

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

for the exclusion of students not from that group, and does not allow any exceptions from other provision of the *EO Act*.

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 exception was supported by the Association of Independent Schools Victoria, and was noted to be of great importance to the religious schools (as noted in the discussion of s. 75(3) and 76, below). There was some concern about this provision and its impact. Professor Margaret Thornton argued that the 'inclusion of s. 38 is over-inclusive and unnecessary. ... Sections 39, 41 and 76 of the *EO Act* already deal with the particularities of impairment, religion and age.' Recognising the crucial role in education of primary and secondary schooling, Professor Thornton expressed her concern at the increasing numbers of private schools under s. 38 and the use of public funding in what could be an inequitable way:

Special schools for children with disabilities may be justifiable. However, the legitimisation of discrimination in respect of sex, race and religion is questionable. It may also disguise discrimination on the ground of class or social origin. ...

As approximately 50% of Victorian children attend private schools and there are very few single-sex public schools, and no race-based or religious public schools, the provision has the effect of immunising so-called private schools. I say 'so-called' here because such schools are now the recipients of significant public funding. As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding should be permitted to discriminate on any of the legislatively proscribed grounds unjustifiably. Furthermore, proof of the existence of non-discriminatory policies should be a precondition to the receipt of public funds. It might be noted that such a requirement is included in Title IX of the US Civil Rights Act,<sup>47</sup> a provision that Victoria would do well to emulate.

Interpretation of Title IX has led to pressure to resource programs for women on the same basis as program for men, particularly in sport, rather than to allocate women less resources and worse training and playing times. Funding practices in Australia have not so far attached any particular equality responsibilities to the receipt of education funding from the state. But the substantial and continuing expansion of private schooling and the adoption of the *Charter* may provide a basis for requiring some greater attention to equality issues from the recipients of public funding. For example, religious schools receiving funding could be asked to ensure that there is fair allocation of resources between the sexes, or to students with an impairment. On this basis, public funding should only be used for the benefit only of specific groups where there is a clear special measures rationale. This concern was expressed by the Victorian Gay and Lesbian Rights Lobby:

there may be genuine educational reasons for some educational institutions discriminating in admissions and other policies on the basis of gender, age (differentiating 'mainstream' high schools from adult educational institutions) and impairment. To be acceptable, however, they should amount to 'special measures' as in s. 8 of the *Charter*. If the option of amending the

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<sup>47</sup> Title IX of the US Civil Rights Act provides: Section 1681. Sex: (a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, ...

Act to restate that provision (as on page 37 of the Equal Opportunity Options Paper) is adopted, the exception may anyway need redrafting.

The attributes of impairment, age and religion are addressed in sections 39, 41 and 75(3) and 76 respectively. Section 39 provides a general 'special services and facilities' exception in relation to students with an impairment who may need special services or facilities that goes beyond merely admission or exclusion. Section 42 allows age based admission schemes, and may have some overlap with s. 38. Sections 75(3) and 76 allows discrimination on any attribute in any area by religious educational authorities; in practice most distinctions seem to involve religious belief, marital status, pregnancy, sexual orientation and possibly gender identity.

There are equivalent provisions in every other Australian law except the federal RDA and Age DA. However all involve more limited grounds than s. 38. In NSW, SA and WA, only sex and disability or impairment are permitted. In Qld, ACT and NT it is sex, religion and disability, while in Tasmania it is gender, age and disability. It is not clear that a school for students of one race would be acceptable in all circumstances.

### Options for reform:

**Option 1:** No legislative change is currently proposed in respect of this exception.

**Option 2:** Amend or redraft the provision.

Submissions are sought on the following questions:

- Whether there is a need for race to be retained in s. 38.
- Whether there may be a need to redraft s. 38 to comply with the special measures provision in s. 8(4) of the *Charter*, or whether other rights support s. 38 in areas that would fall outside the special measures provision (because they do not deal with disadvantaged groups).

### Section 39 – Special services or facilities

Section 39 is an equivalent to the other special services or facilities exemptions in the context of providing education to students. It allows an educational authority to discriminate against a person on the basis of impairment if special services or facilities are required in order for that person to participate in an educational program and it is not reasonable for those services or facilities to be provided.

#### 39. Exception—special services or facilities

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

- (a) in order to participate or continue to participate in, or to derive or continue to derive substantial benefit from, the educational program of the authority—
  - (i) the person requires or would require special services or facilities; and
  - (ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or

- (b) the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational program even after the provision of special services or facilities.

The purpose of this provision is to enable an educational authority to discriminate against a person on the basis of their impairment, if in order to participate or continue to participate in, or derive or continue to derive a substantial benefit from the educational program of the authority, the person requires or would require special services and facilities, but it is not reasonable for such to be provided in the circumstances.

Section 39 is not limited to admission and exclusion like s. 38, but allows discrimination in all areas covered by the prohibition of discrimination in education in s. 37, which includes the terms on which the authority admits the person as a student; denying or limiting access to any benefit provided by the authority; and subjecting the student to any other detriment.

The Disability Discrimination Legal Service noted that as currently expressed, the obligation in s. 39(b) 'not to discriminate may be discharged simply by a claim that the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational program even after the provision of special services or facilities without reference to the adequacy or quality of the special services so provided.' This is a reason why the adoption of an express duty to make reasonable accommodation is essential.

Section 39 should be amended to modernise its language in the same ways as ss. 22, 23, 32, 33 and 36. This means the adoption of an express duty to make reasonable adjustments to accommodate the person, limited by the concept of unjustifiable hardship. The idea of genuine and reasonable requirements of the job does not apply in the education context, but the provision should make clear that it applies only to students, and the test should be expressed with a reasonableness element, for example 'reasonable and substantial benefit'.

Blind Citizens Australia noted that the Disability Standards on Education are now in effect under the *DDA* (Cth) and that, as far as possible, exceptions in the *EO Act* should be aligned with the requirements of the Standards.

All other relevant state and territory legislation, and the *DDA* (Cth) contains similar provisions, except the Tasmanian Act which is drafted on a different basis (s. 46) and the NT Act which refers only to a 'special need' (s. 58).

#### Options for reform:

**Option 1:** No change.

**Option 2:** Section 39 should be amended to modernise its language consistently with that of other impairment related exceptions.

#### Section 40 – Standards of dress and behaviour

Section 40 allows an educational authority to set and enforce reasonable standards of dress, appearance and behaviour for students. A standard for appearance or behaviour must be taken to be

reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard.

40. Exception—standards of dress and behaviour

- (1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.
- (2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard.

The purpose of this exception is to enable an educational authority to set and enforce reasonable standards of dress, appearance and behaviour for students. This exception attempts to balance the competing rights of students with the need for school discipline by providing for consultation with the school community. The exception could be used to protect, but also to limit a range of different human rights protected by the *Charter*, including:

- equality rights (*Charter* s. 8);
- freedom of religion and belief (*Charter* s. 14,) including the right to demonstrate one's beliefs;
- cultural rights (*Charter* s. 19, including the rights of individuals and communities to enjoy their culture and to declare and practice their religion; and
- in some circumstances the right to express oneself freely may also be relevant (*Charter* s. 15).

The VEOHRC commented that s. 40:

is a troubling provision from both a drafting and policy perspective given the arbitrary and imprecise nature of the terminology 'take into account' and 'views of the school community'. Conceivably, the wording of s. 40 could be read as making the scenario of a school prohibiting students from wearing religious clothing or icons, (which is *prima facie* indirect discrimination on the basis of religion) lawful, if it can be demonstrated the school took the views of the school community into account.

Sub-section 40(2) provides that a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community. Some concern about s.40 focussed on the operation of sub-section (2). The WA EO Commissioner commented that s. 40(2) 'appears to surrender the setting of such standards in school to the views of the school community. If the views of the school community are in themselves unreasonable and discriminatory, and the school administration in turn adopts those views, there would appear to be little that can be done about it.'

Concern was expressed in several submissions at the potentially unsatisfactory nature of s. 40. There is nothing in the section that requires consideration of other human rights that might be limited by setting a standard. While the aim of s. 40(2) to give school communities a right to be consulted is valuable, giving that factor alone conclusive weight in establishing reasonableness is difficult to justify. Section 40 has not been considered by VCAT or the courts, and there is no equivalent in any other Australian jurisdiction.

Concerns expressed in submissions focussed on the potential of s. 40 to be used to limit forms of religious dress and also against students in minority groups such as gay and lesbian or transgender students. The Ministerial Advisory Committee on GLBTI Health and Wellbeing expressed its concern about the potential of this provision to force young people out of school, for example in its impact on transgender students. It regarded retention of this provision as undermining the significant work of the Department of Education and Early Childhood Development (DEECD) in acknowledging and addressing the real problem of homophobic bullying in schools.<sup>48</sup>

The Sikh Interfaith Council expressed its concerns about the impact of s. 40 on Sikhs who are required for religious reasons to wear specific items like a turban or the kirpan, a small, curved ornamental steel dagger carried by all initiated Sikh men. The Law Institute submission discussed case law under the UK *Human Rights Act* and the Canadian *Charter of Rights and Freedoms* in relation to whether the kirpan could be worn in schools and public places. Issues have also arisen and been decided by courts in relation to both teachers and students wearing various forms of Islamic veils in schools. The DDLS suggested that recognition of religious freedom is important, but that the rights of other students also have to be considered, so suggested that religious attire should be governed by conditions such as:

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

The Education and Training Committee ('ETC') of Parliament inquired and reported on *Dress Codes and School Uniforms in Victoria Schools*,<sup>49</sup> in 2007, recognising that some schools need additional guidance on how to ensure they meet the requirements of anti-discrimination law specifically in relation to gender and gender identity, age, physical appearance, religion, ethnicity and culture, and philosophical and conscientious objections. The Committee recommended that schools should work with the Sikh community to allow male students to carry a kirpan – a small, curved ornamental steel dagger carried by all initiated Sikh men.

The Law Institute argued that s.40 does not adequately consider the obligation not to indirectly discriminate against students by setting general policies that are neutral on their face. Since public schools, at least, would be public authorities within s.38 of the *Charter*, it would be unlawful for them to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The Law Institute thus argued that s.40 should be amended to provide that in setting and enforcing reasonable standards of dress and behaviour, an educational authority must have regard to relevant human rights.

The VEOHRC recommended that sub-section 40(2) be amended so that the views of the school community are just one relevant factor to be taken into account in considering the reasonableness of a dress and appearance standard, and that consideration be given to including other relevant factors

<sup>48</sup> See DEECD website: <http://www.education.vic.gov.au/healthwellbeing/safety/bullying/homophobia.htm>.

<sup>49</sup> Education and Training Parliamentary Committee, *Inquiry into Dress Codes and School Uniforms in Victoria Schools*, Final Report December 2007, Chapter Four.

to provide schools with necessary guidance on how to develop reasonable and balanced standards of dress and appearance.

One example might be s. 24, the equivalent provision in relation to employment, which provides:

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.

Sub-section 40(1) could be reworded to refer to standards 'that are reasonable having regard to the nature and circumstances of the school' to ensure that variations between schools are considered. Subsection (2) could be deleted altogether, or the list of factors relevant to reasonableness could expand to include:

- whether the standards could be indirectly discriminatory against any group,
- whether a standard will affect the enjoyment of any human rights and if so, whether it would be a reasonable limitation on that right, and
- the views of the school community obtained through broad consultation.

Power could be added to make regulations or produce guidelines for schools in relation to acceptable standards.

#### **Options for reform:**

**Option 1:** No change.

**Option 2:** Amend s. 40(2) to ensure a more balanced consideration of the factors relevant to determining whether an educational authority's setting of a standard of dress and appearance is objectively reasonable.

### **Section 41 – Age based admission schemes and age quotas**

Section 41 allows an educational authority to select students for an educational program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of different age groups.

#### 41. Exception—age-based admission schemes and age quotas

An educational authority may select students for an educational program on the basis of an admission scheme—

- (a) that has a minimum qualifying age; or
- (b) that imposes quotas in relation to students of different ages or age groups.

The only submission to comment on this provision was that of the VEOHRC:

The purpose for this exception appears to enable educational authorities to select children according to their age or to impose age quotas to enable children to be educated in circumstances appropriate for and commensurate to their development and learning needs.

In this way the exception facilitates the protection of children in that it promotes the best interests of the child by ensuring their learning environment is appropriate and adapted to beneficially foster their development through education.

This is an important purpose and the limitation is reasonable, rational and proportionate. There are no less restrictive means to achieve the exceptions 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.

#### Options for reform:

**Option 1:** No legislative change is proposed in respect of this exception.

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

#### Section 43 – Insurance

Section 43 allows an insurer to discriminate against another person in the terms on which an insurance policy is offered.

##### 43. Exception—insurance

(1) An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if—

- (a) the discrimination is permitted under the Sex Discrimination Act 1984 or the Disability Discrimination Act 1992 of the Commonwealth; or
- (b) the discrimination is based on—
  - (i) actuarial or statistical data on which it is reasonable for the insurer to rely; or
  - (ii) if there is no such data, on other data on which it is reasonable to rely— and is reasonable having regard to that data and any other relevant factors; or
- (c) if neither of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors.

(2) In this section—

*insurance policy* includes an annuity, a life assurance policy, an accident insurance policy and an illness insurance policy;

*insurer* means a person who is in the business of providing insurance policies.

The purpose of this exception is to provide a limited exception to the prohibition of discrimination in insurance. The Insurance Council of Australia explained the reason for this exception:

The basic principle that underpins the successful operation of insurance models is rigorous risk assessment to determine acceptability criteria and pricing for insurance policies. For