The Exceptions

The relevant questions from the Consultation Paper were:

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Should any exceptions be repealed?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 fact that there are 53 separate sections of the Act that provide for exceptions and exemptions is itself problematic, as the Act is complex and it is difficult for individuals to understand their rights. The Act would be more usable and effective if the number of exceptions could be reduced and they could be better focussed and more systematic.

The exceptions differ widely in their purposes, scope and application. Submissions made to the Exceptions Review Consultation Paper were equally diverse, with many discussing those exceptions that were of particular interest to their own activities. Over 500 submissions were made in response to the Consultation Paper, indicating the broad interest in the exceptions, and contrasting with the 89 submissions made in response to the Discussion Paper issued by the Equal Opportunity Review in December 2007, and the 60 submissions made in response to its Options Paper published in March 2008.[26] Given the time and resource constraints on it, this review cannot substitute for a full law reform review, and some exceptions need to be referred for further research.

A number of submissions opposed any changes. The Australian Industry Group commented:

> AI Group does not propose any reform to the existing exemptions and exception in the Act. Our view is that such exemptions and exceptions are reasonable limitations to the legislation and they enable business to operate effectively.

However, the submission does not refer to either the impact of the Victorian *Charter*, or to the desirability of improving the consistency of Australian anti-discrimination laws, which is likely to be a significant benefit to interstate employers.

The Victorian Farmers Federation agreed, commenting that:

> As a principle the VFF believes that there should be a degree of flexibility in relation to the *Equal Opportunity Act*. The flexibility in this Act is in the form of exemptions and exceptions. If

[26] Gardner Review, Appendix A.

> the exemptions and exceptions were removed then in certain circumstances this could lead to disharmony in the community. Disharmony may occur where there is rigid enforcement of the *Equal Opportunity Act*. That is why under the current Act there are current exemptions and exceptions. … the exceptions and exemptions contained in the Act do not limit the enjoyment of human rights protected and promoted by the *Charter*. The VFF supports the exceptions to discrimination in employment and employment related areas especially the small business exception. It also generally supports the other exceptions.

In contrast a number of organisations argued for quite substantial changes to the exceptions in the Act to ensure compliance with the *Charter* and for other reasons. The Law Institute of Victoria (LIV) was of the view that 'there are some exceptions and exemptions to the *EO Act* which neither seek to overcome systemic discrimination nor constitute a reasonable limitation within the meaning of the *Charter*. Where appropriate, [they] should be removed or amended, in accordance with human rights principles.' The LIV stated that:

> The purpose of the Exceptions Review is to assess whether each of the exceptions and exemptions in the *EO Act* are compatible with the human rights protected under the *Charter*, including the human right to equality in s. 8. The LIV submits that following s. 7(2) of the *Charter*, this assessment will require consideration of whether each exception is a reasonable and demonstrably justified limit on the right to equality, having regard to:
>
> (a) the fundamental importance of the right to equality; and
>
> (b) the importance of the purpose of the exception; and
>
> (c) the effect of the exception; and
>
> (d) the relationship between the exception and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the exception seeks to achieve.

The rationale for scrutinising and limiting the exceptions and exemptions was well-expressed by the Disability Discrimination Legal Service (DDLS):

> 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.

The bulk of submissions to the Department of Justice Consultation Paper were in favour of either retaining or repealing / amending the existing exceptions. Some submissions argued that none of the exceptions was acceptable. For example, the Federation of Community Legal Centres (FCLC) said: '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*'

The Victorian Council of Social Service noted that even though:

> The Victorian *EO Act* states that one of its primary purposes is to eliminate discrimination 'as far as possible'. The quantity and extent of exceptions and exemptions significantly undermine this intent. Given that domestic equal opportunity Acts primarily give effect to our international obligations to eliminate discrimination, it is reasonable that the approach to exemptions and exceptions in the *EO Act* are placed within a human rights framework. …

VCOSS recommended: 'that exemptions and exceptions to the *EO Act* be considered against two criteria:

> 1. a 'reasonable limitations' test
>
> 2. a 'temporary special measures' test
>
> Exemptions and exceptions which are neither a 'reasonable limitation' on the right to be free from discrimination, nor constitute a 'temporary special measure' should be repealed or amended."

The B'nai B'Rith Anti-Defamation League in its submission suggested that exceptions that meet the needs of minorities should be retained. This rationale certainly underlies many of the exceptions in the EO Act, and indeed of anti-discrimination law, but it is under-inclusive. Women are not a minority group, but still suffer disadvantage in many situations, so the broader focus should be on

discrimination and disadvantage, acknowledging that these are most likely to be suffered by, but not exclusively limited to, minority groups.

The only proposal for a new exception was that made by Job Watch for a new exception of 'inherent requirements'[27] that could substitute for a number of exceptions currently in *the EO Act*. This is discussed in the context of ss. 19, 22 and 23 below.

The VEOHRC has proposed that the *EO Act* should adopt consistent language and easily identifiable thresholds and standards to ensure that people understand their obligations and rights under it:

> The existing exceptions use a variety of different words to describe when discrimination is allowed. Words such as 'rational', 'reasonable', 'genuine' are used in different places in the Act. The principles that underpin general limitations clauses (reasonable, justified, proportional, rational and balanced) should guide the consideration of amendments to, exceptions to, and exemptions from the *EO Act*. This will ensure compatibility with the *Charter* and that any limitations an exception imposes are reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.[28]

Criteria against which the exceptions will be tested

In the following section, each exception provision is reviewed from the perspective of whether it is necessary or justifiable within Victoria's human rights framework. In some cases this requires balancing human rights against each other and against competing public interests. The following issues are considered:

- Is the exception a reasonable limitation on rights within the *Charter* framework? Can it be interpreted and applied in a way that is compatible with the rights protected by the *Charter*?
- Is the exception still justified in the context of changing community standards and the passage of time so that transitional provisions would now need a different justification?
- Where human rights must be balanced against each other and competing interests, how should this be done?
- Does the exception have the least restrictive effect on rights possible?
- Can the exception be re-worded or re-defined to rely more closely on better established legal concepts and tests, to consolidate some existing exceptions for clarity, or to use an approach that is consistent across the *EO Act* and other Australian anti-discrimination legislation?
- Should any exception be repealed or amended because it does not amount to a justifiable limitation?

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[27] Inability to perform the inherent requirements of the particular work even after being provided with reasonable adjustments or accommodation.

[28] VEOHRC supplementary submission, 2009.

General or Specific formulation

In proposing changes to exceptions and exemptions, there is a choice to be made between:

- retaining exceptions in the most specific form, which may make application relatively straightforward, but tends to be inflexible and may leave out important areas, and
- expressing exceptions in a principled and generalised form, which may provide decision-making criteria but less specific guidance. This approach is more flexible and may be more valuable up to a point where it is too general to provide adequate guidance.

Which is preferable may depend on the context and area involved. A good example of this tension is the idea of adopting the principle of reasonable adjustments, as used in the *Disability Discrimination Act 1994* (Cth), to replace several provisions with similar formulations but slightly different details relating to different areas of activity covered by the *EO Act*, as discussed in the context of ss. 22, 23, 32, 33, 36, 39 and 46.

Is the exception expressed as narrowly as possible given that it is restricting equality rights protected by the Charter?

Since the *Charter* has made it plain that the fundamental nature of equality rights is now recognised by Victoria, no exception should be expressed more broadly than is absolutely necessary. This applies to the scope of the area involved as well as to the attributes to which the exception applies. This means there should be

- few or no blanket exceptions – that is exceptions that cover all attributes, and/or all areas of activity and usually have no condition that must be present before they apply
- all exceptions should be tested to see whether they can be either
  - repealed
  - generalised while still providing adequate guidance
  - retained and amended to narrow them as far as possible or clarify them
  - for a blanket exception, whether criteria for its application can be introduced, including a reasonableness test, and the attributes covered can be limited.

1 – Exceptions to Discrimination in Employment

Section 16 – Domestic or personal services in the home

Section 16 provides that a person selecting someone to work in or in relation to any person's home may discriminate on any attribute. It provides:

> 16. Exception—domestic or personal services
>
> 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.

VEOHRC commented on s. 16:

> This exception protects a sphere of personal space in a person's home, allowing a person to discriminate on any ground in selecting an employee to provide domestic or personal services in their home. It protects the human right to privacy of the family and home (*Charter* s. 13), and is consistent with the public/private delineation of areas in which the prohibition of discrimination operates, acknowledging that a person should be able to choose whom they allow into their home, even for the purpose of employment. This can protect interests in safety and decency.
>
> The exemption applies only to selection of employees, not to any other aspect of their treatment, so it is narrowly confined. It is likely to be regarded as a reasonable limit on non-discrimination rights within the *Charter*.

Job Watch commented that s. 16 'creates an unfortunate inference regarding the importance of eliminating discrimination and undermines the effective operation of *the EO Act* and promotion of the value of equal opportunity for all.' Job Watch argued that s. 16 should be repealed because it was not a reasonable limitation, noting that in practice most domestic employers offer employment through channels other than the commercial employment market. This approach probably fails to accord sufficient weight to the privacy interest in the home.

The Disability Discrimination Legal Service suggested a middle path, on the basis of comparison with provisions in other Australian anti-discrimination laws. It acknowledged that: "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'." In that case, there are rights and interests that need to be balanced, so the *Charter* may require a different assessment of the balance.

The Victorian legislation appears to have a broader scope other Australian jurisdictions in two respects, as it applies to employment 'in, or *in relation to*, *any* person's home'. The wording 'any person's' would allow an employment agency operating only to provide domestic workers in clients' homes a complete exemption from compliance with the Act. The wording 'in relation to' may apply to outdoor workers on the home, such as painters or gardeners. This provision was broadened significantly in the 1995 Act. Previously, in the 1984 *EO Act*, it provided:

> 21 (4) This section [which prohibited discrimination in employment] does not apply to –
>
> (a) employment of not more than three persons (disregarding any persons employed under paragraph (f)) in domestic or personal services in or in relation to the home of the employer.

In the 1995 Act the limit of three persons was removed, making it applicable even where there are a large number of workers in a home.

Whose home?

In NSW the exemption relates to 'employment for the purposes of a private household', and SA excepts 'employment within a private household'. In other jurisdictions the exception is tied to the performance of domestic duties in the household of the person who is the employer: 'employment to perform domestic duties within a private household in which the employer resides' (WA); 'perform domestic duties at the person's home' (Qld), and equivalent formulations in ACT, NT, *RDA* (Cth)

s. 15(5), *SDA* (Cth) s. 14(3) and *ADA* (Cth) s. 18(3). Interestingly, this exception does not appear in the *DDA* (Cth), or in the Tasmanian ADA. If the exception is limited only to the employer's home, then agencies that provide house cleaners and other domestic staff may not be protected.

'In relation to' the home?

The privacy rationale that applies to selection of workers within the home does not seem as applicable to selection of workers in relation to, but outside, the home, such as a gardener or painter who is working outside only. Protection of the employer's right to privacy only extends to protecting a decision in relation to his or her own home, or possibly that of a relative the person was assisting. It is interesting that this position is reflected in the form of the exception in the RDA (Cth), the oldest of Australia's anti-discrimination laws, but also the one most closely based on an international human rights treaty. It is suggested that in light of the requirements of the *Charter*, s. 16 should be amended for Victorian law to be consistent with the narrower definitions present in the federal and territory laws.

There is also a question of whether the exception should be limited to particular grounds, but the privacy rationale would seem to support broad based control, so this is not proposed.

Options for reform:

> **Option 1**: No change to this provision.
>
> **Option 2**: Amend s. 16 to omit the words 'or in relation to'; and replace the words 'any person's home' with 'the home of the employer, the person on behalf of whom the act was done, or a relative of either of those persons.'

Section 17 – Genuine occupational requirements

Section 17 provides an exception from sex discrimination where it is a genuine occupational requirement that the employees be people of that sex. It lists a series of situations which it accepts fall within this exception. Sub-sections (3) and (4) create an exception on the wider grounds of age, sex, race, impairment and physical features for employment in areas of a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment where such discrimination is necessary for reasons of authenticity or credibility.

Section 17 provides:

> 17. Exception—genuine occupational requirements
>
> (1) An employer may limit the offering of employment to people of one sex if it is a genuine occupational requirement of the employment that the employees be people of that sex.
>
> (2) Without limiting the generality of subsection (1), it is a genuine occupational requirement to be a person of a particular sex in relation to employment if—
>
> (a) the employment can be performed only by a person having particular physical characteristics (other than strength or stamina) that are possessed only by people of that sex; or
>
> (b) the employment needs to be performed by a person of that sex to preserve decency or privacy because it involves the fitting of clothing for people of that sex; or

(c) the employment includes the conduct of searches of the clothing or bodies of people of that sex; or

(d) the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex; or

(e) the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress.

(3) An employer may limit the offering of employment—

(a) to people of a particular age, sex or race;

(b) to people with or without a particular impairment—

in relation to a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

(4) 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.

While most of these exceptions appear to be acceptable in principle, some are expressed widely and may need adjustment. Most identify features of employment that could also be seen as inherent requirements of the job, and an exception for inherent requirements (as proposed by Job Watch and in a personal submission by John Ryan, discussed below) could provide an alternate avenue for them. There is value in having the more common instances specifically included for clarity. The VEOHRC commented:

> In *Belle Beauty* [1997] VADT 11, the then Anti-Discrimination Tribunal expressed a view that this exception addresses the question of safety and also the question of privacy and the necessity for a person of the same sex to carry out certain duties in certain circumstances.
>
> This exception seeks to balance and promote various rights recognised by the *Charter*:
>
> - the protection of privacy of persons *(s13)* in relation to sub-section 17(1) and (2) – the limitation of the exception is also constrained because the permitted discrimination is limited to circumstances where it is a 'genuine occupational requirement';
> - the protection of cultural rights in terms of practice and observance of customs and religion *(s19)* and *(s14)*;
> - and freedom of expression *(s 15)* in the context of sub-section 17(4) which constrains the limitation to apply only where it is necessary for reasons of authenticity and credibility and sub-section 17(5) which is a broader limitation but most likely justified in terms of freedom of expression in a free and democratic society.
>
> These are important purposes and therefore the limitations that this exception gives rise to are reasonable, rational and proportionate to the purposes of protecting privacy and freedom of expression and balanced with the right to equality and non-discrimination.
>
> There are no less restrictive means to achieve these purposes; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified

> in a free and democratic society which respects the dignity, equality and freedom of all persons.

Live Performance Australia (formerly known as the Australian Entertainment Industry Association), the peak body for the live entertainment and performing arts industry in Australia and an employer association, said that s. 17 was imperative to its members 'when employing performers, as physical appearance is one of the main criteria in deeming an individual's suitability for employment and a performance role. It extends from the gendered, ethnic or physical characteristics required by a role, through to the particular 'look' to meet a particular artistic vision.'

The Association of Independent Schools Victoria noted that the ability to specify sex as a genuine occupational requirement was important in many school situations relating to such areas as boarding house staff and sports coaching. It noted that holding particular religious beliefs could be a genuine occupational requirement in some positions.

John Ryan, in a personal submission argued that s. 17(1) and 17(2)(a) were too wide and subjective, and that the exception should be limited only to the circumstances identified in paragraphs 17(2)(b)-(e).

> In all other circumstances including the matters raised in s. 17(2)(a) the issue of whether there is a genuine occupational requirement of the employment that the work be performed by a person of a particular sex is quite subjective and therefore it is not appropriate for a general exception. … In [those] circumstances … where an employer is of the view that work can only be performed by a person of a particular sex then at the very least the employer should be required to identify the nature of the work and reasons why a person of a particular sex is required. … There is a need for a process which lies between an exception and an exemption under s. 83 to deal with this issue. What is needed is a simpler exemption process for some specific issues.

Mr Ryan's proposal for a notification or authorisation process in relation to some exceptions is discussed in the context of s. 83 in this paper. The procedural question of how the exception is applied is conceptually separate from the criteria specified in *the EO Act* for an exception. Concern about the subjectivity of the judgments made by an employer is difficult to tackle, but could be addressed by placing the onus of making out this defence on the employer, and requiring an employer who seeks to rely on it to provide a statement to the person affected outlining the elements of the particular job and the inherent requirements that are asserted as a basis for excluding that person.

Concern about the specific wording of s. 17(4) was expressed by the Disability Discrimination Legal Service, as it does not clearly refer to 'physical features' being a genuine occupational requirement. It argued that s. 17(4) should not permit broad discrimination in employment 'without a clear nexus to what is considered genuine occupational or reasonable requirements within the context of changing values or developments in artistic freedom.'

Genuine, inherent, or reasonable occupational requirement?

In principle, the exceptions that fall under this heading should be justified by necessity in the context of the particular job involved, and should not be available unless this criterion is satisfied. In most situations the employer will be seeking the best person for the job, and this involves looking for the

best fit between the genuine, reasonable or inherent requirements of the job and the people who have applied.

There is general agreement on the need for this exception, subject to concerns over the details of its wording. At present it rests on the idea of a genuine occupational requirement, a term derived originally from the American case law on bona fide occupational qualification. However, the criterion of genuineness is unclear. Possible alternatives would be a reasonable or an inherent occupational qualification. Job Watch proposed that although s. 17 was a justified and legitimate exception, it could be repealed and replaced by an exception for inherent requirements that would provide a broader, principled basis:

> It is submitted that [s. 17] has sound foundations and appears to be based on balancing equality of opportunity with the attainment of logical and practical outcomes which are essentially grounded in the public interest. Further, the requirement for any limitation based on attributes to be based on 'genuine' occupational requirements provides an effective safeguard against unfair or arbitrary discrimination.
>
> The relatively narrow scope of this exception makes it clear that there are very few situations in which the genuine occupational requirements of a particular position will be determined by a person's particular attributes. …
>
> While this exception can be justified as a 'reasonable limitation' on human rights under the *Charter*, it is submitted that the alternative 'inherent requirements' provision suggested below will effectively retain the benefits of this provision and operate to simplify the Act as a whole. … This would be the repeal of most exceptions in their current form …and the inclusion of the following provisions which incorporates the following elements:
>
> 1. A statement that discrimination in employment is prohibited, unless a person is unable to perform the inherent requirements of the particular employment.
> 2. A list of the factors to be considered when determining whether a particular requirement is 'inherent' to a position. This list should include:
>   - Whether a particular task is genuinely essential to the position.
>   - The skill set and qualifications required to do the position.
>   - Whether the position could be performed with modifications being made to accommodate the performance of the job by a person with an impairment.
>   - Whether public standards of decency require that the position be filled by a person of a particular sex.
>   - Whether reasons of artistic credibility require the position to be filled by someone with a particular attribute.
>   - Whether it is a genuine occupational requirement that a person be of a particular sex, such as necessary physical characteristics particular to people of one sex, other than strength or stamina; or the preservation of decency or privacy; for example where employment involves fitting clothing, doing body searches or entering lavatories or other areas where people are in a state of undress.
>   - Whether the most effective delivery of welfare services to a particular group requires that the job be performed by a person with a specific attribute.

- Whether adherence and commitment to the particular beliefs and tenets of a religion are required in order to carry out the fundamental requirements of a position with a religious body or religious school.

This approach would have the advantage of focussing attention on the requirements of the particular job as a basis for assessing whether any exceptions from anti-discrimination law are required. The term derives from International Labour Organisation (ILO) *Convention 111 concerning Discrimination in respect of Employment and Occupation*, Article 1.2 of which provides: 'Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.' It appears in the *Workplace Relations Act 1996* (Cth) s. 659(3) and the *Fair Work Act 2009* (Cth) s. 351(2)(b), and in the *DDA* (Cth) s. 15(4)(a), where it forms one of the two main defences to employment discrimination, along with the argument that adjustments to accommodate a disability would impose unjustifiable hardship. It has been interpreted by the High Court on two occasions: in *Qantas v Christie*[29] involving the *Workplace Relations Act*, and *X v Cth*[30] concerning the *DDA* (Cth). Some statutory modification of the results of these cases may be needed in defining it.

In drafting an exception for the inherent requirements of the particular job it would be necessary to ensure that the narrowest range of attributes and areas was excepted for any particular job, and that the features of s. 7(2) of the *Charter* such as reasonableness, proportionality, and least restrictive alternative were included in the wording of the exception. It would also be desirable to include a provision like s. 17(2) that lists the well established circumstances in which the exception applies, identifying the justifying factor in each case to guide interpretation.

This proposal could simplify the structure of the *EO Act* significantly and restructure a number of currently isolated exemptions, such as ss. 17, 18, 19 and some of the religious exceptions on a principled basis. The DDLS commented on the similarity of:

> Genuine Occupational Requirements or genuine and reasonable requirements [that] resemble the term 'inherent requirements" under the *Disability Discrimination Act 1992* (Cth) … 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.

Provisions in other jurisdictions

All Australian anti-discrimination laws except the federal *RDA*, *DDA* and *ADA* have provision for genuine occupational requirements, and most (NSW, WA, Qld, ACT, *SDA* (Cth)) contain examples of the types of activities that fall within the provisions. The Victorian provisions are primarily aimed at sex discrimination, but other jurisdictions have exceptions covering race, sex and age discrimination (NSW, SA), race, sex, age and impairment (SA), race, sex and disability (ACT) and gender, age, race, disability, industrial activity and religion (Tas). This spread of grounds indicates that broader use could be made of this exception or a corresponding inherent requirements exception in the *EO Act*.

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29 *Qantas Airways Ltd v Christie* [1998] HCA 18; 193 CLR 280; 72 ALJR 634; 79 IR 120; 152 ALR 365.

30 *X v Commonwealth* [1999] HCA 63; 200 CLR 177; 167 ALR 529; 74 ALJR 176.

Criminal record

The Gardner Review recommended that discrimination on the basis of criminal record be prohibited, with an exception for the area of employment where a person is unable to satisfy the inherent requirements of the job.[31] If this proposal is accepted, the exception for 'genuine occupational requirements" or inherent requirements could be amended to allow discrimination on the basis of criminal record where it relates to the 'genuine occupational requirements."

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** Amend the wording of s. 17 by requiring a nexus to be shown in subsections 17(1), (2)(a) and (4) between the work itself and the proposed restriction on eligibility for it, in terms of a reason of sufficient weight to justify the restriction.
>
> **Option 3 (in addition to Option 2 or by itself):** Repeal s. 17 and replace it with a provision that allows an exception for discrimination against a person who cannot carry out the inherent (or genuine and reasonable) requirements of the job. The criteria to be considered should be included in the section, as listed above, and should require the employer to discharge the onus of showing the nature of the work, the nature of the proposed restriction and the inherent requirement on which it is based, and a justification for the restriction that is sufficient in terms of the s. 7(2) criteria.
>
> **Option 4:** If the attribute of 'criminal record' is adopted, then a specific subsection be adopted recognising that in some circumstances conditions as to criminal record may be a genuine or inherent occupational requirement. VEOHRC should be requested to develop guidelines on this for employers.

Section 18 – Political employment

This section provides that discrimination on the basis of political belief or activity is acceptable in the offering of employment to a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

> 18. Exception—political employment
>
> An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

The VEOHRC commented that:

> The purpose for this exception is to promote the efficacy of parliament and to facilitate proper working of democracy. This is an important purpose in a democratic society and therefore the limitation is reasonable, rational and proportionate to the purpose. There are no less restrictive means to achieve this purpose; as such the limitation the exception places on the

[31] See *An Equality Act for a Fairer Victoria* (Gardner Report), 105-6.

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

An opposing view was put by Job Watch, in arguing that this exception was not justifiable and went beyond being a reasonable limitation.

> From a policy perspective, it should be noted that the positions of electoral officer and ministerial adviser are funded by the State. As such, they should be filled in accordance with equal opportunity principles, as opposed to what appears to be a licence to limit employment to a specific group of 'party members' or adherents to the beliefs of the political party in office at any particular time. Equal opportunity legislation should not be used to provide these special benefits to a group of exclusive political 'insiders', at public expense, as part of the 'spoils of office.'

John Ryan supported both s. 18 and s. 68, the political employment exceptions, and suggested that a broader exception may be required to meet the needs of organisations that were not a political party but were involved in work which is heavily influenced by political activity. As these areas are not clear-cut, any exception would need to be available only on the basis of application. Mr Ryan commented that:

> As participation in the body politic is a fundamental right as it goes to the whole issue of governance and law making it is important that in areas which are overtly political that the general prohibition against discriminatory conduct is made subject to a proper exception. …Industrial organizations such as trade unions and employer organizations often have quite close and very specific links to political parties. Some lobbyist organisations and businesses often have specific political agendas which are critical determinants of their organizational culture. In both these circumstances the employer should have the ability of directly discriminating for and against persons in employment with the organization on the grounds of political belief or activity.
>
> Recognition needs to be given to the fact that many of the entities now actively seen as political players should be allowed to discriminate on the grounds of political belief or activity. Such discrimination is often necessary in order to ensure the integrity of the entity.
>
> As the need for discrimination in such cases will be less clear cut than the examples given in ss. 18 and 68 then the extension of discrimination on the grounds of political belief or activity should be by way of application rather than by way of blanket exception or exemption.

If an inherent requirements exception is adopted as discussed above (at s. 17), then it should be flexible enough to deal with these extended areas in which political belief or activity is regarded as an inherent requirement of the job. It should be accessed through an application process that specifies in advance the nature of the employment and the reason why the particular restriction is necessary and proportionate.

There is no equivalent of this exception in any of the federal anti-discrimination laws, or in NSW, SA or NT. Equivalents in much the same terms exist in WA (covering religious or political conviction), ACT and Tasmania, but in Queensland it appears as an example under s. 25(1) genuine occupational requirements.

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** This section should be repealed, and replaced by an equivalent paragraph in a section relating to genuine occupational qualification or inherent requirements of the employment.

Section 19 – Welfare services

This provision allows an employer to offer employment only to people with a particular attribute where the employment involves provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

> 19. Exception—welfare services
>
> An employer may limit the offering of employment to people with a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

VEOHRC commented:

> This exception has an important purpose in that it aims to facilitate the delivery of services that have as their purpose the welfare and advancement of disadvantaged groups by permitting that employment may be limited to people with the same attributes if a particular service can best be delivered by people with those attributes.
>
> This is an important purpose in a democratic society which values high quality and appropriate service provision, therefore the limitation is reasonable, rational and proportionate to the purpose.
>
> There are no less restrictive means to achieve this purpose; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

The Department of Justice Background Paper noted:

> This exception aims to effectively promote the provision of special measures. The exception may also potentially facilitate promotion of the following rights depending on the facts and the context of facilitating special measures programs or services:
>
> - protection of families and children – to facilitate the provision of services and programs by persons with shared experiences where this would enhance the fundamental importance of families and/or be in the best interests of children *(s17)*;

- protection and promotion of cultural rights - to facilitate the provision of services and programs by persons with shared experiences, understanding and awareness where this would promote the enjoyment and practice of culture *(s19)*;

The B'nai B'Rith in a submission expressed its support for the exceptions that meet the needs of minorities, which included ss. 19, 38, 61 and 75-77.

However Job Watch queried the assumptions underpinning this exception, which it saw as insufficiently justified. Its concern was to ensure that access to employment is not unjustifiably restricted by excluding people unnecessarily. It identified the following (among other things) as principles that should guide the granting of exceptions and exemption:

1. The right to work is a fundamental human right ... This right extends to all persons, irrespective of their protected attributes, and it is this principle which the Act has sought to implement in Victoria since its inception.
2. Any exceptions or exemptions in the Act should not be used to limit access to employment opportunities but rather, should either serve to advance substantive equality between various groups in society, as befits beneficial legislation, or should be limited to only those provisions which are necessary to ensure fairness and reasonable practical application of equal opportunity principles. For instance, Job Watch recognises that it is unjust to require a particular sector of the community to make unreasonable accommodations to permit a person to perform work, the inherent requirements of which they would otherwise be incapable of performing. So it is sound for an 'inherent requirements of the job' exception, strictly contained and strictly applied, to remain. However, any arbitrary exceptions which unfairly serve to limit the opportunities of a particular group should be removed.
3. Recruitment, selection and employment-related decisions should be based on sound and defensible criteria, such as ability, merit, performance, behaviour and the operational requirements of the employer, untainted by irrelevant and unjust reference to a person's attributes. For example, it is acceptable for an employer to discriminate against job applicants if they are unsuitable for particular employment for any reason not based on an attribute, such as a lack of requisite skills or qualifications for the position.
4. Equal opportunity legislation should not be used to satisfy a constituency at the expense of others' legitimate interests or protect the exclusionary interests of particular sectors of society.
5. The community's best interests are afforded by facilitating genuine equality of opportunity for all its members. It is only in rare circumstances that competing interests, rights or 'community standards' justify limiting the operation of beneficially intended human rights based legislation.
6. Equal opportunity legislation should not, where possible, be used as a vehicle to legislate on matters best dealt with by employment and industrial laws.

In relation to s. 19, Job Watch commented that:

> The objects of the Act and the *Charter* would be better served if this exception were repealed.
>
> In some cases, it may be appropriate for welfare services to be provided by people with a particular attribute if they could do so significantly more effectively than those without the attribute. An example of this would be multi-lingual social workers engaged in a service run for the benefit of speakers of a language other than English.
>
> However, there is also the scope for this exception to exclude particular groups from access to certain employment which may be characterised as being for the advancement of people with a particular attribute. For example, an 'old boys' club of former students of a male single sex school may wish to employ one of its members to provide services, such as producing a newsletter or organising lunches for the purpose of networking. … Such an exception could mean that certain groups, most notably women in this situation, would be excluded from access to employment.
>
> If a position does have 'inherent requirements' pertaining to particular attributes, rather than it merely being preferable for a person to have a particular attribute, then the … general 'inherent requirements' exception ... would afford sufficient immunity from an unlawful discrimination claim.
>
> Regardless, it would still be possible for an employer seeking greater certainty or authorisation to appoint a person with specific attributes, to apply to VCAT under section 83 of the Act for a temporary exemption.
>
> From this perspective, the exception is both unjustifiable and unnecessary and therefore does not represent a reasonable limitation on human rights under the *Charter*. On the other hand the proposed 'inherent requirements' exception would be a 'reasonable limitation' on human rights under the *Charter* as it a justifiable limitation necessary to balance legitimate competing interests in a way that is fair, objective and non-arbitrary.

Section 19 as it stands is not sufficient to meet the requirements for either a special measure or a genuine occupational requirement or inherent requirement of the employment. What s. 19 lacks to establish it as a special measure is a requirement to show that the group is disadvantaged in some way, and that the proposed service provision is both intended to and objectively capable of advancing the interests of the group. Alternatively, what is needed to establish that possessing the same attribute is a genuine occupational requirement, would be to show why the services can be provided so much more effectively by the members of the same group that this should be regarded as central to the work involved.

Examining comparative provisions in other jurisdictions reveals that the Victorian provision is by far the widest such provision in Australia. None of the federal laws contain an equivalent provision, nor does SA, Qld or NT legislation. The exceptions in other jurisdictions are much more carefully targeted than s. 19. ACT treats this practice as a genuine occupational requirement if services can be most effectively provided by the same groups; it allows discrimination on the ground of race, sex and disability. Tasmania allows similar discrimination on the ground of disability only. WA allows it on the grounds of race, impairment or age. In all these jurisdictions, it may also be dealt with through the general genuine occupational qualification provisions. NSW allows an exception on the ground of

race for welfare services, while its sex exception in the genuine occupational requirement provision relating to sex.

By contrast, s. 19 allows this exception on any attribute, without the need to explain the way in which the reservation of jobs for people of that attribute is either a genuine occupational requirement or a special measure.

Options for reform:

Option 1: No change to s. 19.

Option 2: Repeal section 19 and indicate that its function is to be carried out by another provision by including an example or specific paragraph in that exception:

(b) the genuine occupational requirement (or inherent requirement of the particular employment) provision

and / or

(c) the special measures provision.

Section 20 – Family employment

This provision allows an employer to limit the offering of employment to people who are his or her relatives.

20. Exception—family employment

(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.

This exception serves to protect the right of an employer to offer a job only to a relative and exclude all others from it. VEOHRC commented that:

> This exception facilitates the right to protection of families and children (s17) recognising the importance of the family unit in society by facilitating opportunities for family businesses and enterprise to make express decisions to group together in enterprise and foster and develop family relationships and prosperity.
>
> This is a legitimate purpose given the *Charter*'s recognition of the importance of family therefore the limitation is reasonable, rational and proportionate to the purpose of promoting family unity and prosperity.
>
> There appears to be no less restrictive means to achieve the purpose (presumably where an employer advertises and recruits), as such the limitation the exception places on the right to

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

This exception has no equivalent in any other Australian anti-discrimination legislation. It allows any employer to offer a job in any kind of business they operate only to a relative. The 'family employment' referred to is not employment in a family business, but preferential employment of family members, or the reservation of positions for family members.[32]

John Ryan argued that this should only be allowed where all people already employed within the business were family members, that is, that it should be restricted solely to businesses that employ only family members, and it should be lost as soon as anyone outside the family is employed in the business.

This exception is hard to justify on the basis of human rights or the right to privacy in a small businesses as it is patently not confined to those situations. Job Watch commented that:

> Although there is some justification for the retention of this exception being that:
>
> (a) from an economic and social perspective, a family should be at liberty to establish a business that only offers employment to family members within the meaning of the Act; and
>
> (b) this exception does not seem to have the effect of discriminating against an individual or group on the basis of any protected attribute.
>
> However, on either basis, the exception is completely unnecessary because:
>
> (a) it is difficult to see how a complaint could ever arise as such an employer would not publicly advertise any positions; and
>
> (b) the exception doesn't exclude or relate directly to any protected attribute.

If this exception was to be assessed under s. 7(2) of the *Charter*, it is difficult to see how it would be a reasonable limitation on the right to equality. On the other hand, it recognises a very human aspect of managerial prerogative in business, even though situations that it applies to are very unlikely to ever become the subject of a discrimination complaint.

Options for reform:

> **Option 1:** No change to this provision.
>
> **Option 2:** Repeal this provision.

[32] For this reason, clarifying the meaning of 'family business' as suggested by State Trustees in its submission would not be relevant to the operation of this provision, as it applies to any business.

Section 21 – Small Business

Section 21 allows a small business employer of no more than 5 equivalent full-time employees to discriminate in determining who should be offered employment. The exception does not apply to existing employment relationships and small businesses are obliged to comply with equal opportunity laws for current employees in relation to issues like terms and conditions, or benefits, of employment.

> 21. Exception — small business
>
> (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.
>
> (3) For the purposes of this section—
>
> (a) a person who holds a controlling interest in a body corporate is to be taken to be the employer of the employees of the body corporate;
>
> (b) a body corporate is to be taken to be the employer of the employees of any of its related bodies corporate (within the meaning of section 9 of the Corporations Act);
>
> (c) full-time basis means a minimum of 30 hours a week.

This exception withdraws protection against discrimination from prospective small business employees. It has been suggested that this diminishes their right to equal and effective protection against discrimination under the *Charter*. The VEOHRC recommended the repeal of this exception. It commented:

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

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

Job Watch supported repealing this section, commenting that

> 'this exception undermines the operation of the Act (and the *Charter*) by suggesting that the Act (and the *Charter*) impose an onerous burden that small businesses are either not capable of complying with, or with which they should not possibly be expected to comply. It also creates the false impression that the deleterious effects of unlawful discrimination are of less consequence if a business employs less than 5 staff.
>
> This exception should be repealed as it offends against principles of justice (including section 8 of the *Charter*), which requires that the law be applied consistently and equally unless there are overwhelming competing interests of justice, fairness or practicality. This exception is therefore not a 'reasonable limitation' under the *Charter*.
>
> It is also worth noting that the Commonwealth anti-discrimination legislation does not provide for a small business exception and there does not seem to be any evidence to suggest that the Commonwealth scheme has caused any particularly adverse outcomes, economic or otherwise, for the small business sector.

The small business exception was supported by the Victorian Automobile Chamber of Commerce (VACC), which has a high proportion of members who are small businesses (which it defined as having 10 or fewer employees) and by the Victorian Farmers Federation. It was also relied on by some religious groups to permit choice of a co-religionist where no other exemption would apply.[33] Lynda Slavinskis, Lawyers and Consultants, noted that:

> Small businesses already struggle with regulatory compliance requirements in all other areas of their business without adding an extra burden; …
>
> The cost of compliance would be great, requiring reviews of occupational health and safety processes within the workforce and added cost to make workplaces suitable for employment of those with a disability for example.

However the law already requires small businesses to comply with the law in every respect except recruitment, and the existence of a 'small business exception' can be misleading in suggesting that there is a complete exemption from compliance. The regulatory burden of not choosing an employee for a discriminatory reason in small business cannot be vast, as employers who care about their business would already be likely to select the best person for the job, regardless of attributes protected by *the EO Act*. The concerns expressed about regulatory burden especially in relation to impairment could be better addressed by adopting an effective 'unjustifiable hardship' defence as outlined further below.

Several further reasons were put forward for the repeal of this provision. First was harmonisation with the federal law: There are some exceptions in *the EO Act* that are not reflected in the Commonwealth

[33] John Ryan referred to a counselling service operated in accordance with Catholic principles that did not fall within the religious exemptions and relied instead on s.21.

anti-discrimination scheme.[34] To assist people's understanding of their rights and obligations and reduce the compliance burden, it may be desirable to align the scope of protection where possible. It is noted that *the EO Act* protects a wider range of attributes than the Commonwealth anti-discrimination scheme. Among the states and territories, only NSW and WA have any small business exception. NSW's exception applies to employment on a wide range of grounds 'where the number of people employed does not exceed 5,' so does not require identifying equivalent full-time numbers. In WA a similar exception exists only in relation to religious or political conviction. Thus small businesses in all other states and territories are able to manage their responsibilities to respect the right to non-discrimination in recruitment.

Second is the impact on employment, especially for disadvantaged groups. Professor Thornton noted that small business is a substantial sector of the employment market and estimated (in the absence of any reported data) that up to 1 million Victorians may be employed in small businesses, and that they are likely to be major employers of women, and indigenous and non-English speaking background (NESB) employees.

The provision rests on an assumption that complying with the *EO Act* in employee selection inevitably costs money, but there is no necessary basis for that assumption. Small businesses are just as capable of selecting the best person for the job regardless of irrelevant characteristics as are other businesses without the need to employ a consultant or expert to advise them. Guidance on such processes is provided by the VEOHRC and by employer and trade associations. It can be very difficult to establish discrimination in recruitment, since the evidence is under the employer's control, so fear of complaints if s. 21 is repealed or amended may not be realistic.

In any event, small businesses have to comply with the *EO Act* in relation to all other aspects of their business, as this exception applies only to recruitment, so they are already under a duty to understand sufficient equal opportunity requirements for compliance.

If the reasonable limitations test in s. 7(2) of the *Charter* was applied to this exception, it is most unlikely that it would be found to meet the criteria, since it provides a blanket exception without reference to whether it is the least restrictive alternative or any of the other criteria.

Finally, it is difficult for a prospective small business employee to know whether or not this exception applies, as they will not be in a position to know the number of employees in a business and what hours they work per week. In the 1984 *EO Act*, the exception was for 'discrimination [on any attribute] in employment where the number of persons employed by the employer does not exceed three (disregarding any persons employed [in domestic or personal services in or in relation to the employer's home].' (s. 21(4)(f).) A head count of employees is a much clearer basis for setting such an exception than an equivalent full-time standard where the person affected has no way of knowing what number of equivalent full-time employees the business has.

The Law Institute of Victoria recognised:

> 'the policy consideration that small business should not be over-burdened by excessive regulation and compliance costs. We submit however that this policy tension can be

[34] See *Sex Discrimination Act 1984*; *Race Discrimination Act 1975*; *Disability Discrimination Act 1992*; *Age Discrimination Act 2004*; *Human Rights and Equal Opportunity Commission Act 1986*.

addressed by an 'unjustifiable hardship' defence, similar to that used in the *Disability Discrimination Act 1992* (Cth).[35]

Alternatively, the LIV would support a framework that requires businesses to make 'reasonable adjustments", similar to provisions in the recently enacted *Equal Opportunity Amendment (Family Responsibilities) Act 2008* and discussed in the *Equal Opportunity Review Options Paper*.

The LIV submits that amendments relating to 'unjustifiable hardship' or a requirement to make 'reasonable adjustments' would provide a less restrictive means to achieve the purpose of the small business exception. Further, such amendments would ensure that all businesses would be required to comply with equal opportunity laws, to the extent possible given their resources. In particular, we note that many attributes may not require any particular accommodation or incur any financial cost and that as a result, a blanket exception may serve only to permit discriminatory attitudes to continue.

Blind Citizens Australia commented that if the provision was to be retained it should be conditional on the business showing unjustifiable hardship.

Alternative ideas for amendment were put forward: The Department of Justice suggested that this exception could be amended to require that any limitation on the right to equality is reasonable in the circumstances. This could be achieved by incorporating or adapting the reasonable limitations test in the *Charter* for this purpose. Then discrimination could be confined to situations where the limitation on a person's right to equality was assessed to be a reasonable limitation.

Options for reform:

Option 1: No change.

Option 2: Repeal and replace with a provision allowing an exception for situations where compliance would result in unjustifiable hardship for a business or a small business. This could be accompanied by a restriction of the attributes covered by the exception. (See further discussion of the idea of unjustifiable hardship below at s. 22).

Option 3: Retain this provision, with the deletion of the words 'on a full-time basis' in sub-s. (1) and deletion of sub-s. (3). This would alter the employee count from equivalent full-time staff to a head count, as in other states.

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[35] Section 11 of the DDA provides: 11 Unjustifiable hardship
For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:
(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
(b) the effect of the disability of a person concerned; and
(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
(d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

Section 22 – Special services or facilities

This section allows an employer to discriminate on the basis of impairment in any area relating to employment (except sexual harassment) where in order for that person to perform the genuine and reasonable requirements of the job that person would require special services or facilities and it is not reasonable in the circumstances for those services and facilities to be provided, or the person would not be able to perform the genuine and reasonable requirements of the employment even if they were provided.

> 22. Exception—special services or facilities
>
> (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.

The background to this exception was explained by the VEOHRC in its submission:

> The purpose for this exception is to allow an employer to discriminate on the basis of impairment if, in order to perform the genuine and reasonable requirements of the job, special services/facilities are required but it is not reasonable for them to be provided in the circumstances (s22(1)(a)). This exception also recognises that an employer may refuse to employ, or dismiss, or take other action in relation to an employee who, because of their impairment, is unable to perform adequately the requirements of employment (s22(1)(b)).
>
> This exception is usually relied upon by respondents in circumstances where it is not economically viable or practicable for business reasons, or inappropriate for health and safety reasons to provide a person with special services or facilities to enable them to undertake a role, or where even after the provision of such services a person is unable to perform in the role.
>
> This provision has however been interpreted by VCAT to give rise to a very important implied obligation on employers to make reasonable adjustments to accommodate a person with a disability in employment: see *Davies v State of Victoria* VCAT 5 January 2000. This was based on the idea that people with a disability may require special services or facilities to undertake employment and the fact that those services are special (that is designed or provided to assist a person with a disability perform the requirements of employment and may

> not be provided to other applicants or employees without a disability) is what gives rise to the implied duty to reasonably accommodate.
>
> The purpose of this exception is important in that it recognises the legitimate business imperative that a person be capable of performing the genuine and reasonable requirements of employment and balances this with a very important implied duty which is required to facilitate equality of opportunity for people with a disability. ….
>
> Notwithstanding this provision's likely compatibility with the *Charter,* the Commission is of the view the language it uses requires modernising. Our complaint experience demonstrates a limited understanding of this exception and the implied duty to reasonably accommodate that it gives rise to. In the Commission's experience the phrase 'special services and facilities' is not readily understood by employers. Describing such services and facilities as 'special' may not be helpful means of communicating that accommodation is what is required.
>
> - What might be required to accommodate an employee with a disability may not be 'special' in nature but more simply an alteration, adjustment or provision of a support.
> - 'Special' may imply that what is required to accommodate a person with a disability in employment is over and above, that their needs are unique or unusual, and accordingly it may be costly or difficult.
>
> The Commission believes that the phrase 'special services and facilities' is outdated and out of sync with communicating what is required to accommodate people with a disability in employment. Furthermore just because an employee with a disability asks for flexible working arrangements this may not necessarily mean they are requesting special services or facilities when other employees may have the same access to similar accommodations such as parents and carers or employees wishing to undertake religious observance in the workplace.
>
> Substituting the phrase 'special services and facilities' with the phrase 'reasonable adjustments' or 'reasonable accommodation' will assist in providing some clarity around the implied duty to reasonably accommodate a person with a disability in employment.

Most submissions regarded an exception of this type as defensible and necessary, but concluded that this exception was too broad, too subjective, and did not provide clear guidance to employers on what the law required them to do. Many of the exceptions related to disability in the *EO Act* reflect the understanding of disability rights of the period when they were first adopted in the early 1980s. However, understanding of disability discrimination law has advanced since then, and these exceptions need to be updated and refined to match modern knowledge. There were varied recommendations for reform, but most agreed with the recommendation of the Gardner Review that:

> The Act should be amended to include an express requirement to make reasonable adjustments for people with impairment in relation to all areas protected by the Act and in public spaces. Reasonableness should be clarified in the legislation. (Recommendation 43)

This recommendation applies to s. 22 and to a series of similar exceptions based on the same 'special services or facilities' tests that apply across the different areas of activity covered by *the EO Act*: s. 32 (employment-related areas), 39 (education) and 46 (provision of goods and services). The reason for this was put succinctly in the La Trobe University submission:

> The requirement for the application of many of the exceptions in the Act could be eliminated by the introduction of provisions relating to reasonable adjustments and unjustifiable hardship

> consistent with those in the *DDA* (Cth). These particularly relate to breastfeeding, pregnancy, impairment, race, religious belief or activity and parental or carer status. We support a move to provide a consistent approach to disability/impairment matters in line with that of the DDA.

The VEOHRC commented that in light of the Gardner Review recommendation, it is 'appropriate that these exceptions (section 22, 32, 39 and 46) be reframed as express reasonable adjustments obligations. … The objectives of amendments to these provisions should be to provide certainty and clarity about the scope and application of the obligation to make reasonable adjustments and utilise the existing policy underpinning the implied obligations in *the EO Act*.

The DOJ's Background Paper commented that 'Reasonable adjustments are considered an important means of achieving equality of outcome by removing barriers to employment, access to education and the provision of goods and services. An example of a reasonable adjustment may be providing a ramp at the entrance to a shop to assist people using a wheelchair to access the premises.'

The Gardner Review recommended clarifying the existing implied requirement in *the EO Act* to make reasonable adjustments to assist people to understand their rights and obligations under the Act. It recommended that any express requirement to make reasonable adjustments only apply to accommodating people with an impairment.[36] The Report notes:

> Using exceptions provisions to provide guidance on reasonable adjustments does not give certainty to people seeking to apply the law. Exceptions do not explain what factors should be considered as part of a reasonableness test.
>
> A clearly stated and defined requirement to make reasonable adjustments for people with disabilities would provide clarity, and thereby greater certainty, about the obligations and entitlements of all parties.[37]

If a more express recognition of the duty to make reasonable adjustments was introduced, it would have direct implications for the existing special services and facilities exceptions in *the EO Act*. In particular, it would be necessary to re-examine the following exceptions and ascertain whether they have any additional ongoing utility:

- s. 22 – special services and facilities (in employment)
- s. 23 – reasonable terms of employment
- s. 32 – special services and facilities (in partnership)
- s. 33 – reasonable terms of partnership
- s. 39 – special services or facilities (in education)
- s. 46 – special manner of providing a service (goods & services)
- s. 80 – protection of health, safety and property.

There were seen to be problems with the breadth of the existing provision and its inevitable reliance on the employer's own assessment of reasonableness.[38] Blind Citizens Australia thought the

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[36] The *Equal Opportunity Amendment (Family Responsibilities) Act 2006* also sets out a requirement to make reasonable adjustments for parents and carers. See further *An Equality Act for a Fairer Victoria*, p. 92.

[37] *An Equality Act for a Fairer Victoria,* (Gardner Report), 91.

[38] John Ryan, personal submission.

threshold was set too low. For example an employer might insist that an ability to drive was needed, whereas if that was only a small part of the work then the person could take a taxi as needed, and the employer should be obliged to accommodate those needs if it was reasonable. Vision Australia criticised the 'subjectivity of the key judgements here of what is reasonable and genuine, are again discriminative in themselves and place a premium on one persons views over another's. Therefore, s. 22 substantially belittles the fundamental prohibition of s. 13 and 14 and in doing so, minimizes equal opportunity for disabled persons and largely preserves rather than eliminates discrimination in the community.'

The phrase 'more onerous terms" was generally considered to be a low threshold. The term 'unjustifiable hardship" is used in the Commonwealth *Disability Discrimination Act 1992* and may be a more appropriate (and more easily understood) measure. Adopting the terms used in the *DDA* (Cth) would have the benefit of harmonising the federal and state laws in an important respect, will bring into the Victorian law concepts and case law guidance that set a stronger and better understood standard, and making the law generally easier for businesses to understand and comply with.

Section 22 reflects an older formulation of what is now recognised as a requirement to provide reasonable adjustments or accommodation unless it would expose the employer to unjustifiable hardship, or even if they were provided, the person would still be unable to undertake the inherent requirements of the job, as expressed in s. 15(4) of the *DDA* (Cth):

> 15 (4) Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
>
> (a) would be unable to carry out the *inherent requirements* of the particular employment; or
>
> (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an *unjustifiable hardship* on the employer.

This test may provide clearer guidance than 'genuine and reasonable requirements of the employment", which has had little case law interpretation and maybe too low a standard of protection for people with a disability. The phrases that perform equivalent roles in the *DDA* (Cth) and that should be adopted in the *EO Act* include:

s. 22 *EO Act*	Equivalent from the *DDA* (Cth)
special services or facilities	Reasonable adjustments or accommodation
not reasonable in the circumstances for those special services or facilities to be provided	Provision of which would impose an unjustifiable hardship
the genuine and reasonable requirements of the employment	Inherent requirements of the particular employment

While there is no express duty of reasonable accommodation in the *DDA* (Cth), there is an implicit duty, and it would be preferable for there to be an express duty in the *EO Act* for clarity.

Legislation in other jurisdictions tends to adopt variations on these concepts. The impairments exceptions in NSW and Tasmania use the terminology of 'inherent requirements' and 'unjustifiable hardship'. In WA the terms 'reasonable requirements' and 'unjustifiable hardship' are used. In ACT the reference is to 'work that is essential', while in NT it is to 'inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated': s. 35(1)(b)(ii). There are no equivalent provisions in SA, or the federal *RDA*, *SDA* or *ADA*.

Disability advocacy groups noted the impact on those affected of the various exclusionary provisions relating to disability or impairment. The Disability Discrimination Legal Service (DDLS) expressed concern about the situation of workers who have a history of injury or disability. However, the *EO Act* cannot remedy issues outside the scope of its protection against discrimination in the areas it applies to. The *EO Act* cannot substitute for an adequate system of employment regulation that deals effectively with compensation and rehabilitation of injured workers. The VEOHRC suggested in its submission that 'in addition to the reframing of the special services and facilities exceptions it will be important to consider whether a clear and instructive inability to work exception is required for inclusion in the Act.' However, no submissions or proposals were made in relation to any such exception, so it is not considered in this Paper.

Vision Australia also commented that the legislation constructs disability as homogenous, whereas in reality it is non-homogenous and non-static. For example, 'sensory impairment such as the case of blindness or low vision, and the impact of one's 'disability' in accessing and participating in the community, is determined by a range of factors that combine to create an ever changing, context specific, environment specific, socially specific and time specific situation. … Therefore, a snap shot in time and particularly where expertise may be limited will most likely not produce a fair prediction of ones ability to perform … a task. It is for this reason that Vision Australia is of the view that the exceptions as those stated below, are not mindful of the nature of disability and therefore a barrier to equal opportunity for people who are blind or have low vision.'

Options for reform:

Option 1: No change.

Option 2: Repeal s. 22 and replace it with a provision that expresses similar principles based on the structure and wording used in the *DDA* (Cth). A subsection should identify the factors that should be considered in assessing the three main conceptual tests. Alternatively the duty

to reasonably accommodate could be expressed in the same form as the provision used to create the duty to accommodate parental or carer responsibilities in s. 13A of the *EO Act*.

Section 23 – Reasonable terms of employment

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

> 23. Exception—reasonable terms of employment
>
> An employer may set reasonable terms or requirements of employment, or make reasonable variations to those terms or requirements, to take into account—
>
> (a) the reasonable and genuine requirements of the employment;
>
> (b) any special limitations that a person's impairment or physical features imposes on his or her capacity to undertake the employment;
>
> (c) any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment.

The rationale for this exception appears to be to enable an employer to set reasonable terms of employment or vary those terms to take into account the requirements of employment or any special limits of an employee or job applicant. Sub-paragraph 23(a) permits a limitation on the freedom from discrimination to ensure that the genuine requirements of employment can be met. The nature and extent of the limitation is constrained by the requirement of reasonableness and that it be associated with the genuine occupational requirements.

Section 23 appears to have been intended to apply to impairment and physical features discrimination. However, there is nothing in the words of paragraph (a) that would limit its application only to those contexts, and it could potentially be used in relation to any attribute. The section is vague and specifies no criterion for the validity of any terms or requirements other than 'reasonable', which is not very specific, and without more could mean many different things. This provision does not make clear its underlying policy or aim. Its effect is to authorise a court to allow a contract of employment to prevail over a fundamental human rights claim (non-discrimination).

There is no equivalent to this in the *DDA* (Cth), or any other federal law, nor in NSW, SA or Tasmania. In those states and territories which have an equivalent provision, it is applicable only to disability discrimination, and has provisions similar to paragraphs (b) and (c) but nothing equivalent to paragraph (a): see WA s. 66Q(2), Qld s. 34, ACT s. 49(2) and NT s. 35(1)(a).

If it is retained, some clearer criterion should be identified and a standard set that provides more guidance for courts and parties, so that is does not undermine protection against disability discrimination. This could be done by importing the factors from s. 7(2) explicitly as relevant to the reasonableness of the terms and requirements set. The provision appears to be directed towards the genuine or inherent requirements of the job in the same way as s. 22, and could be subsumed into a re-worded version of s. 22.

VCAT has held that the exceptions in paragraphs (b) and (c) can only be sued to limit the terms and requirements of the employment for the assistance of a person with a disability. However this is not apparent on the face of the legislation. The VEOHRC commented:

> The interpretation this exception was given in *Davies* has also had the effect of constraining the limitation it gives rise to. In relation to the examination of the reasonableness of employment requirements the genuine occupational requirements as a whole must be analysed not just a person's inability to perform one requirement when a respondent seeks to rely upon this exception.
>
> In relation to sub-paragraph 23(b) the VCAT in *Davies* stated that this provision was directed to enabling an employer to make positive adjustments to the duties of employment to accommodate a particular individual's impairment or physical features and it is not directed to permitting an employer to exclude such an individual because of their incapacity to perform the duties of employment because of their impairment or physical features.
>
> In relation to sub-paragraph 23(c) *Davies* established that it enables an employer to make reasonable adjustments to the terms of employment to accommodate a particular individual with an impairment or physical features but it does not protect terms that would exclude such a person from the employer's workforce.
>
> This exception recognises that employers should be able to set or vary reasonable terms or requirements of employment which is an important purpose in a competitive market economy. The provision seeks to balance the reality of employment requirements and the recognition that such requirements may be varied to take into account the requirements of the employment or a person's circumstances arising from their disability. Therefore the limitation is reasonable, rational and proportionate to the purpose.
>
> There are no less restrictive means to achieve the purpose of this exception; as such the limitation the exception places on the right to effective protection from discrimination is reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.
>
> The Commission notes that the natural reading of this exception can cause some uncertainty as to whether the paragraphs (a)-(c) are conjunctive or disjunctive. Specifically, whether the provision permits an employer to set reasonable terms or requirements of employment or make reasonable variations to them, when all those factors are present in section 23 or just one. Whilst *Davies* noted that the sub-paragraphs are disjunctive this is not clear on the face of the provision and can cause some uncertainty about the capacity of an employer to set genuine and reasonable requirements generally and when this aspect of the exception may be relied upon.
>
> Similarly to the Commission's view in relation to section 22 the language in sub-paragraphs 23(b) and (c) require modernising. Any amendments to this provision should ensure that they do not permit employers to transfer the costs of reasonable adjustments to an employee by varying their terms and conditions of employment in a detrimental way and thereby significantly negating the notion of reasonable adjustments. Variations which have such an effect could not be considered reasonable and should not be protected by the exception.

In a later submission the VEOHRC recommended that s. 23 be amended similarly to s. 22 to use the more progressive term 'reasonable adjustments' and to clarify that the three provisions are to be read

disjunctively, and that paragraphs (b) and (c) are directed at enabling an employer to make positive adjustments to the duties of an employee or terms of employment to accommodate a particular individual's impairment or physical features, not at permitting an employer to exclude such an individual because of their incapacity to perform the duties of employment because of their impairment or physical features. It concluded that the policy underlying these paragraphs should be reconsidered in the context of formulation of an express reasonable adjustments obligation.

Since the decision in *Davies'* case is not reported, it is not a sound basis for relying on a positive interpretation of this provision, and consideration should be given to imposing explicit conditions that any such terms or requirements are to be set to accommodate but not to exclude a person with an impairment or physical feature from the position.

In relation to paragraph (a) it would be necessary to consider whether an exception to protect the setting of reasonable terms or requirements of employment in relation to any attributes is either necessary or desirable within *the EO Act*. For example should the exception, if retained, provide that any term or requirement amounting to indirect discrimination would not be reasonable? Would any such broad limitation of the right to equality and freedom from discrimination be reasonable or justified within s. 7(2) of the *Charter*?

Job Watch commented that the exception should be substantially retained but that it should be reformulated. It operates to limit the scope of *the EO Act*, however it is apparent that there are circumstances where this is necessary, just and reasonable so as to ensure the fair and practical application of the Act and so this exception may be seen as a 'reasonable limitation" under the *Charter*.

Job Watch suggested that this exception could be used as the basis for a general 'inherent requirements" exception for the area of employment as discussed above (see s. 19). This could be done by combining paragraphs (a) and (b) into a form that provides a defence to discrimination where a person is unable to adequately perform the inherent requirements of the particular employment even after reasonable accommodation has been or would have been made, similar to the formulation in the *DDA* (Cth). The potential application of paragraph (a) to attributes other than impairment or physical features should be removed.

Finally, John Ryan highlighted the fact that while employers want the power to set reasonable terms and conditions of employment, there are often disagreements over the reasonableness of the employer's views. He suggested that if the provision is retained in its current form, a specific process could be adopted to ensure that any such terms and conditions were clearly stated and could be tested. However, it would be an unwieldy and very bureaucratic process. He suggested that the terms and conditions should only be able to be set or varied be way of application. The Act should provide that some exceptions operate by way of application, and s. 23 would be one of them.[39] Such

[39] The employer seeking to use this exception should be required to make an application to the Commission specifying the 'reasonable terms and conditions' which the employer intends to impose and the grounds for requiring the 'reasonable terms and conditions'. The applicant should be required to advise persons affected by the exception of the application and its details, and all applications should be available to the public and easily accessible. The lodgement of the application with the Commission should activate the exception. Any person affected by the exception or with an interest in the exception should be permitted at any time the exception is in operation to lodge an objection to the operation of the exception. If a challenge was brought, the matter of the application and objection should be dealt with by the Tribunal with the applicant being required to bear the onus of proof in relation to the exception. The Tribunal should have the power to confirm, vary or terminate the exception.

a procedure allows exceptions to operate in less clear areas but gives persons who would be subject to discrimination a real opportunity to challenge the exception, and is very different from a complaint process.

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** That the substance of this exception be retained, but that it be amended. Paragraphs (a) and (b) should be combined to provide for an exception where the person could not carry out the inherent requirements of the job based on the model of s. 35(1)(a) of the NT Act or s. 34 of the Qld Act.
>
> The language in sub-paragraphs 23(b) and (c) should be modernised similar to s. 22.

Section 24 – Standards of dress and behaviour

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

> 24. Exception—standards of dress and behaviour
>
> An employer may set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.

The purpose for this exception is to strike a balance between the right of an employer to regulate, within reasonable limits, the conduct and appearance of his or her staff with the right of employees not to be subject to unreasonable requirements as to appearance, dress and conduct. It contains a very important safeguard in that the standards set and enforced by the employer have to be reasonable in the circumstances of the employment.

However this provision has no equivalent in any other Australian legislation. The only provision that has any similar effect is s. 29(4) of the *EO Act* (SA) which provides that:

> it is not discrimination on the ground of sexuality where:
>
> (a) a person discriminates against another on the basis of appearance or dress;
>
> (b) that appearance or dress is characteristic of, or an expression of, that other person's sexuality; but
>
> (c) the discrimination is reasonable in all the circumstances

That provision is much narrower than s. 24 as it is confined only to the ground of sexuality and only where the appearance or dress is characteristic of the person's sexuality. By contrast, s. 24 purports to give employers authority to set reasonable standards of dress and appearance across all attributes and in respect of all dress and appearance, and in respect of behaviour as well. Despite the presence of the reasonableness qualification, the breadth of expression in s. 24 is such that an employer may try to extend their standards very broadly into these areas.

The reason that there are so few exceptions of this type is that the ability of an employer to set reasonable terms and conditions of employment exists at common law, and does not need to be reinforced by the *EO Act*. Job Watch recommended that this provision be repealed because it is unnecessary and inappropriate:

> This exception does not pertain to any protected attribute and does not fit within the concept of discrimination contained within the Act or deal in any way with matters that are relevant to its operation. Rather, it merely confirms an employer's common law right to set reasonable terms and conditions of employment.
>
> In relation to the *Charter*, it could be argued that this exception may impinge upon the right to freedom of opinion and expression and/or similar rights but it is difficult to imagine any employment context where the exception could be seen as unreasonable.
>
> Nevertheless, the Act aims to eliminate discrimination and promote equal opportunity. It is therefore not an appropriate vehicle to use to codify an aspect of managerial prerogative regardless of whether the exception may be a 'reasonable limitation' under the *Charter*.

Several submissions expressed support for s. 24.[40] Live Performance Australia (formerly the Australian Entertainment Industry Association), the peak body for the live entertainment and performing arts industry in Australia and an employer association, supported the retention of s. 24, as it:

> complements and expands upon Section 17, in that once a person of the 'right look' is found the employer needs to be able to set and enforce a standard of appearance for the duration of the project. This also ensures artistic consistency when a role is being created or portrayed by more than one person. For the purposes of ensuring dancers maintain their level of fitness, there may be a clause in their contract stating they remain within a percentage of their audition weight for example. … More broadly, we support the right of employers to enforce appearance standards in roles of service such as cinema staff, ushers, ticket staff and members of orchestras for aesthetic reasons and uniformity.

While these issues are of legitimate concern to employers, they do not raise issues of discrimination, and they can be adequately handled within the scope of management power to set reasonable terms and conditions of employment. Without more information on what, if any, discrimination concerns may have arisen in relation to employee dress and appearance, or behaviours, and why this exemption was needed to resolve these issues rather than simply employment law, it is difficult to see that there is any necessity to retain s. 24.

Clubs Victoria supported s. 24 as it also has an interest in ensuring that staff maintain good appearance, but it expressed some concerns about how s. 24 was expressed and the variety of terms used in the exception:

> Section 24 allows employers to enforce *reasonable* standards of dress, appearance and behaviour. Although enforcement of these standards and requirements can often reinforce disadvantage of persons with protected attributes, the necessity to prove reasonableness operates to modify the limitation so as to ensure that the limitation acts fairly to all concerned.

[40] Association of Independent Schools Victoria also supported s. 24 as a reasonable provision.

> Employers often find it difficult to interpret the criterion of *reasonableness*, and ClubsVIC would recommend that more literature and training be made available to employers to properly understand how the criterion works both in specific limitations (eg ss 22, 23, 24) and in respect of indirect discrimination under section 9 of the Act.
>
> Section 25 also affects clubs, [and uses the words genuine, rational and necessary]… However, it is difficult for employers to understand the differences between *reasonable, necessary, genuine, rational* etc. ClubsVIC recommends that the Act adopt consistent language and where a different standard is required that this different standard be highlighted.

There may well be dispute over what standards are reasonable under s. 24. John Ryan saw this as the biggest problem with the provision, as with ss. 22 and 23, and he recommended that for this reason it should be available only by application.

Many areas of importance are potentially affected by s. 24. The VEOHRC commented on the areas in which this exception has relevance:

> 'Typically the exception is relied upon in the context of aesthetics as marketing imperatives but is also relied upon in relation to health and safety. … This exception may potentially engage with the following rights: a person may be restricted from demonstrating their religious beliefs through restrictions on dress and conduct (s14) and bodily privacy as the provision may enable control of physical appearance (s13) or a person may be denied the opportunity to freely express themselves through dress/conduct (s15) or prohibited from enjoying cultural practices (s19).

Disability Discrimination Legal Service and Blind Citizens Australia pointed out that it effectively sets up a subjective standard that can allow prejudices to have effect. PILCH Homeless Persons Legal Clinic commented on the prejudice experienced by homeless people who may well not be able to clothe or present themselves as required by employer; this would need attention if homelessness is adopted as an attribute covered by *the EO Act*.

Several submissions pointed out the potentially discriminatory uses of this provision. The Sikh Interfaith Council expressed concern over the fact that elements of Sikh clothing which are required by the religion, such as a turban or the kirpan, a ceremonial dagger which must be carried, might be affected by s. 24. There is potential for it to be used in cases concerning Muslim headscarves and other forms of religious dress as well, and the provision gives no guidance on what criteria can be used to assess 'reasonableness.'

Among the areas identified by the VEOHRC, marketing imperatives are the business of the employment contract, not discrimination law. Aesthetics would (or should) be covered already by the genuine occupational requirements provision of s. 17. Occupational and public health and safety requirements should be the business of the relevant pieces of legislation, not of the *EO Act*. The need for a provision that preserves the operation of occupational health and safety requirements is discussed below in the context of s. 69.

Finally, there is case law on the question of employers insisting on uniforms that exploit employee sexuality, such as short skirts. The existing precedent suggests that exploitation of women's sexuality

at work is not sex discrimination.[41] There is a strong argument that the decision in that case was wrong.[42] If the provision is retained, then protection for employees from such exploitation should be included.

Options for reform:

Option 1: No change.

Option 2: Repeal s. 24.

Option 3: If a provision is to be retained, replace s. 24 with a provision to the same effect as s. 29(4) of the EOA (SA).

Option 4: Add a provision that it is discrimination to require an employee to wear skimpy or revealing clothing unless it is an inherent requirement of the particular employment.

Section 25 – Care of Children

Section 25 allows an employer to discriminate against prospective and existing employees where an employment position involves the care, instruction or supervision of children and the employer has a genuine belief with a rational basis for it that the discrimination is necessary to protect the physical, psychological or emotional well-being of children.

25. Exception—care of children

(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 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.

The purpose of this exception is to allow employers to discriminate in recruitment where the employer genuinely believes that the discrimination is necessary to protect the welfare of children and they have a rational basis for that belief to discriminate. The exception is not expressed to be directed at any particular groups in the community, as it applies to all attributes. The overriding requirement is a genuine belief the action is necessary to protect the children's well-being, with a rational basis.

This provision was supported without detailed comment by the Association of Independent Schools, which noted that the Working with Children Check (WWC) reviews only specific serious offences, and a person may still be unsuitable for a teaching position even if they pass a WWC check. In such a case, however, it is unlikely that the person will be the best person for the job, and if their employment is terminated, for the reason that leads to concern about them, that is unlikely to be discriminatory.

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41 *Zhang v Kanellos & Anor* [2005] FMCA 111.

42 Hunyor, J 'Short skirts and the Sex Discrimination Act: 'what's wrong with being sexy?' (2006) 31 *Alternative Law Journal* 15.

Section 25 was also supported by VACC, which noted that its members often took young people on for work experience.

Several arguments were put forward as to why this provision should be repealed or amended. First, it was said, it has no work to do. The VEOHRC noted that its:

> 'primary objection to section 25 is that it is entirely superfluous. If anyone who is the subject of any type of discrimination complaint can demonstrate their actions were based on a real need to protect children their conduct will not be unlawful. The Commission would find that the complaint lacked substance or was misconceived, whilst VCAT would find that the complaint was not proved. This outcome is completely independent of section 25 and would be reached in its absence [because of] … a respondent showing that there was a non-discriminatory reason for their actions or decision. Section 25 is essentially anomalous and not required.'

If the employer does have a rational basis to fear harm to children's well-being, then that rational basis will be the basis for the decision, and not the prohibited attribute, so a discrimination claim would not succeed. Acting to protect children when there is a rational basis for it is quite lawful. This argument was put in another way, by saying that the provision suggests that the mere fact of having an attribute could be sufficient to put children at risk. It suggests that an employer may rationally and genuinely believe that discrimination on the basis of a prohibited attribute is necessary to protect children from harm. But 'If there is any risk from black people, men, Christians, Muslims, etc, then it must come from some other feature of the person involved.'[43] The same is true for homosexuals: unless we conclude that all homosexuals are a risk to children, the risk of harm must come from a feature other than homosexuality, which would then be a non-discriminatory basis for acting.

The LIV recognised:

> 'the paramount importance of the safety of children. We are concerned however that this exception is too broad and may reinforce discriminatory stereotypes relating to particular attributes and the emotional well-being of children. This concern may be particularly relevant for discrimination on the basis of sexual orientation, gender identity, physical features, sex and impairment, though is not limited to these attributes. We note that s25 provides there must be a 'rational basis' for the employer's genuine belief that discrimination is necessary to protect the physical, psychological or emotional well-being of children. The LIV submits that this is not clearly defined and may be used to justify a particular prejudice.'

Second, it was pointed out that since this provision was adopted in 1995, two further protective systems have been adopted to safeguard children in educational and other settings. The first is teacher registration through the Victorian Institute of Teaching, and the second is the system of Working with Children Checks under the *Working with Children Act 2005* (Vic). It was argued that these operate to provide significant protection so that there is little space left for anything s. 25 can do. However, as the Association of Independent Schools noted, the WWC system looks only for specific criminal convictions, and a person without a conviction could nevertheless be a potential threat to children's well-being. Another difference acknowledged by the Law Institute of Victoria was 'a key difference between the exception and the WWC … that the exception for the care of children also covers protection of the psychological and emotional well-being of children.' But it remains the

[43] Kristen Walker, Legal opinion [39]-[40], attachment to Victorian Independent Education Union submission.

case that the reason that exists to fear that a person might harm children's well-being is likely to take the case out of the category in which the attribute is a substantial factor in decision-making.

The terms used in the section are not consistent with terms used in the remainder of *the EO Act*, and the standard of a 'rational' basis for the belief is vague and too low a threshold. The DDLS noted that the criterion of genuine belief:

> 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.

The Victorian Gay and Lesbian Rights Lobby expressed their concern about the provision, especially as it suggested that gay people could be inherently dangerous to children. The Ministerial Advisory Committee on GLBTI Health and Wellbeing also expressed serious concern about this provision. For example, it could permit discrimination on the basis of facial markings that the employer might fear could frighten children. They added:

> There is evidence that lesbian teachers have been discriminated against and lost their jobs. In 2005 one lesbian was dismissed from a Victorian school when it became aware she had a same sex partner. This was on the basis of a complaint from a parent and assumed adverse consequences on the students in her care.

Clubs Victoria commented on the difficulty of applying standards in ss. 24 and 25 when the terms vary and their intended meaning is far from clear. Employers often find it difficult to interpret the criterion of reasonableness, and ClubsVIC would recommend that more literature and training be made available to employers to properly understand how the criterion works both in specific limitations (eg ss. 22, 23, 24) and in respect of indirect discrimination under s. 9 of *the EO Act*. It noted that s. 25 also affects clubs, as does the *Working with Children Act 2005*, because many clubs provide services that involve the care, instruction and supervision of children, for example in coaching, organisation of sport, presentation nights etc.. Section 25 uses the words 'genuine', 'rational' and 'necessary', and:

> In section 25 the employer must form a *genuine* belief (which belief has a *rational basis*) that the limitation is *necessary*. All these qualifications to the limitation restrict its practical affect to circumstances where the limitation is probably appropriate. However, it is difficult for employers to understand the differences between *reasonable, necessary, genuine, rational* etc. ClubsVIC recommends that *the EO Act* adopt consistent language and where a different standard is required that this different standard be highlighted. .

Job Watch commented that this exception undermined the objectives of *the EO Act*:

> and effectively undermines its integrity and effectiveness by inferring that oblique criteria based on non-specified attributes are an acceptable basis for discrimination.

> When considering this exception, it is important to note that it allows an employer to discriminate against a person on the basis of a belief which is rational and genuinely held. 'Rational' is not defined in the Act. Accordingly, 'rational' does not necessarily mean valid, objective, sound, defensible or reasonable. Therefore, in reliance on this exception, a person could lawfully discriminate against a person or group of persons on the basis of ignorance, dislike, or intolerance if these sentiments were based on genuine and rational considerations. …
>
> As with a number of the exceptions discussed in this paper, if particular employees are not appropriate for particular positions, employers are not required to employ them, provided that the reason for their being denied employment is not based on an attribute.

Job Watch also argued that repeal of this provision would not limit a parent's rights:

> to entrust his or her child to a particular person or for a school to employ instructors with particular religious beliefs. Rather, it requires employers to treat all prospective and existing employees in a manner that is not based on what would otherwise be discriminatory criteria and restricts them to logical assessment of criteria which are relevant to the job.
>
> The Act is therefore an inappropriate instrument for restricting employment relating to the care, instruction and supervision of children. If an employee poses a risk to the health or well-being of children, the appropriate mechanisms to use are founded in thorough recruitment and screening processes, workplace policies and industrial relations or subject specific legislation.
>
> From the perspective of the *Charter*, this exemption is both unnecessary and unjustified and so cannot be seen as a 'reasonable limitation' on human rights.

Provisions in other jurisdictions

There a quite a range of variation in the provisions relating to employment in child care around Australia. Section 35 of the *SDA* (Cth) allows discrimination based on sex or marital status in relation to work that involves child care in the home. WA and ACT laws have similar provisions. None of the other federal laws has any provision like s. 25. NT (s. 37) and Tasmania (s. 50) both have provisions quite similar to s. 25, but they apply only to discrimination on the basis of irrelevant criminal record and require the intervention to be 'reasonably necessary' to protect the physical psychological or emotional well-being of the child. The NT provision protects 'vulnerable people, which includes the elderly and people with an intellectual disability or mental illness.' Neither NSW nor SA has any such provision. Finally, Qld has a provision similar to s. 25, although it applies only to the grounds of lawful sexual activity or gender identity, but it does include a test of 'reasonably necessary' to protect the children's well-being. Thus s. 25 is the broadest exception in the country, and the only one to rest on an undefined test of 'genuine' and 'rational' rather than 'reasonably necessary'.

Support for the repeal of s. 25 was expressed by the Law Institute, Job Watch, the VEOHRC, the DDLS and the Federation of Community Legal Services. If it is to be retained, then it should be much more carefully circumscribed to ensure that it does not suggest a licence to give effect to prejudice. This can be done by requiring an objective basis for the concern that leads to action through a test of reasonable necessity.

Options for reform:

Option 1: No change.

Option 2: Repeal s. 25.

Option 3: Amend s. 25 to require that any person relying on it must show that their action was reasonably necessary to protect the child(ren). This would add an objective test.

Option 4: In addition, this ground could be expressly limited to the attribute of 'irrelevant criminal record' as it is in NT and Tasmania, and protection could be extended to the wider group referred to in the NT provision.

Section 26 – Compulsory retirement of judicial officers

The purpose of this section is to make clear that statutory provisions which provide for a compulsory retirement age for judicial officers are not unlawful age discrimination.

> 26. Exception—compulsory retirement of judicial officers
>
> Nothing in this Division applies to the compulsory retirement on the basis of age of, or the failure to appoint a person on the basis of age as—
>
> (a) a judge of the Supreme Court or the County Court; or
>
> (b) a magistrate or bail justice.

The policy rationale for this provision is to ensure that the judiciary is competent and able to adequately perform their judicial functions and that the public maintain confidence in the judiciary. This is an important purpose also recognised by the right to a fair hearing by a competent judiciary in s. 24(1) of the *Charter*. Another policy served by s. 26 is to promote diversity of appointments to the bench by ensuring places become vacant. But compulsory retirement is not the way to promote diversity in judicial appointments.

Compulsory retirement exceptions sit uneasily with the *EO Act*'s prohibition on age discrimination in employment. Competence to continue in a job should be tested directly, rather than using age as a proxy. The VEOHRC's view is that compulsory retirement ages are an unjustified proxy for competency and are arbitrary as the underlying objective is usually able to be realised in a manner less restrictive on human rights. Compulsory retirement has been unlawful in Victoria since 1997. Not even the federal *Age Discrimination Act 2004* provides an exemption for compulsory retirement ages. As a result, this provision cannot be seen as a reasonable limitation on rights.

This exception is limited only to the judiciary, but nevertheless gives the message that professional competency is compromised as a person ages. Such a message seems at odds with current social policy on mature age employment, recognising work and life experience, and reducing the skills shortages.

Only a few other jurisdictions have provisions like this. A provision that authorises compulsory retirement in a broader range of judicial, legal and other public employment exist in the NSW (s. 49ZX), WA (s. 66ZN(2)) and Qld (s. 106A) Acts. There is no similar provision in SA, Tasmania, NT, ACT or any of the federal laws.

In light of this the VEOHRC suggested that the Department of Justice should conduct further research and analysis into whether it is possible to adopt a less restrictive means to manage the competency of the judiciary and thereby achieve the objective of a competent judiciary in which the public have confidence in a manner that is less arbitrary. One caution is that executive assessment of the judiciary may be seen as inappropriate because it infringes the separation of governmental powers. An alternative would be to acknowledge social change leading to better health and longevity by increasing the age of retirement for judges in s. 77(4) of the *Constitution Act 1975* (Vic) to 75.

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** Repeal of this provision is desirable. If immediate repeal is not acceptable, then the Department of Justice should be encouraged to conduct further research and analysis into whether it is possible to adopt a less restrictive means to manage the competency of the judiciary so as to permit the removal of s. 26.

Section 27 – Youth wages

Section 27 authorises lower pay rates for workers aged under 21.

> 27. Exception—youth wages
>
> An employer may pay an employee who is under the age of 21 years according to the employee's age.

The purpose of this exception is to permit the payment of youth wages, so an employer can pay an employee under the age of 21 according to that employee's age without infringing the prohibition on age discrimination. This exception may promote the employment of young people and/or enable an employer to make an economic decision about how much it is willing to pay an employee to perform a particular role.

When this exception was enacted, the Government agreed that skill and competency should be the basis for fixing wages and not age. However, youth wages were made exempt from the operation of *the EO Act* until a suitable skills and experience based replacement became available. That has been slow to come.

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

Subject to the provisions of federal industrial relations legislation, the Commission is of the view that once a person has attained adulthood, their age is not an appropriate basis on which to be

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

VACC supported this provision, noting that many of its members were small businesses of up to 10 employees, and surveys of their members indicate that up to 80% employ juniors. Pay rates and age levels are often a key factor in employment decision-making. Changing this provision may affect their ability to act as an entry point for young people to the workforce.

Several submissions expressed disquiet at the continuation of this provision. It was regarded as unfair to make wage rates rest on age rather than competence. So a genuine trainee wage may be defensible where that employee was not as valuable to the employer as a fully productive worker. But where a worker is trained it was seen as unacceptable to pay that worker less for work of equal value just because they are young.

The rationale for junior rates has rested on the claim that there is a need to pay lower wages because junior employees lack the work skills and productivity of older employees. But even on this rationale, once a junior employee has established their capacity to work and to work at the same level of output as an adult employee performing the same work then the rationale for junior rates of pay ceases to exist.

Section 27 has, however, little influence, because the payment of youth wages is authorised by Commonwealth legislation, the *Workplace Relations Act 1996*. This means that youth wages can be lawfully paid regardless of s. 27, because the WRA would prevail in accordance with section 109 of the Constitution or alternatively, in reliance on the statutory authority exception of the *EO Act*, s. 69, until that section is repealed. The *EO Act* may only be relevant to State Government employment.

Provisions similar to s. 27 that authorise lower wages for those under 21 appear in Qld (s. 33), the *ADA* (Cth) (s. 25) and ACT (s. 57B), with the additional qualification that it must be permitted by an award under the *Workplace Relations Act 1996* (Cth). Tasmania's provision is wider in authorising age based rates of pay without the limitations to ages under 21 only. There is no equivalent in NSW, SA, WA or NT, although there may be no need for it because those jurisdictions may rely on the *Workplace Relations Act* instead.

Fernanda Dahlstrom submitted that the exception for youth wages should be repealed: 'The placing of commercial profits ahead of the prevention of discrimination against young persons in Victoria is inconsistent with the Objectives set out in Section 3 of the Act'.

Paying young people less for the same work is not compatible with respect for equality. Whatever the microeconomic arguments that increasing youth wages will decrease access to work, as it will be given instead to more experienced older workers if they are paid the same rates, the human rights analysis of youth wages required by the *Charter* makes it unambiguously clear that an exception for youth wages is unacceptable. A genuine trainee wage may be acceptable, but it would have to be based on the skill and experience of the particular employee.

Options for reform:

Option 1: No change.

Option 2: That consideration be given to amending s. 27 to provide for the operation of genuine trainee wages, without any reference to chronological age.

Section 27A – Early retirement schemes

This exception provides that an employer may take age of an employee into account, together with that employee's eligibility to receive a superannuation retirement benefit, in deciding the terms on which to offer an employee an incentive to resign or retire.

> 27A. Exception—early retirement schemes
>
> (1) In deciding the terms on which to offer an employee an incentive to resign or retire, an employer may take into account the age of the employee and any eligibility of the employee to receive a retirement benefit from a superannuation fund.
>
> (2) Subsection (1) applies, and is deemed always to have applied, to anything done by an employer on or after 1 January 1996.

The VEOHRC explained the reasons for this provision:

> This exception was introduced in 1996 shortly after the *EO Act* was enacted to clarify the Government's intention in relation to the impact of the *EO Act* on voluntary early retirement schemes. Before then public sector had been authorised to offer voluntary early retirement payments to employees to facilitate restructuring of the public sector to achieve more efficient service delivery. These early retirement schemes involved the offer of different payments to employees depending on whether they are eligible to access retirement benefits from their superannuation fund.
>
> The underlying policy of this provision is that it is reasonable to provide greater incentive to forego future employment to employees who (because of their age) do not have access to superannuation retirement benefits than it is to employees who have access to these benefits. The effect of this provision therefore is that it potentially excludes older workers from Voluntary Departure Package schemes and/or permits reduction in benefits. The Commission questions whether such economic considerations are so pressing as to justify this limitation and recommends that the Department conduct more research and analysis into this.

Job Watch commented that s. 27A:

> 'is inconsistent with the objects of the Act and serves to entrench rather than eliminate the increasingly reported problem of age discrimination. … If an employer wishes to reduce the size of its workforce, it should follow a proper process using objectively sound and defensible criteria to select candidates, in accordance with the relevant industrial law. Given that this exception allows employers to use age selectively when deciding to which employees they should offer an incentive to finish work, it may act as an illegitimate substitute for a fair disciplinary process, appearing to permit selective and targeted offering of the incentive. Job Watch submits that exceptions permitting age discrimination in the area of employment cannot

be justified and, in the context of early retirement schemes, are unnecessary where industrial laws are better placed to deal with issues such as termination, workplace change and redundancy. On this view, this exception cannot be seen as setting 'reasonable limitations' under the *Charter*.

This provision may not be a reasonable limitation under the *Charter*, given its impact on older workers who may have access to superannuation benefits and may therefore be offered less by way of redundancy. Its justification may depend on the type of superannuation scheme involved. This is not a generally applicable reasonable justification for the age discrimination involved.

Options for reform:

Option 1: No change

Option 2: The Committee recommends the Department undertake more research and analysis on the social and economic considerations relevant to this exception and whether they are sufficient to justify such a limitation.

Option 3: This provision could be amended to expire after five years except in relation to those people whose superannuation schemes include specific types of age-related benefits.

Section 27B – Gender identity

Section 27B applies only to the attribute of gender identity, and provides that an employer may discriminate against applicants and employees on that basis where:

- the person does not give the employer adequate notice of the person's gender identity or
- the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

27B. Exception—gender identity

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

(a) the person does not give the employer adequate notice of the person's gender identity; or

(b) the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

(2) In determining whether or not it is unreasonable for the employer not to discriminate against the person, all relevant facts and circumstances must be considered, including—

(a) the cost to the employer of not discriminating;

(b) the feasibility of the employer not discriminating;

(c) the financial impact on the employer of not discriminating;

(d) the financial circumstances of the employer;

(e) the impact of the proposed discrimination on the person;

(f) any other relevant factors.

This provision was introduced in 2000 when the gender identity provisions of *the EO Act* were adopted. Gender identity is defined in s. 4(1) to cover transgender and intersex people as follows:

> *gender identity* means—
>
> (a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—
>
> (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
>
> (ii) by living, or seeking to live, as a member of the other sex; or
>
> (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—
>
> (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
>
> (ii) by living, or seeking to live, as a member of that sex.

Section 27B was introduced during the parliamentary passage of the *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000*. It was not in the original Bill. The Law Institute of Victoria commented on its origins:

> It is our understanding that it was not originally the Victorian Government's intention to exclude employers from these protections for transgender people, but that due to opposition from at least one Independent MP and the prospect of the Bill not being passed, the government had little choice but to introduce s. 27B.
>
> Section 27B was defended by one independent MP with the use of the example of a 'country hardware store'.[44] He referred to the drop-off in business that could result from employing a transgender person. There is no equivalent of s. 27B in NSW or Queensland and yet there is no evidence in either of those states of any economic problems for businesses as a result of employing a transgender person.
>
> Furthermore, s. 27B endorses discriminatory attitudes in society and is contrary to Australia's international obligations under Article 2 of the International Covenant on Civil and Political Rights.
>
> Since its enactment, s. 27B has not been referred to in any case law. An employer has never used it as a defence since its introduction. This section unnecessarily discriminates against transgender people and should not exist for the purpose of protecting businesses from the discriminatory attitudes of customers. Therefore it is submitted that s. 27B should be repealed in its entirety.

The LIV further considered that s. 27B 'is not a reasonable limitation to the right to equality, according to s. 7(2) of the *Charter*. We do not consider there to be a legitimate purpose to justify discrimination on the basis of gender identity and submit that the effect of the provision does not create any demonstrable benefit. Rather, it merely reinforces existing prejudices.'

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[44] Victoria, Parliamentary Hansard, Legislative Assembly, Tuesday 29 August 2000, p. 251.

Support for this provision was expressed by the Association of Independent Schools, which was concerned that there may be a need for such a provision in relation to areas of concern to it such as employment in a single sex boarding school or in sports coaching or PE teaching. However, there is no indication that this provision has been relied on in any way. Job Watch regarded it as having very narrow potential operation, since:

> it would appear that there are very few circumstances in which an employer could establish that it would be 'unreasonable in the circumstances' for them not to discriminate against a person on the ground of gender identity, as there do not appear to be many occupations in which any particular sex or gender identity is an inherent requirement. Despite this, the very existence of this exception undermines the Act's stated objective of promoting recognition and acceptance of everyone's right to equality of opportunity. Furthermore, this exception may be strongly criticised for actively contributing to, and further entrenching, the significant hardships already faced by members of the transgender community, who are amongst the most disadvantaged groups in society with respect to employment outcomes.[45]

Section 27B potentially restricts such rights of the individual as freedom of expression and the right to privacy. If there were to be any concerns about the behaviour of employees, then the exceptions for reasonable standards of dress (s. 24) and reasonable terms and conditions of employment should be adequate to cover the situation. It is not a reasonable limitation on the right to equality and should not be retained in *the EO Act*. There is no equivalent of s. 27B in any other Australian legislation, with only Queensland's provisions on protection of children (discussed above in the context of s. 25) coming anywhere near.

Two features of this exception are notable. First, sub-section (2) provides an effective model for identifying the criteria that are relevant to the making of multifactorial decisions under *the EO Act*. Second, it was pointed out by the Federation of Community Legal Services that the sexual status of transgender and intersex people is unclear in relation to other provisions of the Act such as s. 66, the competitive sports exception, and s. 28, which contrasts 'one sex' to 'both sexes' and leaves the place of intersex individuals unclear by suggesting sex is a simple dichotomy. It is not clear how intersex and transgender individuals are situated in relation to the exceptions allowing exclusion of people of the other sex in relation to (for example) welfare accommodation in s. 55.

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** This exception should be repealed.

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[45] *Enough is Enough: a report on discrimination and abuse experienced by lesbians, gay men, bisexuals and transgender people in Victoria,* Deb Dempsey, Victorian Gay and Lesbian Rights Lobby, c2000, found that 90 per cent of transgender people experienced verbal abuse, 63 per cent experienced physical threats and 20 per cent suffered physical abuse. These figures are quoted at page 254 of the 29 August 2000 Victorian Hansard debate prior to the introduction of the *Equal Opportunity (Gender Identity and Sexual Orientation Bill) 2000*.

Section 28 – Single sex accommodation

This provision empowers the Tribunal to grant an exemption to authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

> 28. Exemption—single sex accommodation
>
> The Tribunal, by granting an exemption under section 83, may authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

Since this provision does not directly result in an exception from compliance with *the EO Act*, but only in VCAT being able to authorise single sex accommodation, it has only indirect effect. Questions of reasonableness may arise, such as when it would be reasonable to expect the employer to have made the accommodation suitable for employees of both sexes, and how an intersex or transgender employee is to be treated under this provision. While VCAT would need to address these questions, the need for greater clarity about the position of transgender and intersex people in relation to the sex-based exceptions will require further consideration.

Any exemption granted would be temporary, and since VCAT will be obliged to exercise its power under s. 83 in accordance with the purpose of the Act, this exception can be regarded as a 'reasonable limitation' on the right to equality within s. 7(2) of the *Charter*.

There is no provision in other Australian legislation similar to s. 28. The jurisdictions that have exceptions for single sex accommodation mainly treat it as an example of a genuine occupational requirement: NSW s. 31(2)(f), WA s. 27(2)(f), ACT s. 34(2)(g) and *SDA* (Cth) s. 30(2)(f). In Queensland it is treated as a stand alone exception by s. 30. There is no specific provision in SA, NT, Tasmania or the other federal laws. Thus the Victorian provision is the only one that requires a tribunal decision before this exception is relied on. There has been no dissatisfaction expressed with this provision, however, and it is proposed to retain it in its current form.

Section 28 provides a useful model for allowing an exception where it is preferred that there should be supervision by VCAT of the circumstances in which it is used.

Options for reform:

> **Option 1:** No change is proposed in relation to s. 28.

Sections 30 and 31 – Establishing firms and partnerships

Sections 30 and 31 relate to establishing firms and selection of partners in firms. Where the number of partners is less than 5, then the prohibitions on discrimination by firms and partnerships do not apply to selection of partners, or in the terms on which a person is invited to join the partnership.

30. Discrimination in establishing firms

A person who intends to establish a firm comprising 5 or more partners must not discriminate against another person in the terms on which the other person is invited to become a partner.

31. Discrimination by firms

(1) This section applies to firms comprising 5 or more partners.

(2) A firm to which this section applies must not discriminate against a person—

(a) in deciding who should be invited to become a partner;

(b) in the terms on which the person is invited to become a partner.

(3) A firm to which this section applies must not discriminate against a partner of that firm—

(a) by denying or limiting access by the partner to any benefit arising from partnership in the firm;

(b) by expelling the partner from the firm;

(c) by subjecting the partner to any other detriment.

This provision is an apparent counterpart of the small business exception, though it relates to partnerships and firms (the name for the whole partnership) rather than the employer / employee relationship. This report has recommended that the small business exception be repealed. However, the situation with partnerships is different from employment. A partnership involves the sharing of legal risk by the partners and involves joint and several liability for debts. A fiduciary relationship exists between partners, which requires 'partners to make full disclosure of all material information, to act with utmost good faith in all matters concerning the partnership business, and to account for all benefits derived by use of the partnership property, name or business connection.'[46] These features make a partnership relationship quite different from an employment relationship. The selection of a new partner in a small partnership may involve undertaking joint legal risk and fiduciary duties towards the new partner. It involves a more personal level of commitment and responsibility than does an employment relationship.

This may bring the relationships involved in partnerships of four or less closer to the realm of individual privacy and choice than to the public nature of a contract of employment. However, no submissions were made in relation to ss. 30 and 31 other than by the VEOHRC, which argued that limiting the prohibition of discrimination to firms of five or more partners only is an unreasonable and unjustified limitation on the right to equality. It saws the rationale for such an exception as similar to the one for small business, that of reducing regulatory and economic burden for small business, which would not be sufficient to make this exception and reasonable limitation on the right to equality.

In other Australian jurisdictions, similar provisions exist, with most excepting partnerships of five and under from the prohibitions of discrimination: SDA s. 17, NSW ADA, s. 10A(1), 27A(1), etc; Qld s. 16, 17; SA s. 33(1), where sexuality is the only exempted ground, and WA: s. 14, and 33. No similar exceptions exist in Tasmania, ACT or NT. Sections 30 and 31 are more limited than most of these provisions, because they cover only firms of four or fewer partners.

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[46] *Laws of Australia*, 4. Business organisations: 4.8. Non-corporate Organisations, Partnerships, Fiduciary Duties.

There were no other submissions on these provisions. The VEOHRC recommended removing this exception to parallel the small business exception.

Comments are sought on whether or not there is support for regarding the 'small partnerships' exceptions as reasonable limitations on the right to equality.

Options for reform:

> **Option 1:** No change is proposed to these provisions at this stage.

Section 32 – Special services and facilities

Section 32 is similar to s. 22, but applies in relation to partnerships or firms rather than employment relationships. A firm, or a person intending to establish a firm may discriminate on the basis of impairment in relation to the admission of a partner where that person would require special services or facilities to perform the genuine and reasonable requirements of partnership and it is not reasonable in the circumstances for those services and facilities to be provided, or even if the special services or facilities were provided, the person could not adequately perform the genuine and reasonable requirements of the partnership.

> 32. Exception—special services or facilities
>
> (1) A firm, or a person intending to establish a firm, may discriminate against a person seeking admission to the firm as a partner or against a partner in the firm on the basis of impairment if—
>
> (a) in order to perform the genuine and reasonable requirements of partnership in the firm—
>
> (i) the person or partner 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 or partner cannot or could not adequately perform the genuine and reasonable requirements of partnership in the firm 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 partnership, all relevant factors and circumstances must be considered, including—
>
> (a) the person's training, qualifications and experience;
>
> (b) the person's current performance as a partner, if applicable.

Section 32 is the equivalent of s. 22, but in the context of admission to partnerships rather than selection for employment. The only attribute excepted is impairment. The discussion of the need to modernise and update the wording of s. 22 is equally applicable to s. 32. This would require that it be re-worded so as to make express the implicit duty to make reasonable adjustments and its limits in the concept of unjustifiable hardship. The concept of the 'genuine and reasonable requirements of partnership' could be retained or could be amended to the 'inherent requirements' of the partnership. The 'genuine and reasonable' requirements focuses attention on whether the requirements are

genuinely required for the position and it is reasonable to ask for them, whereas the concept of 'inherent requirements' focuses attention on the specific work and what are its essential elements. If both must be considered in relation to the specific role proposed in the partnership, there may be little difference between them except a difference of emphasis. Comments are sought on the advantages and disadvantages of either formulation.

Among the reasons for amending s. 32 to correspond with s. 22 are to modernise the language of *the EO Act* and harmonise it with the *DDA* (Cth), to make the obligations of an employer or a partnership clear (regarding the implicit duty to make reasonable adjustments and its limits), and to ensure that it would be regarded as a reasonable limitation on the right to equality.

Options for reform:

> **Option 1:** No change
>
> **Option 2:** Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to s. 22.
>
> Comments are sought on whether there are any advantages in retaining the reference to 'genuine and reasonable requirements' of the partnership rather than adopting 'inherent requirements'.

Section 33 – Reasonable terms of partnership

Section 33 is similar to s. 23, but in relation to partnerships and firms. Section 33 allows a firm, or a person intending to establish a firm, to set reasonable terms or requirements of partnership and vary those terms or requirements, to take into account the reasonable and genuine requirements of the partnership, any special limitations that a person's impairment or physical features imposes on their capacity to undertake the obligations of partnership or any special services or facilities that are to enable him or her to undertake those obligations or to facilitate the performance of those obligations.

> 33. Exception—reasonable terms of partnership
>
> A firm, or a person intending to establish a firm, may set reasonable terms or requirements of partnership, or make reasonable variations to those terms or requirements, to take into account—
>
> (a) the reasonable and genuine requirements of partnership in the firm;
>
> (b) any special limitations that a person's impairment or physical features imposes on his or her capacity to undertake the obligations of partnership in the firm;
>
> (c) any special services or facilities that are required to enable him or her to undertake those obligations or to facilitate the performance of those obligations.

Section 33 is the equivalent of s. 23, but in the context of admission to partnerships rather than selection for employment. The only attribute excepted is impairment. It allows a firm or person intending to establish a firm to set reasonable terms of partnership or make variations to those terms to take into account any requirements of the partnership or any special limitations a partner or prospective partner may have.

The same comments apply to s. 33 and to s. 23. In particular, although it is implicit that s. 33(a) should apply only in the context of impairment discrimination, this is not explicit in the provision, and it could be given a broader effect if read literally. It should be limited only to impairment matters. There is the same need as for s. 23 and s. 32 to modernise the language and preferably harmonise it with the language of the *DDA* (Cth), to ensure that the implicit duty to make reasonable adjustments is clear, along with its limit in the notion of unjustifiable hardship, and to ensure that the provision is a reasonable limitation on the right to equality and therefore compatible with the *Charter* equality right.

As with s. 32, consideration should be given to whether the terminology of 'genuine and reasonable requirements of the partnership' should be retained or whether it would be preferable to move to the 'inherent requirements' of the partnership.

Similar provisions can be found in all Australian laws, mostly in the form of a general exception for impairment discrimination at work, except that of SA, NT, Tasmania and the federal RDA, SDA and ADA. Definitions of the concept of unjustifiable hardship in terms of relevant factors to consider can be found in s. 11 of the *DDA* (Cth), s. 49C NSW (similar to the DDA definition) and s. 5 of the Qld Act, and a similar list of relevant factors should be adopted in Victoria.

Options for reform:

> **Option 1:** No change.
>
> **Option 2:** Amend to modernise language to refer to reasonable adjustments in similar terms to the changes to sections 23 and 32. A definition of 'unjustifiable hardship' in the form of a list of relevant factors should be adopted as well.

Section 36 – Reasonable terms of qualification

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

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

A qualifying body is defined in s. 4(1):

> 'qualifying body' means a person or body that is empowered to confer, renew or extend an occupational qualification;

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

Most other jurisdictions do not have a specific exception in these terms, although their general impairment at work exceptions may apply.

This provisions should be updated in the same way as ss. 23 and 33 in order to ensure it has the same compatibility with the *Charter*.

Options for reform:

Option 1: No change

Option 2: Amend s. 36 to modernise its language to refer to reasonable adjustments similarly to the recommendations in relation to ss. 23 and 33.

2 – Exceptions to discrimination in education

Section 38 – Educational institutions for particular groups

Section 38 allows schools to be run for particular groups identified on the basis of sex, race, religious belief, age or age group or general or particular impairment, by empowering the schools to exclude students who are not from the group the school is for.

> 38. Exception—educational institutions for particular groups
>
> An educational authority that operates an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment may exclude—
>
> (a) people who are not of the particular sex, race, religious belief, age or age group; or
>
> (b) people who do not have a general, or the particular, impairment—
>
> from that institution or program.

The purpose of this provision is to provide an exception for educational institutions which cater for particular groups within the community. This serves the welfare and advancement of the groups involved. In relation to many of these groups, the exception may also serve other rights:

- freedom of thought, conscience, religion and belief – where an educational institution or program has as its aims the observance, practice and teaching of a religion or belief (*Charter* s. 14);
- protection of families and children – to limit the provision of educational services to persons of particular attributes where this is in the best interests of children (*Charter* s. 17);
- protection and promotion of cultural rights - to facilitate the provision of education to persons with shared experiences, understanding and awareness where this would promote the enjoyment and practise of culture (*Charter* s. 19);

As the VEOHRC noted, it also recognises an important public preference for single sex schools which are a rational and well accepted educational strategy. For groups that are disadvantaged, this may also fall within the idea of special measures protected by the *Charter*. The exception in s. 38 is only