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Ms Elizabeth Eldridge  
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Dear Ms Eldridge

**Review of Exceptions and Exemptions in the *Equal Opportunity Act 1995 (EOA)*:  
Submission**

Thank you for your letter of 29 February last advising of the exceptions review. I made a submission to the Scrutiny of Acts and Regulations Committee Inquiry regarding s 207 of the EOA in 2004 and subsequently gave evidence to the Committee in 2005. While I pointed out that the EOA was riddled with exceptions, which significantly limited the efficacy and symbolic significance of the Act, I chose to focus on three of the most egregious exceptions, namely ss 21, 38 and 69. I reiterate my arguments regarding these exceptions. I also make some observations regarding the exemptions power.

**1. Employment – s21: Small Business**

Employment is a sphere of public life that should be free from discrimination for all employees. For most people, employment is a major life activity in terms of livelihood, career and personal satisfaction. It is therefore unsurprising that most complaints of discrimination arise from employment (consistently 60 to 80 per cent).

Restricting complaints of discrimination to workplaces of more than five people significantly erodes the force of the EOA. The effect of the provision means that a substantial proportion of Victorian workers have no recourse to the EOA, as many thousands are employed in multifarious small shops, cafes, service stations, law firms, medical practices, etc, which are licensed to discriminate by virtue of this exception. I was unable to establish from Australian Bureau of Statistics figures exactly how many of the 2,623.7m Victorians in the workforce (March 2008) were employed in small businesses, but a guestimate would suggest a figure at around the one million mark. The message emitted from the exception is that the preponderance of businesses in the suburbs and country towns can refuse women, Aboriginal or NESB people jobs, or give rein to their prejudices in other ways.

Small entrepreneurial concerns should not be treated as ‘private’ as though they were part of the domestic sphere. They are engaged in business for profit with the imprimatur of the state. It is therefore totally acceptable that profits should be garnered through discriminatory practices. As regulation of employment by the state is well established, the deference displayed towards small business by the EOA is totally unwarranted. Just as employers are not free to pay whatever

wages they wish, or to ignore occupational health and safety legislation or other mandatory requirements regarding conditions of work, they should not be permitted to treat the non-discrimination principle as optional. While the cost to small business of any regulation is invariably raised, it is difficult to see how acting in a non-discriminatory manner would cost money. The business case in favour of diversity suggests that appointing the best people for the job, regardless of race or sex, actually enhances business.

The exception does not accord with the spirit of a multicultural and diverse Australian State in the 21st century, but would seem to be more appropriate for a colonial backwater of a past age. It might also be noted that no comparable exception is found in any other Australian federal, State or Territory legislation. The exception significantly undermines the Human Rights Charter.

**Recommendation 1: That s 21 be repealed.**

## **2. Education – s38: Institutions for Particular Groups**

It has long been recognised that an understanding of discrimination within the community must be engendered through education. However, an individual complaint-based mechanism in which approximately 99 per cent of complaints do not proceed beyond the privatised sphere of conciliation has limited educative effect. The educational role of the primary and secondary school system therefore plays a crucial role. However, it is a matter of concern that more and more schools are private schools are being established that are permitted to discriminate under s 38.

Special schools for children with disabilities may be justifiable. However, the legitimisation of discrimination in respect of sex, race and religion is questionable. It may also disguise discrimination on the ground of class or social origin. While class is not presently a proscribed attribute under the EOA, Victoria should not be actively promoting the perpetration of discrimination by wealthy private schools anxious to protect and promote the interests of the ruling class in the name of sex or religion.

As approximately 50% of Victorian children attend private schools and there are very few single-sex public schools, and no race-based or religious public schools, the provision has the effect of immunising so-called private schools. I say ‘so-called’ here because such schools are now the recipients of significant public funding. As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding should be permitted to discriminate on any of the legislatively proscribed grounds unjustifiably. Furthermore, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds. It might be noted that such a requirement is included in Title IX of the US Civil Rights Act, a provision that Victoria would do well to emulate.

Sections 39, 41 and 76 of the EOA already deal with the particularities of impairment, religion and age. The inclusion of s 38 is over-inclusive and unnecessary. Its effect may well be no more than a camouflage of class privilege.

**Recommendation: That s38 be repealed**

## **3. S69: Things done with Statutory Authority**

The status of the EOA is further enfeebled by virtue of its subordination to all other Acts by virtue of s69. This section makes clear that the EOA does not even have the status of an ordinary Act of Parliament. The usual principle is that the most recent Act supersedes any previous Act to

the extent that it is inconsistent. In contrast, the EOA is subject to all past, present and future legislation. The retention of this provision is an ever-present reminder of the low status accorded human rights and the non-discrimination principle in Victoria.

Occasionally, there might be reason to uphold a provision in another Act that is inconsistent with the EOA. The over-inclusiveness problem can be avoided by not having a s69-type exception at all, but by addressing any problem on a case-by-case basis at the time of the determination of a complaint. The burden of proving that the discriminatory provisions remain should shift to the respondent. The test should be carefully delimited on the ground of justifiability in circumstances where no other alternative is feasible. The test should not be one of reasonableness which, although commonly invoked, endows judges and administrators with too much discretion, particularly in light of their unfamiliarity with the concept of discrimination and the purposive approach underpinning anti-discrimination legislation. The reported decisions are overflowing with examples of ‘reasonableness’ being interpreted in light of the decision-maker’s subjective views, rather than in accordance with either the objectives of the EOA or the relevant doctrine. The case of *State of Victoria v Schou* [2004] VSCA 71 is a striking example. Thus, to delimit the ambit of discretion, I suggest that a much tighter test, such as compliance with another Act is justifiable only if compliance with the EOA would be likely to produce a greater discriminatory effect.

**Recommendation: That s 69 be repealed**

**4. Exemptions (Ch 10)**

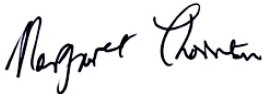
It is a matter of concern that exemptions are now being granted on the basis of economic considerations under the guise of ‘the public interest’, as in the *Boeing Case*, in contrast to the principles set forth in *Fernwood Fitness*.

While it is difficult to restrict the ambit of a discretion, it is notable that the *Fernwood Fitness* principles expressly excludes ‘commercial advantage’, albeit not mentioned in the consultation paper: ‘if exemption is sought for reasons wholly unrelated to the objectives or scheme of the Act (such as commercial advantage), an exemption would be inappropriate’ (1996) EOC ¶¶92-782, p 78,805). To authorise race discrimination in the interests of profitmaking is totally unacceptable.

I recommend the inclusion of guidelines for the granting of exemptions. The *Fernwood Fitness* qualification would be appropriate.

**Recommendation: That guidelines be included for the granting of exemptions together with the following: If exemption is sought for reasons wholly unrelated to the objectives or scheme of the Act (such as commercial advantage) an exemption is inappropriate.**

Yours sincerely



Margaret Thornton