



Blind Citizens Australia

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## **Submission to the Victorian Equal Opportunity Act Exceptions Review**

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## Introduction – About Blind Citizens Australia

Blind Citizens Australia (BCA) is the peak national advocacy organisation of and for people who are blind or vision impaired. Our mission is to achieve equity and equality by our empowerment, by promoting positive community attitudes, and by striving for high quality and accessible services which meet our needs. As the national advocacy peak body we have over 3000 individual members, branches nationwide and 13 affiliate organisations that represent the interests of blind or vision impaired Australians.

### Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?

Human rights must always be balanced to ensure that everyone can have their needs met without placing undue burdens on other people or groups. It is appropriate that the relevant legislation should acknowledge this and seek to resolve any conflicts between meeting the rights of an individual and protecting the rights and welfare of others.

However, the use of exceptions in the Victorian Equal Opportunity Act (1995) to achieve this balance creates a number of problems. Some specific exemptions create a system which is not consistent with Federal anti-discrimination laws such as the *Disability Discrimination Act (1992)*. While each jurisdiction must create legislation to suit the local circumstances, there is an argument for consistency in areas where systems, and outcomes, can be intertwined.

For example, people with disabilities can choose to withdraw a complaint at the Federal level placed before the Human Rights and Equal Opportunity Commission (HREOC) in favour of a state based disability discrimination hearing, though the reverse is not true. This situation can cause confusion among those who are already daunted by the very fact of the discrimination they face and the long waiting times and complex processes involved in overcoming that discrimination.

Blind Citizens Australia argues that in general, exceptions on the basis of affirmative action (such as schools and jobs specifically for people who are blind or vision impaired) are more appropriate than those which promote negative discrimination, such as the exceptions regarding the special provision of goods and services.

We believe that while all circumstances should be taken into consideration, it would be more appropriate for them to be dealt with by providing potential defences as per the *Disability Discrimination Act 1992*. Doing this would remove the onus from the complainant to show why an exception does not apply to them, meaning that they would need to prove that discrimination had occurred and the respondent would need to prove why that discrimination was necessary or unavoidable. In practice, this would mean that some of the exceptions we have recommended for repeal below, such as the exception for small businesses, could still be brought to bear in a conciliation case where the facts were relevant.

What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?

There are many long term social and economic benefits to reforming the exceptions in the Act. These include a greater workforce participation rate among people with disabilities and older Australians, as well as increased social inclusion leading to greater wellbeing and a more open, tolerant society.

For some, such as small businesses, religious organisations and private clubs, changing the Act may mean greater initial costs as they adapt their attitudes or infrastructure to support an inclusive and non-discriminatory society. Without a firm understanding of what changes will occur it is difficult to place any figure on economic costs. These costs, however, could be reduced by gradually introducing any changes and seeking ongoing government support for those unable to support themselves in achieving change.

Should any exceptions be repealed? If so, which exceptions and why?

### **Section 17 – Exception – genuine occupational requirements**

Blind Citizens Australia believes that discriminating against people on the basis of physical features for artistic work is both unnecessary and detrimental to the diversity of the arts. If a performer or model who is blind or vision impaired can undertake every aspect of the work just as well as a fully sighted candidate would, there should be no room for discrimination.

### **Section 21 – Exception – small business**

Often people with disabilities could be employed with minimum cost or hardship to a small business; it should be the responsibility of the business to show that the burden is too great, rather than simply allowing all small businesses to be exempt. For example, a blind bookkeeper working for a small business would require screen reading software for their computer and a scanner to computerize digital materials. This equipment would be paid for by the government under the Workplace Modifications Scheme, so there would be no hardship for a small employer to endure.

## **Section 22 – Exception – special services or facilities**

People with disabilities may not be able to meet all the ‘genuine and reasonable’ requirements for employment as required in a job description (such as a person who is vision impaired being unable to drive a car), but if these are not frequent requirements then they should not be cause for discrimination. In the example of a staff member who is vision impaired, it would be reasonable for that staff person to be given taxi vouchers or extra time to travel using public transport when necessary. An employer, however, may feel that this is unreasonable, and may feel encouraged in this view because the law asks that people with disabilities carry the burden of proof regarding why and how adjustments can be made.

For similar reasons, Blind Citizens Australia also recommends repealing Sections 32, 39 and 46, which relate to the provision of special services or facilities in other contexts.

## **Section 24 – Exception –standards of dress and behaviour**

Standards of dress and behaviour should not be subject to law. Sometimes the appearance or behaviour of a person will be due to particular issues related to disadvantage; for example, a person who is vision impaired will not always notice stains on their clothing. Blind Citizens Australia believes that it is entirely appropriate for companies to set policies regarding appearance and behaviour, but a breach of those standards should mean dialogue, not dismissal.

Section 40, which relates to standards of dress and behaviour in education, should also be repealed.

## **Section 25 – Exception - Care of Children**

Blind Citizens Australia believes that, while care for children is important, it would be covered under the provision for meeting the essential requirements of a job. An exception for care of children means that the onus is on those who are often discriminated against, not those in power. For example, a teacher or child carer who is blind currently needs to show that they can provide adequate care, which may be difficult for someone with minimal work experience. We believe an employer should have to show why that wouldn't be possible, not the other way around.

## **Section 27B – Exception – Gender Identity**

This exception should be repealed because it denies someone of any gender identity the right to disclose their identity as they see fit. We do not require potential employees to disclose marriage status, sexual orientation,

pregnancy or disability under threat that they may later be dismissed if they do not disclose.

Additionally, asking a person to disclose one trait to a potential employer places that person in an awkward position if they have other, undisclosed traits which later come to light. For example, a vision impaired biological woman who identifies as a man will have to disclose his gender identity, but not his vision impairment. In disclosing his gender identity, he may feel as though he is also obliged to disclose his disability despite the fact that this is not the case.

### **Section 75 – Exception - Religious Bodies**

Religion is a critical part of civil life for many Victorians. To deny access to religious buildings and services to the most vulnerable in the community is not acceptable. BCA believes that religious organizations should have the same right to argue the need for case-specific exceptions on the basis of religious sensitivities rather than having the automatic right to exclude people on those grounds.

This is particularly important because religious sensitivities are not defined by boundaries. For instance, it is perfectly reasonable for a Mufti to ban a guide dog from entering a mosque because it may be offensive, but it is far less reasonable for a Muslim waiter to refuse a guide dog entry to a restaurant.

For the same reason BCA believes that Section 76, pertaining to religious schools, should also be repealed.

### **Section 78 – Private Clubs**

The ability to join a private club such as a local issues lobbying group is critical to civil and political participation, and a broad exception for private clubs arguably prevents freedom of association which is protect under the Victorian Charter of Human Rights and Responsibilities. Although these incompatibilities could be eliminated by providing a clear definition of a private club, we believe this would not remedy the underlying problem: the onus should be on clubs to prove that they ought to be allowed to discriminate.

Should any exceptions be amended? If so, which exceptions and why?

### **Section 23 – Exception – reasonable terms of employment**

‘Reasonable terms of employment’ should be made flexible enough to be acceptable a wide section of the community in the first place. That is, if there are two options which could be considered reasonable, the more reasonable one should be preferable. This should be made clear in the law.

For example, setting working hours of 9:00am – 5:00pm is reasonable, but unless there is a compelling reason for those to be the only hours an employee can work, it is more reasonable to say that 10:00am – 3:00pm are core working hours. As long as employees work those hours as required, the rest of their working day can be performed anywhere between 8:00am and 7:00pm. The second scenario is much more acceptable to people with disabilities who may not wish to order a taxi during peak hour, but also assists parents of young children, people with fatigue issues, or those who might like to engage in voluntary work during normal business hours.

## **Section 43 – Exception – Insurance**

Blind Citizens Australia encourages the review to ensure maximum consistency between this exception and similar measures in the Disability Discrimination Act. We note, however, that doing so may encourage small businesses in particular to adopt a risk management approach to employing or serving people with disabilities on the basis of insurance claims. For this exception to be effective while causing minimum harm, it needs to be accompanied by clear outlines of 'reasonable' data or evidence.

## **Section 80 – Protection of Health, Safety or Property**

It is important that this exception exists, however BCA is concerned that there is some danger that it allows for discrimination on the basis of perceived threats to health, safety or property rather than real ones. For example, there may be the perception that allowing a person who is blind or vision impaired to work in a reception role is unsafe because they will not see potentially dangerous customers. In reality, it is very rare for any receptionist to face this problem and a receptionist who is blind or vision impaired may not be at a disadvantage if the danger cannot be seen from some distance away.

BCA recommends that the wording of this exception be changed to reflect the need for evidence that there is a reasonable expectation of a direct threat to health, safety or property, rather than a perception of a threat which may or may not come to pass.

## **Exceptions to Discrimination in Education**

Blind Citizens Australia notes that the Victorian Equal Opportunity Act came into power long before the Disability Standards on Education were adopted as part of the Disability Discrimination Act. While we are not qualified to provide an intricate examination of the ways in which these two laws differ, we believe that this review should make an attempt to ensure that any remaining exceptions in the Act are closely aligned with federal law.

Is the VCAT exceptions process appropriate? How could it be improved?

Blind Citizens Australia believes that there should be a greater reliance on temporary exceptions or one-off exceptions granted through the VCAT system.

This outcome would achieve lower levels of systemic and individual discrimination, and could be brought about through changes to the exceptions under the Act such as the repeal of blanket negative discrimination exceptions and the provision of potential defences.

Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?

Yes. This section of the Act allows discrimination to occur without any checks and balances; discrimination need not be considered in the development of other Acts or in their application.

In limiting social and legal thought about discrimination this exception also places serious limitations on the effectiveness of both the Equal Opportunity Act and the Charter of Human Rights and Responsibilities. Anti discrimination conciliation

processes are discouraged and the general public is therefore disempowered.

Are there any examples of Acts and enactments that cannot be reconciled with the Act?

Blind Citizens Australia is currently unaware of any incompatible legislation.

Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?

Yes. Such a mechanism would allow people seeking to resolve anti-discrimination matters to be clearer about whether or not they have a case to take forward. For many people who are blind or vision impaired, the decision to lodge a disability discrimination complaint is not taken lightly because it is felt that the process may be long and stressful. Being more certain that a case has merit will encourage people who are blind or vision impaired to consider lodging a complaint.

It is especially important that there be a finite list of exempt Acts from the perspective of people who are blind or vision impaired. Those who use audio or Braille as a primary means of reading print material find it difficult to skim large tracts of information for one specific detail. Combing through every potentially exempt Act would be a nearly impossible task for someone with sight, let alone someone faced with longer reading times to begin with.

Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

Yes. A three-year sunset clause would allow the various Departments to evaluate their legislation clearly and carefully. From a community sector perspective, this timeframe would also allow for consultation and open discussion about any changes.