



THE UNIVERSITY OF
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Submission to the Equal Opportunity - Exceptions Review

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This submission comments on selected exceptions. It argues for changes to them on the basis that the existing provisions reflect earlier drafting styles and understandings of the appropriate scope of anti-discrimination laws, and that the *Equal Opportunity Act* (EOA) should be updated and brought into line with similar provisions in anti-discrimination laws in other states and at commonwealth level. There is strong value in having provisions that are consistent between state and federal law. There will be less scope for confusion about what standards apply. People in Victoria have rights under both laws, and those rights should not diverge without good reason. The EOA's older provisions should be updated to reflect the more modern approach, so that people affected have a genuine choice to use state processes to resolve disputes, rather than federal processes which involve court litigation rather than a tribunal application.

Exceptions related to disability

Many of the exceptions related to disability in the EOA reflect the understanding of disability rights of the period when they were first drafted in the early 1980s. However, understanding of disability discrimination law has advanced since then, and these exceptions should be updated and refined to match modern knowledge. In many instances the exception should remain but the hurdle to allow discrimination should be raised. Specific provisions are discussed below:

Section 22 reflects an older formulation of what is now recognised as an inability to carry out the inherent requirements of the job, as in the *Disability Discrimination Act 1992 (Cth)* (DDA). This is a much tighter test than the bare criterion of "genuine and reasonable requirements of the employment", which has had little case law interpretation and provides too low a standard of protection for people with a disability. It should be replaced by the "inherent requirements of the job", to parallel the DDA formulation.

Section 23 appears to have been intended to apply to disability discrimination because of its references to impairment and physical features. However, there is nothing in the general words of the provision that would limit its application only to those contexts. The provision is vague and specifies no criterion except judicial opinion, even though its effect is to authorise a court to allow a contract of employment to prevail over a fundamental human rights claim (non-discrimination). Preferably it should be deleted, as it has not been necessary to have such a provision in the DDA. However, if it is retained, some criterion should be identified and a standard set that provides more guidance for courts and parties. The

provision appears to be directed towards the inherent requirements of the job in the same way as s. 22, and could be subsumed into a re-worded version of s. 22. The existence of numerous vague and wide exceptions to disability discrimination dilutes its protection.

Similarly, *section 39* refers to equivalent provisions in relation to discrimination in education. This should also be amended to be more consistent with similar provision in the DDA, that is, it should state a duty to accommodate unless that would impose unjustifiable hardship on the education provider.

Section 80: this provision puts the protection of property above protection of an individual from discrimination, without any criterion of proportionality or reasonableness. It should be revised to allow an exemption only where it is reasonable (or, perhaps more strongly, necessary) having regard to the effect on the person affected and the potential harm to the interest affected, and any other relevant factors. Again, a duty to make adjustments subject to a limit where unjustifiable hardship would be imposed would be the modern way to express this provision and would allow adequate flexibility.

Discrimination in sport: s. 66

The exception to discrimination in sport focuses only on the level of the individual team or competition. However, arguably there is a need for a more sophisticated provision in relation to sport, especially where expenditure is made using public resources. There should be some overall provision that ensures that there is a fair allocation of resources to sports that cater to people of different attributes. This would prevent a public body from, for example, resourcing men's football and cricket teams at a higher level than women's. This would have an effect similar to Title XI of the Civil Rights Act 1964 US which prohibits discrimination in sport including ensuring that resourcing does not unfairly favour one group over another. It is a logical next step in relation to non-discrimination in sport in Australia, and would ensure better resources for women's sport. Given that women are taxpayers and ratepayers on the same basis as men, equity in the use of public resources for sports provision is an important step forward.

Religions discrimination provisions: ss. 75, 76, and 77

The religious exception provisions in the Victorian Act are more broadly worded than the norm for similar provisions in other state and territory Discrimination Acts. While it is not proposed that the exemption should be tightly constricted, it should be refined and tailored more narrowly to protect the interests of people affected, especially of the most numerous group, women teachers in religious schools. Hence the blanket exemption given to religious schools to discriminate by s. 76 should be limited to situations where "the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed," which is the wording of the equivalent provision, s. 38 of the *Sex Discrimination Act 1984(Cth)* (SDA). Religious schools should not be authorised to discriminate in areas where their religious susceptibilities or doctrines are not involved.

Section 77 should be reworded as a proper conscientious objection provision, but one that also takes account of the effect on the person who is discriminated against. Religious susceptibilities should not be able to be protected in situations where the offence to them would be small and the effect on the person affected would be serious. Thus some sort of test of proportionality would seem necessary.

Special measures s 82

Because the definition of direct discrimination requires equal treatment, any departure from equal treatment is prima facie unlawful discrimination (see eg *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70)). However, it is acknowledged that in some situations where people are not similarly situated, it may be necessary to treat them differently to achieve equality. This covers a wide range of approaches, from the provision of special services for people with a disability or language limitations, to affirmative action schemes to encourage employment of disadvantaged groups or encourage the advancement of groups who are represented below what could be expected in the workforce, where for example, it may be appropriate to allow special searches for women candidates for positions.

However, section. 82 appears to be drafted with only the first of these models in mind, and it should be made clear that it applies to the employment situations as well as other areas. It refers only to “special services, benefits or facilities that are designed (a) to meet the special needs of ... people; or (b) to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.” There is no reference to positive action in employment in this section and it appears to lie outside this wording. Section 82 is worded very differently from the special measures provisions in other Australian anti discrimination laws (see the provisions from federal laws extracted below in the Appendix). It falls far short of the type of exception that would be needed to ensure that programs designed to achieve equality in substance do not breach the prohibition on direct discrimination, which requires sameness of treatment. It should be updated to reflect those in federal and more recent state and territory laws, none of which have resulted in any problems of application. The formulations in the SDA and *Age Discrimination Act 2004 (Cth)* are both much clearer and a version of these could be considered for adoption in place of s. 82.

This argument for change is supported by the provision of the Charter with regard to special measures, which suggest that standards are changing as we have more experience with how to address unequal treatment legally.

Section 83: temporary exemptions

This power has been used extensively in recent years, and many exemptions granted are for purposes that are intended to be permanent as they form the basis for developing a business. This is not an appropriate use for a temporary exemption power, and there should be an effort to develop a standing exception that would cover such cases, as well as to provide guidelines on how the power should be exercised.

APPENDIX: FEDERAL SPECIAL MEASURES PROVISIONS

RACIAL DISCRIMINATION ACT S. 8 Exceptions

- (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

SEX DISCRIMINATION ACT s. 7D Special measures intended to achieve equality

- (1) A person may take special measures for the purpose of achieving substantive equality between:
 - (a) men and women; or
 - (b) people of different marital status; or
 - (c) women who are pregnant and people who are not pregnant; or
 - (d) women who are potentially pregnant and people who are not potentially pregnant.
- (2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).
- (3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:
 - (a) solely for that purpose; or
 - (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.
- (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

AGE DISCRIMINATION ACT 33 Positive discrimination

This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:

- (a) the act provides a bona fide benefit to persons of a particular age; or
 - Example 1: This paragraph would cover a hairdresser giving a discount to a person holding a Seniors Card or a similar card, because giving the discount is an act that provides a bona fide benefit to older persons.
 - Example 2: This paragraph would cover the provision to a particular age group of a scholarship program, competition or similar opportunity to win a prize or benefit.
- (b) the act is intended to meet a need that arises out of the age of persons of a particular age; or
 - Example: Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.
- (c) the act is intended to reduce a disadvantage experienced by people of a particular age.
 - Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.