

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

instance, risk profiles for men and women, and different age groups and premiums need to be adjusted accordingly. Pursuant to the risk assessment approach, premium calculation is based on statistical and/or actuarial data to allow the insurer to appropriately reserve the future liabilities.

Lawful discrimination enables insurance to be provided to consumer on the most affordable basis. The exceptions for insurance services under the *EO Act*, *SDA* (Cth), *ADA* (Cth) and *DDA* (Cth) avoid a situation where insurers impose higher premiums on those in low risk demographics than otherwise necessary in order to cover the costs of those in high risk demographics.

Section 41 performs a legitimate and accepted role in allowing insurance to operate. However, it is expressed to cover all attributes in the *EO Act*, even though it appears that the features on which insurance risk is generally split are age, sex and impairment. It is difficult to imagine circumstances where risk could or should be split on the basis of race, family responsibilities or parental or carer responsibilities, political or religious belief or activity, sexual orientation or gender identity, or industrial activity. Use of these factors to discriminate in relation to insurance would raise serious human rights concerns, and they should not be left subject to s.41 without clear justification. Unless the need to retain the possibility of discrimination on another ground can be justified, Section 41 should be expressed to apply only to age, sex and impairment discrimination.

Section 41 is linked to the exceptions in the *DDA* (Cth) and *SDA* (Cth). The *ADA* (Cth) contains a carefully drafted similar exception in s. 37, which was adopted after the *EO Act* 1995. These exceptions all require that discrimination be based on actuarial or statistical data on which it is reasonable to rely and the discrimination is reasonable having regard to that data. A reference to the *ADA* (Cth) should be added to paragraph (1)(a). Once this is done, paragraph (1)(b) and (c) may be able to be repealed as there will be no role for them.

Equivalent provisions in all other Australian laws apply only to grounds of sex, age and impairment (NSW, SA, WA, Qld and Tas). Marital status is added in WA and Tasmania. All laws except those in ACT and NT set a higher standard than the *EO Act* because they provide that discrimination can only be based on actuarial or statistical data on which it is reasonable to rely and where the discrimination is reasonable having regard to that data. They do not allow discrimination in the situations covered by paragraphs (1)(b)(ii) or (1)(c). It appears that the standards expected for data on which insurance discrimination can be based have increased since the *EO Act* was passed, and that the higher standard is now widely accepted in Australian anti-discrimination laws.

The Public Interest Law Clearing House expressed concern about discrimination that may be difficult for the *EO Act* to reach, for example where tenants in public housing have been refused contents insurance by insurance companies because they did not have deadlocks, when this was outside their control. While this is a serious issue that should be addressed, the *EO Act* does not provide a mechanism for doing this.

Refusal of insurance may have serious consequences for individuals, so it should only be done on a basis that infringes equality rights where it is justified. The Productivity Commission, in its *Review of the Disability Discrimination Act 1992*, Report No 30, recommended that in the interests of transparency, accountability and accuracy in underwriting procedures, the data sources and 'other relevant factors' relied upon in unfavourable underwriting decisions should be explained to the insurance applicant in cases where the insurer plans to rely upon the exception. This would limit the

insurance and superannuation exception to only applying if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied). The Productivity Commission further recommended that applicants should be advised of their entitlement to request these reasons.

A provision similar to this already exists in s. 41(5) of the *Sex Discrimination Act* (and in *SA EO Act* s. 89):

- (e) if the client gives the insurer a written request for access to the data—either:
 - (i) the insurer gives the client a document containing the data; or
 - (ii) the insurer:
 - (A) makes a document containing the data available for inspection by the client at such time or times, and at such place or places, as are reasonable; and
 - (B) if the client inspects the document—allows the client to make a copy of, or take extracts from, the document.

A provision similar to this should be adopted in the *EO Act* to ensure that individuals refused on this basis are aware of the basis for the decision. This process should be amended to provide that an insurer cannot rely on the s.43 exception unless they provide a written notification of refusal that advises the person seeking insurances of their right to seek an explanation of the data sources and other factors relied on in reaching the decision (similar to s. 89 SA). A time limit should be set of the insurer to provide such an explanation if it is required.

The Insurance Council of Australia supported retention of consistency between the *EO Act* provisions and the provisions in the federal Acts. The changes proposed here would satisfy that, although the notification requirement would impose additional obligations on insurers in relation to age and impairment discrimination.

Options for reform:

Option 1: No change

Option 2: Add the *Age Discrimination Act 2004* (Cth) to the list of Acts in subsection (1)(a).

Option 3: Delete subsections (1)(b) and (1)(c).

Option 4: Add a requirement to notify people whose claims are refused on the basis of s. 43 of their right to seek an explanation of the basis for the decision.

Section 44 – Credit providers

Section 44 authorises credit providers to discriminate on the basis of age by refusing credit or in the terms on which credit is provided, as long as the criteria involved are based on data that it is reasonable for the credit provider to rely on.

44. Exception—credit providers

- (1) A credit provider may discriminate against an applicant for credit on the basis of age by refusing to provide credit, or on the terms on which credit is provided, if the criteria for refusal or the terms imposed—
 - (a) are based on—
 - (i) actuarial or statistical data on which it is reasonable for the credit provider to rely; or
 - (ii) if there is no such data, on other data on which it is reasonable to rely; and
 - (b) are reasonable having regard to that data and any other relevant factors.
- (2) In this section *credit provider* means a person who provides credit in the course of a business carried on by that person.

The exception is designed to provide a limited exception to allow age to be used as a factor in the assessment of credit worthiness in a credit provider's decision whether or not to provide credit to a person. As in section 43, age can be used as a relevant factor where there is data on which it is reasonable to rely, with preference in the first instance for actuarial or statistical data.

The VEOHRC proposed that this section should be amended to provide that where the credit provider proposed to rely upon the exception (by including age in their credit assessment process) they should be required to state their reasons for refusing credit and the information upon that refusal is based.

The VEOHRC argued that 'it is difficult to reconcile age based exceptions with section 7 of the *Charter* as they are often arbitrary, or as in this instance, a less restrictive alternative is to assess an individual applying for credit – that is on their own capacity to pay.' It suggested that 'a *Charter* consistent interpretation of this section will arguably necessitate a consideration of a person's capacity to pay in relation to considering other relevant factors' upon which a credit provider may rely to refuse credit. This should facilitate the provision being interpreted in a less restrictive manner. This could be further enhanced by credit providers providing reasons for refusing credit and the information they based the refusal upon.' The Commission proposed to ensure the provision has the least restrictive operation by adding a requirement for credit providers to state their reasons for refusing credit and show the actuarial or statistical (or other) data upon which a refusal is based. This presumably would refer to the data on the relevance of age.

The Australian Finance Conference (AFC), the national finance industry association, represents many organisations that provide credit to consumers and businesses, including finance companies, banks, building societies, motor vehicle financiers and leasing companies. It defended section 44, and explained how credit assessment is carried out by prudent lenders:

Responsible lending practices involve making appropriate assessments of risk, including a borrower's capacity to service a credit facility during its term and to repay it when required. The key factors which determine credit risk are:

Character – including age, residential and employment stability and credit history

Capacity – income from employment, investment and other sources, less liabilities and expenses

Collateral – including assets of borrowers and guarantors.

The AFC further noted that:

- age is not used alone, but as one of a number of factors used to assess creditworthiness;
- ability to pay must be substantiated by reference to criteria such as assets, income, credit history, third party security, amount and term of the loan;
- the substantive reason for asking age is to assist in establishing creditworthiness, not to simply know the age of the applicant; and
- age is empirically proven to be a very strong predictor in assessing capacity to pay.

Prudent credit assessment methods are designed to produce consistent, objective, economic-based decisions, rather than subjective value judgements. ... The exception in section 44 allows the use of credit scoring systems based on actuarial or statistical data on which it is appropriate for a lender to rely and which are reasonable having regard to other relevant factors. Such systems assist lenders in making decisions about providing credit and in imposing suitable terms. On this basis, the AFC supports the continuation of section 44 in its current form.

The AFC noted that a similar exception is in operation in the Commonwealth *Age Discrimination Act 2004*, s. 37(4), (5), NSW (ADA s. 49ZYU) and Tasmania (s. 34 ADA) anti-discrimination laws. The *Age Discrimination Act* provision is narrower than the state exceptions, allowing discrimination only where there is actuarial or statistical data on which it is reasonable to rely, not on data from other sources. There are no similar provisions in other jurisdictions. Since credit providers in Victoria must comply with the standard set by the *ADA* (Cth) anyway, it would be appropriate to harmonise the provision of the *EO Act* with the *ADA*, in the same way as the insurance provision has been harmonised in s. 43. Either s. 44 of the *EO Act* could be repealed, as the *ADA* (Cth) will govern this situation, or it could be harmonised with the *ADA*.

This exception appears most likely to be used in relation to a young person who has not yet established a credit or employment history, since age would not appear to be highly relevant once these have been established. Relying on age as a factor appears inconsistent with the right to equality and this rationale does not meet the requirements for a reasonable limit. Even providing advice to the person refused about the data that was relied on may not render it a reasonable limit on rights. An alternative to the Commission's proposal for credit providers who refuse an application on this basis to provide an explanation, could be for *the EO Act* to allow credit providers to seek authorisation from the Commission or VCAT to use specific credit assessment instruments that include age where the relevance of age is based on statistical or actuarial data.

Options for reform:

Option 1: No change.

Option 2: Amend s. 44 to permit reliance only on statistical or actuarial data on which it is reasonable to rely for the purpose involved and where the discrimination is reasonable having regard to that data.

Option 3: Amend s. 44 to require that a credit provider who relies on this exception must advise the person whose application is refused of that fact, and of the data relied on in doing

so, or alternatively amend s. 44 to allow credit providers to seek authorisation from the Commission to use credit assessment instruments that include age where the relevance of age is established on the basis of statistical or actuarial data.

Option 4: Repeal this provision on the basis that it is incompatible with the *Charter* or that the *Age Discrimination Act* provision adequately covers age discrimination in credit provision.

Section 45 – Supervision of children

Section 45 allows a person to require that a child be accompanied or supervised by an adult if there is a reasonable risk that otherwise the child may cause a disruption or endanger himself or herself or any other person.

45. Exception—supervision of children

A person may require, as a term of providing goods or services to a child, that the child be accompanied or supervised by an adult if there is a reasonable risk that, if unaccompanied or unsupervised, the child may—

- (a) cause a disruption;
- (b) endanger himself or herself or any other person.

The purpose of this exception is to enable a person to require a child to be accompanied or supervised by an adult if there is a reasonable risk of disruption/endangerment. It may facilitate the protection of families and children where supervision is in the best interest of the child due to their safety or maturity (*Charter* s. 17) and other individuals' privacy – as this may be interfered with as a result of a child's disruption (*Charter* s. 13).

The limitation permitted by this exception is constrained by reference to the 'reasonable risk' which would need to be interpreted in the context of the *Charter*. This would require that the supervision requirement should be proportionate and rational to the risk.

Section 45 has a legitimate purpose which seeks to balance competing interests and is an important limitation which is reasonable, rational and proportionate to that purpose. There is no less restrictive means of achieving the purpose. Indeed a supervision requirement is less restrictive than permission to outright refuse the provision of services to children or people with children.

Provisions similar to s. 45 exist in the Qld (s. 50) and NT (s. 45) legislation, but other jurisdictions do not have any equivalent.

Options for reform:

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

Section 46 – Special manner of providing a service

Section 46 is an equivalent to the other special services or facilities exemptions in the context of provision of good and services. It allows a person to refuse to provide a service if the service would be required to be provided in a special manner because of the other person's impairment or physical features and it is not reasonable for those services or facilities to be provided or they can only be provided on more onerous terms than the person could reasonably provide.

46. Exception—special manner of providing a service

A person may refuse to provide a service, or set reasonable terms for the provision of a service, to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features and—

- (a) the person cannot reasonably provide the service in that manner; or
- (b) the person can only reasonably provide the service in that manner on more onerous terms than the person could reasonably provide the service to a person without that impairment or those physical features.

The purpose of this provision is to provide that a person may refuse to provide a service or set reasonable terms for the provisions of a service to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features, but it is not reasonable for the service to be provided in that manner.

The VEOHRC repeated concerns it had expressed in the context of s.22 about the potential incompatibility of this exception with the *Charter* and the need to amend the language of the provision, 'special manner,' to more effectively convey the implied duty to reasonably accommodate a person seeking to access services.

The DDLS commented that:

The use of the word 'onerous' under Section 46 is misleading because it is commonly understood to mean burdensome, troublesome, or hard to do or bear. DDLS have represented many clients who have been refused goods or services because they have been put in the 'too hard basket' without their disability needs clearly being understood and correlated to the capacity of the discriminator to provide goods and services. The term 'onerous' does not carry a clear substantial or significant attempt to accommodate the person's attribute (i.e. impairment) and appears to apply regardless of the level or quality of how the services were varied or the manner by which they were delivered.

The tenor of the exception appears to allow a person to say that anything done out of the ordinary is onerous.

Section 24(2) of the *DDA* (Cth) deals with the same area, and provides:

- (2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available,

would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

This provision could be used as a basis for amending s. 46, but it is also important to make express the duty of the service provider or supplier of goods to make reasonable adjustments within the limits of unjustifiable hardship.

All other relevant state and territory legislation contains similar provisions, except the Tasmanian Act which is drafted on a different basis (s. 46). Only SA retains the references to 'more onerous terms'; all the other jurisdictions now refer to unjustifiable hardship. Subsection 58(2) of the NT Act contains a list of relevant factors in assessing the obligation to accommodate.

Options for reform:

Option 1: No change.

Option 2: Amend s. 46 to modernise its language consistently with that of other impairment related exceptions including ss. 39, 22, 23, 32, 33 and 36.

Section 48 – Disposal by will or by gift

Section 48 allows discrimination on any protected attribute in disposal of land by will or gift.

48. Exception—disposal by will or gift

A person may discriminate against another person in the disposal of land by will or as a gift.

The VEOHRC noted that its purpose is to allow people to dispose of their assets in the way they want to. In this way s. 48 respects an individual's privacy by not permitting prohibitions on discrimination to interfere with a person's personal affairs (*Charter* s. 13). This it regarded as a legitimate purpose and therefore the limitation that the exception gives rise to is rational and proportionate to the purpose of enabling people to dispose of their assets consistently with their wishes.

The section is necessary to exempt disposals of land by will or gift, as otherwise they may be thought to fall within the prohibition on s. 47, which precludes discrimination in relation to other types of disposals of land.

Since there are no less restrictive means to achieve the purpose of the exception; as such the limitation this exception places on the right to effective protection from discrimination is taken to be reasonably justified in a free and democratic society, which respects dignity, equality, and freedom of all persons.

There are equivalents of this provision in NSW (s. 49ZYN(3)) and WA (s. 21A, 47A and 66ZH), and in the federal SDA (s. 24(2)), *DDA* (Cth) (s. 26(2)) and *ADA* (Cth) (s. 30(2)), but not in other states and territories.

Options for reform:

No amendment is proposed to this provision.