18 April 2008

Elizabeth Eldridge
Executive Director, Legal & Equity
Department of Justice
26/121 Exhibition Street
Melbourne 2000

Dear Madame

Review of Exceptions and Exemptions in the Equal Opportunity Act

We refer to the above and thank you for initiating the review and giving us an opportunity to provide submissions.

Who is DDLS

The Disability Discrimination Legal Service Incorporated (*DDLS*) is a state-wide community legal centre that specialises in disability discrimination legal matters. The service is located in Melbourne and provides legal information, education and training, advice, representation and policy/law reform services to Victorians with disabilities and their associates. The Service employs one full time solicitor, one part time assistant solicitor, a part time manager and a part time office administrator who are supported by student-volunteers. The DDLS is managed by a Management Committee, a majority of whom must be people with disabilities.

The DDLS is an active member of the Disability Working Group of the Federation of Community Legal Centres (Victoria) and the Disability Law Committee of the Law Institute of Victoria and as such contributes to the development of disability-related policy/law reform strategies and campaigns across Victoria.

Need for Review

The Equal Opportunity Act 1995 ("the Act") is essentially a social justice legislation, hence one that deals with the humanisation of laws and protection of the disadvantaged, marginalised and vulnerable members or sections of the community. As human rights legislation, it is a clear manifestation that the true test of democracy is not the traditional mathematical notion, but the extent of how the majority protects the minority. This makes the broad and beneficial interpretation of the Act imperative and fair.

The exceptions and exemptions provisions are essentially State authorized discrimination in an attempt to reach a compromise amongst the competing rights and interests of individuals, groups and various stakeholders. The nature, extent and affectivity of these provisions need to be harmonised with the test of reasonable limits under Section 7 of the Charter of Human Rights.

Discrimination on the basis of disability (or any of the protected attributes under the Act) is a clear example of an unacceptable disadvantage that many Victorian residents continue to experience. The detriments resulting from disability discrimination are multifaceted. First, and most obviously, the existence of disability discrimination in Victoria reduces the quality of life for Victorians with a disability: specifically, unequal access to goods, services and opportunities prevents full participation in the community, creates social exclusion and reduces the capacity of the individuals concerned to live independently. More broadly, though, it is also detrimental for all Victorians without a disability to the extent that it (a) prevents people with a disability from participating in the economy, and (b) reduces the level of mutual civility and respect within the diverse Victorian communities.

The Victorian Civil and Administrative Tribunal (VCAT) is the administrative-judicial body tasked in interpreting the provisions of the Act and providing remedies against discriminatory conduct and practices. These submissions acknowledge that the Tribunal's sometimes conservative views and interpretation of the Act is a product of the members' sense of wisdom or of the limitations of the Act or of both, and we propose that the exceptions/ exemptions provisions is reviewed with a view to broaden the Act to an appropriate level and if necessary to spell out further protectionist measures in order to achieve the aims and objectives of the Act. Apart from the many, various and repetitive cases of discrimination that continue to come to the Equal Opportunity Commission or at least to the attention of DDLS, the State's duty to give those who have less in life, more in law appears to be the ultimate reason for reforming the Act.

Attitudinal Discrimination

The political, religious and socio-economic rationale for the exception and exemption provisions is commonly understood. These submissions acknowledge that rationale and do not attempt to devalue their relationship with the provisions under review. We

wish to point out however, that the current framing of some of the exceptions and exemptions (.i.e. family and small businesses) may promote attitudinal discrimination because the said provisions constitute a blanket authority to discriminate in all instances instead of simply allowing the discrimination within the context, importance, purpose, and extent of the discrimination. In allowing a conduct that would otherwise be considered unfair and unlawful, the said provisions do not impose any onus on the part of the discriminator to at least demonstrate that the discrimination was consistent with the legislative intent.

Recommendations

The areas recommended for review and reforms are as follows:

I. Employment

1. Genuine Occupational Requirements- Physical Features

Genuine Occupational Requirements or genuine and reasonable requirements are the terms under the Act that resemble the term "inherent requirements" under the Disability Discrimination Act 1992 (cth.) which is usually applied in the context of employment. We acknowledge that the ability to comply with or perform the genuine occupational requirements or genuine and reasonable requirements of the job or position is a reasonable and acceptable requirement of any employment. We note however that either term is not consistently used in the Act.

Subsection 17 (4) provides that an employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment. There is no clear reference to "physical features" being a genuine occupational requirement.

The tenor of Ss 17(4) allows discrimination in employment quite broadly without a clear nexus to what is considered genuine occupational or reasonable requirements within the context of changing values or developments in artistic freedom.

2. Genuine and reasonable requirements of the employment-

Section 22 provides that

(1) An employer may discriminate against another person on the basis of impairment in any of the areas specified in section 13 or 14 if-

(a) in order to perform the genuine and reasonable requirements of the employment-

(i) the other person requires or would require special services or facilities; and

(ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or

(b) the other person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of special services or facilities.

(2) In determining whether or not a person can or could adequately perform the requirements of the employment, all relevant factors and circumstances must be considered, including-

(a) the person's training, qualifications and experience;

(b) the person's current performance in the employment, if applicable.

Employers have successfully defended claims of discrimination by employees who by reason of their injuries or history of injury have been unable to return to their pre-injury duties. Current jurisprudence supports the employer's position that the test of the ability to perform the genuine occupational requirements or genuine and reasonable requirements of the job refers to the pre-injury position or the job that the employee was originally hired and not any interim positions where the tasks are consistent with the employee's medical restrictions.

The section does not specifically require the employer to make any other offer of employment or opportunities to be employed in another capacity. Many DDLS clients have complained that their employers are reluctant to hire a person with a history of impairment because of the perceived potential and onerous obligation to manage or make allowances for the person's impairment. Whilst section 22 provides for a very strong defence for employers, the lack of a mechanism to check further acts of discrimination of an employee who continues to be employable in a different capacity is not consistent with the aim of achieving a balance between competing interests.

3. Domestic or personal services

Section 16 states that an employer may discriminate in determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any person's home.

The home is an essentially private place, hence the action of the homeowner is usually private unless they involve a regulated aspect of public life such as employment, in which case it becomes a "workplace". The Victorian legislation appears to have a much

broader scope than other jurisdictions, suggesting that other state parliaments do not share the rationale for the provision. For instance, the Equal Opportunity Act 1984 (WA), the Anti-Discrimination Act 1977 (NSW), the Anti-Discrimination Act 1991 (Qld) and the Anti-Discrimination Act 1998 (Tas) do not contain explicit exemptions in relation to the provision of domestic or personal services. In other jurisdictions, such as in the Australian Capital Territory, the Northern Territory and South Australia, the exemption relates only to employment within the person's home. Contrast this to the Victorian position where the exemption relates to employment 'in, or **in relation** to, any person's home'.

4. Family employment

Section 20 states that:

(1)An employer may limit the offering of employment, in a business carried on by him or her, to people who are his or her relatives.

(2) For the purposes of this section a person who holds a controlling interest in a body corporate is to be taken to be—

(a) carrying on the business; and

(b) the employer of the employees—of the body corporate.

5. Small business

Section 21 States that

(1) An employer may discriminate in determining who should be offered employment if the employer employs no more than the equivalent of 5 people on a full-time basis (including the people to whom employment is offered).

(2) In ascertaining the number of people employed for the purposes of subsection (1), the following people are not included—

(a) relatives of the employer; and

(b) people employed to provide domestic or personal services in, or in relation to, the employer's home.

The policy reasons for both Section 20 and 21 are clear. The encouragement of growth in small business is a clear policy consideration. " …[T]he general public interest in … giving to employers as much freedom as is possible to pursue their businesses, an interest which to some extent is reflected in the exceptions in the

Equal Opportunity Act.[1] It seems that the family exception allows too much scope for discrimination to justify the purpose of employment of family members.

We note that Margaret Thornton Professor of Law at ANU University and specialist in discrimination law argues that "… [T]he efficacy of the jurisdiction is already limited by being skewed towards business." She argues that the approach of the courts in granting exceptions under Section 83 of the EOA favours profit-making (ADI, Boeing) and evidences a swing away from a complainant orientation in favour of respondents generally and corporate respondents in particular. Professor Thornton suggests that "… the commitment to equality under the Equal Opportunity Act 1995 (Vic) (EOA) is limited by the extensive exceptions that riddle the Act, most notably the exception accorded small businesses."

Whilst we understand the challenges and exigencies faced by family and/or small businesses, the above license to discriminate does not appear to be strongly connected to those factors. We submit that the said provisions if allowed to continue should be reframed to create an onus on the part of the discriminator to at least demonstrate that the discrimination was consistent with the legislative intent. At present, the owner of a small or family business is at liberty to discriminate and vilify a person of a certain ethnicity. Hence instead of providing an incentive to small business, the blanket nature of the exception may encourage discriminatory conduct without serving the public interest that motivated the policy concession.

It should be noted that these exemptions/exceptions are not mirrored by the Commonwealth anti-discrimination legislations, i.e. Disability Discrimination Act 1992.

6. Exception-care of children

Section 25 states that

(1) Nothing in section 13 or 14 applies to discrimination by an employer against an employee or prospective employee if-

(a) the employment involves the care, instruction or supervision of children; and

(b) the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the

[1] De Los Reyes v Aerospace Technologies [2001] VCAT 1511 (28 June 2001).

children; and

(c) having regard to all the relevant circumstances, including, if applicable, the conduct of the employee or prospective employee, the employer has a rational basis for that belief.

(2) Sub-section (1) does not apply to employment by a post-secondary education provider (within the meaning of the Education and Training Reform Act 2006) or a TAFE institute.

DDLS acknowledges that this exception is of utmost importance because the safety and welfare of any person, particularly young persons are of paramount consideration. We note, however, that the requirement that the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children is ambiguous because the determination of what is considered "necessary" appears to be left entirely at the discretion of the employer and that the employer does not have any obligation to link the reasons it may claim to any objective criteria. The test of "genuine belief" is quite unhelpful. Hence, it is quite possible for example, that an employer may claim a section 25 defence if the employer considers that an openly flamboyant gay person is unsuitable in a caring or teaching position. This scenario illustrates that prejudice against sexual preference may override the lack of any concrete evidence that the harm sought may be prevented by the discriminatory conduct.

II. Education

1. Special services or facilities

Section 39 states that:

An educational authority may discriminate against a person on the basis of impairment if-

(a) in order to participate or continue to participate in, or to derive or continue to derive substantial benefit from, the educational program of the authority-

(i) the person requires or would require special services or facilities; and

(ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or

(b) the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational

program even after the provision of special services or facilities.

Subsection 39 (b) of the Act creates an anomaly because the obligation not to discriminate may be discharged simply by a claim that the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational program even after the provision of special services or facilities without reference to the adequacy or quality of the special services so provided. Special services are quite broad and may refer to those services that are not usually provided to a student. The subsection appears to allow the defence based on whatever was made by the discriminator to accommodate the student's impairment instead of the clearer mandate under the Disability Standards for Education that an education authority or educational services provider must provide reasonable requirements to a person's disability unless the provision of such adjustments would subject the school or educational institution to unjustifiable hardship.

2. Standards of dress and behaviour

Section 40 states that

(1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.

(2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, 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 in setting the standard.

We support this exception and make the observation that: the provision must specifically state that such standards must accommodate religious beliefs and practises where such beliefs and practises do not detract from the educational environment being safe and appropriate for all staff, students and visitors.

We acknowledge that the wearing of religious apparel and/or head gear is a reasonable manifestation of religious freedom. However, it is our view that such apparel or gear may be subject to the following conditions:

1. That they do not prevent or impair the capacity of any person to be individually identified, or
2. That they do not prevent or impair the capacity of any person to participate in curriculum activities, or
3. That there is no article or accessory of any sort which may fall within the statutory definition of a weapon.

We note that the Education and Training Committee report of the Victorian parliamentary committee on school uniforms has recommended that schools should work with the Sikh community to allow male students to carry a kirpan - a small, curved ornamental steel dagger carried by all initiated Sikh men.

III. Provisions of Goods and services

1. Special manner of providing a service

Section 46 states that:

A person may refuse to provide a service, or set reasonable terms for the provision 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 and-

(a) the person cannot reasonably provide the service in that manner; or

(b) the person can only reasonably provide the service in that manner on more onerous terms than the person could reasonably provide the service to a person without that impairment or those physical features.

The DDA has a similar provision using the term unjustifiable hardship. The use of the word “onerous” under Section 46 is misleading because it is commonly understood to mean burdensome, troublesome, or hard to do or bear.[2] DDLS have represented many clients who have been refused goods or services because they have been put in the “too hard basket” without their disability needs clearly being understood and correlated to the capacity of the discriminator to provide goods and services. The term ‘onerous” does not carry a clear substantial or significant attempt to accommodate the person’s attribute (i.e. impairment) and appears to apply regardless of the level or quality of how the services were varied or the manner by which they were delivered.

The tenor of the exception appears to allow a person to say that anything done out of the ordinary is onerous.

2. Disposal by will or gift

Section 48 states that:

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

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[2] **burdensome, oppressive, or troublesome onerous duties.’** –Macquarie Dictionary

We submit that this section is unnecessary because the subject matter of the action or conduct is outside the operation of the Act. Neither constitutes provision of services which is an underlying element of the areas in life where unlawful discrimination is prohibited. The availability of this defence (lack of jurisdiction) makes the provision redundant. The presence of this exception does not alleviate the animosity or bickering amongst family members may have in relation to intestate matters and serves only to condone discriminatory conduct in society.

3. Accommodation for commercial sexual services

Section 57 states that:

A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

The conduct of lawful sexual activity on a commercial activity is regulated by both state and local governments. The Prostitution Control Act and the Town Planning Act define the nature, limitations and venues of this type of commercial activity. Hence, the discrimination envisioned by Section 57 is covered by the more relevant defence of compliance with the relevant statutes, regulations or by laws. The regulation and control of such activity is better left within the purview of collective decision rather than to an individual who is effectively allowed to make a discriminatory decision based on what maybe arbitrary grounds. Moreover, an express exception should only be provided where there is no other avenue of manifesting the rationale in limiting the affected rights.

4. Competitive sporting activities

Section 66 states that:

(1) A person may exclude people 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****.*

(2) A person may restrict participation in a competitive sporting activity-

(a) to people who can effectively compete;

(b) to people of a specified age or age group;

(c) to people with a general or particular impairment.

(3) Subsection (1) does not apply to a sporting activity for children under the age of 12 years.

The use of the term “relevant” in Subsection 66 (1) is misleading and appears to allow the discriminator to discharge their obligations based on their views on what is relevant or not. We submit that this provision should be reapproached along the lines of genuine and reasonable requirements of the activity. The test of relevance alone is much too wide whereas the test of genuine and reasonable requirements necessitates establishing a clear link or impact of the disability to the requirements of the activity. To illustrate, visual ability may be considered relevant in order for a person to participate in competitive Judo, but it may be argued that it is not a genuine and reasonable requirements of the activity given that whether the lack of sight is an advantage or disadvantage in this particular sport is highly debateable amongst experts.

5. Private clubs

Section 78 states that:

> *(1) Nothing in Part 3 applies to the exclusion of people from a private club or from any part of the activities or premises of a private club.*
>
> *(2) In this section,* ***private club*** *means a social, recreational, sporting or community service club or a community service organisation, other than one that—*
>
> > *(a) occupies any Crown land; or*
> >
> > *(b) directly or indirectly receives any financial assistance from the State or a municipal council.*

This provision greatly reduces the effectiveness of Part 3, Division 6 prohibiting discrimination by a club. The definition of private club is so broad as to exempt most clubs and effectively allows discrimination in membership for majority of clubs i.e. those that fall outside the definition in 78(2). In order to prove that there is discrimination under the EOA the club most occupy Crown land or receive government/council funding. This means that clubs that may be actually be very public in nature and have a very large membership but as they are not either occupying Crown land or receiving financial assistant they may discriminate.

No other state or territory has a separate “private clubs” exception. No other state or territory makes this distinction in the way that Victoria does. This would appear to therefore be out of touch with the discrimination law in Australia generally.

We suggest that the definition provided by Section 78 be abandoned or that Section 78 be removed because most private clubs would not be occupying crown land or receiving state of municipal financial assistance. This nullifies discrimination claims against such entities.

IV. GENERAL EXCEPTIONS TO AND EXEMPTIONS FROM THE PROHIBITION OF DISCRIMINATION

Things done with statutory authority

Section 69 states that:

(*1) A person may discriminate if the discrimination is necessary to comply with, or is authorized by, a provision of-*

(a) an Act, other than this Act;

(b) an enactment, other than an enactment under this Act.

(2) For the purpose of subsection (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

(3) Section 47(3) and 58(1) prevail over this section to the extent of any inconsistency between them.

The introduction of The Charter and the need for all other Victorian Acts to comply with The Charter strengthens the case for repealing Section 69 as this section is clearly not compatible with the right to equal and effective protection against discrimination and the human rights which are purported to be protected and promoted by The Charter

In Hanson v Lake [3] Member Harbison states that "The entire education system in this State is based upon discriminating on the grounds of age. This discrimination is enshrined in the Education Act…" Quite clearly the Government's avenue to enshrine discrimination by passing an Act, particularly in light of the Charter and the broader community values upon which this rests ought to be a narrow road less taken.

This Section is out of step with other Australian jurisdictions as pointed out in the Scrutiny of Acts and Regulations Committee Report 2005. This provision goes beyond those of the other jurisdictions and should be amended to be more in line with other jurisdictions or taken out altogether. The danger in keeping this section is confirmed by the fact that there are state legislations that cannot be reconciled with human rights principles of anti-discrimination. For instance, the Transport (Ticketing and Conduct) Regulations 2005 allows discrimination of passengers who rely on an assistance animal because the provisions only afford protection where the animal is classified as a guide dog.

[3] Hanson v Lake VCAT

The Act is also silent in relation to assistance animals.[4] This failure to recognise assistance animals constitutes an implied exception from the Act.

We agree with SARC (Scrutiny of Acts and Regulations Committee) that the exemption should be repealed and allow government departments and statutory entities three years to audit their Acts in order to comply with EOA. The three year period is necessary as the task of making sure the Act and enactments are amended would be a complex and involved task and a three year period may be necessary to make sure it is comprehensively completed. It would also ensure that the amendment of the Acts and enactments would occur in a specific timeframe that is appropriate to the goals of the Charter.

V. Exemptions by the Tribunal

Section 83 states that:

(1) The Tribunal, by notice published in the Government Gazette, may grant an Exemption-

(a) from any of the provisions of this Act in relation to-

(i) a person or class of people; or

(ii) an activity or class of activities; or

(b) in the circumstances referred to in section 28; or

(c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.

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[4] 52. Discrimination by refusing to allow guide dogs

(1) A person must not refuse to provide accommodation to a person with a visual, hearing or mobility impairment because that person has a guide dog.

(2) A person must not require, as a term of providing accommodation to a person with a visual, hearing or mobility impairment who has a guide dog-

(a) that the dog be kept elsewhere;

(b) that the person pay an extra charge because of the dog.

(3) This section does not affect the liability of the person with the guide dog for any damage caused by the dog.

(2) An exemption remains in force for the period, not exceeding 3 years, that is specified in the notice.

(3) The Tribunal, by notice published in the Government Gazette-

(a) may renew an exemption from time to time for the period, not exceeding 3 years, specified in the notice;

(b) may revoke an exemption with effect from the date specified in the notice, which must be a date not less than 3 months after the date the notice is published.

(4) An exemption may be granted or renewed subject to any conditions the Tribunal thinks fit.

(5) An exemption may be granted, renewed or revoked-

(a) on the application of a person whose interests, in the opinion of the Tribunal, are or may be affected by the exemption; or

(b) on the Tribunal's own initiative.

Currently, in hearing applications for exemption, VCAT applies the n Fernwood Fitness Centre Test. The Tribunal needs to be satisfied that granting of the exemption must be "appropriate in the light of the objectives and scheme of the Ac". Consideration shouldl be given to the circumstances of the case, the reasonableness of the exemption and whether the circumstances bear a close resemblance to other exceptions.

In the case of ADI Limited (Anti-Discrimination) [2007] VCAT 2242 (27 November 2007) and Raytheon Australia Pty Ltd (CAN 063709295) & Ors Exemption Application (Anti-Discrimination) [2007] VCAT 2230 (17 October 2007) VCAT allowed exemption to allow to discriminate based on race in relation to employment on the basis that the discrimination was required to continue business arrangements and contract with American companies who are bound by US anti-terrorism laws. We note that the exemption granted effectively gives precedent of American over Australian law and prefers the monetary or fiscal outcomes over those objects of the EOA.

Whilst we agree with the Fernwood Fitness Centre test, and agree that such test be codified, we submit that the grant of exemption should also be the last resort. In the

above cited case, which happens to be a second grant of exemption, there appears to be little regard to the fact that there are equally vital industries and government positions such as in the commonwealth defence force and state or federal law enforcement services and agencies where discrimination on the basis of nationality alone is not allowed and that prospective employees are subjected to rigorous background checks to prevent infiltration of hostile agents. The latter appears to be the safer and fairer avenue to strike a balance between the seemingly conflicting but important priorities.

Please call us if you have any queries.

Yours sincerely

Placido Belardo
Principal Solicitor

Julie Phillips
Service Manager