



Submission to the Exemptions Review

April 2008

Overview

The Victorian Council of Social Service (VCOSS) has served Victorians as the peak independent coordinating body of the social and community services sector for over 60 years. VCOSS raises awareness of the existence, causes and effects of poverty and inequality and advocates for the development of a sustainable, fair and equitable society. As well as promoting the wellbeing of those experiencing disadvantage and contributing to initiatives seeking to create a more just society, VCOSS also provides a strong, non-political voice for the community sector.

VCOSS works together with its members on issues of poverty and inequality and seeks to ensure that community resources and services are accessible and affordable. VCOSS promotes community participation and strengthening the value of citizenship in our community. VCOSS advocates on behalf of disadvantaged Victorians through:

- policy development and analysis;
- direct advocacy to government;
- evidence based research;
- reports, media releases and submissions;
- an annual State budget submission;
- strengthening the community sector with collaborative initiatives; and
- providing a range of services to member organisations.

The Exemptions Review

VCOSS welcomes the current review of the exemptions in the Victorian *Equal Opportunity Act 1995* ('EOA') in light of the recently enacted *Victorian Charter of Human Rights and Responsibilities 2006* ('the Charter'), particularly given the broader review of the EOA currently being conducted.

It is VCOSS' view that the exceptions and exemptions to the EOA need reform as they are not compatible with the right to equal and effective protection against discrimination as guaranteed in the Charter¹. Non-discrimination is a fundamental principle of international human rights law. All major United Nations human rights treaties and conventions to which Australia is a signatory, contain non-discrimination provisions which oblige State parties to take all necessary steps to guarantee.² One of the principal means for achieving this is through domestic equal opportunity acts.

¹ The Charter, s 8.

² Including ICCPR article 2, ICESCR Article 2 (2); Convention on the Rights of Persons with Disabilities article 3; International Convention on the Elimination of All Forms of Racial Discrimination, article 2.

The Victorian EOA states that one of its primary purposes is to eliminate discrimination 'as far as possible'³. The quantity and extent of exceptions and exemptions significantly undermine this intent. Given that domestic equal opportunity Acts primarily give effect to our international obligations to eliminate discrimination, it is reasonable that the approach to exemptions and exceptions in the EOA are placed within a human rights framework.

The recent introduction of the Victorian Charter provides a further impetus to harmonise EO law with human rights. Section 8 of the Victorian Charter guarantees the right to be free from discrimination, and to enjoy all the other rights without discrimination. Section 7 recognises that these rights are subject to 'reasonable limits as can be demonstrably justified in a free and democratic society'. Many of the existing exemptions are not 'reasonable limitations' according to the Charter definition.

It is VCOSS view that exemptions and exceptions to the EOA fall into two broad types:

1. those permitting discriminatory conduct, often because it is believed that it would impose unreasonable hardship to ensure compliance;
2. those that permit 'positive' discrimination.

1. Exemptions and exceptions that permit discriminatory conduct

The EOA contains many exemptions which undermine the spirit and the effect of the Act, such as section 76 (2) exempting religious schools from the operation of Part 3 of the Act. Other provisions, such as s 22 – Exemption – special services or facilities, permit discriminatory conduct on the basis that it would be unreasonable to compel compliance. It is VCOSS' view that such exceptions and exemptions need urgent review according to whether they constitute 'reasonable limitations' to the right to be free from discrimination so as not to defeat the object of the EOA.

If an exception and exemption is granted, it should ideally be subject to a sunset clause provision, or regular review.

2. Exemptions and exceptions that permit 'positive' discrimination

Some provisions recognise that in order for substantive equality to be achieved, it is sometimes necessary to permit conduct that is *prima facie* discriminatory. Examples include Indigenous employment programs, or women-only sporting programs.

International human rights law and jurisprudence recognise the need for 'temporary special measures' ('TSM') to achieve *de facto* equality among groups experiencing structural disadvantage caused by past and present discriminatory laws and practices⁴. General Recommendation No. 25 on of the non-discrimination provision in CEDAW notes that the application of TSM 'is one of the means to realize *de facto*

³ As set out in Section 3 of the EOA.

⁴ These include International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(4), the Convention on the Elimination of All Forms of Discrimination Against Women, Article 4 (1), and the ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111).

or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.⁵

In Australian courts, 'special measures' has been interpreted to mean that to qualify as such, the measure in question needs to confer a benefit; the benefit must be conferred on members of a class, and membership of this class must be based on an identified characteristic; and the measure taken must be to secure their advancement.⁶ It is generally also a requirement that the people affected have consented to its introduction.

Recommendation 1: that exemptions and exceptions to the EOA be considered against two criteria:

1. a 'reasonable limitations' test
2. a 'temporary special measures' test

Exemptions and exceptions which are neither a 'reasonable limitation' on the right to be free from discrimination, nor constitute a 'temporary special measure' should be repealed or amended.

Statutory authority exception

VCOSS supports the recommendation to repeal the Statutory authority exemption (s. 69 EOA) made by the Scrutiny of Acts and Regulations Committee in 2005, and agrees that 'a broad exemption for government [is] inappropriate if non-government entities are required to comply with the Act'⁷

Recommendation 2 : that the Statutory authority exemption be repealed

⁵ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: Temporary special measures*, Thirtieth session, 2004, para 14.

⁶ *Gerhardy v Brown* (1985) 159 CLR 70 at 126.

⁷ The Exceptions Review, p 24.