

Victorian Equal Opportunity & Human Rights Commission

submission to

The Exceptions Review: Consultation Paper 2008

A review of exceptions to
and exemptions from the
Equal Opportunity Act 1995 (Vic)

State of Victoria,
Department of Justice

18th April 2008



Victorian Equal Opportunity
& Human Rights Commission

Table of Contents

Executive Summary	4
Structure of this submission	8
Introduction	9
Section one – General and Specific exceptions	11
1.1 Exceptions to discrimination in employment and employment related areas.....	14
1.2 Exceptions to discrimination in education.....	29
1.3 Exceptions to discrimination in the provision of goods and services and the disposal of land.....	32
1.4 Exceptions to discrimination in accommodation.....	36
1.5 Exceptions to discrimination by clubs and club members	39
1.6 Exceptions to discrimination in Sport and Local Government	40
1.7 General Exceptions	42
Section two – Exemptions by the Victorian Civil and Administrative Tribunal..	53
Section three – Statutory authority exception	57
Section four – Intersections with the Broader Review	59

Concurrently with a broader review of the *Equal Opportunity Act 1995*, (EOA) the Department of Justice is now undertaking a review of the exceptions to, and exemptions from, the EOA provisions prohibiting discrimination. A consultation paper was released on 29 February 2008 with submissions due by 18 April 2008.

The consultation paper asks the following questions:

General questions

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

Exceptions and exemptions

- Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?
- Should any exceptions be repealed? If so, which exceptions and why?
- Should any exceptions be amended? If so, which exceptions and why?
- Is the VCAT exemption process appropriate? How could it be improved?

Statutory authority exception

- Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?
- Are there any examples of Acts and enactments that cannot be reconciled with the Act?
- Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?
- Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

Executive Summary

The Victorian Equal Opportunity and Human Rights Commission (in this document the Commission) has developed this response to the review of exceptions to and exemptions from the *Equal Opportunity Act 1995* (Vic) ('EOA') Consultation Paper.

The Commission's submission to the Exceptions Review is made following its recent submission to a broader Review of the EOA. In August 2007 the Attorney-General announced a review of the *Equal Opportunity Act 1995* (the Review) to be undertaken by Mr Julian Gardiner. The focus of that review is to investigate how best to eliminate discrimination and promote equal opportunity through reforms to modernise the EOA. Review of exemptions and exceptions did not form part of the terms of reference of the broader review. A Discussion Paper was released in November 2007 and the Commission provided a substantial response to this in January 2008¹. In March 2008 an Options Paper was released seeking submissions on possible reform options for the EOA. The Options Paper sets out some significant options for reform to the role of the Commission and the framework of the EOA. The Commission is presently preparing its response to the Options Paper.

The Commission's recent submission to the Review Discussion Paper stated that the focus of equal opportunity legislation in Victoria should be to achieve substantive equality rather than merely formal equality. To achieve this, the Commission recommended that a modernised anti-discrimination statute requires a range of provisions that will provide for:

- a positive duty on organisations and agencies to be proactive in eliminating discrimination, shifting this burden away from individual complainants
- assistance with compliance with the legislation, including the prevention of discrimination;
- enforcement powers where necessary;
- ensuring the capacity for individuals or groups to have access to justice in line with the current government policies.²

The Commission identified that the implications of the changes for its functions are:

1. greater emphasis on functions that address prevention and compliance with the law;
2. additional functions that enable the Commission to enforce substantive equality;
3. reformed alternative dispute resolution processes that continue to enable individual access to justice at the same time as increased choice and responsiveness.

¹ A copy of the Commission's submission to the Review Discussion Paper can be found at: <http://www.humanrightscommission.vic.gov.au/projects%20and%20initiatives/ea%20review.asp>

² *New Directions for the Victorian Justice System 2004 – 2014*: Attorney-General's Justice Statement, May 2004; *A Fairer Victoria: Progress and Next Steps*, June 2006.

The Commission expressed the view that such reforms to the *Equal Opportunity Act 1995* (EOA) are consistent with the Government's policy directions in seeking to achieve proactive and creative forms of compliance with the Act³. This includes seeking to address disadvantage and recognising the link between disadvantage and discrimination⁴. Finally, any changes to the EOA must be consistent with the legal changes that arise from the passage of the Charter of Human Rights (the Charter).⁵

In light of the present stage of the broader Review the Commission has approached its consideration of and response to the Exceptions Consultation Paper with regard to how the Act is currently framed without trying to pre-empt the outcome of the Review and the implications this may have for the general framework of the EOA. Aside from commenting on the compatibility of the existing exceptions with the Charter, the Commission does make some general comments/recommendations about the operation of some exceptions, which may be improved by options currently being considered by the broader review. Hence, the Commission's views expressed herein are relevant insofar as they are based on the status quo - taking into account the existing framework and objectives of the EOA and its experience in administering that Act. Accordingly, any significant reforms to the EOA more generally are likely to have considerable implications for the exceptions and exemptions framework, which in turn may impact the currency of the views expressed by the Commission in this submission.

Following the introduction of the Charter there is a need to review and amend legislative limits on rights to ensure they are compatible with and justified under this new legal framework. The Commission is of the view that the vast majority of exceptions in the EOA are on face value compatible with the Charter or capable of being interpreted consistently with the Charter⁶.

In summary the Commission has come to the following views in relation to the amendment and repeal of exceptions in the EOA and has identified others where further research and analysis is required:

Amendment	Repeal	Further research and analysis
s 22 – Special Services or facilities in employment	s 21 – Small business	s 26 – Compulsory retirement of judicial officers
s 23 – Reasonable terms of employment	S 25 – Care of children in employment	s 27A – early retirement schemes
s 27 – Youth wages	s 27B – Gender Identity in employment	s 66 – competitive sporting activities
ss 30-31 Discrimination in establishing firms and by firms	s 77 – Religious Beliefs or principles	s 71 – Pensions
s 32 - Special Services or facilities in partnerships	s 84 – Exemptions to allow compulsory retirement in the public sector	ss 72-73 – Superannuation – new and existing fund conditions

³ Ibid. p. 57.

⁴ *A Fairer Victoria: Progress and Next Steps*, June 2006.

⁵ *Charter of Human Rights and Responsibilities Act 2006*.

⁶ Section 32(1) of the Charter establishes a new fundamental rule of statutory interpretation in Victoria. It provides that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the provisions purpose.

s 33 – Reasonable terms of partnership	s 69 – Things done with statutory authority	
s 36 – Reasonable terms of qualification		
s 39 – Special services and facilities in education		
s 40 – Standards of dress and behaviour in education		
s 43 – Insurance		
s 44 – Credit providers		
s 46 – Special manner of providing a service		
s 53 – Accommodation unsuitable for children		
S 75 – Religious Bodies		
S 76 – Religious Schools		
s 78 – Private Clubs		
s 82 – Welfare measures and special needs		

The Commission’s recommendations mainly arise from analysis that some exceptions are incompatible with the Charter – either they are not justifiable limitations on human rights and require repeal or amendments to clarify their operation or reduce their potential for limiting rights to promote a more balanced application. Some exceptions require further research and analysis given complex considerations involved in assessing their compatibility with the Charter. The Commission has also made some recommendations, for policy or technical reasons, where it believes these are necessary to improve the operation of the EOA and effectively eliminate discrimination.

Specifically, the Commission recommends the following exceptions be repealed:

- Section 21 which permits an employer to discriminate in terms of who should be offered employment in a business if the employer employs no more than the equivalent of five full time employees. The Commission is of the view that this exception lacks a legitimate or rational purpose for limiting the right to equality and mere reliance upon reducing economic and regulatory burden for small business is not compelling to justify limiting employment opportunities. Further the provision is likely to be inconsistent with federal anti-discrimination legislation in relation to attributes protected by that legislation which do not contain exceptions for small business.
- Section 25 permits employers to discriminate when they genuinely believe that the discrimination is necessary to protect the welfare of children and have a rational basis for that belief to discriminate. The Commission’s view is that this exception is entirely superfluous. If anyone who is the subject of any type of discrimination complaint can demonstrate their actions were based on a real need to protect children their conduct will not be unlawful. This outcome is completely independent of section 25 and would be reached in its absence.
- Section 77 permits a person to discriminate if the discrimination is necessary to enable that person to comply with their genuinely held religious beliefs or principles. The Commission is of the view that this exception is not a

reasonable and justified limitation on the right to equality. It gives rise to a significant limitation in that it may be relied upon by anybody in relation to anything prohibited by the Act and is neither reasonable nor necessary as there are adequate exceptions in the Act which can maintain an appropriate balance between freedom of religion and freedom from discrimination.

- Section 84 allows exemptions to be sought to permit compulsory retirement in the public sector. The Commission is of the view that compulsory retirement ages are arbitrary and the underlying objective could be realised in a manner less restrictive on human rights.
- Section 69 permits discriminatory acts necessary to comply with or authorised by laws. Following the introduction of the Charter and the findings of the Scrutiny of Acts and Regulations Committee (“SARC”) *Discrimination in the Law Inquiry under section 207 of the Equal Opportunity Act 1995*⁷ the Commission maintains that repeal of section 69 is necessary to reverse the EOA’s current subservience to other Victorian statutes and enactments.

The Commission is of the view that temporary exemptions from the EOA granted by the Victorian and Civil Administrative Tribunal (“VCAT”) remain appropriate and recommends some minor changes to formally recognise the Commission’s increased involvement in this area to ensure that exemptions which are granted are consistent with the objectives and spirit of the Act.

The Commission is concerned however that the pursuit of special measures and affirmative action programs should not be unduly hindered or discouraged by the need to obtain an exemption. Greater clarity is needed for efficiency and the effective realisation of the objectives of the Act in this area.

The Commission has identified that specific options being considered by the broader Equal Opportunity Review as outlined in the Options Paper will have direct implications for the scheme of certain exceptions in the EOA:

- The Options Paper canvassed 2 options for improving the clarity and understanding of the requirement to provide reasonable adjustments in the EOA: rely on the current implied duties or create an express general requirement to make reasonable adjustments which applies to all attributes and all areas – clearly spelling out the factors to be taken into consideration when determining whether an adjustment is reasonable. If a more express recognition of the duty to reasonably accommodate was incorporated into the EOA as part of the broader review, it would have direct implications for the special services and facilities exceptions in the Act. Depending on the drafting of any reasonable adjustment provisions – the special services and

⁷ A copy of the report by SARC can be located at:
http://www.parliament.vic.gov.au/sarc/Equal_Opportunity/Final/Final_index.htm

facilities exceptions may no longer be relevant or needed, or may require consequential amendments.

- The Options Paper recognised the disparity between the section 82 exception which permits discrimination in pursuit of the objectives within that provision and the express recognition in section 8(4) of the Charter which provides that measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination. For clarity and consistency between these two pieces of human rights legislation the Options Paper proposed that the existing special measures provision of the Charter s8(4) be recognised in some form or incorporated into the EOA. If this were to occur the necessity of the exception for welfare measures and special needs will need to be further considered.
- The Options Paper also flags the adoption of positive duties as a deliberate strategy to facilitate the achievement of substantive equality. Considering positive duties can require active steps to be taken by organisations to achieve substantive equality without relying on individuals to bring complaints the temporary exemption framework should not unnecessarily hinder or burden agencies seeking to comply with positive duties.

Structure of this submission

The introduction cursorily addresses the need for reform in this area and the social and economic benefits of reforming exceptions.

In section one, the Commission outlines its views on the compatibility of the 50+ exceptions in the EOA with the Charter, which provisions should be repealed and which provisions should be amended. Where the purposes of provisions are identified these have been drawn or discerned from the explanatory memorandum or the second reading speech of the 1995 Act or relevant amending Acts.

In section two, the Commission reflects upon the appropriateness of the temporary exemption process administered by VCAT, its current involvement in this process, how this has evolved and the Commission's views on how this process may be improved to promote efficiency, fairness and legal certainty.

Section three comments upon the need to repeal section 69 and why such an exception is no longer appropriate and justified in Victoria's current legal framework.

In section four, the Commission highlights two key areas of the broader review which are relevant to and may have direct implications for particular classes of exceptions in the EOA currently.

This document follows the general structure of the Consultation Paper for ease of reference. Questions posed by the Consultation Paper are reproduced in text boxes. The Commission's views appear bolded in text boxes.

Introduction

The consultation paper asks:

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

Exceptions and exemptions are an integral part of the EOA. Exceptions are recognised as providing a balance between the rights and freedoms of individuals by providing limited exceptions where discrimination prohibited by the EOA in specified circumstances will not be unlawful⁸. Exemptions provide a mechanism for individuals and entities to seek permission from the VCAT to discriminate in specified circumstances.

Such an approach is necessary to avoid a purist application of the principle of non-discrimination which can lead to counter-intuitive results that reinforce disadvantage. The majority of exceptions in the Act and exemptions granted by VCAT are designed to mitigate or overcome this risk.

The common rationales behind current exceptions in the EOA can be categorised loosely as:

- special measures – designed to promote and facilitate the provision of benefits, programs, opportunities aimed at addressing disadvantage experienced by particular groups of people in society because of historic and lingering disadvantage that these groups may have experienced arising from discrimination.
- private conduct – designed to ensure people's personal and private choices are infringed as little as possible.
- transitional – facilitating protection for specific conduct or complex regulatory areas where further reform is required to remove discriminatory practices.
- reducing regulatory burden on business – seeking to infringe as little as possible with Victorian businesses enabling them to regulate the conduct of their own affairs.

These may seem compelling and important rationales; however, the effective elimination of discrimination in Victoria requires reflection upon whether the current exceptions strike an appropriate balance in Victoria today through interrogating

⁸ Second reading speech of the *Equal Opportunity Act 1995*.

whether they are reasonable limits on rights and freedoms which can be justified in a free and democratic society based on human dignity, equality and freedom.

It is the Commission's view that several compelling reasons exist as to why exceptions and exemptions need reform:

- When the 1977 and 1984 Acts were introduced some exceptions were described as transitional – after 30 years of equal opportunity legislation in Victoria transitional exceptions should be questioned as to whether they are still necessary and/or justified.
- The legal framework established by the Charter to protect and promote human rights.
- Pursuit of the broader review objectives – improving fairness, effectiveness and efficiency of the EOA and to ensure discrimination is eliminated to the greatest possible extent.
- The need to modernise the law and ensure exceptions are still appropriate, relevant, efficient and effective.

In its recent submission to the Equal Opportunity Review the Commission addressed in detail the social and economic costs of discrimination and the case for reforming the law in this area. This submission to the Exceptions Review Consultation Paper does not propose to address further the social and economic costs and benefits involved in specifically reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent. The Commission is of the view that these can be drawn from its submission to the Review Discussion Paper. However, the legitimacy and appropriateness of exceptions in their pursuit of social and economic purposes will be considered in the context of examining the compatibility of those exceptions with the Charter.

Section one – General and Specific exceptions

The relevant consultation paper questions are:

- Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?
- Should any exceptions be repealed? If so, which exceptions and why?
- Should any exceptions be amended? If so, which exceptions and why?

The Consultation Paper states that as one of the key aims of the exceptions review is to ensure that the exceptions and exemptions in the EOA are necessary and justifiable pursuant to Victoria’s human rights framework established by the Charter. Central to this is the assessment of whether the exceptions are ‘reasonable limitations’ on the enjoyment of human rights protected and promoted by the Charter.

The starting point for assessing the compatibility of exceptions in the EOA with the Charter is section 8 - Recognition and Equality before the law. This section provides ‘every person has the right to enjoy his or her human rights without discrimination’ and elaborates on this in sub-section 8(3):

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

The Charter recognises that circumstances will arise where rights need to be limited and prescribes a detailed test that is to be used to assess whether a particular limitation is reasonable – this is set down in section 7:

7 (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (d) the relationship between the limitation and its purpose; and*
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

This section provides the basis for what is referred to in this submission as the reasonable limitations test, which will be used in our analysis of whether the exception provisions in the EOA are a reasonable limitation principally on the right to recognition and equality before the law.

In terms of the Charter's procedural or compliance provisions the reasonable limitations framework of section 7 is used to assess whether, in the event a right enshrined in the Charter is engaged, and that engagement is limiting in nature, whether the limitation is permissible because it is reasonable, or alternatively, is inconsistent with human rights or a breach of the Charter because the limitation extends too far. This can arise in three contexts:

- assessments of the human rights compatibility of new legislation before Parliament in both the statement of compatibility made by the Member proposing a Bill, as well as the human rights assessment conducted by the Scrutiny of Acts and Regulations Committee;⁹
- the interpretation of other laws consistently with the Charter, including the power of the Supreme Court to make declarations of inconsistent interpretation;¹⁰ and
- discharge of the duty now on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights in the course of making decisions.¹¹

Therefore, it is appropriate that section 7 of the Charter now defines the parameters for assessing the need for reform of the exceptions in the EOA.

A reasonable limitation test is about striking a balance between the various interests and considerations that require adherence to and protection of human rights principles, but which also need to accommodate the infrequent situations where a departure from this may be necessary. Decisions in Canada and New Zealand have held that such limits will be reasonable where the exercise, or full exercise of a particular right would be "inimical to the realisation of collective goals of fundamental importance"¹². Identified factors that may be relevant to reasonableness include social, legal, moral, economic, administrative and ethical considerations¹³.

The Supreme Court of Canada has held that this requires the following values to be taken into consideration¹⁴:

- respect for the inherent dignity of the human person;
- commitment to social justice and equality;
- accommodation of a wide variety of beliefs;
- respect for cultural and group identity; and
- faith in social and political institutions which enhance the participation of individuals and groups in society.

⁹ Refer to Part 3, Division 1 of the Charter.

¹⁰ Sections 32 and 36 of the Charter.

¹¹ Section 38 of the Charter.

¹² *R v Oakes* [1986] 1 SCR 103, 136.

¹³ *Moonen v Film and Literature Review Board (No 1)* [2000] 2 NZLR 9, 17.

¹⁴ *R v Oakes* at 136.

The obligation to consider these matters is then reinforced by the identification of particular considerations that rigorously test the need or rationale for limiting rights, and even if a limitation is shown to be warranted, ensure the limitation is minimised. The reasonable limitations test in the Charter identifies five non-exhaustive considerations:

- regard must be had to the specific right that may be limited, including its importance, purpose and the values that inform it. A particular aspect of this analysis is whether the particular right is regarded as an absolute right in international law.
- alongside the meaning and significance of the particular right there must be consideration and assessment of the importance of the purpose or reason underlying the proposed limitation. Courts have held that the relevant purpose should reflect societal concerns that are pressing and substantial in a free and democratic society¹⁵. It has also been held that limitations must have a specific purpose rather than based merely on a general concern¹⁶. Courts have grappled with the significance to be accorded to economic considerations and whilst of themselves they will generally not support a limitation, financial crises or economic factors relating to broader social considerations may be treated differently¹⁷.
- in order to fully understand and assess the proposed limitation consideration must be given to the means by which it achieves the purpose it is intended to achieve, i.e. there must be clarity about the manner and extent to which the particular right will be limited and interfered with.
- it must be shown that there is a rational connection between the nature and extent of the limitation and its identified purpose, in other words a limitation must address the identified need. This analysis guards against permitting limitations that on closer analysis are in fact arbitrary, irrational or ineffective. A further dimension of this analysis is assessing the proportionality between the purpose of the proposed limitation on a right, and the means used to achieve that purpose. Put colloquially, it is about ensuring a sledgehammer isn't being used to crack a walnut.
- wherever the analysis of a proposed limitation identifies a means of achieving the relevant purpose without restricting a right, or subjecting it to a lesser degree of restriction, this will be a strong indicator that the proposed limitation is not reasonable. At the same time, however, courts have held this is not a requirement that the least restrictive option must be used to achieve a particular purpose, rather the strategy employed must

¹⁵ *R v Oakes* at 138-139.

¹⁶ *Zundel v R* [1992] 2 SCR 731.

¹⁷ *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 38, para 75.

be from the range of reasonable responses available to address a particular purpose¹⁸.

Finally, it is of course for the proponent of a restriction on rights (in the case of exceptions – the State Government) to prove that it is in fact necessary and this must be based on robust, verifiable evidence.

With this framework in mind the Commission makes the following comments on the likely¹⁹ compatibility with the Charter or incompatibility as the case may be in relation to the exceptions in the EOA. In this Part the Commission provides the following opinions in relation to which exceptions:

- can be interpreted and applied compatibly with the charter – and a reasonable limits interpretation will facilitate a balanced application of such exceptions;
- require further research and analysis as to the extent of their limitations and whether they can be justified;
- require amendment to ensure the interpretation and application of the exceptions results in the least restrictive limitation on rights possible;
- require repeal because on the basis of the ascertainable purpose are not justified limitations on the right to equality and non-discrimination.

**NB section numbers italicised are a reference to the sections of the Charter of Human Rights and Responsibilities Act 2006*

1.1 Exceptions to discrimination in employment and employment related areas

Section 16 - domestic or personal services - offering of employment in relation to the provision of domestic or personal services in, or in relation to any person's home.

No legislative change is required in respect of this exception.

The VCAT, in exemption decisions, indicates that personal preferences for those working in a person's home, based on perceptions of safety and decency is a public interest argument for allowing potentially discriminatory conduct.

This exception also lends itself to the protection of privacy of the family and home (s13) in that it facilitates choice about who is employed to undertake work in a person's home.

¹⁸ *R v Sharpe* [2001] 1SCR 45, 101-102.

¹⁹ This assessment is made on the face of the exceptions and their interpretation and application in case law where relevantly available.

Essentially this provision is about permitting prejudice in the area of employment when it crosses into the private domain. The Act is recognised generally as attempting to strike a balance between the aims of equal opportunity and a desire to infringe as little as possible into private spheres of life.

Whilst exclusionary choices based on prejudice may seem unpalatable in an equal opportunity context the limitation this exception gives rise to is likely to be reasonable given the Act preserves the public private dichotomy and individuals' choice about matters directly pertaining to their private homes.

There are no less restrictive means to achieve this exceptions purpose; as such the limitation this exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Section 17 - Genuine occupational requirements - offering employment to people of one sex where it is a genuine occupational requirement that the employees be people of that sex.

No legislative change is required in respect of this exception.

The purpose for this exception is to allow employers to limit the offering of employment to people of a particular sex where it is a genuine requirement of the occupation. For instance, in employment that involves the fitting of clothing for people or that includes conducting body searches, it may be necessary to limit the offering of employment to people of a particular sex for reasons of privacy or decency.

In *Belle Beauty* [1997] VADT 11, the then Anti-Discrimination Tribunal expressed a view that this exception addresses the question of safety and also the question of privacy and the necessity for a person of the same sex to carry out certain duties in certain circumstances.

This exception seeks to balance and promote various rights recognised by the Charter:

- the protection of privacy of persons (s13) in relation to sub-section 17(1) and (2) – the limitation of the exception is also constrained because the permitted discrimination is limited to circumstances where it is a 'genuine occupational requirement';
- the protection of cultural rights in terms of practice and observance of customs and religion (s19) and (s14); and
- freedom of expression (s 15) in the context of sub-section 17(4) which constrains the limitation to apply only where it is necessary for reasons of authenticity and credibility and sub-section 17(5) which is a broader limitation but most likely justified in terms of freedom of expression in a free and democratic society.

These are important purposes and therefore the limitations that this exception gives rise to are reasonable, rational and proportionate to the purposes of protecting privacy and freedom of expression and balanced with the right to equality and non-discrimination.

There are no less restrictive means to achieve these purposes; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 18 - political employment - on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

No legislative change is required in respect of this exception.

The purpose for this exception is to promote the efficacy of parliament and to facilitate proper working of democracy.

This is an important purpose in a democratic society and therefore the limitation is reasonable, rational and proportionate to the purpose.

There are no less restrictive means to achieve this purpose; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 19 - welfare services - 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

No legislative change is required in respect of this exception.

The purpose for this exception is to provide an exception in relation to the provision of services for the promotion of the welfare or advancement of people with that same attribute, if those services can be provided most effectively by people with that attribute. This exception aims to effectively promote the provision of special measures.

The exception may also potentially facilitate promotion of the following rights depending on the facts and the context of facilitating special measures programs or services:

- protection of families and children – to facilitate the provision of services and programs by persons with shared experiences where this would enhance the fundamental importance of families and/or be in the best interests of children (s17);
- protection and promotion of cultural rights - to facilitate the provision of services and programs by persons with shared experiences, understanding and awareness where this would promote the enjoyment and practice of culture (s19);

This exception has an important purpose in that it aims to facilitate the delivery of services that have as their purpose the welfare and advancement of disadvantaged groups by permitting that employment may be limited to people with the same attributes if a particular service can best be delivered by people with those attributes.

This is an important purpose in a democratic society which values high quality and appropriate service provision, therefore the limitation is reasonable, rational and proportionate to the purpose.

There are no less restrictive means to achieve this purpose; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 20 - family employment - limit the offering of employment in a family business to people who are his or her relatives.

No legislative change is required in respect of this exception.

The purpose of this exception is to allow an employer to limit the offering of employment to his/her relatives.

This exception facilitates the right to protection of families and children (s17) recognising the importance of the family unit in society by facilitating opportunities for family businesses and enterprise to make express decisions to group together in enterprise and foster and develop family relationships and prosperity.

This is a legitimate purpose given the Charter's recognition of the importance of family therefore the limitation is reasonable, rational and proportionate to the purpose of promoting family unity and prosperity.

There appears to be no less restrictive means to achieve the purpose (presumably where an employer advertises and recruits), as such the limitation the exception

places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 21 - small business - in determining who should be offered employment if the employer has no more than the equivalent of 5 people employed on a full-time basis (including the people to whom employment is offered).

The Commission submits that this exception should be repealed

The rationale behind this exception appears to be it is to recognise the more private nature of small employment environments as against the desirability of extending protection to as many employees as possible.

This provision is problematic for at least two reasons. Firstly, the Commission does not accept that the size of a workplace mitigates the obligation to conduct recruitment processes based solely on merit and ability, and believes section 21 does little more than enshrine a stereotype or prejudice that if people are working in a small group it is somehow acceptable to make sure no one is “too different”. Furthermore, none of the federal anti-discrimination statutes permit small businesses to discriminate when recruiting. Accordingly, small businesses that do discriminate in recruitment on the basis of age, disability, sex, marital status, pregnancy or race would all be breaching federal laws. Not only does this mean their conduct could be the subject of a complaint to the federal Human Rights and Equal Opportunity Commission, it may also be inconsistent under section 109 of the Commonwealth Constitution, in that it purports to make lawful conduct that is prohibited federally.

It is the Commission’s view that this exception lacks a legitimate or rational purpose for limiting the right to equality. It appears to fall back on the rationale of reducing economic and regulatory burden for small enterprise which is arguably not compelling to justify limiting employment opportunities. For these reasons section 21 should be repealed.

Section 22 - special services or facilities - on the basis of impairment in certain circumstances where in order for that person to perform the genuine and reasonable requirements the job that person would require special services or facilities and it is not reasonable in the circumstances for those services and facilities to be provided.

Amend to modernise language to refer to reasonable adjustments.

The purpose for this exception is to allow an employer to discriminate on the basis of impairment if, in order to perform the genuine and reasonable requirements of the job special services/facilities are required but it is not reasonable for them to be provided in the circumstances (s22(1)(a)). This exception also recognises that an employer may refuse to employ, or dismiss, or take other action in relation to an employee who, because of their impairment, is unable to perform adequately the requirements of employment (s22(1)(b)).

This exception is usually relied upon by respondents in circumstances where it is not economically viable or practicable for business reasons, or inappropriate for health and safety reasons to provide a person with special services or facilities to enable them to undertake a role, or where even after the provision of such services a person is unable to perform in the role.

This provision has however been interpreted by VCAT to give rise to a very important implied obligation on employers to make reasonable adjustments to accommodate a person with a disability in employment: see *Davies v State of Victoria* VCAT 5 January 2000. This was based on the idea that people with a disability may require special services or facilities to undertake employment and the fact that those services are special (that is designed or provided to assist a person with a disability perform the requirements of employment and may not be provided to other applicants or employees without a disability) is what gives rise to the implied duty to reasonably accommodate.

The purpose of this exception is important in that it recognises the legitimate business imperative that a person be capable of performing the genuine and reasonable requirements of employment and balances this with a very important implied duty which is required to facilitate equality of opportunity for people with a disability.

The implied duty established by s22(1)(a)(i) to provide reasonable adjustments in the form of 'special services and facilities' to a person with a disability to assist them to perform the genuine and reasonable requirements of employment is balanced with the consideration that it may not be reasonable in the circumstances for special services and facilities to be provided (s22(1)(a)(ii)). The limitation that s22(1)(a)(ii) gives rise to in respect of the provision of special services and facilities is constrained by reasonableness to ensure proportionality in that there will be discrimination if special services and facilities are required and can be reasonably provided but are not provided by an employer: see *Vanderhorn v VYMP International Pty Ltd known as Artflo Design* (1992) EOC.

Section 22(1)(b) aims to balance the consideration of permitting an employer to choose not to employ a person, or dismiss an employee who cannot perform the required work against the prohibition of discrimination against people with a disability. This balancing exercise occurs through an assessment of the ability of the individual

in question to perform the genuine and reasonable requirements of employment following the provision of 'special services and facilities'.

Accordingly the limits within this exception are reasonable, rational and proportionate given its purpose and the obligation to facilitate employment opportunities for people with a disability through the provision of reasonable adjustments.

There are no less restrictive means to achieve the purposes of this provision; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Notwithstanding this provisions likely compatibility with the Charter the Commission is of the view the language it uses requires modernising. Our complaint experience demonstrates a limited understanding of this exception and the implied duty to reasonably accommodate that it gives rise to. In the Commission's experience the phrase 'special services and facilities' is not readily understood by employers. Describing such services and facilities as 'special' may not be helpful means of communicating that accommodation is what is required.

- What might be required to accommodate an employee with a disability may not be 'special' in nature but more simply an alteration, adjustment or provision of a support.
- 'Special' may imply that what is required to accommodate a person with a disability in employment is over and above, that their needs are unique or unusual, and accordingly it may be costly or difficult.

The Commission believes that the phrase 'special services and facilities' is outdated and out of sync with communicating what is required to accommodate people with a disability in employment. Furthermore just because an employee with a disability asks for flexible working arrangements this may not necessarily mean they are requesting special services or facilities when other employees may have the same access to similar accommodations such as parents and carers or employees wishing to undertake religious observance in the workplace.

Substituting the phrase 'special services and facilities' with the phrase 'reasonable adjustments' or 'reasonable accommodation' will assist in providing some clarity around the implied duty to reasonably accommodate a person with a disability in employment.

The Commission in section 4 also highlights the possible implications for 'special services and facilities' type exceptions in light of the broader review Options Paper and its proposals around reasonable adjustments.

Section 23 - reasonable terms of employment - may set reasonable terms or requirements of employment, and vary those terms or requirements, to take into account the reasonable and genuine requirements of the employment, any special limitations imposed on an employee by their impairment or physical features or any special services or facilities required for an employee to enable him or her to undertake the employment.

Amend to modernise language in sub-paragraphs 23(b) and (c) similar to section 22 and clarify disjunctive paragraphs.

The rationale of this exception appears to enable an employer to set reasonable terms of employment or vary those terms to take into account the requirements of employment or any special limits of an employee or job applicant.

Sub-paragraph 23(a) permits a limitation on the freedom from discrimination to ensure that the genuine requirements of employment can be met. The nature and extent of the limitation is constrained by the requirement of reasonableness and that it be associated with the genuine occupational requirements.

The interpretation this exception was given in *Davies* has also had the effect of constraining the limitation it gives rise to. In relation to the examination of the reasonableness of employment requirements the genuine occupational requirements as a whole must be analysed not just a person's inability to perform one requirement when a respondent seeks to rely upon this exception.

In relation to sub-paragraph 23(b) the VCAT in *Davies* stated that this provision was directed to enabling an employer to make positive adjustments to the duties of employment to accommodate a particular individual's impairment or physical features and it is not directed to permitting an employer to exclude such an individual because of their incapacity to perform the duties of employment because of their impairment or physical features.

In relation to sub-paragraph 23(c) *Davies* established that it enables an employer to make reasonable adjustments to the terms of employment to accommodate a particular individual with an impairment or physical features but it does not protect terms that would exclude such a person from the employer's workforce.

This exception recognises that employers should be able to set or vary reasonable terms or requirements of employment which is an important purpose in a competitive market economy. The provision seeks to balance the reality of employment requirements and the recognition that such requirements may be varied to take into account the requirements of the employment or a person's circumstances arising from their disability. Therefore the limitation is reasonable, rational and proportionate to the purpose.

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

The Commission notes that the natural reading of this exception can cause some uncertainty as to whether the paragraphs (a)-(c) are conjunctive or disjunctive. Specifically whether the provision permits an employer to set reasonable terms or requirements of employment or make reasonable variations to them, when all those factors are present in section 23 or just one. Whilst *Davies* noted that the sub-paragraphs are disjunctive this is not clear on the face of the provision and can cause some uncertainty about the capacity of an employer to set genuine and reasonable requirements generally and when this aspect of the exception may be relied upon.

Similarly to the Commission's view in relation to section 22 the language in sub-paragraphs 23(b) and (c) require modernising. Any amendments to this provision should ensure that they do not permit employers to transfer the costs of reasonable adjustments to an employee by varying their terms and conditions of employment in a detrimental way and thereby significantly negating the notion of reasonable adjustments. Variations which have such an effect could not be considered reasonable and should not be protected by the exception.

Section 24 - standards of dress and behaviour - may set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.

No legislative change is required in respect of this exception.
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The purpose for this exception is to strike a balance between the right of an employer to regulate, within reasonable limits, the conduct and appearance of his or her staff with the right of employees not to be subject to unreasonable requirements as to appearance, dress and conduct. It contains a very important safeguard in that the standards set and enforced by the employer have to be reasonable in the circumstances of the employment.

Typically the exception is relied upon in the context of aesthetics as marketing imperatives but is also relied upon in relation to health and safety. On a narrow reading of this provision the reasonableness of such standards may be assessed asymmetrically by reference to the nature and circumstances of employment. Under a Charter interpretation a far more balanced application would occur having regard to the need to balance other rights that may be engaged in the circumstances by the dress and appearance standards (having regard to the people upon whom the standards are to be imposed).

This exception may potentially engage with the following rights: a person may be restricted from demonstrating their religious beliefs through restrictions on dress and conduct (s14) and bodily privacy as the provision may enable control of physical appearance (s13) or a person may be denied the opportunity to freely express themselves through dress/conduct (s15) or prohibited from enjoying cultural practices (s19).

Whilst the purpose is to give an employer freedom to regulate and conduct their own affairs it is also important in that it may be used to facilitate occupational health and safety requirements which is a very important objective in a free and democratic society. The exception contains an inbuilt constraint that standards must be reasonable having regard to the circumstances of employment ensuring that any limitation on human rights is therefore reasonable, rational and proportionate.

There are no less restrictive means to achieve the purposes of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 25 - care of children - where an employment position involves the care, instruction or supervision of children and the employer believes that the discrimination is necessary to protect the physical, psychological or emotional wellbeing of the children.

The Commission submits that this exception should be repealed
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The purpose of this exception is to allow employers to discriminate in recruitment where the employer genuinely believes that the discrimination is necessary to protect the welfare of children and they have a rational basis for that belief to discriminate. The exception is not intended to be directed at any particular groups in the community. It applies to discrimination based on any attribute with the overriding requirement being the rationality of the employer's belief.

The history of this provision is controversial, in that it was included in the EOA at the same time discrimination on the basis of sexuality was prohibited with the addition of lawful sexual activity as a protected attribute. Whilst section 25 applies to all attributes, it has been regarded by many as an allowance that needed to be made to placate those who persist with the prejudice that "homosexual equals paedophile" and would otherwise have sought to derail the inclusion of lawful sexual activity in the Act.

The Commission is cognisant of and sympathetic to that perception. However its primary objection to section 25 is that it is entirely superfluous. If anyone who is the subject of any type of discrimination complaint can demonstrate their actions were based on a real need to protect children their conduct will not be unlawful. The

Commission would find that the complaint lacked substance or was misconceived, whilst VCAT would find that the complaint was not proved. This outcome is completely independent of section 25 and would be reached in its absence. The issue is purely evidentiary, namely a respondent showing that there was a non-discriminatory reason for their actions or decision. Section 25 is essentially anomalous and not required.

Section 26 - compulsory retirement of judicial officers - statutory provisions that provide for the compulsory retirement of judicial officers at a certain age are not unlawful.

The Commission encourages the Department to conduct further research and analysis into whether it is possible to adopt a less restrictive means to manage the competency of the judiciary and thereby achieve the objective of a competent judiciary in which the public have confidence in a manner that is less arbitrary.

The purpose of this section is to permit statutory provisions which provide for a compulsory retirement age for judicial officers. The policy rationale is to ensure that the judiciary is competent and able to adequately perform their judicial functions and that the public maintain confidence in the judiciary.

This is an important purpose also recognised by the right to a fair hearing by a competent judiciary in s24(1) of the Charter.

Compulsory retirement exceptions sit uneasily with the prohibition on age discriminations in employment in that ability to undertake a job should be the appropriate measure of competency and not a person's age. It is the Commission's view that compulsory retirement ages are an unjustified proxy for competency and are arbitrary as the underlying objective is usually able to be realised in a manner less restrictive on human rights. Indeed not even the federal *Age Discrimination Act 2004* provides an exemption for compulsory retirement ages.

Whilst the extent of the limitation is limited to the judiciary the Commission is concerned that it perpetuates an underlying message that professional competency is compromised as a person ages. Such a message seems at odds with current social policy on mature age employment, recognising work and life experience, and reducing the skills shortages.

In light of this the Commission encourages the Department to conduct further research and analysis into whether it is possible to adopt a less restrictive means to manage the competency of the judiciary and thereby achieve the objective of a competent judiciary in which the public have confidence in a manner that is less arbitrary.

Section 27- youth wages - may pay an employee who is under the age of 21 years according to the employee's age.

Amend – to preserve the operation of genuine trainee wages, without any reference to chronological age

The purpose for this exception is to permit the payment of youth wages – in that an employer may pay an employee under the age of 21 according to that employee's age without infringing the prohibition on age discrimination.

This exception may promote the employment of young people and/or enable an employer to make an economic decision about how much it is willing to pay an employee to perform a particular role.

In enacting this exception the Government agreed that skill and competency should be the basis for fixing wages and not age. However, youth wages were made exempt from the operation of the Act until a suitable skills and experience based replacement became available.

From the Commission's complaint handling experience it is clear that the scope of this provision is uncertain in terms of whether it is restricted to paying a person according to their age or whether it can be relied upon in recruitment for which youth wages will be offered. This is not possible to discern from the purpose either and requires clarity. If the provision were to apply to decisions to decide to only offer youth wages – where this is based upon economic considerations and not special measures designed at providing youth with employment opportunity – then it is quite possibly an unreasonable limitation not demonstrably justifiable in a free and democratic society. It is also the Commission's experience that in the absence of a specific link to training this exception can effectively result in people under 21 being paid less for exactly the same work as those over 21.

Subject to the provisions of federal industrial relations legislation, the Commission is of the view that once a person has attained adulthood, their age is not an appropriate basis on which to be determining their wage. This is essentially age discrimination. At the same time however, the Commission recognises that where a person is engaged in training and skills development, there is an objective basis for making an adjustment to their salary to reflect this. In this context, section 27 fails to articulate and advance a legitimate objective. To address this, the Commission recommends that section 27 should be amended to preserve the operation of genuine trainee wages, without any reference to chronological age. Not only does this more clearly and legitimately identify and advance the relevant policy objective of workforce development, it could also potentially promote access by older workers to trainee roles.

Section 27A - early retirement schemes - may take into account the age of an employee and any eligibility of the employee to receive a retirement benefit from a superannuation fund in deciding the terms on which to offer an employee an incentive to resign or retire.

The Commission recommends the Department undertake more research and analysis on the social and economic considerations relevant to this exception and whether they are sufficient to justify such a limitation.

This exception was introduced in 1996 shortly after the EOA was enacted to clarify the Government's intention in relation to the impact of the EOA on voluntary early retirement schemes.

This arose from the context that public sector employers had been authorised in the preceding years to offer voluntary early retirement payments to employees to facilitate restructuring of the public sector to achieve more efficient service delivery. These early retirement schemes involved the offer of different payments to employees depending on whether they are eligible to access retirement benefits from their superannuation fund. The underlying policy of this provision is that it is reasonable to provide greater incentive to forego future employment to employees who do not have access to superannuation retirement benefits than it is to employees who have access to these benefits.

The effect of this provision therefore is that it potentially excludes older workers from Voluntary Departure Package schemes and/or permit reduction in benefits. The Commission questions whether such economic considerations are so pressing as to justify this limitation and recommends that the Department conduct more research and analysis into this.

Section 27B - gender identity - may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person's gender identity or 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.

The Commission submits that this exception should be repealed.

Drafted to address 'vexatious cross-dressers', this provision results in complaints of direct discrimination on the basis of gender identity being the only direct discrimination complaints subject to a general reasonableness test. This exception may also impact significantly on freedom of expression (s15) and as such is neither legitimate nor proportionate, particularly given no comparable provision in any other jurisdiction. Accordingly, the Commission view is that it is not a justified limitation on the right to equality and should be repealed.

Section 28 (exemption)- single sex accommodation – the Tribunal, by granting an exemption from the Act, may authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes

No legislative change is required in respect of this exception.

Whilst the purpose of this exception is not clear the safeguard that the VCAT may grant such exemptions is an appropriate constraint on the limitation in that the VCAT will need to assess such applications for exemption consistently with the Charter.

Sections 30 & 31 – establishing firms and partnerships – relates only to firms with five or more partners

Amend to remove restriction relating to number of partners

The Commission is of the view that limiting the prohibition of non-discrimination to 5 or more partners is an unreasonable and unjustified limitation on the right to equality.

Similarly to the small business exception the inbuilt restriction in the prohibition lacks a legitimate or rational purpose for limiting the right to equality. It appears to fallback on the rationale of reducing economic and regulatory burden for small enterprise which is arguably not compelling to justify limiting employment opportunities. For these reasons the prohibition should be amended to ensure that it applies to all size firms.

Section 32 - special services and facilities - A firm, or a person intending to establish a firm may discriminate against a person seeking admission to the firm as a partner or against a partner in the firm on the basis of impairment in certain circumstances where in order for that person to perform the genuine and reasonable requirements of partnership that person would require special services or facilities and it is not reasonable in the circumstances for those services and facilities to be provided.

Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to section 22.

The purpose of this provision is to enable a firm or a person seeking to establish a firm, to discriminate on the basis of impairment against a person seeking admission to the firm as a partner or against a partner in a firm where in order to perform the genuine and reasonable requirements of the partnership, the person or partner

requires special services and facilities, and it is not reasonable for them to be provided in the circumstances.

The Commission repeats its comments it made in respect of section 22 here in terms of the likely compatibility of this exception with the Charter and the need to amend to modernise the language of the provision to more better effectively convey the implied duty to reasonably accommodate a person seeking partnership or a partner in a firm with a disability.

Section 33 - reasonable terms of partnership - A firm, or a person intending to establish a firm, may set reasonable terms or requirements of partnership, and vary those terms or requirements, to take into account the reasonable and genuine requirements of the partnership, any special limitations that a person's impairment or physical features imposes on their capacity to undertake the obligations of partnership or any special services or facilities that are to enable him or her to undertake those obligations or to facilitate the performance of those obligations.

Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to section 23.

The purpose of this provision is to enable a firm or person intending to establish a firm to set reasonable terms of partnership or make variations to those terms to take into account any requirements of the partnership or any special limitations a partner or prospective partner may have.

The Commission repeats its comments it made in respect of section 23 here in terms of the likely compatibility of this exception with the Charter and the need to amend to modernise the language of the provision to better effectively convey the implied duty to reasonably accommodate a person seeking partnership or a partner in a firm with a disability.

Section 36 - reasonable terms of qualification - A qualifying body may set reasonable terms in relation to an occupational qualification, or make reasonable variations to those terms, to take into account any special limitations that a person's impairment or physical features imposes on his or her capacity to practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates

Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to section 23.

The purpose of this provision is to enable a qualifying body to set reasonable terms in relation to an occupational qualification or make reasonable variations to those terms to take into account any special limitations of a person.

The Commission repeats its comments it made in respect of section 23 here in terms of the likely compatibility of this exception with the Charter and the need to amend to modernise the language of the provision, 'special limitations' to better effectively convey the implied duty to reasonably accommodate a person with a disability seeking a qualification.

1.2 Exceptions to discrimination in education

Section 38 - educational institutions for particular groups - An educational authority may exclude a person from an educational institution or program where that institution or program is wholly or mainly for students of a particular sex, race, religious belief, age or age group or for students with a general or particular impairment and the person is not of the particular sex, race, religious belief, age or age group, or they do not have a general or the particular impairment

No legislative change is required in respect of this exception.

The purpose of this provision is to provide an exception for educational institutions which cater for particular groups within the community.

The exception may also potentially facilitate promotion of the following rights depending on the facts and the context of educational institutions or programs wholly or mainly for students of a particular attribute:

- freedom of thought, conscience, religion and belief – where an educational institution or program has as its aims the observance, practice and teaching of a religion or belief (s14);
- protection of families and children – to limit the provision of educational services to persons of particular attributes where this is in the best interests of children (s17);
- protection and promotion of cultural rights - to facilitate the provision of education to persons with shared experiences, understanding and awareness where this would promote the enjoyment and practise of culture (s19);

Importantly also it recognises an important public preference for single sex schools which are a rational and well accepted educational strategy.

This exception has an important public purpose in that it permits the delivery of education in environments that facilitate the welfare and advancement of the groups

that they are wholly or mainly established for by permitting the exclusion of people who are not of the particular attribute the authority or program caters for.

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 39 - special services or facilities - An educational authority may discriminate against a person on the basis of impairment if special services or facilities are required in order for that person to participate in an educational program and it is not reasonable for those services or facilities to be provided.

Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to section 22.

The purpose of this provision is to enable an educational authority to discriminate against a person on the basis of their impairment, if in order to participate or continue to participate in, or derive or continue to derive a substantial benefit from the educational program of the authority, the person requires or would require special services and facilities, but it is not reasonable for such to be provided in the circumstances.

The Commission repeats its comments it made in respect of section 22 here in terms of the likely compatibility of this exception with the Charter and the need to amend to modernise the language of the provision to more better effectively convey the implied duty to reasonably accommodate a person seeking to participate in an educational program.

Section 40 - standards of dress and behaviour - An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students. A standard for appearance or behaviour must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard.

Amend to ensure a more balanced consideration of the factors relevant to determining whether an educational authorities setting of a standard of dress and appearance is reasonable.

The purpose for this exception is to enable an educational authority to set and enforce reasonable standards of dress, appearance and behaviour for students. This exception attempts to balance the competing rights of students with the need for school discipline by providing an exception for reasonable standards of dress, appearance and behaviour.

This exception may engage with and sometimes limit the following rights:

- equality rights (s8) – which adopt and reinforce the EOA’s prohibition of discrimination on the basis of protected attributes;
- freedom of religion and belief (s14) – including the right to demonstrate one’s beliefs;
- cultural rights (s19) – which recognise the rights of individuals and communities to enjoy their culture and to declare and practice their religion; and
- in some circumstances the right to express oneself freely may also be relevant (s15).

Sub-section 40(2) provides that a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community.

There has been no consideration of section 40 by either VCAT or the courts, and it is a troubling provision from both a drafting and policy perspective given the arbitrary and imprecise nature of the terminology “take into account” and “views of the school community”. Conceivably, the wording of section 40 could be read as making the scenario of a school prohibiting students from wearing religious clothing or icons, (which is prima facie indirect discrimination on the basis of religion) lawful, if it can be demonstrated the school took the views of the school community into account.

The Commission in its recent appearance at Education and Training Parliamentary Committee (“ETC”) *Inquiry into Dress Codes and School Uniforms in Victoria Schools* cautioned against any such interpretation of section 40, particularly in light of the recent passage of the Charter. Instead the Commission suggested that a very balanced and sensitive process of consultation would be required, and one not necessarily governed by the principle of majority rule, before section 40 could be relied upon as a full defence to a complaint of discrimination. The Commission is unsure whether the current drafting of section 40(2) would permit such a balanced analysis.

An appropriate approach by educational authorities to ‘taking into account the views of the school community’ will need to be informed by an awareness of how to strike an appropriate balance when accommodating and restricting rights through dress standards. Indeed the ETC recognised that some schools need additional guidance on how to ensure they meet the requirements of anti-discrimination law specifically in relation to gender and gender identity, age, physical appearance, religion, ethnicity and culture, and philosophical and conscientious objections²⁰.

²⁰ Education and Training Parliamentary Committee, *Inquiry into Dress Codes and School Uniforms in Victoria Schools*, Final Report December 2007, Chapter Four.

Accordingly it is recommended that sub-section 40(2) be amended to note that – the views of the school community are just one relevant factor to be taken into account in considering the reasonableness of a dress and appearance standard and that the Department give consideration to including other relevant factors to provide schools with necessary guidance on how to develop reasonable and balanced standards of dress and appearance.

Section 41 - age based admission schemes and age quotas - An educational authority may select students for an educational program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of different age groups

No legislative change is required in respect of this exception.

The purpose for this exception appears to enable educational authorities to select children according to their age or to impose age quotas to enable children to be educated in circumstances appropriate for and commensurate to their development and learning needs.

In this way the exception facilitates the protection of children in that it promotes the best interests of the child by ensuring their learning environment is appropriate and adapted to beneficially foster their development through education.

This is an important purpose and the limitation is reasonable, rational and proportionate. There are no less restrictive means to achieve the exceptions purpose, as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

1.3 Exceptions to discrimination in the provision of goods and services and the disposal of land

Section 43 – insurance - An insurer may discriminate against another person in the terms on which an insurance policy is offered.

Amend to limit to certain attributes similar to federal legislation (age, impairment and sex) and require that where the insurer proposes to rely upon the exception they are required to state their reasons for refusing insurance and the information upon which that is based

The purpose for this exception is to provide a limited exception to the prohibition of discrimination in insurance. It is effectively designed to allow a person's age to be

used as a relevant factor where there is an objective basis to suggest that the person's age puts him or her in a higher or lower risk category than other persons.

Notwithstanding the purpose, the drafting of the provision itself is not restricted to particular attributes. This gives rise to a significant and broad limitation on the right to freedom from discrimination which is unlikely to be justified in respect of all attributes in the EOA. Section 43 should be clarified that it is restricted to age impairment and sex, similarly to exceptions in federal anti-discrimination legislation which permit insurers to make discriminatory insurance decisions in relation to those attributes.

The provision appears to justify insurers making risk based decisions on insurance coverage which may seem a reasonable and important purpose in a modern market economy. The nature and extent of the limitation however is significant as insurance coverage may be refused altogether.

Sub-paragraph 43(a) applies federal insurance exceptions to the scope of the EOA. These federal exceptions are drafted similarly to sub-paragraphs 43(b) and (c) which include a constraint on the limitation by only permitting discrimination if it is based upon data/evidence that it is reasonable for an insurer to rely upon. Accordingly the limitation in this respect is possibly justified.

The Productivity Commission, *Review of the Disability Discrimination Act 1992*, (DDA) Report No 30, recommended that in the interests of transparency, accountability and accuracy in underwriting procedures, the data sources and 'other relevant factors' relied upon in unfavourable underwriting decisions should be explained to the insurance applicant in cases where the insurer plans to rely upon the exception. Thereby limiting the application of the insurance and superannuation exception to only applying if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied). The Productivity Commission further recommended that applicants should be advised of their entitlement to request these reasons.

The Commission believes that section 43 should also be similarly limited to ensure that the limitation is less restrictive.

Section 44 - credit providers - A credit provider may refuse to provide credit and may discriminate on the basis of age in the terms on which credit is provided.

Amend to provide that where the credit provider proposed to rely upon the exception they are required to state their reasons for refusing credit and the information upon that refusal is based

The rationale behind this exception is to provide a limited exception, on the basis of age only, in the provision of credit. As with section 43, it is to allow a person's age to be used as a relevant factor where there is an objective basis to suggest that the person's age puts him or her in a higher or lower risk category than other persons.

It is the Commission's view that it is difficult to reconcile age based exceptions with section 7 of the Charter as they are often arbitrary, or as in this instance, a less restrictive alternative is to assess an individual applying for credit – that is on their own capacity to pay.

The limitation may be constrained in that it only permits discrimination by credit providers where this is based upon data/evidence that it is reasonable to rely. A Charter consistent interpretation of this section will arguably necessitate a consideration of a person's capacity to pay in relation to considering other relevant factors' upon which a credit provider may rely to refuse credit. This should facilitate the provision being interpreted in a less restrictive manner. This could be further enhanced by credit providers providing reasons for refusing credit and the information they based the refusal upon.

To ensure that this provision has the least restrictive operation the Commission recommends that there be a requirement for credit providers to state their reasons for refusing credit and show the actuarial or statistical data upon which a refusal is based.

Section 45 - supervision of children - A person may require that a child be accompanied or supervised by an adult if there is a reasonable risk that the child may cause a disruption or endanger himself or herself or any other person if the child were to remain unaccompanied or unsupervised.

No legislative change is required in respect of this exception.

The purpose for this exception is to enable a person to require a child to be accompanied or supervised by an adult if there is a reasonable risk of disruption/endangerment.

This provision may facilitate the protection of families and children where supervision is in the best interest of the child due to their safety or maturity (s17) and other individuals' privacy – as this may be interfered with as a result of a child's disruption (s13).

The limitation this exception gives rise to is constrained by reference to the 'reasonable risk' which would need to be interpreted in the context of the Charter – as such terms of the supervision should be proportionate and rational to the risk.

This exception has a legitimate purpose which seeks to balance competing interests and is an important limitation which is reasonable, rational and proportionate to that purpose. There is no less restrictive means of achieving the purpose. Indeed a supervision requirement is less restrictive than permission to outright refuse the provision of services to children or people with children.

Section 46 - special manner of providing a service - A person may refuse to provide a service if the service would be required to be provided in a special manner because of the other person's impairment or physical features.

Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to section 22.

The purpose of this provision is to provide that a person may refuse to provide a service or set reasonable terms for the provisions of a service to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features, but it is not reasonable for the service to be provided in that manner.

The Commission repeats its comments it made in respect of section 22 here in terms of the likely compatibility of this exception with the Charter and the need to amend to modernise the language of the provision, 'special manner' to better effectively convey the implied duty to reasonably accommodate a person seeking to access services.

Section 48 - disposal by will or by gift - A person may discriminate against another person in the disposal of land by will or as a gift.

No legislative change is required in respect of this exception.

The purpose of this exception is to allow people to dispose of their assets in the way they want to. In this way it respects an individual's privacy by not permitting prohibitions on discrimination to interfere with a person's personal affairs (s13).

This is a legitimate purpose and therefore the limitation that the exception gives rise to is rational and proportionate to the purpose of enabling people to dispose of their assets consistently with their wishes.

There are no less restrictive means to achieve the purpose of the exception; as such the limitation this exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society, which respects dignity, equality, and freedom of all persons.

1.4 Exceptions to discrimination in accommodation

Section 53 - accommodation unsuitable for children - may refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

Amend to include that where possible a person may impose a term on the provision of accommodation to a child that they be supervised by an adult.

It appears the underlying purpose of this provision is to protect the health, welfare and safety of children in the area of accommodation.

This may be an acceptable limitation in that it is aimed at safety of children and if relied upon will need to be assessed in a manner consistent with the Charter to ensure a refusal is rational and proportionate to the risk posed – and the exception is not relied upon as an excuse to discriminate against children in accommodation.

The Commission is of the view that in some circumstances there may be less restrictive means of ensuring the safety of children in accommodation by imposing terms on the provision of that accommodation that the child be supervised by an adult. This would then make this provision consistent with section 45 which permits a service provider to require as a term of providing that service that a child be accompanied or supervised by an adult due to a reasonable risk that the child might endanger themselves. Such an amendment would facilitate a more proportionate approach to the balancing of the rights and interests of the child in relation to their safety and ensure that they are not unreasonably refused accommodation where they may be reasonably accommodated with appropriate adult supervision.

Section 54 - shared accommodation - may discriminate in deciding who is to occupy residential accommodation in which the person or a relative of the person lives and intends to continue to live.

No legislative change is required in respect of this exception.

The purpose for this exception is to allow a person to discriminate in deciding who is to occupy residential accommodation in which the person or his or her relative and no more than six other people live.

This exception also lends itself to the protection of privacy of the family and home (s13) in that it facilitates choice about who accommodation is offered to in a person's family home.

Essentially this provision is about permitting prejudice in the area of accommodation when it crosses into the private domain. The Act is recognised generally as

attempting to strike a balance between the aims of equal opportunity and a desire to infringe as little as possible into private spheres of life.

Whilst exclusionary choices based on prejudice may seem unpalatable in an equal opportunity context the limitation this exception gives rise to is likely to be reasonable given the Act preserves the public private dichotomy and individuals choice about matters directly pertaining to their private homes.

There are no less restrictive means to achieve this exceptions purpose; as such the limitation this exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Section 55 - welfare measures - may refuse accommodation to a person where a hostel or similar institution is established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief and the person is not of that particular sex, age, race or religious belief.

No legislative change is required in respect of this exception.

The purpose for this exception is to allow a person to refuse to provide accommodation to another person in a hostel or similar institution which is established wholly or mainly for the welfare of people with a particular attribute.

The exception may also potentially facilitate promotion of the following rights depending on the facts and the context of welfare accommodation provide wholly or mainly for people of a particular attribute:

- respect for privacy – where it may be appropriate to restrict access to shared accommodation services where this may be appropriate for reasons of privacy and decency (s13);
- freedom of thought, conscience, religion and belief – where a hostel or similar institution aims to facilitate an environment which respects the observance of a particular religion or belief (s14);
- protection of families and children – to limit access to a hostel or similar institutions to persons of particular attributes where this is in the best interests families and/or children (s17);
- protection and promotion of cultural rights - to provide an accommodation environment for people with shared experiences, understanding and awareness where this would promote the their advancement or the enjoyment and practise of a particular culture (s19);

This exception has an important public purpose in that it permits reasonable restrictions on welfare accommodation services where they are aimed at facilitating the welfare and advancement of the groups that they are wholly or mainly

established for by permitting the exclusion of people who are not of the particular attribute that the hostel or institution caters for.

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 56 - accommodation for students - An educational authority may provide accommodation wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular impairment at an educational institution wholly or mainly for students with that attribute.

No legislative change is required in respect of this exception.

The purpose for this exception is to provide an exception for accommodation for students in educational institutions operating wholly or mainly for students with a particular attribute.

The Commission repeats its comments it made in respect of section 38 here in terms of the likely compatibility of this exception with the Charter.

Section 57 - accommodation for commercial sexual services - A person may refuse to provide accommodation to a person if they intend to use the accommodation for, or in connection with, lawful sexual activity on a commercial basis.

No legislative change is required in respect of this exception.

The purpose of this provision is to permit a person to refuse to provide accommodation to another where the other intends to use the accommodation for or in connection with the provision of sexual services on a commercial basis.

This exception seeks to balance, on the one hand, the rights of a person to have equal opportunity to access accommodation and on the other hand, the rights of the provider of accommodation to have some input as to who occupies the accommodation and for what purpose it is used.

Whilst it is not clear as to the nature and extent of this limitation it expressed in the explanatory memorandum that the exception is intended to operate only in relation to persons who wish to provide commercial sexual services such as operate a licensed brothel. Again this provision seems to be about permitting prejudice in the area of accommodation when this crosses into the private domain. The Act is recognised

generally as attempting to strike a balance between the aims of equal opportunity and a desire to infringe as little as possible into private spheres of life.

Whilst exclusionary choices based on prejudice may seem unpalatable in an equal opportunity context the limitation this exception gives rise to is likely to be reasonable given the Act preserves the public private dichotomy and individuals choice about matters pertaining to themselves directly - in this case who by and for what purpose are their proprietary assets used.

There may be no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

1.5 Exceptions to discrimination by clubs and club members

Section 61 - clubs for disadvantaged people or minority cultures

No legislative change is required in respect of this exception.

The purpose of this exception is to allow a club to exclude from membership a person who is not a member of the group of people with a particular attribute for whom the club was established, if the club operates principally to –

- Prevent to reduce disadvantage suffered by people of that group;
- To preserve a minority culture.

This exception has an important public purpose that promotes freedom of association (s16) for the sharing of a particular culture (s19) or the advancement of a particular disadvantaged group (s8(4)).

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 62 - clubs and benefits for particular age groups

No legislative change is required in respect of this exception.

The purpose for this exception is to enable a club to exclude a person from membership if the club exists principally to provide benefits for people of a particular age group and the person is not part of that age group.

This exception has an important public purpose that promotes freedom of association (s16) for the sharing of mutual interests and the provision of benefits for the benefit of particular age groups (s8(4)).

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 63 - separate access to benefits for men and women

No legislative change is required in respect of this exception.

The purpose for this exception is to enable a club to provide separate, but similar, benefits for members of each sex.

The exception may operate to preserve the right to equal membership benefits irrespective of gender whilst balancing the right to privacy (s13) where the provision of certain benefits may necessitate this for reasons of respect for privacy and decency.

This exception has a legitimate purpose and the limitation it gives rise to on the right to equality is rational and proportionate to the purpose it is seeking to achieve.

There are no less restrictive means to achieve the purpose; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

1.6 Exceptions to discrimination in Sport and Local Government

Section 66 - competitive sporting activities - permits the exclusion of a person of one sex or with a gender identity from participating in a competitive sporting activity in which the strength stamina or physique of competitors is relevant and to restrict participation in a sporting activity to people who can effectively compete, people of a specified age group and to people with a particular or general impairment.

The Commission recommends that the Department undertake further consultation and analysis in relation to the impact of this exception on prohibition of discrimination on the basis of gender identity.

The purpose for this exception is to provide an exception for competitive sporting activities. It permits the exclusion of people of one sex or with a gender identity from participating in a competitive sporting activity where strength, stamina and physique of competitors is relevant (s66(1)). It also permits restriction on participation in competitive sporting activities to people who can effectively compete, people of a specified age group and to people with a particular or general impairment (s66(2)).

Culturally in Australia single sex competitive sporting competitions are recognized as important and necessary given the physiological differences between men and women in terms of strength, stamina and physique. Similarly, restrictions based on age, ability and capacity are also recognized as legitimate in terms of participation in competitive sport.

Whilst the exception may facilitate an appropriate balance between the right to equality, and observance of cultural rights broadly in relation to competition between the sexes, the exception insofar as it permits discrimination on the basis of gender identity gives rise to a particular tension in the EOA. Gender identity in the EOA is defined as bona fide identification by a person of one sex with another sex, or an indeterminate sex (whether or not the person is recognised as such).

The limitation the exception establishes in respect of people with the attribute of gender identity significantly limits these person's human rights. In addition to the limitation it has on a person's equality rights (s8) it also potentially interferes with the right to privacy and reputation (s13) and freedom of expression (s15) of a person who affirms a sex different from the sex they were born with. The Commission is concerned about the tension this exception gives rise to in the Act and the significant limits it may have on the rights of people who have the attribute of gender identity. Presumably the fact that the exception extends to gender identity is based upon assumptions about the strength, stamina and physique of persons whose affirmed sex different from their birth sex. Accordingly, the Commission recommends that the Department undertake further consultation and analysis in relation to the impact of this exception on prohibition of discrimination on the basis of gender identity and whether or not it is a justified limitation.

Section 68 - political belief or activity - A councillor of a municipal council may discriminate against another councillor of that council or a member of a committee of that council on the basis of political belief or activity.

No legislative change is required in respect of this exception.

The purpose for this exception is to allow discrimination on the basis of political belief or activity facilitating the efficacy of Local Government through democratic political affiliations.

This is a legitimate purpose in a democratic society and therefore the limitation is rational and proportionate to the purpose.

There are no less restrictive means to achieve the purpose of the exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

1.7 General Exceptions

Section 70 - Things done to comply with orders of the courts and tribunals

No legislative change is required in respect of this exception.

The purpose for this exception is fairly self explanatory in that it allows discrimination if it is necessary to comply with an order of any tribunal or court.

This is an important purpose in a democratic society committed to the rule of law. As Courts and Tribunals are required by the Charter to interpret all legislative provisions consistently with the Charter it is likely that any limitation this exception may give rise to will be reasonably limited and balanced and accordingly is likely to be reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Section 71 – Pensions

Recommend that the Department undertake further research and analysis into the limitations that this provision may give rise to.

The purpose for this exception was a temporary measure to allow discrimination while complexities of pensions and superannuation schemes are investigated (2nd reading speech, 1977). It was to provide that the prohibition of discrimination does not apply to discriminatory provisions relating to pensions.

The compatibility and ongoing need for this exception is difficult to analyse without regard to specific provisions in other legislation which may be discriminatory. Presumably consideration will have to be had to federal laws which preserve discriminatory provisions. Accordingly, the Commission recommends that the Department undertake further research and analysis into the limitations that this provision may give rise to.

Sections 72 & 73 - Superannuation – existing fund and new fund conditions

Recommend that the Department undertake further research and analysis into the limitations that this provision may give rise to.

Section 72: The purpose of this exception is to allow the retention of an existing superannuation fund condition in relation to a current member of a fund or a person who becomes a member within 12 months.

Section 73: The purpose for this exception is to specify the circumstances under which discrimination on the basis of age, sex, marital status or impairment is permitted in relation to new superannuation fund conditions.

These exceptions are presumably necessitated by reference to federal regulation of superannuation schemes and the constitutional implications this has for State based regulatory schemes such as the EOA. Without regard to the federal provisions it is impossible to determine the nature and extent of the limitation and whether it is justifiable in light of a Charter analysis.

Further research and analysis is required to determine the extent of the limitation and what circumstances are giving rise to blatant unjustified discrimination (e.g discrimination in the area of vesting in relation to same-sex relationships) and where discrimination may be justified by reliance on actuarial and statistical data in a market economy.

Section 74 – Charities - permits discrimination where it is in accordance with the provisions of a charitable deed or will.

No legislative change is required in respect of this exception.

The purpose of this exception is to provide a general exception for charities. The exception therefore facilitates freedom of choice in relation to the conferral of a charitable benefit.

This is an important purpose in that it is reasonable for a donor to decide upon whom to confer a charitable benefit upon therefore the limitation is rational and proportionate to the purpose.

There are no less restrictive means to achieve this exceptions purpose; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 75 – Religious bodies - anything done where the action conforms with the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion. This includes actions in relation to the employment of people in an educational institution under the control of a religious body.

Amend – s 75(2)(a) to ensure that actions taken to conform with religious doctrines are ‘reasonably necessary’

The purpose for this exception is to provide a general exception for religious bodies from the provisions of the EOA (however, religious bodies are subject to the prohibition against sexual harassment in the Act).

In relation to s75(1) the limitation this sub-section has upon the right to equality is appropriate and justified as it permits specific discriminatory actions that are reasonable and legitimate in terms of the freedom of religion in the context of observance, practice and teaching (s14).

Section 75(2)(a) gives rise to a significant limitation in that it permits conduct by religious bodies that complies with religious doctrine, or is in accord or harmony with religious doctrines.

In *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998), the then Anti-Discrimination Tribunal considered and applied section 75(2)(a) of the EOA concerning the Respondents' conduct in refusing to permit the Complainant to attend Church while he wore an earring. The Tribunal was satisfied that the code of conduct that the Church had developed and that the Pastor was enforcing in refusing the complainant's attendance contained precepts designed to encourage adherents of Revival Centres International to conform to their religious doctrines. The Tribunal found that there was no doubt that the Pastors actions were done to implement the code of conduct. In these circumstances, his conduct, in implementing that code conformed with the doctrines of the religion as professed by RCI and interpreted by the provisions of the code. Significantly, the Tribunal noted that the sub-section only required it to examine whether the conduct conformed with – not whether it was reasonably necessary to conform with religious doctrines.

Whilst it is acknowledged that actions taken to conform with religious doctrines are important and protected by the freedom of religion these must be balanced against competing rights in the circumstances. Taking into consideration the application of the exception in the above case, sub-section 75(2)(a) may significantly limit human rights in a manner due to the fact that it does not facilitate a balancing of other relevant rights in the application of the exception. Not only in terms of limiting the right to equality but the exception may also significantly limit an individuals right to privacy and reputation (s13) and freedom of expression (s15) depending on factual circumstances.

Any reliance upon this exception which may engage with and potentially limit the human rights should be subject to an analysis of whether it is reasonable, rational and proportionate to the objectives for which the alleged discriminatory actions are taken. From the interpretation established by *Jubber* and the Tribunal's comments on the issue of conformity, it is difficult to interpret this section consistently with the Charter. The sub-section has been interpreted quite expressly to only require a consideration of whether the alleged discriminatory conduct conforms with religious doctrines; it is not constrained by any assessment of whether the discriminatory actions are reasonable and balanced. This may lead this exception to being relied upon where it is convenient to act in a discriminatory manner which conforms with religious doctrines as opposed to where it is balanced and reasonable to do so. Accordingly, it is recommended that a constraint be added to ensure discriminatory actions taken are 'reasonably necessary' to conform with religious doctrines. This will enable such actions to be examined objectively in terms of whether they are reasonable, rational, and proportionate and balanced in relation to competing rights.

In relation to s75(2)(b) the Tribunal in *Jubber* noted that this is a higher test than convenience or reasonableness. This paragraph only applies to permit conduct by a religious body that is necessary to avoid injury to 'religious sensitivities' of people of a particular religion. The sensitivities must have some connection with the religion itself. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable. This limitation on the right to equality in the context of religious bodies being permitted to discriminate where this is necessary to avoid injury to the adherents of their faith can be regarded as reasonable and demonstrably justifiable in that it recognises and promotes observance to religion (s14); has an inbuilt constraint in that the discriminatory actions must be 'necessary'; and the sensitivities of adherents must have a causal nexus with a particular religion.

In relation to sub-section 75(3) this must be examined by reference to sub-section 75(2) thereby making anything done in relation to employment of people in educational institutions under the direction and control of a religious body required either to conform to the doctrines of a religion or necessary to avoid injury to the religious sensitivities of adherents of a religion. This sub-section seeks to balance the relevant rights of an individual (freedom from discrimination (s8), right to privacy and reputation (s13), freedom of religion (s14) and freedom of expression (15)) with the group rights of the religious body and the school community (freedom of religion (s14), protection of families and children(s17), and cultural rights (s19)). The Charter provides a useful framework for applying this exception to appropriately balance competing rights and ensure that prejudices are not used as a basis to unreasonably discriminate. The limitations posed by this section will also be lessened if amendments are made to confine s75(2)(a).

Religious exceptions need to be framed in a manner that recognises the religious/secular divide in order to help identify the correct balance. Accordingly, religious exceptions should not be drafted so broadly and unlimited that they do not

respect this divide. They should be drafted to include moderating language which facilitates a more balanced consideration of and respect for competing rights.

Section 76 – Religious schools – anything done (by a person or body not established for the purposes of religion)(including employment) that is in accordance with the relevant religious beliefs or principles

Amend to ensure that discriminatory actions are ‘reasonably necessary’ to conform with religious doctrines.

The purpose for this exception is to provide a general exception to religious schools. This exception applies in relation to schools conducted in accordance with religious beliefs and principles, but not schools run by organised religious bodies (this is covered by s 75). This is to provide a limited exception for educational institutions in relation to anything done by the individual or body in the course of establishing, directing, controlling or administering the educational institution that is in accordance with the relevant religious beliefs or principles. The individual is subject to the sexual harassment provisions of the Act.

Like section 75 this section seeks to balance the relevant rights of an individual (freedom from discrimination (s8), right to privacy and reputation (s13), freedom of religion (s14) and freedom of expression (15)) with the group rights of the religious school and the school community (freedom of religion (s14), protection of families and children(s17), and cultural rights (s19)). Unlike s75(3) however the potential limitation is less restrained in that it is not limited by reference to conformity with religious doctrines or necessity to avoid injury to religious sensitivities. It is confined only to actions in accordance with ‘the relevant religious beliefs or principles’.

Whilst the purpose of this limitation is reasonable and demonstrably justified, as it is currently drafted this exception is expressed in too broad terms. It gives rise to an almost unrestrained limitation on the right to equality and other possible rights of individual teachers. The Commission is of the view that a less restrictive and more balanced drafting is possible to achieve the purpose of this exception. This could be facilitated by only making discriminatory actions excepted by section 76 where they are reasonably necessary to conform with religious doctrines or necessary to avoid injury to the religious sensitivities of the adherents of a religion.

Section 77 – Religious beliefs or principles - where it is necessary for a person to comply with their genuine religious beliefs or principles.

The Commission submits that this exception should be repealed.

The purpose of this exception is to allow a person to discriminate if the discrimination is necessary to enable the person to comply with the person's genuinely held religious beliefs or principles.

This exception gives rise to a significant limitation in that it may be relied upon by any person in relation to anything prohibited by the Act and is only constrained by reference to actions being necessary to comply with subjectively held genuine religious beliefs or principles.

The Commission is of the view that such a limitation is far too broad and unnecessary given the existence of sections 75 and 76 and various other exceptions across other areas of the EOA which could be relied upon to legitimately discriminate where religious freedom is concerned. For example a person may be permitted to discriminate on religious grounds when employing someone to provide personal or domestic services in their own home (s16); educational institutions may exclude people who are not of a particular religion from that institution if the institution caters wholly or mainly for students of a particular religion (s38); a person may discriminate on the basis of religious belief and activity in deciding who is to occupy shared accommodation in which that person or their relative lives (s54).

This exception is neither reasonable, rationale nor necessary as there are adequate exceptions in the Act which can maintain an appropriate balance between freedom of religion and freedom from discrimination (providing the Commission's views on amendments in respect of section 75 and 76 are adopted). Accordingly, it is not a justified limitation on the right to equality and should be repealed.

Section 78 – Private clubs - the exclusion of people from a private club or from any part of the activities or premises of a private club.

Amend - clubs wishing to discriminate and maintain exclusionary membership policies should demonstrate that such policies are justified by reference to a specific purpose and/or interests.

This exception gives private clubs an exemption from the operation of the EOA in relation to their activities.

This exception seeks to facilitate a balance between freedom from discrimination (s8) and promotion of freedom of association (s16) of like minded people and/or for sharing of mutual interest. The limitation relates to exclusion from the activities and premises of private clubs. This limitation is significant in that private clubs are permitted to discriminate on the basis of sex or race or any other personal characteristic which would normally be protected under the EOA just because they may want to maintain exclusivity for whatever reason. The current breadth of this exception is unlikely to be reasonable and justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

It is the Commission's view that private elitist clubs are old fashioned and outdated and have no place in the 21st Century, however, at the same time the Commission recognises that freedom of association is also an important right. Accordingly the current limitation this exception gives rise to should be constrained to ensure that a less restrictive and more balanced approach to achieve the purpose of recognising freedom of association.

This exception should be amended to ensure a more balanced and justified approach to the promotion of freedom of association. Specifically, clubs wishing to discriminate and maintain exclusionary membership policies should demonstrate that such policies are justified by reference to a specific purpose and/or interests.

Section 79 - Incapacity and age of majority – where a person is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved

No legislative change is required in respect of this exception.

The purpose for this exception is to make it clear that nothing in the EOA is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority. The *Age of Majority Act* 1977 specifies 18 as the age in which a person attains full age and capacity.

Sub-section 79(2) permits a person to discriminate against another person who is subject to a legal incapacity where that incapacity is relevant to the transaction or activity in which the parties are involved. For instance a person may refuse to enter into a contract with a person who is under 18 years of age. The nature and extent of the limitation of sub-section 79(2) is confined in that it extends only to those transactions in which legal capacity is an issue. There is the potential for this exception to be applied broadly which may unduly restrict the types of activities and transactions of people with certain attributes such as age and impairment and thereby limit their right to equality. However, because such actions must be interpreted in light of the Charter this should act to constrain the limitation. Accordingly the limitation is rational and proportionate.

These are reasonable limitation and there is no less restrictive means to achieve the purpose of this exception; as such the limitation this exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Section 80 - Protection of health, safety and property - on the basis of impairment or physical features for the purposes of protecting the health, safety or property of any person (including the person discriminated against or the public generally).

No legislative change is required in respect of this exception.

The purpose for this exception is to permit conduct that is reasonably necessary for the protection of health, safety or property.

This exception seeks to balance the right to equality with equally important rights such as the protection of life (s9); the right to security of person (s21); and the protection of children in terms of safety of pregnant women (s17).

The interpretation of this provision to date by VCAT (see *Hall v VAFA* (1999) and *Kilburn v State of Victoria (Victoria Police)* (2007)) facilitates an interpretation and application of this provision that is consistent with the Charter in that it requires an examination reasonableness, rationality and proportionality of conduct taken for the purpose of protecting health and safety in terms of whether it was 'reasonably necessary'. This application to date indicates that the provision is reasonable and demonstrably justified in a free and democratic society. There are no less restrictive means to achieve such purposes.

Section 81 - Age benefits and concessions - the provision of benefits, including concessions, to another person based on age.

No legislative change is required in respect of this exception.

The purpose for this exception is to allow a person to provide benefits, including concessions, to another person based on age.

This exception has an important purpose of permitting benefits and concessions based on age. This is a reasonable limitation which is proportionate and rational to the purpose of the exception.

There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

Section 82 - Welfare measures and special needs - if it relates to the provision to people with a particular attribute of special services, benefits or facilities that are designed to meet the special needs of those people or to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training and welfare.

Taking into account the possible implications of the broader review the Commission believes that section 82 should either be repealed or amended to clarify its application and ensure that only a limited exception operates which permits reasonable restrictions on eligibility to services, benefits and facilities where such services, benefits and facilities are designed to meet the special needs of particular groups.

It appears the purpose of this provision is twofold:

- To provide an exception for anything done that may be described as special measures to prevent or reduce disadvantage; and
- To enable restrictions on eligibility for such services.

The exception therefore permits actions consistent with s8(4) of the Charter which recognizes special measures are not discriminatory and recognises that Governments and agencies face inherent resource limitations and difficult decisions need to be made in relation to eligibility and access to welfare and beneficial services. Whilst these may seem reasonable and justified limitations the manner this provision has been interpreted and applied by the VCAT and Courts makes this presumption untenable.

Since the decision of the Court of Appeal in *Colyer v. State of Victoria* [1998] 3 VR 759 ("*Colyer's case*"), the Commission has been concerned that in its current form, section 82 could potentially operate to reduce rather than advance the rights of marginalised and disadvantaged groups. In *Colyer's case*, the Court of Appeal held, if it could be shown that the genuine as opposed to the colourable intention of a respondent was to design special services, facilities or benefits to meet the ends recognised in section 82, then the exception applied²¹. Of itself this may not appear problematic, except that the drafting of section 82 is not confined to eligibility for a special service, but rather anything done in relation to the provision of that service. The current drafting and interpretation of section 82 could not just enable a respondent to defend itself against a complaint regarding access to and eligibility for a service, but it could also provide a total response or defence to a complaint in relation to the manner in which services were provided to disadvantaged groups.

Section 82 was then considered by the then President of VCAT, Justice Morris, in *Mangan v Melbourne Cricket Club* [2006] VCAT 73 whom identified several issues with the interpretation of section 82 following *Colyer's case*. The Court of Appeal had

²¹ Refer in particular to the reasons of Kenny JA (as she then was) at pp 773-775. These comments were *obiter* however, as the matter was determined on the basis of standing.

applied the exception using a subjective test notwithstanding the drafting of the provisions lent itself more so to an objective test. Justice Morris noted further that if section 82 were to turn solely upon the subjective intent of the person providing some special measure, it was difficult to reconcile this with section 10 of the EOA that provides motive is irrelevant in determining whether or not a person discriminates.

Justice Morris highlighted the danger that a subjective test in the exception could be relied upon by, not just by responsible entities, but by genuine people who held views that were inconsistent with empirical evidence and the purpose of the exception:

...the section is designed to allow discrimination, which would otherwise be unlawful, in order to redress inequality. If the test imposed by section 82 is an objective test (or an objective and subjective test), then this would always be consistent with such a purpose. However the same cannot be said if the test is merely a subjective test. Section 82 does not apply merely to the State, but to every citizen. It is not difficult to imagine circumstances where a person may seek to discriminate against a disadvantaged gender or group in circumstances where the person genuinely believes that this is desirable to meet the special needs of another (advantaged) gender or group. I doubt that the section should be interpreted in a manner that makes such discrimination lawful simply because the discriminator's belief is not colourable.

Justice Morris held the view that section 82 ought to be applied using an objective test which was inconsistent with the opinion expressed by the Court of Appeal in *Colyer* and in deference to the Court of Appeal applied both a subjective and objective test noting that if the same answer emerged, then it would be unnecessary to conclusively determine this legal issue. The same answer did emerge and therefore the question of which test should be applied in section 82 is arguably further clouded in doubt.

Notwithstanding Justice Morris noted that the law may have moved on somewhat since the decision of the Court of Appeal in *Colyer's* case given that it had been accepted that State legislation should be interpreted consistently with international obligations Australia had entered into, such as human rights covenants, the Commission is concerned that a balanced and justified application of section 82 may not be achieved by a Charter consistent interpretation given the uncertainty around its application and the undesirability of it excepting discrimination in the administration of special measures.

The Commission in its 2005 submission to the Attorney-General²² recommended that the section should be amended to, like its predecessor, be restricted to the exclusion of people from a special service, benefit or facility (i.e. eligibility only rather than anything done in relation to the provision of that service). Given the uncertain application of

²² Recommendations from the Equal Opportunity Commission Victoria to the Attorney-general regarding reform and modernisation of the *Equal Opportunity Act 1995* (Vic) to address systemic discrimination, November 2005.

this provision and its likely incompatibility with the Charter in that it significantly limits freedom from discrimination in relation to the administration of welfare services it should be either amended or repealed to clarify its application and ensure that only a limited exception operates which permits reasonable restrictions on eligibility to services, benefits and facilities where such services, benefits and facilities are designed to meet the special needs of particular groups.

The Commission in section four discusses the implications that some of the proposals made by the broader review may have for this exception.

Section 84 – Exemptions to allow compulsory retirement in the public sector

The Commission submits that this exception should be repealed

Compulsory retirement ages are arbitrary and the underlying objective is able to be realised in a manner less restrictive of human rights. Indeed not even the federal *Age Discrimination Act 2004* provides an exemption for compulsory retirement ages.

The fact that this exception is limited to the public sector emphasises its arbitrariness. It is the Commission's view that the limitation this exception gives rise to is unreasonable and disproportionate given other less restrictive means are available to manage public sector competency such as performance management.

Section two - Exemptions by the Victorian Civil and Administrative Tribunal

The consultation paper asks:

- Is the VCAT exemption process appropriate? How could it be improved?

Permitting an individual or organisation to operate outside the requirements of the EOA is an incredibly significant decision. In stating this, it does need to be acknowledged that the vast majority of exemptions that are granted are 'routine', in the sense that they are designed to avoid a technical operation of the Act giving rise to outcomes that are contrary to equal opportunity principles. An example of such an exemption would be one granted to permit a comprehensive recruitment and training strategy designed to increase Indigenous recruitment and retention within a government department²³, which is clearly compatible with the principles of equal opportunity and human rights. In the absence of a temporary exemptions framework, the operation of such initiatives could be distracted (or worse discouraged) by having to respond to complaints of discrimination.

At the same time however, unusual applications are not uncommon, where the application raises issues not previously considered, or may in fact seek an exemption that is contrary to the principles of the legislation. In addition, there is a growing appreciation that exemptions from the EOA can sometimes be used as a strategic compliance tool – ie using the 'carrot' of a fixed-term exemption, to secure undertakings, and allow time for an organisation to transition to non-discriminatory conduct and processes.

The Commission's role in the exemption process

Within this context, over the past four years the Commission has had an arrangement with VCAT whereby the Commission receives notification of exemption applications (which raise significant policy and/or requires a public hearing) and can seek leave to appear or make submissions in relation to those applications.

Examples of the Commission's involvement in exemption applications include:

- Following his decision in *Taylor v. Moorabbin Saints Junior Football League and Football Victoria Limited*²⁴, which determined the exception in relation to single-sex sporting competitions contained in section 66 of the EOA did not apply until after competitors reached the age of 14, Justice Morris called for submissions on whether an exemption should be granted to preserve single-sex competitions between the ages of 12 and 14. The Commission made a submission opposing a general exemption, and expressed the view that such matters should be approached on a case by case basis. This view was accepted by VCAT.

²³ Refer for example to *Department of Infrastructure (Anti Discrimination Exemption)* [2005] VCAT 2257.

²⁴ [2004] VCAT 158.

- VCAT received an application from an organisation seeking to restrict employment to males of Spanish / Latin American background / appearance. The Commission opposed this application on the basis that the exemption sought was contrary to the objectives and spirit of the EOA and had the potential to reinforce negative (albeit cultural) stereotypes. This application was struck out following the applicant's request that the matter not proceed.
- A student accommodation provider applied for an exemption to allow it to place age restrictions on tenants. The Commission were of the opinion that the exemption being sought appeared to relate more to convenience and the concerns it raised were more adequately dealt with through appropriate behaviour management practices including the imposition of equal opportunity and sexual harassment policies together with effective internal complaint resolution mechanisms. Following consideration of the Commission's submission this application was withdrawn.
- Applications have been made by a number of nightclubs seeking to exclude men or women, in order to maintain gender balance within a venue at any given time. The Commission's written and oral submissions to VCAT were neutral as to whether or not an exemption should be granted, however, suggested that certain safeguards should be attached to any exemption to ensure unintended discrimination did not result. These applications have since been granted for a period of six months and subject to the strict conditions proposed by the Commission.
- Boeing group of companies applied for a renewal of an exemption granted in 2003 to enable it to request information about employees and job applicants nationality or citizenship status and to restrict employees access to US contract work on the basis of their nationality, in order to comply with US export regulations related to the manufacturing of aircraft component contracts. The Commission made submissions to the Tribunal neither supporting or opposing the granting of the exemption, instead it advocated for a more rigorous and balanced test to be applied in the circumstances rather than the public interest test applied in the past. The application for an extension of the exemption was granted with conditions.

This arrangement between the VCAT and the Commission does not provide the Commission with a broad discretion to intervene in exemption applications it considers warranting its attention. Rather the purpose of the agreement is to allow the Commission to provide its submission on an exemption application consistent with the objectives and spirit of the EOA. VCAT can decide on the particular course it wishes to take once an exemption application has been made, and the Commission's input into the process is very much determined by VCAT's handling of the matter. To this extent, the Commission's role as governed by the arrangement is analogous to the role performed by *amicus curiae* in other jurisdictions.

In the relatively short period since the agreement was reached, the Commission's intervention in these applications appears to have contributed to the s.83 scheme's rigorous testing of proposed exemptions against the objects of the EOA and has facilitated the formulation of conditions that, if accepted by the VCAT, can ameliorate (potentially) arbitrary or otherwise unconsidered impacts of an exemption.

Whilst the operation of this informal arrangement with VCAT has been satisfactory, the Commission believes there is merit in formalising the Commission's role in relation to exemptions in legislative provisions²⁵. Specifically the Commission recommends the following:

- applicants for an exemption from the EOA should be required to provide a copy of their application to the Commission;
- the Commission should have standing under the Act to appear or make submissions in relation to applications for an exemption from the EOA; and
- the Commission should have standing to seek review, variation or revocation of an exemption that has previously been granted by VCAT.

The Commission in its submission to the Review noted that its work to date in relation to exemptions gives weight to the Commission's belief that its powers should be extended to specifically allow it to appear as amicus and intervener in discrimination related matters before VCAT and the courts.

Improving efficiency and clarity in the exemption process

The Commission's own anecdotal experience has been that the exemption application process can be challenging for some applicants in terms of understanding whether the conduct they propose to undertake is potentially unlawful discrimination and whether they would require an exemption. This may be partly because there is some uncertainty around the meaning and scope of the general and certain specific special measures exceptions in the Act, which has possibly resulted in some applicants seeking exemptions for reasons of legal certainty. It is the Commission's view that individuals and entities should not be unduly burdened or discouraged from undertaking affirmative action programs because of legal uncertainty and the need to obtain an exemption.

The Commission does not provide advice on whether a person or entity requires an exemption to pursue particular conduct. The Commission can only provide information on the exemption process, the considerations relevant to granting of exemptions, and the general scope and application of exceptions in the Act. Indeed

²⁵ Interstate and federal provisions in relation to exemptions are quite mixed. In the ACT (section 91 *Discrimination Act 1991*), Qld (section 91 *Anti-Discrimination Act 1991*), Tasmania (section 98 *Anti-Discrimination Act 1998*) and the NT (section 59 *Anti-Discrimination Act 1992*) exemptions are granted by the equivalent body to the EOCV. Federally, exemptions can be sought from HREOC under the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*. In NSW exemptions are granted by the Minister on the advice of the Anti-discrimination Board (section 126 *Anti-Discrimination Act 1977*). In both SA and WA exemptions are granted by the equivalent body to VCAT, in SA the Commissioner for Equal Opportunity has automatic standing (section 92 *Equal Opportunity Act 1984*), whilst in WA the Commissioner can apply to intervene (section 135 *Equal Opportunity Act 1984*).

it is only appropriate that the Commission provide general information given its interest in monitoring and intervening in exemption applications.

In light of the above and the Commission's own observations of the routine exemptions the VCAT grants, the Commission recommends, that as part of the Exceptions Review, the Department reflect upon the types of exemptions granted by the Tribunal to ensure there are appropriate and relevant exceptions in the Act capable of obviating the need to obtain routine exemptions which are consistent with the spirit and objects of the Act. This may lead to possibly extending some exceptions to include common and unobjectionable exemption applications that the Tribunal routinely receive and grant such as women working from home and wishing to restrict their services to women only and/or inserting examples of excepted conduct into existing exceptions. The Commission would welcome the inclusion of examples in the EOA of conduct designed to promote special measures programs for which exceptions apply.

The Commission notes that the Options Paper also flags the adoption of positive duties as a deliberate strategy to facilitate the achievement of substantive equality. Considering positive duties can require active steps to be taken by organisations to achieve substantive equality without relying on individuals to bring complaints the temporary exemption framework should not unnecessarily hinder or burden agencies seeking to comply with positive duties.

The Commission is of the view that the process for granting temporary exemptions from the EOA by the VCAT remains appropriate and necessary. The Commission is concerned however that the pursuit of special measures and affirmative action programs should not be unduly hindered or discouraged by the need to obtain an exemption. As such greater clarity is needed for efficiency and the effective realisation of the objectives of the Act in this area.

The Commission recommends that its role in relation to exemptions should be formalised:

- **applicants for an exemption from the EOA should be required to provide a copy of their application to the Commission;**
- **the Commission should have standing under the Act to appear or make submissions in relation to applications for an exemption from the EOA; and**
- **the Commission should have standing to seek review, variation or revocation of an exemption that has previously been granted by VCAT.**

Further the Commission recommends that the Department reflect upon the types of exemptions granted by VCAT to ensure there are appropriate and relevant exceptions in the Act capable of obviating the need to obtain routine exemptions which are consistent with the spirit and objects of the Act.

Section three - Statutory authority exception

The consultation paper asks the following specific questions relating to the statutory authority exception, section 69:

- Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?
- Are there any examples of Acts and enactments that cannot be reconciled with the Act?
- Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?
- Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

Section 69 provides a general exception from discrimination where the conduct is necessary to comply with, or is authorised by an Act or enactment; giving compliance with other laws priority over the provisions of the EOA.

The Commission regards it as critical that the outstanding recommendations of the SARC *Inquiry into Discrimination and the Law* be adopted, and that the subservience of the EOA to all other statutes and statutory instruments cease.

This is now more imperative following the introduction of the Charter enshrining the human right of recognition and equality before the law. The Commission is of the view that section 69 contradicts the central premise of the Charter, that legislation should be developed and interpreted consistently with human rights, and the rights may only be subjected to reasonable limits that are demonstrably justified in a free and democratic society.

The SARC recommendations that require implementation are:

- that section 69 should be repealed,
- any legislative provision which is intended to override the EOA be prescribed in the EOA,
- all existing legislation that is not intended to override the EOA be amended.

Some of SARC's findings have been implemented to certain degrees through the adoption of the Charter in terms of the need to audit all existing legislation (for compatibility with the right to equality in the Charter defined by reference to the EOA), the scrutiny of all new legislation against the principles set out in the Charter and the statement of compatibility process, and the duty to interpret legislation in a manner that is consistent with the right to equality (provided it is compatible with the purpose of the legislation).

Accordingly, the 3-year transitional period SARC recommended to provide Departments time to audit and amend existing legislation is perhaps excessive and no longer justified. A minimal lead-time is more appropriate (such as 12 months from

the royal assent of the repeal of section 69) given the implementation of the Charter and the transitional time, Departments have had to audit and amend legislation.

The Commission is of that view that where a legislative provision is prescribed in the EOA as intending to override that Act the override protection should expire on the 5th anniversary of day on which the override came into operation. This will ensure that such limitations are subject to review and reconsideration. A similar provisions exists in relation to override declarations made by Parliament in relation to the Charter²⁶.

SARC also recommended that section 207 be repealed as it is an inefficient and ineffective means of auditing Victorian enactments that discriminate or may lead to discrimination. In its recent submission to the Equal Opportunity Review the Commission expressed the view that it believed existing mechanisms for reviewing legislation and assessing draft legislation are adequate. These are:

- the requirement to notify a responsible Minister when the Commission becomes aware of any discriminatory effect of legislation;²⁷
- the requirement that the Scrutiny of Acts and Regulations Committee assess bills and regulations in relation to their effect on rights and freedoms;
- and the Charter requirement for statements of compatibility.

Section 207 of the EOA, which requires the Minister to review all Acts, has already been complied with and does not require any ongoing review process. The Commission considers that this section should be repealed also.

The Commission recommends that:

- **that section 69 should be repealed,**
- **any legislative provision which is intended to override the EOA be prescribed in the EOA,**
- **all existing legislation that is not intended to override the EOA be amended.**
- **Section 207 be repealed**
- **A minimal lead-time is more appropriate (such as 12 months from the royal assent of the repeal of section 69)**

²⁶ s 31 *Charter of Human Rights and Responsibilities Act 2006*.

²⁷ s 162(3)

Section four – Intersections with the Broader Review

There are some obvious areas in the consultation paper that intersect with the concurrent broader review. These are most notably in relation to special measures and reasonable adjustments - and what implications they have for the existing exceptions in the Act.

Special Measures

Section 82 of the EOA provides a general exception for the provision of special services, benefits or facilities to people of a particular attribute where those measures are designed to meet the needs of disadvantaged groups in relation to their education, accommodation, training or welfare.

The Equal Opportunity Review Options Paper recognised the disparity between the section 82 exception which permits discrimination in pursuit of the objectives within that provision and the express recognition in section 8(4) of the Charter which provides that measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination²⁸.

For clarity and consistency between these two pieces of human rights legislation the Options Paper proposes that the existing special measures provision of the Charter s8(4) be recognised in some form or incorporated into the EOA.

If this proposal was to be adopted, it would have direct implications for the welfare measures and special needs exception s 82 of the EOA (and possibly others²⁹). As previously noted the exceptions operate to define types of permissible discrimination. If a provision was introduced to recognize that special measures were not discrimination an amendment would need to be made to section 82 to clarify its scope and operation as an exception. In light of this the Commission makes the following observations about section 82.

The Commission noted previously that it appears that the purpose of section 82 is twofold, to provide an exception for anything done that may be described as special measures to prevent or reduce disadvantage and to enable restrictions on eligibility for such services.

The Commission's 2005 submission recommended that section 82 should be amended to, like its predecessor, be restricted to the exclusion of people from a special service, benefit or facility (i.e. eligibility only rather anything done in relation to the provision of that service). In this submission, it was noted that since the decision of the Court of Appeal in *Colyer's* case, the Commission has been concerned that in its current form, section 82 could potentially operate to reduce rather than advance the rights of marginalised and disadvantaged groups. The Commission's concern in

²⁸ p 29.

²⁹ s 19 – Exception for employment in welfare services, s 55 exception for welfare measures in accommodation, s 61 exception for clubs for disadvantaged people or minority cultures.

this respect has not been ameliorated by the subsequent decision of VCAT in *Mangan* nor is the Commission of the view that this could be resolved through a reinterpretation of this exception consistent with the Charter.

The Productivity Commission in its 2004 review of the DDA considered that the reason for introducing the special measures exemption in that Act, to ensure that it is lawful to do things for the benefit of people with disabilities, is still a relevant objective, but it had been misinterpreted or misunderstood³⁰. Similarly to section 82 it had been interpreted as protecting any act done in the course of administering a beneficial service and not just beneficial acts, but services themselves. Because of this the Productivity Commission recommended that the exemption in the DDA for 'special measures' be amended to clarify that it exempts the establishment, eligibility criteria and funding of these measures designed to benefit particular groups within the community and clarified to ensure that it does not exempt the general administration of special disability services³¹.

The Commission was of the view in its 2005 submission and remains of the view that the special measures provisions of the EOA cannot be permitted to operate in a manner that denies already disadvantaged individuals and groups their rights under the Act.

Taking into account the possible implications of the broader review the Commission believes that section 82 should either be repealed or amended to clarify its application and ensure that only a limited exception operates to permit reasonable restrictions on eligibility to services, benefits and facilities where such services, benefits and facilities are designed to meet the special needs of particular groups.

As a corollary, the Commission would support the introduction of an express provision, which recognises that measures taken for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. Examples should also be provided to assist understanding of this including the ones referred to in sub-section 82(2).

Reasonable adjustments

Traditionally, 'reasonable adjustments' or 'reasonable accommodation' refers to the need to make changes to usual requirements, practices, policies, facilities to allow a person with a particular attribute to participate equally with people without that particular attribute. It is not meant to give an advantage to people with particular attributes, but to facilitate the removal of a source of disadvantage that arises from their attribute. Essentially, whether the concept is implied or express it necessitates that requirements, practices, policies and facilities should be reasonably altered in

³⁰ Finding 12.4.

³¹ Recommendation 12.4.

the circumstances to accommodate the different needs of a particular individual due to their particular attribute.

The requirement of reasonable adjustment in the EOA principally comes from the indirect discrimination provision. This section requires the removal of unreasonable requirements, which disadvantage people with particular attributes. The Productivity Commission in their review of the DDA believed that the similarly implied duty in that Act to make reasonable adjustments expressed in this piecemeal way was unsatisfactory, ambiguous and did not lend itself to lay interpretation. Hence, their recommendation for an express duty of reasonable adjustments.

The VCAT has considered also that sections 22 and 23 of the EOA are directed at enabling an employer to make reasonable adjustments to the terms of employment to accommodate a person with a impairment³². It is the Commission's view that this implied requirement extends to the other employment related areas, education and the provision of goods and services, based upon the exceptions ss 32, 33, 36, 39 and 46 of the EOA, that contain similar notions of a person with an impairment requiring the provision of 'special services and facilities' or 'service[s]...provided in a special manner' unless it is not reasonable to do so.

The Commission's in its recent submission to the EOA review submitted that the objectives of the EOA should recognise the need for substantive equality and for reasonable adjustments to be made to achieve this. The Commission also recommended that an express requirement to make reasonable adjustments for a person with a disability in employment be included into the EOA and that this could be drafted similarly to the recently enacted family responsibilities amendments³³.

The Equal Opportunity Review Options Paper canvassed 2 options for improving the clarity and understanding around the requirement to provide reasonable adjustments in the EOA: rely on the current implied duties or create an express general requirement to make reasonable adjustments which applies to all attributes and all areas – clearly spelling out the factors to be taken into consideration when determining whether an adjustment is reasonable.

If a more express recognition of the duty to reasonably accommodate was incorporated into the EOA as part of the broader review, it would have direct implications for the special services and facilities exceptions in the Act. Depending on the drafting of any reasonable adjustment provisions – the special services and facilities exceptions may no longer be relevant or needed, or may require consequential amendments.

At this time, the Commission is giving further consideration to its position in relation to the express inclusion of a duty to reasonably accommodate in the EOA and how

³² *Davies v State of Victoria (Victoria Police)* VCAT 5 January 2000.

³³ Equal Opportunity Amendment (Family Responsibilities) Bill 2007.

that might be framed as part of its response to the Equal Opportunity Review Options Paper.

Putting aside the implications of the review the Commission repeats that the special services and facilities exceptions require modernising in terms of the language that they use.