination: a summary

Discrimination against people who use illicit drugs is common and serious. There is recourse under Victorian law for people to seek protection from discrimination on the basis of illicit drug use; however, across Australia extremely few anti-discrimination actions have been taken by illicit drug users.

This suggests that

- The law in relation to discrimination against users of illicit drugs needs to be refined; and/or
- The anti-discrimination complaints process needs to be changed to improve its accessibility to people who use illicit drugs

The Victorian law in relation to discrimination against users of illicit drugs has been discussed in earlier sections of this submission. The final section of this submission presents a range of changes to the Victorian anti-discrimination complaints process that VAADA considers necessary to reduce individual and systemic discrimination against illicit drug users.

Potential changes to the Equal Opportunity Commission

VAADA believes that much of the discrimination occurring in Victoria at present is of a systemic nature. This is particularly so for those who use illicit drugs many of whom are former prisoners or are experiencing a co-occurring mental illness. People who use illicit drugs are routinely denied life opportunities and consequently face concentrated and entrenched disadvantage.

New powers and functions of the EOC

At present the EOC is not equipped with powers sufficient for dealing with systemic discrimination within the Victorian community. VAADA considers that the EOC would need to be equipped with the following functions and powers to address systemic discrimination:

An enhanced **research/inquiry power** that enables the EOC to

- Undertake own-motion investigations in individual cases



- Undertake inquiries into cases of systemic discrimination
- Initiate complaints at VCAT and other courts and tribunals as appropriate
- Review the implementation of any codes of practice it establishes as part of its new advocacy/policy-making function (see below), and issue improvement notices where necessary
- Develop reports on the basis of statistics it already collects

An **advocacy/policy-making function** that enables the EOC to

- Employ Legal Advocates who will assist people taking complaints to VCAT
- Establish funded legal and advocacy positions within community based organisations and agencies which may have a specialist focus arising out of EOC work
- Bring representative complaints in instances of systemic discrimination
- Make submissions to other courts and tribunals
- Establish codes of practice for employment, education and other sectors that provide good and services. Such codes could also focus on housing and accommodation, clubs, sporting bodies, local government, and other sectors, as appropriate
- Develop documents setting out standards in anti-discrimination policy and practice
- Make recommendations for legislative change to the State Attorney-General.

A 'continued' **educative function** that allows the EOC to

- Establish a phone line to give free and confidential information and referrals in the area of discrimination law
- Commission the development of educational materials on Victorian discrimination law to be placed in workplaces, educational institutions, and so forth, as determined by EOC research and policy
- Mount educational campaigns on discrimination issues

VAADA believes additions to the existing EOC functions such as educational activity particularly around advocacy and policy functions will help prevent systemic discrimination against illicit drug users and others. This will occur because

- Those affected by discrimination are often so marginalised that they are not sufficiently informed and/or confident to make complaints on their own behalf. It then allows the EOC to undertake anti-discrimination actions on their behalf. This in turn may help break the cycle of discrimination and disadvantage in which profoundly marginalised people are entrenched.
- Several of the measures described above will help inform both people who experience discrimination, and the community generally about discrimination issues.
- Many aspects of discrimination cannot be approached through the individual complaints system, but require a more powerful response than can be achieved through educational measures. These aspects are best addressed through some



of the suggestions provided above, especially the EOC powers to undertake inquiries into systemic discrimination.

Recommendation:

That the Equal Opportunity Commission be granted new and enhanced powers in the area of research/inquiry, and advocacy/policy, as described in the text of submission by the Victorian Alcohol and Drug Association to the Equal Opportunity Review.

Is there a potential conflict of interest between the proposed new powers of the EOC and its existing functions?

VAADA anticipates that there is a potential conflict of interest between the proposed new powers of the EOC and its existing functions. The independent advisory service and impartial conciliation service currently offered by the EOC are valuable elements of the response to discrimination in Victoria. However, should the EOC take on a more advocacy-oriented role, the independence and impartiality of its existing functions might be seen to be compromised.

VAADA endorses Fitzroy Legal Service's submission with regards to placing the EOC's existing conciliation function within another appropriate body. The requisite expertise on discrimination matters and any increased powers and functions around research/inquiry, advocacy/policy and educative functions should remain within the Commission structure.

The reconfigured EOC would have a strong focus on undertaking inquiries into systemic discrimination and investigating incidents of individual discrimination, rather than on conciliation.



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