

SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC

TO

**DEPARTMENT OF JUSTICE REVIEW OF THE EXCEPTIONS AND EXEMPTIONS IN THE EQUAL
OPPORTUNITY ACT 1995 (VICTORIA)**



Federation of
Community Legal Centres
VICTORIA

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This submission was prepared by the Federation of Community Legal Centres, with contributions from our member centres Youthlaw and Fitzroy Legal Service, and in consultation with other member centres.

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

The Federation welcomes the opportunity to comment on the exceptions and exemptions provisions in the *Equal Opportunity Act 1995* (Vic) ('the Act'), having expressed concern in our earlier submission to the Attorney-General's Independent Review of the *Equal Opportunity Act 1995* (Vic) ('the EO Review') about the absence of these provisions from that Review's terms of reference.

Our submission here should be read in tandem with our submission to the EO Review concerning our views on the significant improvements that need to be made to the way discrimination is prohibited in Victoria. In particular, we emphasise again here that the Act needs to better facilitate effective responses to systemic discrimination, alongside improved investigation of individual complaints. These changes must be enacted in a manner that recognises the close relationship between the Act and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), and that therefore acknowledges Victorian and international human rights obligations to offer redress for, and to attempt to effectively prevent, all forms of discrimination.

As we outlined in our submission to the EO Review, independent and accessible legal advice and representation is also critical in ensuring the prevention of discrimination through the provision of support to individual complainants, including to those complainants who claim that invoking an exception or granting an application for an exemption would constitute unlawful discrimination in the particular circumstances.

GENERAL QUESTIONS

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

Yes, significant reforms are needed. The Federation believes that there are too many exceptions in the Act,¹ and that the definitions are frequently too broad or too vague, with varying tests, often with too low a threshold. In our experience, the present nature and structuring of the exceptions provisions mean that many people who believe that they have been discriminated against decide that it is not worth complaining, and that even many of those people who might be ultimately found to have experienced discrimination, when confronted with a potential respondent's claim to an exception, do not pursue the matter.

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?

As we outlined in our submission to the EO Review, we regard it as inappropriate to frame the problem of discrimination in economic terms, as if, were the economic costs of eliminating discrimination as far as possible to be considerable, the conclusion should be that it should only partly be done. From a social justice policy stance, discrimination must be eliminated as far as is possible; and from a legal perspective, the Charter requires this approach.

With respect to social costs and benefits, discrimination often impacts on communities and individuals who are already marginalised, disadvantaged or otherwise subjected to prejudice, such as ATSI peoples, women, CALD communities, lesbians, gay men, transgender and intersex people, young people, and people living with disabilities. Discrimination further entrenches this social inequality, particularly for people who experience multiple forms of discrimination and who have poor access to justice. Specific studies of social costs are delineated in our and others' submissions to the EO Review.

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?

The Federation believes that in the present framework of the Act, none of the exceptions are reasonable limitations on the right to equality.

In our view, some exceptions are simply unjustified in any circumstances, for reasons outlined below. Other exceptions provisions make it too easy for discrimination to take place with respect to domestic and personal services (s 16), small business (s 21), family employment (s 20) and private clubs (s 78). This is due to definitions often being too broad (eg s 17(4) regarding discrimination on the basis of physical features).

The Federation is also concerned that other provisions in the Act, while not explicitly concerned with exceptions, operate as de facto exceptions by restricting the meaning of prohibited discrimination. One example is s 52, which applies to guide dogs only, thereby effectively providing an exception for discrimination in providing accommodation to people with other impairments and who require other types of assistance animals. For example, some people living with mental illness may have a dog as a companion animal in order to assist them to alleviate phobic symptoms, but are not protected from discrimination.

Another illustration is s 14, which when read together with s 4 excepts discrimination against volunteers and unpaid workers. In its submission to the EO Review, the Federation has also previously argued for an expansion of the attributes covered by s 6 of the Act, in order to protect against discrimination on the basis of a criminal record, homelessness or employment status.

The current structure of exceptions within the Act also makes it too easy for a person to discriminate by referring any would-be complainants to the relevant exceptions provision. This is not only likely to have a chilling effect on complaints, but also requires only minimal consideration by the potential respondent as to whether the discrimination might be unlawful. Specific examples of such exceptions are outlined below.

With respect to those exceptions which may be justified in some circumstances, we submit that a more nuanced test as to whether particular differentiation is unlawful discrimination is supplied by s 7(2) of the Charter,

¹ The Victorian Act has a huge range of exceptions and exemptions not found in other State or Commonwealth jurisdictions.

especially because the Charter employs the same definition of discrimination as the Act.² The s 7(2) balancing test for limitations on human rights requires an assessment of whether the limitation being considered is not only reasonable, but demonstrably justified in a free and democratic society. The assessment must include relevant factors such as

- (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

However, we also note that there are various specific mechanisms by which the Charter, and therefore the s 7(2) test, are engaged.⁴ It may be possible that the Charter could be deemed not to have been engaged in some specific situations where potential discrimination is to be assessed. If so, we submit that it may also be necessary to embed the s 7(2) test in the Act itself. In our view, the Act's objective of education, and its associated targeting of systemic rather than only individual discrimination, is better served by the dialogic model underpinning the Charter than by the current exceptions framework in the Act.⁵

Reliance on the Charter for the test of whether discrimination is justified in the circumstances would also change the current status in the Act of 'special measures' as a form of lawful discrimination. Under the Charter, such actions are not discrimination,⁶ thereby preserving an understanding of discrimination as working against social justice – an interpretation which we believe is to be preferred.

We refer the Reviewer to the joint submission from our member centres, Public Interest Law Clearing House and Human Rights Law Resource Centre, for more detail on the role of the Charter and for further explanation of why the s 7(2) balancing test, including the necessity to draw on international human rights jurisprudence, should be used.

We make more detailed comments in relation to specific exceptions below.

Exceptions to discrimination in employment and employment related areas

Section 16 Exception – domestic or personal services

This provision should be repealed. For more detail, the Federation refers the Reviewer to the submission from our member centre, Job Watch.

Section 18 Exception – political employment

This provision should be repealed. For more detail, the Federation refers the Reviewer to the submission from our member centre, JobWatch.

Section 21 Exception – small business

This provision should be repealed. For more detail, the Federation refers the Reviewer to the submission from our member centre, JobWatch.

Section 22 Exception – special services or facilities and Section 32 Exception – special services and facilities

The test of 'not reasonable in the circumstances' has a lower threshold than 'unjustifiable hardship' in s 11 of the *Disability Discrimination Act 1992* (Cth), and supports our view that the process and test for obtaining what is effectively an exception to the prohibition on discrimination is better served by the balancing exercise under s 7(2) of the Charter. Both provisions should therefore be repealed.

² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1).

³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

⁴ For example, via the assessment of Bills introduced to Parliament (*Charter of Human Rights and Responsibilities Act 2006* (Vic) Part 3, Division 1); via the interpretation of laws by courts and tribunals (*Charter of Human Rights and Responsibilities Act 2006* (Vic) Part 3, Division 3); via obligations on public authorities (*Charter of Human Rights and Responsibilities Act 2006* (Vic) Part 3, Division 4); and via the role of the Victorian Equal Opportunity and Human Rights Commission (*Charter of Human Rights and Responsibilities Act 2006* (Vic) Part 4).

⁵ *Equal Opportunity Act 1995* (Vic) s 3(a).

⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

Section 25 Exception – care of children

The Federation believes that this exception should be repealed, on the basis that applicants seeking to work with children are already subject to a Working with Children Check under the *Working with Children Act 2005* (Vic). We are concerned that s 25 only requires that the prospective employer have a rational basis for the belief in the need to protect children from harm, which may include a threat to their psychological and emotional wellbeing.

We submit that ‘a rational basis for that belief’ leaves the door open for commonly held prejudices against people with some physical disabilities or who, for example, have facial scars. It may also, particularly given other aspects of the Act discussed elsewhere in this submission, facilitate discrimination against transgender/intersex or gay/lesbian applicants if they are perceived as looking ‘confronting’ or ‘different’, thereby catering to entrenched social prejudices.

We are also concerned that given the lack of Victorian protection against discrimination for people with criminal records (outlined in our submission to the EO Review), ‘a rational basis for that belief’ may allow discrimination on this ground, even where the conviction is spent, not recorded, or irrelevant to the job sought.

We therefore believe that the Working with Children Check is sufficient screening and that s 25 should be repealed.

Section 27 Exception – youth wages

This exception should be repealed, on the basis that young people should be paid equal rates of pay for equal work. In the Federation’s view, youth wages disempower young people by restricting their ability to obtain money in order to enjoy an adequate standard of living.

We support the development of a skills-based alternative to youth wages. Payments should be based on responsibilities and skills required in the job rather than age. It is conceivable that in many workforce situations young people are just as competently performing jobs as older workers in the same positions.

The question for this Review is whether the discriminatory use of age as a criterion for determining rates of pay is justified. We submit that this exception fails a section 7(2) Charter test. Some sectors would argue that well-designed youth wages may justifiably be used to create or protect employment opportunities for young employees. However, claims that youth wages actually lower unemployment are unsubstantiated, and youth wages often amount to economic exploitation of young people, who are more likely than other workers to lack bargaining power.⁷

Further, there is an anomaly that a young person of 18 years is usually considered to be legally an adult, yet those between 18 and 20 years can be paid a lesser rate than other adults.

Section 27A Exception – early retirement schemes

This provision should be repealed. For more detail, the Federation refers the Reviewer to the submission from our member centre, JobWatch.

Section 27B Exception – gender identity

This exception has no legitimate purpose and condones blatant discrimination against transgender and intersex people. It has no place in equal opportunity legislation and would not survive the balancing test under s 7(2) of the Charter. Accordingly, it should be repealed.

Exceptions to discrimination in education

Section 39 Exception – special services or facilities

The test of ‘not reasonable’ has a lower threshold than ‘unjustifiable hardship’ in s 11 of the *Disability Discrimination Act 1992* (Cth), and supports our view that the process and test for obtaining what is effectively an

⁷ There are anecdotal reports of young people’s rights and award conditions being stripped away by the imposition of Australian Workplace Agreements (eg in franchises); see, eg, Michael Bachelard, 5 May 2007, No ‘fairness test’ for teens on front line of IR change <http://www.theage.com.au/news/national/no-fairness-test-for-teens-on-front-line-of-ir-change/2007/05/04/1177788399422.html>

exception to the prohibition on discrimination is better served by the balancing exercise under s 7(2) of the Charter. The provision should therefore be repealed.

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

Section 46 Exception – special manner of providing a service

The test of ‘cannot reasonably provide’ or ‘more onerous terms’ has a lower threshold than ‘unjustifiable hardship’ in s 11 of the *Disability Discrimination Act 1992* (Cth), and supports our view that the process and test for obtaining what is effectively an exception to the prohibition on discrimination is better served by the balancing exercise under s 7(2) of the Charter. The provision should therefore be repealed.

Exceptions to discrimination in accommodation

Section 53 Exception – accommodation unsuitable for children

We submit that this exception is too broad and relies simply on the belief of the person refusing accommodation. In the view of VCAT Deputy President, Cate McKenzie, the terms ‘unsuitable’ and ‘inappropriate’ are vague and imprecise.⁸

It may be that in some situations the exception should apply for the protection of health and safety of children concerned, to protect the uniqueness of the property itself, or, for example, to exclude children from specially created senior citizen housing. However, this exception must not provide an excuse to give preference to older tenants or to those without children when providing accommodation, or to refuse to rent to someone because they have children or because they are under 18 themselves. In our view, 16- or 17-year-olds who are living away from their parents should not be refused an apartment because of their age.

In the current housing market where there is a limited supply of affordable housing, single parents and young people are increasingly being overlooked by landlords when they apply for rental properties. For many young parents or young people, the effect of a refusal to provide accommodation under this exception is to refuse them a lease, thereby leaving many of these people homeless.

Accordingly the provision should be repealed and replaced by the s 7(2) balancing test.

Section 55 Exception – welfare measures

This exception should be repealed, on the basis that the provision does not make clear who makes the decision about the nature of the person’s gender identity. The s 7(2) balancing test, combined with the Act’s prohibition on discrimination on the basis of gender identity (s 6(ac)), would enable more nuanced decision-making in order to distinguish between situations of discrimination and contexts where special measures are enacted.

Section 57 Exception – accommodation for commercial sexual services

The Federation believes that this exception should be repealed, on the basis that the commercial sexual activity at issue is lawful. Providing an exception to discriminate therefore panders to moral judgments and prejudice. Any legitimate restrictions on the provision of accommodation are better dealt with by existing planning legislation and regulations. The provision should therefore be repealed.

General exceptions

Sections 75 Religious bodies and 77 Religious beliefs or principles

In our view, applying the s 7(2) Charter test, these exceptions fail to strike a proportionate balance between the conflicting rights to freedom of religion and to freedom from discrimination, with the consequence that the right to freedom from discrimination is likely to be subject to unreasonable limits.

We therefore consider that either:

- a) Sections 75 and 77 should be repealed, or

⁸ *Lakes Motel* [2001] VCAT 2320 (11 December 2001) at [12].

b) They should be expressly limited so that the exceptions are not available to religious bodies/individuals who are otherwise engaging in 'mainstream/secular' activities such as the provision of accommodation, goods and services, employment, education etc. In support of narrowing the potential for exceptions, even the broad definition of 'private club' in s 78 excludes those clubs which occupy Crown land or receive any financial assistance from the State or a municipal council.

In further support of removing or at least narrowing these exceptions, the Second Reading speech to the Equal Opportunity Bill 1995 made it clear that the exception was intended to protect 'religious activities'.⁹ In *Jubber v Revival Centres International*,¹⁰ the Victorian Anti-Discrimination Tribunal noted that the exception is not intended to permit discrimination in a secular activity unrelated to observance or practice of a religion. The Tribunal quoted with approval the decision of the NSW Equal Opportunity Tribunal in *Burke v Tralaggan*,¹¹ in relation to the NSW exception similar to Victoria's s 75:

[The exception] protects the members of religious orders or bodies established to propagate religion in relation to its own members and its own structures. The section does not operate to allow the members of any religion to impose their beliefs on secular society, so as to exempt them from the operation of the law.¹²

These principles illustrate the importance of limiting the scope of exceptions for religious organisations under anti-discrimination law; and in particular, not allowing absolute exceptions which have the potential to encourage prejudice and unfair treatment based on matters such as personal lifestyle. To allow religious organisations a broad exemption for conscience encourages prejudice and unfair treatment of certain individuals, is dangerously open to misuse, and seriously undermines the effectiveness of associated anti-discrimination provisions.

These issues pertaining to the scope and operation of exceptions for religious organisations were highlighted in an inquiry by the Human Rights and Equal Opportunity Commission, which has since become the subject of a report to the federal Attorney-General.¹³ This inquiry arose out of a complaint against the Catholic Education Office of the Archdiocese of Sydney for its refusal of an application for classification as a teacher in Catholic schools in the Archdiocese. The complainant was a lesbian who had been involved in campaigning against homophobia and violence against young gay and lesbian school students. The Office cited among its reasons for refusing to employ the complainant her high public profile as a convenor of the Gay and Lesbian Teachers and Students Association and her public statements on these issues. The Commission found the refusal of her application was not protected by the religious institutions exception in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

The Commission found that the complainant did not, by virtue of her sexual preference and her public campaigning against homophobia, refute or denigrate the teachings of the Catholic Church. The respondent was not able to substantiate its claim that she advocated a lifestyle and values contrary to the teachings of the Catholic Church. The fact that the complainant was openly lesbian, and the speculation which such openness might attract regarding her private activities, could not be construed as injurious to the religious susceptibilities of adherents of the Catholic faith.

Indeed it would not be an injury to their religious susceptibilities but an injury to their prejudices. These injuries do not come within the terms of [the] exception and are not a permissible reason for discriminating on the ground of sexual preference.¹⁴

We also have concerns about religious organisations using exceptions to exclude non-heterosexual people from access to various community services. In our experience, the exceptions are a factor in discouraging potential complainants from lodging a complaint of discrimination. This is borne out by the absence of Anti-Discrimination Tribunal case law on point, and by a recent example known by Youthlaw and recounted below with permission.

Youthlaw has recently been supporting a group of young people who were treated unfairly on the basis of their sexuality by being refused a service/accommodation. WayOut Rural Victorian Youth & Sexual Diversity Project is a youth suicide prevention initiative which aims to raise awareness about the needs of same-sex-attracted young people and the nature and effects of homophobia in rural communities. In 2007 WayOut's coordinator sought to organise a weekend forum for rural young people and workers. They initially sought to book facilities in Gippsland but were refused when they provided details about their project and its aims. They were then told by the Christian organisation managing the facility that they would not be able to accommodate 'a group such as yours'.

⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1254 (Jan Wade, Attorney-General).

¹⁰ [1998] VADT 62 (unreported, 7 April 1998).

¹¹ [1986] EOC 92-161.

¹² *Burke v Tralaggan* [1986] EOC p 96, 588 cited in *Jubber v Revival Centres International* [1998] VADT 62 (unreported, 7 April 1998).

¹³ Human Rights and Equal Opportunity Commission, *Discrimination on the Ground of Sexual Preference: Report of Inquiry into Complaints of Discrimination in Employment and Occupation*, HRC Report No. 6 (1998).

¹⁴ *Ibid*, 22.

The group's initial reaction was to regard the matter as 'hopeless' in terms of making a formal complaint, because the respondent was a Christian organisation. It was only after they obtained (pro bono) legal advice that they decided to proceed with lodging a complaint, which is currently being dealt with within the Victorian Equal Opportunity and Human Rights Commission (VHREOC).

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

To illustrate our submission here, we refer to discrimination/exemption matters concerning transgender and intersex individuals, on the basis that the experiences of the most severely disadvantaged function as a litmus test for the efficacy of anti-discrimination legislation.¹⁵

With respect, we believe that VCAT members require more rigorous training in their use of the Act, particularly with regard to matters involving transgender/intersex applicants.¹⁶

We note that transgender and intersex people are not even always accommodated in the wording of the Act; for example, s 28 counterposes 'one sex' to 'both sexes' and so leaves it unclear as to the place of intersex individuals. As noted under discussion of s 27B, the present Act also allows discrimination against transgender and intersex people if a 'business case' can be made for it (s 27B(2)). Section 55 also facilitates potential discrimination on the basis of gender identity if the person's own identification is not read as determining the question of the person's sex.

It is therefore not surprising that, in the Federation's understanding, even those transgender or intersex people who might make an enquiry to the Victorian Equal Opportunity and Human Rights Commission feel that little or nothing will come of it and simply accept that this is 'the way that things are' for them.

The Federation supports the submissions of VHREOC in *Boeing* and *Hanover*,¹⁷ that the exemptions process should be made subject to the s 7(2) test in the Charter. We endorse VHREOC's submission in *Hanover* that the s 7(2) test would mandate more nuanced considerations of issues pertinent to discrimination against transgender and intersex people than are currently required under s 83 of the Act. The s 7(2) test would also provide consistency of approach under the Act, together with an increased emphasis on an educative and dialogic process concerning the meaning of human rights, including freedom from discrimination. We also submit that the grant of an exemption should be made conditional on the requirement for ongoing review by the applicant of the need for, and operation of, the exemption.

More generally, we submit that the VCAT exemption process should be made more transparent and accessible, including publicising any application for exemption and inviting direct comment from third parties such as representative organisations, before decisions are made.

As we outlined in our submission to the EO Review, independent and accessible legal advice and representation is also critical in ensuring the prevention of discrimination, through the provision of support to individual complainants/third parties in VCAT matters.

STATUTORY AUTHORITY EXCEPTION

The Federation supports the recommendation of the Scrutiny of Acts and Regulations Committee that s 69 of the Act (the statutory authority exception) be repealed.¹⁸ We believe that a sunset period of one year is sufficient given that audits have already been undertaken. If a statute cannot be reconciled with the Act, it should be listed in a schedule to the Act, and be subject to a renewable sunset clause.

¹⁵ The systematic discrimination and social disadvantage experienced by transgender and intersex Victorians and Australians is detailed in several submissions to the EO Review: see, eg, submissions from Transgender Victoria and Victorian Gay & Lesbian Rights Lobby.

¹⁶ See, eg, *Hanover Welfare Services Ltd (Anti-Discrimination Exemption)* [2007] VCAT 640 (20 April 2007).

¹⁷ Submission by Victorian Equal Opportunity and Human Rights Commission in regards to the Victorian Civil & Administrative Tribunal's consideration of an application by the Boeing group of companies for an extension of their exemption from aspects of the prohibitions on race discrimination in recruitment, employment and contract work, discriminatory requests for information and discrimination in advertising contained in sections 6, 13-15, 98, 100 and 195 of the *Equal Opportunity Act 1995 (Vic)*; Submission by Victorian Equal Opportunity and Human Rights Commission in regards to the Victorian Civil & Administrative Tribunal's consideration of an application by Ms Rosalind Spencer and TransGender Victoria for revocation of exemption number A76/2007 previously granted to Hanover Welfare Services Ltd, permitting specified conduct that might otherwise constitute discrimination on the basis of sex and gender identity in the course of employment, the provision of services and accommodation, requests for information and advertising in breach of sections 6, 13, 14, 42, 49 100 and 195 of the *Equal Opportunity Act 1995 (Vic)*.

¹⁸ Scrutiny of Acts and Regulations Committee (2005), 'Final Report, Chapter *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995*, [Victoria] 2005, 46.