



## **The Exceptions Review:**

**Submission to the Review of the Exceptions to and Exemptions from the *Equal Opportunity Act 1995***

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## **About Job Watch Inc.**

Job Watch Inc (“JobWatch”) is an employment rights community legal centre which, since 1980, has operated as the only service of its type in Victoria. The centre is funded primarily by the Victorian State Government (the Department of Innovation, Industry and Regional Development– Industrial Relations Victoria).

JobWatch’s core activities include:

- The provision of advice, information and referral to Victorian workers via a free and confidential telephone information service which received 17,939 in the 2006/2007 financial year;
- A community education program that includes publications, information via the internet, and talks aimed at workers, students, lawyers, community groups and other organisations;
- A legal casework service provided by JobWatch’s Legal Practice for disadvantaged workers;
- Research and policy work on employment and industrial law issues;
- Advocacy on behalf of those workers in greatest need and disadvantage.

In 2006/2007, JobWatch received 1,682 queries relating to discrimination and sexual harassment on its telephone advice line.

In addition, JobWatch’s legal practice made 47 appearances on behalf of clients during 2006/2007 mostly in relation to discrimination and sexual harassment matters at the Victorian Equal Opportunity and Human Rights Commission (“the Commission”), the Federal Human Rights and Equal Opportunity Commission (“HEREOC”), the Victorian Civil and Administrative Tribunal (“VCAT”) and at the Australian Industrial Relations Commission in relation to unfair/unlawful termination applications.

JobWatch is uniquely placed to comment on the effects of legislation on a broad range of Victorian employees, particularly disadvantaged workers.

Our records indicate that our callers have the following characteristics:

- the majority are not covered by collective agreements and are only entitled to the minimum conditions under federal awards or the minimum Standard under *Workplace Relations Act 1996*;
- the majority are not union members;
- a large proportion are employed in businesses with less than 20 employees;
- a significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting;
- many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status, or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships;
- many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment;

JobWatch welcomes the opportunity to make a submission to the Review of the Exceptions to and Exemptions from the *Equal Opportunity Act 1995* (“the Exceptions Review”) and is pleased to note that the Statutory Authority Exception is to be repealed after a 3 year sunset period.

The case studies provided in this submission are those of actual but de-identified JobWatch clients or callers to JobWatch’s telephone information service.

## Introduction

The *Equal Opportunity Act 1995*, (“the Act”) in its original form, was passed by the Victorian Parliament in 1977, and was amongst Australia’s earliest anti-discrimination legislation. It was, and in its present incarnation continues to be, founded upon principles of “a fair go” or equality of opportunity for all persons, regardless of their attributes<sup>1</sup>.

While this legislation extends equality of opportunity to a number of specified areas, the focus of JobWatch’s submission is on discrimination in the area of employment.

Equality of opportunity in employment translates to a recognition of the right to work. This right is specifically recognised in Article 23 (1) of the Universal Declaration of Human Rights, which provides that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

*The Charter of Rights and Responsibilities Act 2006* (“the Charter”) also seeks to prevent discrimination before the law<sup>2</sup>, subject to certain necessary or justifiable limitations<sup>3</sup> hereafter known as “reasonable limitations”. The Charter also provides for a number of human rights including the right to life and the protection of families and children of which the right to work is arguably a necessary element.

In this submission (which is largely based on JobWatch’s previous submission to the Security of Acts and Regulations Committee review<sup>4</sup>), JobWatch contends that although the Act goes some way towards meeting its objectives and the objectives of the Charter, it could be improved by reducing or limiting the scope of the exceptions under the Act which only work to undermine its effectiveness.

In particular, we argue for the repeal of a number of employment related exceptions and exemptions contained within the Act. We believe that these exceptions and exemptions go beyond the scope of “reasonable limitations” on human rights as provided for in the Charter and that the objectives of the Act will be more effectively achieved if these recommendations are implemented.

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<sup>1</sup> See section 6 of the *Equal Opportunity Act* for a list of the protected attributes

<sup>2</sup> See section 8 of the Charter.

<sup>3</sup> See section 7 of the Charter.

<sup>4</sup> Job Watch Inc - Submission to the Discrimination in the Law Inquiry under section 207 of the *Equal Opportunity Act 1995* (April 2004) prepared by Louisa Dickinson and Andrew McCarthy.

## **Underlying principles of this submission**

1. The right to work is a fundamental human right as outlined above. This right extends to all persons, irrespective of their protected attributes, and it is this principle which the Act has sought to implement in Victoria since its inception.
2. Any exceptions or exemptions in the Act should not be used to limit access to employment opportunities but rather, should either serve to advance substantive equality between various groups in society, as befits beneficial legislation, or should be limited to only those provisions which are necessary to ensure fairness and reasonable practical application of equal opportunity principles. For instance, JobWatch recognises that it is unjust to require a particular sector of the community to make unreasonable accommodations to permit a person to perform work, the inherent requirements of which they would otherwise be incapable of performing. So it is sound for an “inherent requirements of the job” exception, strictly contained and strictly applied, to remain. However, any arbitrary exceptions which unfairly serve to limit the opportunities of a particular group should be removed.
3. Recruitment, selection and employment-related decisions should be based on sound and defensible criteria, such as ability, merit, performance, behaviour and the operational requirements of the employer, untainted by irrelevant and unjust reference to a person’s attributes. For example, it is acceptable for an employer to discriminate against job applicants if they are unsuitable for particular employment for any reason not based on an attribute, such as a lack of requisite skills or qualifications for the position.
4. Equal opportunity legislation should not be used to satisfy a constituency at the expense of others’ legitimate interests or protect the exclusionary interests of particular sectors of society.
5. The community’s best interests are afforded by facilitating genuine equality of opportunity for all its members. It is only in rare circumstances that competing interests, rights or “community standards” justify limiting the operation of beneficially intended human rights based legislation.
6. Equal opportunity legislation should not, where possible, be used as a vehicle to legislate on matters best dealt with by employment and industrial laws.

## **Exceptions to discrimination in employment and employment related areas**

It is apparent that the Act itself constitutes legislation that contains provisions which lead, or may lead, to discrimination on the basis of a protected attribute. These provisions take the form of exceptions and exemptions.

This paper examines the following employment-specific exceptions contained within sections 16 to 28 of the Act with a view to assessing whether they are necessary or justifiable within Victoria’s human rights framework:

- Exception-domestic or personal services
- Exception-genuine occupational requirements
- Exception-political employment

- Exception-welfare services
- Exception-family employment
- Exception-small business
- Exception-special services or facilities
- Exception-reasonable terms of employment
- Exception-standards of dress and behaviour
- Exception-care of children
- Exception-compulsory retirement of judicial officers
- Exception-youth wages
- Exception-early retirement schemes
- Exception-gender identity
- Exemption-single sex accommodation

We also examine the following general exceptions and exemptions, insofar as they pertain to employment:

- Things done with statutory authority
- Things done to comply with orders of courts and tribunals
- Religious bodies
- Religious schools
- Protection of health, safety and property
- Welfare measures and special needs
- Exemptions by the Tribunal
- Exemptions to allow compulsory retirement in the public sector

## **EMPLOYMENT SPECIFIC EXCEPTIONS**

### **Section 16 - Domestic or personal services**

This exception allows an employer to lawfully discriminate when employing people to provide domestic or personal services in their home.

Recommendation – That section 16 be repealed.

While it may be argued that “community standards” require that the home be free from external regulation, this contention is untenable from the perspective of the Charter and general equal opportunity and employment law principles. While there is a social expectation that, as a matter of general principle, everyone should be free to express themselves and live comfortably in their homes, this should not create an unfettered right to unfairly discriminate against potential domestic workers.

Regardless of whether paid work is performed in a large organisation, a small business or in the domestic sphere, it constitutes employment and must be subject to a level of regulation if the paramountcy of human rights referred to above it is to be respected. The domestic or personal services exception however, seems to be at odds with this principle and sends an ambiguous message when viewed within the context of the Act and the Charter. It suggests that although discrimination on the basis of an attribute is generally unacceptable and should be discouraged, if it occurs within employment in a domestic context it is acceptably beyond the reach of the operation of the Act. The exception therefore creates an unfortunate inference about the importance of eliminating discrimination and undermines the effective operation of the Act and the promotion of the value of equality of opportunity for all.

In practice, the repeal of this exception will not mean that potential domestic employers will have unsuitable candidates imposed on them. Rather, it merely means that they cannot use an attribute such as gender identity, sexual orientation, race or sex as the basis for declining to employ someone should they choose to enter the employment market. This does not create an unreasonable burden on employers but rather provides opportunity for all workers, regardless of their particular attributes. In any event, many, if not most, domestic employers will continue to offer domestic work using means other than the public employment market, and it is unlikely that claims will arise in such circumstances.

From this perspective, the exception is both unjustifiable and unnecessary and therefore does not represent a reasonable limitation on human rights under the Charter.

### **Section 17 - Genuine occupational requirements**

Section 17 allows employers to limit employment to one sex if there is a genuine occupational requirement, such as a necessary physical characteristic particular to people of one sex, other than strength or stamina; or the preservation of decency or privacy; for example where employment involves fitting clothing, conducting body searches or entering lavatories or other areas where people are in a state of undress.

Under this section, employers are also allowed to limit the offering of employment to people of a particular age, sex or race, or to people with or without a particular impairment or physical features, in relation to a dramatic or artistic work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

Recommendation – that this exception (in its current form) be repealed and that the measures contained within this exception be incorporated into a new “inherent requirements” exception, which is discussed later in this submission (see below).

It is submitted that this provision has sound foundations and appears to be based on balancing equality of opportunity with the attainment of logical and practical outcomes which are essentially grounded in the public interest. Further, the requirement for any limitation based on attributes to be based on “genuine” occupational requirements provides an effective safeguard against unfair or arbitrary discrimination.

The relatively narrow scope of this exception makes it clear that there are very few situations in which the genuine occupational requirements of a particular position will be determined by a person’s particular attributes.

While this exception can be justified as a “reasonable limitation” on human rights under the Charter, it is submitted that the alternative “inherent requirements” provision suggested below will effectively retain the benefits of this provision and operate to simplify the Act as a whole.

### **Case study - Genuine occupational requirements**

Anita returned to work as a buyer in the retail industry after 6 months leave due to a spinal injury. On her first day back at work she was called into a meeting within 5 minutes of arriving to discuss what her capacity was and what duties she could and could not do. Anita told her employer that she could do all the duties, except heavy lifting which makes up about 5% of her job. Her employer told Anita that because she could not do the heavy lifting she could not perform the inherent requirements of the job. Anita suggested that she have an assistant for 4 hours per week but the employer rejected this. Her employer suggested that she move to a desk job, a completely different role and one that would possibly make her back injury worse.

The alternative “inherent requirements” provision would also be a “reasonable limitation” on human rights under the Charter as it is a justifiable limitation necessary to balance legitimate competing interests in a way that is fair, objective and not merely arbitrary.

### **Section 18 – Political employment**

This section allows an employer to discriminate on the basis of political belief or activity in the offering of employment to a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

Recommendation – That this provision be repealed.

This exception does not operate in a manner which is consistent with the objectives of the Act. Rather than eliminating discrimination or expanding opportunities, similarly to the domestic service exception, it appears to allow for a “protected” area where discrimination is tolerated and tolerable. It is not necessary or justifiable to ensure a proper and practical application of the Act or equal opportunity principles generally.

The roles of electoral officer, ministerial adviser and political staffer involve the performance of tasks which, it is submitted, generally do not require a specific political belief. For example, the key role of an electoral officer is to assist an elected representative and members of the electorate with queries and/or liaison with various levels of government on their behalf. Holding particular political beliefs or allegiances would not, in the usual course of events prevent or preclude a person from performing these tasks. Moreover, the context is self-regulating insofar as it can be reasonably expected that a person who feels that they could not perform the job due to their political beliefs would not seek a position with the opposing political party in any event.

In most cases however, a person’s political beliefs, whether expressed through their vote, political party membership or stated opinions, do not preclude them from performing work in accordance with their specific contract of employment. For example, it would be reasonable to assume that a person who votes for Party A and

who has the relevant skill set, such as research, policy development and communications skills, could perform these duties as directed to do so and not contrary to their employer's instructions, even if their employer was Party B.

It is important to note that the common law imposes a number of duties upon employees, which operate effectively to prevent employees from working in a manner inconsistent with their contract of employment. For instance, employees are required to carry out their duties with reasonable care and skill and to obey their employer's lawful and reasonable instructions. It is submitted that a person who is unwilling or unable to fulfil these fundamental obligations should be disqualified from employment on that basis, rather than on the basis of their political beliefs, which may not have any effect on his or her capacity or desire to perform a particular role. If, however, a person does not work faithfully or in accordance with their contract of employment, an employer would be reasonably entitled to exercise his or her rights to terminate the employment. The general body of employment law is the appropriate mechanism to deal with this, rather than legislation which is intended to eliminate discrimination.

From a policy perspective, it should be noted that the positions of electoral officer and ministerial adviser are funded by the State. As such, they should be filled in accordance with equal opportunity principles, as opposed to what appears to be a licence to limit employment to a specific group of "party members" or adherents to the beliefs of the political party in office at any particular time. Equal opportunity legislation should not be used to provide these special benefits to a group of exclusive political "insiders", at public expense, as part of the "spoils of office."

On this view, the political employment exception is not a "reasonable limitation" on human rights under the Charter.

## **Section 19 - Provision of welfare services**

This section allows an employer to limit the offering of employment to people with a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

Recommendation – That this provision be repealed.

There are some persuasive arguments in support of the retention of this exception, however it is submitted that the objects of the Act and the Charter would be better served if this exception were repealed.

In some cases, it may be appropriate for welfare services to be provided by people with a particular attribute if they could do so significantly more effectively than those without the attribute. An example of this would be multi-lingual social workers engaged in a service run for the benefit of speakers of a language other than English.

However, there is also the scope for this exception to exclude particular groups from access to certain employment which may be characterised as being for the advancement of people with a particular attribute. For example, an "old boys" club of former students of a male single sex school may wish to employ one of its members to provide services, such as producing a newsletter or organising lunches for the purpose of networking. Obviously that person would have the attribute of being of

the male sex to the exclusion of an applicant without that attribute. Such an organisation could argue that the position is for the advancement of the group and could most effectively be performed by a person drawn from within its own ranks because he is familiar with the organisation's culture. However, the genuine and reasonable requirements of the position would generally not preclude persons from outside the school community from performing the role or mean that it could be performed any more than marginally more effectively by the male person. Such an exception could mean that certain groups, most notably women in this situation, would be excluded from access to employment.

If a position does have "inherent requirements" pertaining to particular attributes, rather than it merely being preferable for a person to have a particular attribute, then the general exception that is proposed by this paper (being the general "inherent requirements" exception) would afford sufficient immunity from an unlawful discrimination claim.

Regardless, it would still be possible for an employer seeking greater certainty or authorisation to appoint a person with specific attributes, to apply to VCAT under section 83 of the Act for a temporary exemption.

From this perspective, the exception is both unjustifiable and unnecessary and therefore does not represent a reasonable limitation on human rights under the Charter. On the other hand the proposed "inherent requirements" exception would be a "reasonable limitation" on human rights under the Charter as it a justifiable limitation necessary to balance legitimate competing interests in a way that is fair, objective and non-arbitrary.

## **Section 20 - Family employment**

Under this exception, an employer may limit the offering of employment, in a business carried on by him or her, to people who are his or her relatives.

Recommendation – That this provision be repealed.

Although there is some justification for the retention of this exception being that:

- (a) from an economic and social perspective, a family should be at liberty to establish a business that only offers employment to family members within the meaning of the Act; and
- (b) this exception does not seem to have the effect of discriminating against an individual or group on the basis of any protected attribute.

However, on either basis, the exception is completely unnecessary because:

- (a) it is difficult to see how a complaint could ever arise as such an employer would not publically advertise any positions; and
- (b) the exception doesn't exclude or relate directly to any protected attribute.

### **Case study - Family employment**

Elaine has been working for over 6 years on a permanent full time basis as a store manager. She returned from annual leave to collect her rosters and noticed that her hours had been reduced from 45.5 hours per week to 22 hours per week. Her boss had replaced her with a family member. Her boss was overseas so she couldn't talk to him directly. Elaine went on sick leave for one week because she was so upset about it.

We note however that an employer cannot, nor, we submit, should they be able, to lawfully terminate an employee's employment in order to replace them with a family member.

### **Section 21 - Small business**

Businesses that employ no more than the equivalent of 5 people (other than family or relatives) on a full-time basis (30 hours a week or more) are exempted from anti-discrimination provisions when recruiting staff.

Recommendation - That this provision be repealed.

While recruitment and selection processes should afford equality of opportunity to prospective candidates, this exception operates to allow, rather than eliminate, discrimination in this process based on nothing more than the size of the employing entity. In a similar way to the domestic services exception, this provision also artificially restricts the application of regulation to a particular form of paid employment.

Although it appears intended to create a beneficial "immunity" for small businesses, this exception undermines the operation of the Act (and the Charter) by suggesting that the Act (and the Charter) impose an onerous burden that small businesses are either not capable of complying with, or with which they should not possibly be expected to comply. It also creates the false impression that the deleterious effects of unlawful discrimination are of less consequence if a business employs less than 5 staff.

This exception should be repealed as it offends against principles of justice (including section 8 of the Charter), which requires that the law be applied consistently and equally unless there are overwhelming competing interests of justice, fairness or practicality. This exception is therefore not a "reasonable limitation" under the Charter.

It is also worth noting that the Commonwealth anti-discrimination legislation does not provide for a small business exception and there does not seem to be any evidence to suggest that the Commonwealth scheme has caused any particularly adverse outcomes, economic or otherwise, for the small business sector.

## **Section 22 – Special services and facilities**

Section 22 allows an employer to discriminate against another person on the basis of impairment if the person with a disability would require special services and facilities in order to perform the genuine and reasonable requirements of the employment, and it is not reasonable in the circumstances for those special services and facilities to be provided, or the person could not adequately perform the genuine and reasonable requirements of the employment even after provision of special services and facilities.

Recommendation – That this exception be retained.

There are strong societal benefits and policy arguments to support the retention of this exception. While it provides an exception to employers, it also implicitly recognises both the importance of providing all people with an equal opportunity to obtain gainful employment and the intrinsic value of work in people's lives.

This exception recognises the concept of the reasonableness in requiring employers to accommodate a person's special needs arising from an impairment. Yet, in accordance with community expectations, economic realities and general practical considerations, it provides a limit to the extent to which an employer must provide special services and facilities. This limit is based on what is "reasonable in the circumstances." As such, it represents an acceptable balance between the right to employment and the obligations on employers and so may be seen as a "reasonable limitation" under the Charter.

## **Section 23 – Reasonable terms of employment**

This exception allows an employer to set reasonable terms or requirements of employment or make reasonable variations to those terms, to take into account any of the following:

- the reasonable and genuine requirements of the employment;
- any special limitations that a person's impairment or physical features imposes on his or her capacity to undertake the employment;
- any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment.

Recommendations – That the substance of this exception be retained but that it be reformulated.

It is reasonable for this section to be substantially retained. It operates to limit the scope of the Act, however it is apparent that there are circumstances where this is necessary, just and reasonable so as to ensure the fair and practical application of the Act and so this exception may be seen as a "reasonable limitation" under the Charter.

This exception should also be used as the basis for a general "inherent requirements" exception for the area of employment which is discussed at length below.

## **Section 24- Dress standards**

This provision allows an employer to set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.

Recommendation – That this provision be repealed.

This exception does not pertain to any protected attribute and does not fit within the concept of discrimination contained within the Act or deal in any way with matters that are relevant to its operation. Rather, it merely confirms an employer's common law right to set reasonable terms and conditions of employment.

In relation to the Charter, it could be argued that this exception may impinge upon the right to freedom of opinion and expression and/or similar rights but it is difficult to imagine any employment context where the exception could be seen as unreasonable.

Nevertheless, the Act aims to eliminate discrimination and promote equal opportunity. It is therefore not an appropriate vehicle to use to codify an aspect of managerial prerogative regardless of whether the exception may be a "reasonable limitation" under the Charter.

### **Case study - Dress standards**

Mary's daughter Briony worked as a sales assistant for 6 months on a casual part-time basis. When she got the job and in the interview Briony was wearing a chin piercing. Her employer did not make any comments about it but now he has told Briony that she must remove it.

## **Section 25 - Care of children**

Under the terms of this exception, employers are given the right to discriminate against employees or prospective employees if the employment involves the care, instruction or supervision of children. This exception will apply only when an employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children and has a rational basis for the belief.

Recommendation – That this provision be repealed.

This exception is at odds with the objects of the Act and effectively undermines its integrity and effectiveness by inferring that oblique criteria based on non-specified attributes are an acceptable basis for discrimination.

When considering this exception, it is important to note that it allows an employer to discriminate against a person on the basis of a belief which is rational and genuinely held. "Rational" is not defined in the Act. Accordingly, "rational" does not necessarily mean valid, objective, sound, defensible or reasonable. Therefore, in reliance on this exception, a person could lawfully discriminate against a person or group of persons

on the basis of ignorance, dislike, or intolerance if these sentiments were based on genuine and rational considerations.

It goes without saying that children should be protected from harm and that, in certain circumstances, special measures are required to advance this end, for example the *Child Employment Act* and the *Working With Children Act*. However, it is not appropriate or acceptable for equal opportunity legislation to be suspended to exclude people with particular attributes if they are able to fulfil the inherent requirements of the employment, which would usually be based on skills, qualifications and a capacity to best serve the interests of children. For example, it may be a requirement of a particular job that the prospective (or current) employee be required to obtain a Working With Children Permit which, if not obtained, would make that employee (or prospective employee) unsuitable for the position regardless of whether or not the employee has a protected attribute or not.

As with a number of the exceptions discussed in this paper, if particular employees are not appropriate for particular positions, employers are not required to employ them, provided that the reason for their being denied employment is not based on an attribute. Further, aside from particular impairments<sup>5</sup>, it is difficult to fathom how any protected attributes would render a person unsuitable to care for children on the basis that they are a risk to the physical, psychological or emotional well-being of the children.

This provision is illogical and offensive to the principles of the Act as it implies an endorsement of ill-founded assumptions about the suitability of persons with certain attributes to work with children.

Although this issue may be sensitive, it is important to recognise that the repeal of this section does not encroach on a parent's right to entrust his or her child to a particular person or for a school to employ instructors with particular religious beliefs. Rather, it requires employers to treat all prospective and existing employees in a manner that is not based on what would otherwise be discriminatory criteria and restricts them to logical assessment of criteria which are relevant to the job.

The Act is therefore an inappropriate instrument for restricting employment relating to the care, instruction and supervision of children. If an employee poses a risk to the health or well-being of children, the appropriate mechanisms to use are founded in thorough recruitment and screening processes, workplace policies and industrial relations or subject specific legislation.

From the perspective of the Charter, this exemption is both unnecessary and unjustified and so cannot be seen as a "reasonable limitation" on human rights.

#### **Case study - Care, instruction and supervision of children**

Rosa has been working as a child care worker for a small centre for nearly 2 years. Her employer has problem with Rosa smoking. She smokes on her own time at a café next to the child care centre. Rosa has been told by her employer that she can't touch the children because of her smoking. This has made her job very difficult to do.

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<sup>5</sup> It is submitted that any impairment which prevents a person from being able to perform a particular role would be caught by the inherent requirements exception discussed below.

## **Section 26 – Compulsory retirement of judicial officers**

This exception allows for Judges of the Supreme and County Courts, Magistrates and Bail Justices to be discriminated against on the basis of age by allowing for a compulsory retirement age.

Recommendation – That this provision be repealed.

Compulsory retirement has been prohibited in Victoria since 1 January 1997. It is therefore inconsistent with the operation of the aims of the Act and the Charter for this exception to continue to operate.

Rather than being founded on an objectively defensible ground, this exception gives rise to an inference that judicial officers somehow lose capacity upon reaching a certain age. Such an inference is without foundation as age is an arbitrary measure, which does not bear any necessary relationship with a person's capacity to fulfil most roles. The only bearing that age has on the appointment of a judicial officer would be that as a matter of logic a person would have had to reach a certain age to have attained the specialised skills, qualifications and experience to be able to satisfy the inherent requirements of the position.

On this basis, any compulsory retirement policies and legislation should be abolished.

The public policy arguments in support of promoting diversity of appointments to the bench should not, and cannot, be addressed by a scheme of compulsory retirement from permanent judicial appointments.

The sound public policy reasons for permanency of judicial appointments (principally judicial independence) are not impugned by removing this exception.

Judicial appointments should of course be subject to the inherent requirements exception. Moreover, the Victorian Parliament still retains its right to terminate appointments in the event of incapacity or misconduct.

On this basis, the exception is both unjustified and unnecessary and so cannot be seen as a “reasonable limitation” under the Charter.

## **Section 27 – Youth wages**

Section 27 allows employers to lawfully pay a youth wage, that is, to pay young people at a lower rate than adults.

Recommendation – That this section be repealed.

As the payment of youth wages is authorised by Commonwealth legislation, regardless this exception, youth wages can be lawfully paid in accordance with section 109 of the Constitution or alternatively, in reliance on the statutory authority exception contained within section 69 of the Act until that section is repealed.

However, in the context of this submission, it is important to discuss the discriminatory effects of this exception and the current youth wages policy

irrespective of considerations that are beyond the powers of the Victorian Parliament to address.

JobWatch submits that exceptions permitting age discrimination in the area of employment cannot be justified.

From a policy and justice perspective, work of equal value should be remunerated as such. The payment of different rates to employees on the basis of age is discriminatory treatment that should be eliminated, rather than sanctioned by government policy or supposedly beneficial legislation such as the Act.

An appropriate alternative to youth wages would be a competency-based wage system which addresses any arguments that young employees work at a reduced level of skill or efficiency. There is also scope for employers to use existing programs to employ young people who would otherwise find it difficult to find work by offering employment on reduced wages by way of a traineeship<sup>6</sup> or apprenticeship<sup>7</sup>. From a policy perspective, this is preferable to an out-dated system of attribute-based yet legitimised discrimination.

Furthermore, in JobWatch's view, youth wages do not serve to protect the competitive position of youth in the labour market. Rather, they provide a means of employers obtaining cheap labour and in some cases, the policy actually contributes to unlawful discriminatory conduct. JobWatch has received numerous reports of young people who have been dismissed from their employment upon reaching the ages 18 or 21 apparently because they have become entitled to a slightly higher hourly rate of pay.

#### **Case studies - Youth wages**

Shannon was a 17 year-old working for bakery. After 9 months in the job she was sacked only a week before her 18<sup>th</sup> birthday.

Marcus – in his early 20s – had been working as a casual retail assistant for a couple of years. He and a few other employees aged 23-24 were terminated and younger people were employed in their place.

On this view, this exception is neither necessary - because the area is governed by federal legislation nor justified - because it authorises discrimination on the basis of a protected attribute in direct opposition to the objects of the Act and so cannot be a "reasonable limitation" under the Charter.

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<sup>6</sup> The *National Training Wage Award 2000* allows employers to pay a reduced rate of pay to employees performing work under registered training agreements. While recognising the discriminatory aspect of this award, which allows for different rates of pay on the basis of age, we submit that engagement under a legitimate traineeship, rather than the artificiality of youth wages, is the appropriate mechanism for paying young workers at a discounted rate.

<sup>7</sup> Save for some awards which provide for adult apprentice wages rates, apprentice wage rates in most federal awards and agreements are based on the years of work and off-site training undertaken by the apprentice.

## **Section 27A - Early retirement schemes**

Under this provision an employer is entitled take into account the age of the employee and any eligibility of the employee to receive a retirement benefit from a superannuation fund when deciding the terms on which to offer an employee an incentive to resign or retire.

Recommendation – That this provision be repealed.

This exception is inconsistent with the objects of the Act and serves to entrench rather than eliminate the increasingly reported problem of age discrimination. It may also be used as a substitute for proper management processes to deal with performance problems in the workplace and mitigates against broader social policy attempts to encourage later retirement.

As stated above, age is an arbitrary factor which should not be a relevant consideration in determining access to benefits or attempting to induce particular employees to leave the workforce.

If an employer wishes to reduce the size of its workforce, it should follow a proper process using objectively sound and defensible criteria to select candidates, in accordance with the relevant industrial law.

Given that this exception allows employers to use age selectively when deciding to which employees they should offer an incentive to finish work, it may act as an illegitimate substitute for a fair disciplinary process, appearing to permit selective and targeted offering of the incentive.

### **Case study - Early retirement**

Joan – in her 60s- had worked on a permanent full time basis for a manufacturing company for over 20 years. She has been asked to take early retirement. She does not want to go, but has been verbally harassed by her Manager. Joan believes that if she doesn't accept the package they will make life very unpleasant for her.

JobWatch submits that exceptions permitting age discrimination in the area of employment cannot be justified and, in the context of early retirement schemes, are unnecessary where industrial laws are better placed to deal with issues such as termination, workplace change and redundancy. On this view, this exception cannot be seen as setting "reasonable limitations" under the Charter.

## **Section 27B- Gender identity**

This section allows an employer to discriminate against potential and existing employees on the basis of gender identity if:

(a) the person does not give the employer adequate notice of the person's gender identity; or

(b) the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

Listed within section 27B are a number of factors intended to give guidance as to whether or not it is reasonable for an employer to discriminate in particular circumstances.

Recommendation – That this section be repealed.

There is no sound or defensible justification for this exception. Rather, it clearly offends against the objectives of the Act by authorising discrimination against individuals with a protected attribute when there are no valid policy grounds for doing so.

Additionally, It would appear that there are very few circumstances in which an employer could establish that it would be “unreasonable in the circumstances” for them not to discriminate against a person on the ground of gender identity, as there do not appear to be many occupations in which any particular sex or gender identity is an inherent requirement. Despite this, the very existence of this exception undermines the Act’s stated objective of promoting recognition and acceptance of everyone's right to equality of opportunity.

Furthermore, this exception may be strongly criticised for actively contributing to, and further entrenching, the significant hardships already faced by members of the transgender community, who are amongst the most disadvantaged groups in society with respect to employment outcomes.<sup>8</sup>

#### **Case Study - Gender Identity**

Marilyn works in a staff cafeteria for a large company. She is a Male to Female transsexual. She has worked at the company for a couple of years and believes that she has been passed over for promotion because of her gender identity.

From the perspective of the Charter, this exemption is neither necessary or justifiable and so cannot be seen as a “reasonable limitation” on human rights.

#### **Section 28 – Single sex accommodation**

This provision allows VCAT to grant an employer a temporary exemption from the operation of the Act to enable them to limit the offering of employment to people of one sex if the employees will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

Recommendation – That this exception be retained.

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<sup>8</sup> The “Enough is Enough” report found that 90 per cent of transgender people experienced verbal abuse, 63 per cent experienced physical threats and 20 per cent suffered physical abuse. These figures are quoted at page 254 of the 29 August 2000 Victorian Hansard debate prior to the introduction of the *Equal Opportunity (Gender Identity and Sexual Orientation Bill) 2000*

This exception does not reduce the equality of opportunity of any particular group. Rather it allows for a decision to be made by VCAT on the facts of a particular case. The granting of an exemption is temporary and will only be made if appropriate evidence is put forward in support.

It is a common-sense, practical exemption that should not adversely affect the interests of any particular group or confer special benefits on any other group and as such can be seen as a “reasonable limitation” under the Charter.

## **GENERAL EXCEPTIONS TO AND EXEMPTIONS FROM THE PROHIBITION OF DISCRIMINATION**

### **Section 69 - Things done with statutory authority**

JobWatch is pleased that this section will be repealed. Under the circumstances, a sunset period of 3 years is probably appropriate.

In the meantime however (pending the repeal of this exception), it is submitted that the Act should be urgently amended to expressly include the presumption that equal opportunity principles prevail over any inconsistent statutory provision unless that legislation specifically provides to the contrary.

This would remove any doubt or confusion that may be generated on the part of those otherwise obliged to comply with possibly competing statutory obligations. It would also take the Act further towards eliminating discrimination “as far as possible” as, in order to be truly effective, anti-discrimination legislation should not be subordinate to any other legislation.

Where certain Acts or enactments cannot be reconciled with the Act, JobWatch recommends the following:

### **Option 1 - Prescribe laws that discriminate**

As with the Commonwealth *Disability Discrimination Act 1992*, the government could prescribe legislation which must prevail over the Act, either by a Schedule to the Act or by regulations made under that Act.

In addition or alternatively, the legislation containing the potentially discriminatory provisions could themselves declare that they are intended to prevail over the Act.

In proposing this alternative, we note that the New South Wales Law Reform Commission, when recommending the repeal of a similar provision to section 69 in the NSW *Anti-Discrimination Act*, also noted that any provisions which the Parliament (or the Committee itself in that case) considered should be exempt from the Act could be contained in a schedule to the Act.<sup>9</sup>

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<sup>9</sup> para 6.36

## **Option 2 - Declaration of laws that discriminate**

The Commission could have the power to declare that certain laws lead to discrimination or are inconsistent with the Act.

Such a power could replace the current section 207 of the Act, pursuant to which the current Inquiry exists.

Such a power could resemble that which is provided for in the federal *Disability Discrimination Act 1992*, which confers on various functions including:

- “to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments...are, or would be, inconsistent with or contrary to the objects of the Act, and to report to the Minister the results of any such examination” (s67(1)(i)); and
- “on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination...” (s67(1)(j)).

Upon receiving a report from the Commission, parliament would be required to act by amending the breach or declaring that the breach is to continue, with or without a sunset clause similar to the Commission’s obligations under Section 41 of the Charter.

## **Option 3 – Both of the above**

Discrimination should not occur without explicit authorisation by Parliament. Parliament should be presumed not to intend to discriminate, and this should be reflected in the Act itself.

This presumption should be even stronger where legislation is or has been enacted after the enactment of the Act.

The above options better meet a presumption that Parliament does not generally intend to allow discrimination to occur.

Generally, Job Watch opposes blanket exceptions to the Act. Beneficial legislation such as the *Child Employment Act 2003* is an example of one piece of legislation that could be prescribed as overriding the Act.

Without blanket exceptions, particular acts or practices of employers would still, however, be lawful if they fell into acceptable exceptions under the Act, for example relating to the inherent requirements of the position.

## **Section 70 – Things done to comply with orders of courts and tribunals**

This section allows a person to discriminate if the discrimination is necessary to comply with an order of the Tribunal or an order of any other tribunal or court.

Recommendation – That this section be retained.

In the interests of the efficient administration of justice, it is appropriate that this section be retained. If this section were repealed, potentially unworkable situations could arise whereby parties would be required to breach court orders so as to comply with the Act or vice versa– in either case a party could be exposed to liability. This scenario could cause serious injustice and produce absurd outcomes.

This exception should be seen as a “reasonable limitation” under the Charter.

### **Section 75 and 76 – Religious bodies and religious schools**

Under sub-sections 75 (c) and (d) religious bodies may discriminate on the basis of any attribute when employing people, provided that discrimination is necessary to conform with religious beliefs or sensitivities. Section 76 extends this exception to religious schools run according to religious beliefs and principles but not run by religious bodies.

Recommendation – That this section be repealed and incorporated into the general inherent requirements exception discussed below.

This exception raises the potential for conflict between different but equally important human rights, namely the right to freely practise religious beliefs and the right to equal opportunity in employment.

JobWatch supports the value of the exception in allowing religious freedom. However, this support is on the proviso that it is applied narrowly, that is, strictly in accordance with the intention that it protect the exercise of genuine religious beliefs. We submit that this exception can only be validly invoked if a particular attribute is of such relevance as to constitute an inherent requirement of a position.

However, we are concerned that there is potential for this exception to be misused if it is relied upon to exclude certain groups from employment on no more than a pretence. For example, while the marital status or sexual orientation of an employee may be of relevance if that person is a religious instructor, these attributes are of limited, if any, significance for persons performing roles such as teaching maths, cleaning or administrative duties, and should not be claimed in any circumstances other than limited ones involving genuine religious content in the relevant job.

#### **Case study - Religious bodies and religious schools**

Pam had worked as a permanent teacher for 7 years when she resigned from her job to have a baby. A couple of years later she decided to go back to teaching and approached her old school about a position. The principal of the school had changed and said to her that they could not re-employ her because she had her children out of wedlock.

If this exception is to be retained, we recommend that its application be limited to positions in religious bodies and schools which genuinely require adherence and

commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position.

The alternative “inherent requirements” provision (discussed below) would be a more justifiable limitation under the Charter as its scope is confined to the actual requirements of a position and not just the employer’s preferences. On this view, this exception, in its current form, may not be a “reasonable limitation” under the Charter because it is too broad in scope making it open to abuse.

We note that sub-sections 75 (a) and (b) also provide an exception for religious bodies in relation to the appointment, ordination and training of priests, ministers of religion or members of a religious order. We support the retention of this exception, which in any event is in accordance with the United Nations *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief*<sup>10</sup>.

### **Section 80 - Protection of health, safety and property**

Section 80 allows a person to discriminate against another person on the basis of impairment, pregnancy or physical features if the discrimination is reasonably necessary to protect the health or safety or property of any person (including the person being discriminated against). This provision also allows for discrimination on the basis of impairment or physical features if it is necessary for the protection of the public generally.

Recommendation – That this exception be retained.

Health and safety in the workplace are of fundamental importance and justify a specific exception to ensure that an employer can act for the protection of others, without concern that taking such action will result in claims of unlawful discrimination. Likewise, an employee’s capacity to perform their duties without genuine risk of harm to him or herself, others, or the employer’s property justifies this exception as it is obviously an inherent requirement of employment, which is consistent with an employee’s common law duties to their employer.

While it would be consistent with the approach of this submission to incorporate health and safety considerations into the general “inherent requirements” exception proposed below, the exception as it currently operates is of general application and there are no persuasive arguments to support its amendment.

On this basis, this exception may be justified as a “reasonable limitation” under the Charter.

It should be noted that in an employment context, this exception should only apply if it is not reasonable in the circumstances for special services and facilities to be provided to accommodate an employee’s impairment so as to reduce any risk they may present to health and safety in the workplace.

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<sup>10</sup> This declaration specifically affirms the right to appoint religious personnel as one of the freedoms of belief it covers.

### **Case study - Protection of health, safety and property**

Mandy is 21 weeks pregnant and works as a personal care assistant. Her job is physically demanding and asked could she not do any part of the job that was physically demanding. Mandy was told that there were no lighter duties for pregnant workers.

### **Section 83 - Temporary exemptions**

Under this section employers may discriminate against employees if granted a temporary exemption from the requirements of the Act by VCAT. A temporary exemption cannot extend beyond 3 years.

Recommendation – that this section be retained.

This section should be retained for the reasons set out in relation to the section 28 exception above.

### **Section 84 - Compulsory retirement in the public sector**

This provision allows for the Minister responsible for the administration of the Act, upon receipt of a written request from any other Minister, to grant an exemption from the discrimination provisions of the Act to allow compulsory retirement on the basis of age of any class of people employed under the *Public Sector Management Act 1992*; the *Teaching Service Act 1981*; the *Police Regulation Act 1958*; or by a public hospital within the meaning of the *Health Services Act 1988*.

Recommendation – That this exemption be repealed.

This provision allows for the making of an exemption that discriminates on the basis of age and is thus at odds with the objectives of the Act.

As discussed above in relation to section 26 and 27A, compulsory retirement schemes result in the termination of employment on the basis of the attribute of age, rather than on the sound basis of ability and merit. They are also inconsistent with the abolition of compulsory retirement in Victoria from 1 January 1997 and do not sit comfortably with the principles of the Act.

Furthermore, there are no apparent public policy arguments to support the granting of a special exemption for employees engaged under the listed legislation. From the perspective of the Charter, this exception cannot be seen as a “reasonable limitation” on human rights.

### **Recommended new exception – Inherent requirements**

An alternative to the current exceptions contained within the Act would be the repeal of most exceptions in their current form (leaving aside those of which retention is supported above) and the inclusion of the following provision which incorporates the following elements:

1. A statement that discrimination in employment is prohibited, unless a person is unable to perform the inherent requirements of the particular employment.
2. A list of the factors to be considered when determining whether a particular requirement is “inherent” to a position. This list should include:
  - Whether a particular task is genuinely essential to the position.
  - The skill set and qualifications required to do the position.
  - Whether the position could be performed with modifications being made to accommodate the performance of the job by a person with an impairment.
  - Whether public standards of decency require that the position be filled by a person of a particular sex.
  - Whether reasons of artistic credibility require the position to be filled by someone with a particular attribute.
  - Whether it is a genuine occupational requirement that a person be of a particular sex, such as a necessary physical characteristics particular to people of one sex, other than strength or stamina; or the preservation of decency or privacy; for example where employment involves fitting clothing, doing body searches or entering lavatories or other areas where people are in a state of undress.
  - Whether the most effective delivery of welfare services to a particular group requires that the job be performed by a person with a specific attribute.
  - Whether adherence and commitment to the particular beliefs and tenets of a religion are required in order to carry out the fundamental requirements of a position with a religious body or religious school.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

For further information, please do not hesitate to contact Ian Scott of JobWatch’s Legal Practice on 03 8643 1118.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Z. Bytheway', with a large, stylized flourish at the end.

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**JobWatch Inc**  
*Authorised by Zana Bytheway, Executive Director*