



VICTORIAN GAY & LESBIAN RIGHTS LOBBY

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By email: civil.law@justice.vic.gov.au

The Exceptions Review
C/- Department of Justice
Level 24, 121 Exhibition Street
Melbourne VIC 3000

Dear Sir/Madam

The Exceptions Review

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) welcomes the opportunity to provide a submission to the Department of Justice on its review of the exceptions and exemptions (the **Exceptions Review**) in the *Equal Opportunity Act 1995* (Vic) (the **Act**). The views in this submission are supported by Transgender Victoria.

The VGLRL has long called on the Victorian Government to modernise the Act. In our 2006 election policy platform, we stated:

The VGLRL believes that LGBTI Victorians should be free from discrimination on the grounds of sexual orientation and gender identity. The Victorian Government should modernise the Equal Opportunity Act and ensure that any inappropriate exceptions and exemptions under the Act, including religious exemptions, are eliminated.

We note that the Exceptions Review's aim is to determine the Act's compatibility with the *Charter of Human Rights and Responsibilities* (the **Charter**). We strongly welcome this objective. In our view the Charter imbues the concept of discrimination with a broad flavour, based on the human right to equality. While the Charter does import the definition of discrimination from the Act, the Charter also views discrimination so defined as just one way in which the human right to equality is breached.

About VGLRL

The VGLRL aims to achieve human rights, equality and social justice for lesbians, gay men, transgender, intersex and queer people. We do this by working with the media, undertaking and supporting research, conducting community education and directly lobbying politicians across all levels of government. We have a network of over 1300 people, and are an incorporated

association in Victoria. The VGLRL Committee is designed to ensure representation of both gay men and lesbians, while still allowing space for members who do not identify as either gay or lesbian. The VGLRL focuses on key issues of relevance to the lesbian and gay communities by continually canvassing community needs and assessing the political landscape.

Do the exceptions need to be reformed?

The VGLRL strongly supports the view that the exceptions in the Act need to be reformed. We note that the objective of the Act includes elimination, as far as possible, of discrimination.¹ This is a bold and important objective which we strongly support. Yet we believe that many of the exceptions in the Act mean that the objective cannot be achieved.

We also believe that many of the exceptions in the Act mean that the Act is not consistent with section 8 of the Charter. Section 8 provides:

Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (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.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

In particular, we are concerned that many of the exceptions in the Act mean that sub-section 8(3) of the Charter cannot be achieved. That is, the exceptions prevent the right to equal and effective protection against discrimination.

As noted above, the Charter defines discrimination with reference to the Act. Thus, for the purpose of the Charter, discrimination is less favourable treatment on the grounds of a 'protected attribute', or the imposition of an unreasonable requirement condition or practice with which people with a particular attribute may have difficulty complying. Protected attributes include sex, marital status, sexual orientation, gender identity and lawful sexual activity.

Section 7(2) of the Charter allows for the limitation of the protection of human rights:

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.

Considering this, it is our view that limitations should not be widely cast, arbitrary or unreasonable, and should be subject to challenge and review.² We do note, however, that the purpose of section

¹ *Equal Opportunity Act 1995* (Vic), section 3.

² We would encourage the Review to make use of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, developed by the UN Economic and Social Council, to assist with interpreting the reasonable limitations and exceptions on the recognition of human rights.

8(4) of the Charter is to recognise that substantive equality is not necessarily achieved by treating everyone equally, and that special measures may be required to achieve equality for some groups in the community. In light of this, we acknowledge and strongly support many of the exceptions in the Act that are designed to allow for special measures to protect particular minorities. Below, we comment specifically on exceptions that in our view are not justifiable pursuant to section 7(2) of the Charter. We do not comment specifically on limitations that are designed to address the need for substantive equality, but note that they may need to be redrafted for conformity with section 8 of the Charter, or to take into account the amendments suggested on page 37 of the *Equal Opportunities Review Options Paper* of March 2008.

In addition to the legal basis for the need of reforming the exceptions in the Act, the VGLRL believes that that many of the exceptions create economic and social costs for the State of Victoria. This is because the exceptions detract from the realisation of the objective of the Act – the elimination of discrimination.

The social and economic costs of persistent and widespread discrimination are borne in poorer status and opportunity outcomes of all key indicators in affected populations. There is also growing evidence that communities generally suffer adverse consequences related to unequal social status across the community and a lack of social cohesion, in diminished economic prosperity and increased public expenditure.

Conversely there is also a growing understanding that a range of social and economic benefits flow when communities promote equality of opportunity and act decisively to prevent and remedy discrimination. These benefits include improved access to skills in a shrinking labour market, increased voluntary social support and innovation and creativity, key drivers of economic growth. It can be argued therefore that it is in the interest of Victoria's social and economic well-being to underpin this with the strongest and most appropriately resourced anti-discrimination regime – widely drawn exceptions to the protection of discrimination weaken that regime.

Research by Gay and Lesbian Health Victoria, VicHealth and others shows that pervasive discrimination leads to poorer health in those subject to it. This has direct costs, both to the quality of life of those affected, and to them and the community through the health system. It also has indirect costs, which are no less real. Reduced health means loss of educational opportunity or achievement, which results in lower lifetime productivity, a direct cost to the individual and to the economy. Reduced health means lower workplace productivity, on average, again a cost to both the individual and the economy.

Research in the USA shows that in that country gay men have on average at least 10% (up to 32% in some studies) lower lifetime earnings than their non-gay peers.³ This statistic probably sums up in one stark figure the overall effect of all the ways that breaches of the human right to equality—both individual and most importantly systemic discrimination—directly and indirectly harm this one population group. If discrimination in Victoria has the same average effect as this reveals in the USA, the quantification is astonishing: whether the proportion of the population potentially harmed by such discrimination is 4% (the lower bound in various studies) or 11% (the figure suggested in surveys by Hillier *et al* of Australian young people⁴) the cost to Victoria is between 0.6% and 1.7% of Gross State Product every year, or between \$1.2b and \$3.4b (as GSP is about \$200b). This,

³ Badgett et al (June 2007), *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, <http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf>.

⁴ Hillier et al (January 2006), *Writing themselves in again: The 2nd national report on the sexual health and wellbeing of same-sex attracted young people in Australia*, <http://www.glhv.org.au/node/69>.

then, is the economic benefit of fully realising the human right to equality on this single dimension, or equivalently the cost of not acting. No doubt the costs of inaction on the other dimensions, such as sexism and racism, will involve similar or even greater quantities.

Specific exceptions that should be reformed

Section 16 – domestic or personal service

The VGLRL believes this exception may be justifiable in some limited circumstances. However, we believe that it is drafted too broadly, and would exclude a wide range of discrimination from the operation of the Act. For example, an employer should not be able to discriminate against a house cleaner on the basis of their gender, marital status, gender identity or sexual orientation. As a result, we support the narrowing of this exception.

Section 21 – small business

The VGLRL does not believe that this exception is justified. Small business operators should not be provided with the complete freedom to discriminate on the basis of gender, marital status, sexual orientation or any other protected attribute under the Act. The primary criteria for whether someone should be employed in a small business are the qualifications and experience of the employee, as it is for businesses with more than 5 employees.

Section 25 – care of children

The VGLRL does not believe that this exception is justified. The protection of children is an important purpose, and is now the subject of additional legislative measures, including the Working With Children check. The historical context of this exception, notwithstanding that it singles out no attribute in particular, was widely viewed in 1995 as being to appease those who held the prejudiced view that lesbians and gay men were inherently dangerous to children. The use of the subjective “genuinely believes” in section 25(1)(b), in spite of the subsequent rational basis test, gives strength to this characterisation. If the exception were to be retained the test should be strictly objective.

Section 27B – gender identity

The VGLRL supports removal of this exception. Indeed, we opposed the inclusion of this exception when it was added to the Act in 2000. It is not appropriate for a transgender employee to be required to give ‘adequate notice’ of their gender identity’. If a person, for whatever reason, is unable to perform the job then this would already be covered under the ‘genuine occupational requirements’ exception in section 17. Transgender individuals and other people with diverse gender identities deserve the full protection of anti-discrimination legislation.

While the Commission has interpreted this exception as implying an obligation on the employer to make arrangements, including specific staff training, to accommodate the employee’s transition (cf an analogous implication in *Davies v State of Victoria*⁵), it would be much more appropriate for this obligation to be part of the general positive duty on employers and others to ensure real equality, as discussed in the *Equal Opportunity Review Options Paper* of March 2008.

⁵ VCAT 5 January 2000.

Section 30 – discrimination in establishing firms

While this section is not drafted as an exception, it implicitly allows discrimination, on whatever ground, for a person wishing to establish a firm with less than 5 partners. As with the small business exception (see above), the VGLRL does not believe that people should be able to discriminate on the basis of gender, marital status, gender identity, sexual orientation or other protected attributes in this situation, and therefore supports removing this indirect exception. The protections contained in section 30 should then be expanded to cover firms with less than 5 partners.

Section 38 – educational institutions for particular groups

The VGLRL believes that there may be genuine educational reasons for some educational institutions discriminating in admissions and other policies on the basis of gender, age (differentiating ‘mainstream’ high schools from adult educational institutions) and impairment. To be acceptable, however, they should amount to “special measures” as in section 8 of the Charter. If the option of amending the Act to restate that provision (as on page 37 of the *Equal Opportunity Options Paper*) is adopted, the exception may anyway need redrafting.

We do not, however, support the inclusion in this exception of sexual orientation, gender identity or lawful sexual activity in the absence of the “special measures” conditions. We can see no educational benefit – which, after all, is the primary purpose of educational institutions – from discriminating against lesbian, gay, bisexual, transgender, intersex or queer people. As such, we believe that the attributes of sexual orientation, gender identity or lawful sexual activity should be removed from this section.

Section 40 – standards of dress and behaviour

While we acknowledge that this exception may be justifiable, the VGLRL would be interested in the views of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Civil and Administrative Tribunal with respect to whether this exception was being used responsibly, or whether some institutions were attempting to use this exception in unjustifiable situations. For example, we would be concerned if this exception was being used to restrict the reasonable behaviour of same-sex attracted and transgender young people in schools.

Section 66 – competitive sporting activities

The VGLRL is concerned that the exception in section 66 as it applies to transgender people may prevent them from enjoying their human rights, as others do. We believe that transgender people should not be unfairly prohibited from competing in sports in the gender in which they identify. We note the UK approach through its *Gender Recognition Act 2004* provides that transgender people can only be restricted from competitive sport where it is necessary to secure fair competition or the safety of competitors (including the safety of transgender competitors).⁶ We encourage the Review to contact transgender people who participate in competitive sport in finalising its views about this exception.

⁶ See section 19.

Section 75 – religious bodies

The VGLRL acknowledges the intention of sub-section 75(1), which allows religious bodies to discriminate with regard to particular religious appointments (priests and others who perform religious practices). However, we believe that sub-section 75(2) is drafted too broadly. It should be limited to bodies such as churches, which are established for religious purposes. It should not be extended to include “the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes”, as interpreted through sub-section 75(3). This would appear to include church-run schools, whose inclusion we do not support (see below), as well as potentially church-run charities or service organisations, which again should not be able to discriminate under the Act.

Section 76 – religious schools

The VGLRL strongly supports the removal of this exception. Religious schools should not be able to discriminate on the basis of gender, marital status, sexual orientation or gender identity, particularly in relation to the employment of people in the institution, as allowed for under sub-section 76(2). For example, why should a religious school be able to discriminate against an unmarried but pregnant maths teacher, or a gay physics teacher, when their marital status or sexual orientation has no bearing on the ability to teach? This exception should also be removed given the funding of religious schools which is provided by the State and Federal Governments, in a similar way to sub-section 78(2) which prohibits private clubs from discriminating where they receive Government funding.

An alternative is to re-draft the provision along the lines of section 51(2) of the *Anti-Discrimination Act 1998* (Tas) which allows discrimination in the employment of an educational institution, if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of the relevant religious institution. If this is done, however, the onus of proof should lie on the school to justify the practice in the terms of section 7 of the Charter.

Section 77 – religious beliefs or principles

The VGLRL supports removal of this exception. It is extraordinarily broad (excluding any discrimination provided it is necessary to comply with the person’s genuine religious beliefs or principles), and it is difficult to imagine a scenario where the use of this exception could ever be appropriate, and justifiable under section 7 of the Charter, in all the circumstances. Subjective belief cannot satisfy the test of rational connexion with a proper purpose that the Charter requires. While the VGLRL acknowledges the important human right in the freedom of thought and belief, the Act only reaches areas of public life.

Section 78 – private clubs

The VGLRL supports the retention of the private club exception in some circumstances, although we note that the current section 78 is again drafted very broadly. We suggest that sub-section 78(1) should be narrowed to apply to discrimination where it is inherently linked to the objectives or purposes of the club, rather than allowing for the club to discriminate on any attribute whatsoever. This approach would sit better with the exception being designed to assist minority groups through

“special measures”. We support the prohibition on clubs which occupy crown land or receive Government funding from utilising this exception.

Statutory authority exception

The VGLRL agrees with the Scrutiny of Acts and Regulations Committee (**SARC**) report which notes that section 69 places the Act “at the base of the legislative hierarchy”.⁷ We also agree with the SARC recommendation to abolish the statutory authority exception, and to adopt a three-year sunset process to allow for the evaluation and audit of existing legislation to assess whether it is contrary to the *Equal Opportunity Act*. Given the time elapsed since the SARC report, and also the requirements of the Charter, which were enacted in July 2006, we submit that the three year period should be regarded now as spent. The bill to implement this review, and the Gardner review, should provide for no more than a few months further grace for the completion of that evaluation and audit process.

Where other Acts are contrary to equal opportunity, but cannot be reformed, then as suggested, they should be included as an appendix to the Act. We note that this may appear to undermine the Act in a different way (by including the names of Acts which override it within the document) but we believe this is a more transparent process than the current operation of section 69 and would probably result in a reduction in the number of other Acts which are in breach of anti-discrimination provisions. Inclusion on this exceptions appendix should be subject to a sunset provision, analogous to sub-sections 31(7) and (8) of the Charter.

VCAT exemption process

The VGLRL supports the continuation of a carefully managed process to allow for the granting of exemptions from operation of the Act in limited circumstances. We also believe that, where it is proposed that an exemption be granted, the Tribunal should have the ability, indeed be required, to notify and seek submissions from key/peak organisations that represent those people whom the exemption would negatively affect. For example, before granting an exemption to allow a welfare service for women to exclude male-to-female transgender individuals from utilising this service, there should be a requirement to seek submissions from groups such as Transgender Victoria and the VGLRL. This process may not ultimately change the Tribunal’s decision on whether to grant an exemption, but would contribute to a greater acceptance of and transparency to the exemption process.

Should you have any questions about this submission, please contact us on 0417 484 438.

Yours sincerely

VICTORIAN GAY & LESBIAN RIGHTS LOBBY

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Co-convenors

⁷ Scrutiny of Acts and Regulations Committee, *Final Report – Discrimination in the law (Inquiry under section 207 of the Equal Opportunity Act 1995)*, September 2005.