

There are no less restrictive means to achieve the purpose of the 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.

There is no equivalent to this provision in any other state. This reflects the history of this provision as a response to an early tribunal case that involved sex discrimination against a woman councillor. However, political discrimination in the actual elected political arena is likely to be regarded as a genuine occupational requirement, where there is a general exception to this effect.

Options for reform:

No legislative change is proposed in respect of this exception.

7 – General Exceptions

Section 70 – Things done to comply with orders of the courts and tribunals

70. Things done to comply with orders of courts and tribunals

A person may discriminate if the discrimination is necessary to comply with—

- (a) an order of the Tribunal;
- (b) an order of any other tribunal or any court.

This exception allows discrimination if it is necessary to comply with an order of any tribunal or court. This is an important purpose in a democratic society committed to the rule of law. As courts and tribunals are required by the *Charter* to interpret all legislative provisions consistently with the *Charter* it is likely that any limitation this exception may give rise to will be reasonably limited and balanced and accordingly is likely to be reasonably justified in a free and democratic society, which respects the dignity, equality and freedom of all persons.

Every Australian anti-discrimination Act except the *RDA* (Cth) contains a provision similar to this one. There is a little variance in exact terminology, but s.70 is among the narrowest and best targeted of these provisions.

Options for reform:

No legislative change is proposed in respect of this exception.

Section 71 – Pensions

Section 71 excepts pensions from all the prohibitions of discrimination in *the EO Act*.

71. Pensions

Nothing in Part 3 affects discriminatory provisions relating to pensions.

The VEOHRC commented that:

This exception was intended, when it was adopted in 1977, to be a temporary measure to allow discrimination while complexities of pensions and superannuation schemes were investigated (2nd reading speech, 1977). It allowed discriminatory provisions relating to pensions.

The compatibility and ongoing need for this exception is difficult to analyse without regard to specific provisions in other legislation which may be discriminatory. Presumably consideration will have to be had to federal laws which preserve discriminatory provisions. Accordingly, the Commission recommends that the Department undertake further research and analysis into the limitations that this provision may give rise to.

There is no equivalent provision regarding pensions in any of the state and territory laws, although all have provision relating to superannuation, which may suggest that there is little need for a separate provision regarding pensions. The *SDA* (Cth), *DDA* (Cth) and *ADA* (Cth) each have a provision listing specific legislation that is to prevail over *the EO Act*. It is desirable that the discriminatory provisions relating to pensions should be identified and expressly included in s. 71 or else that the provision should be repealed.

Options for reform:

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

Option 2: Section 71 should be repealed.

It is recommended that the Department of Justice undertake further research and analysis into the limitations that this provision may give rise to with a view to clarifying its role or repealing it.

Sections 72 and 73 – Superannuation

Sections 72 and 73 provide exemptions for superannuation funds. Section 72 permits discriminatory conditions that were in existence within 12 months after *the EO Act* commenced to operate. Section 73 relates to new discriminatory conditions, which can be based on age, sex or impairment. If the discriminatory conditions relate to sex, marital status or impairment, provided such conditions are permitted by the *SDA* (Cth) and *DDA* (Cth), they will be permitted by the *EO Act*, s. 73(2). In relation to age such conditions must be justified by actuarial or statistical data on which it is reasonable to rely or other data on which it is reasonable to rely: s. 73(1).

72. Superannuation—existing fund conditions

- (1) A person may discriminate by retaining an existing superannuation fund condition in relation to a person who—
 - (a) is a member of that fund at the commencement of this section; or
 - (b) becomes a member of that fund within a period of 12 months after the commencement of this section.
- (2) In this section existing superannuation fund condition means, in relation to a superannuation fund, a condition of the fund, or of membership of the fund, that is in operation at the commencement of this section.

73. Superannuation—new fund conditions

- (1) A person may discriminate against another person on the basis of age by imposing conditions in relation to a superannuation fund if—
 - (a) the discrimination occurs in the application of prescribed standards under the Superannuation Entities (Taxation) Act 1987 or Superannuation Industry (Supervision) Act 1993 of the Commonwealth; or
 - (b) the discrimination is required to comply with, obtain benefits, or avoid penalties under any other Commonwealth Act; or
 - (c) the discrimination is based on—
 - (i) actuarial or statistical data on which it is reasonable 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
 - (d) if none of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors.
- (2) A person may discriminate against another person—
 - (a) on the basis of sex or marital status, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Sex Discrimination Act 1984 of the Commonwealth;
 - (b) on the basis of impairment, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Disability Discrimination Act 1992 of the Commonwealth.

Section 72: The purpose of this exception is to allow the retention of an existing superannuation fund condition in relation to a current member of a fund or a person who becomes a member within 12 months of the commencement of the section, which was over three decades ago. So new discriminatory conditions cannot be based on s. 72.

Section 73 allows new discriminatory grounds to be imposed by superannuation funds in certain circumstances on the grounds of age, sex, marital status and impairment. The purpose for this exception is to specify the circumstances under which discrimination on the basis of age, sex, marital status or impairment is permitted in relation to new superannuation fund conditions.

These exceptions are presumably necessitated by reference to federal regulation of superannuation schemes and the constitutional implications this has for state based regulatory schemes such as the *EO Act*. Without regard to the federal provisions it is impossible to determine the nature and extent of the limitation and whether it is justifiable in light of a *Charter* analysis.

Further research and analysis is required to determine the extent of the limitations imposed by federal regulation of superannuation, what areas of discrimination persist, where discrimination may be justified by reliance on actuarial and statistical data in a market economy, and what relevance state and territory law can have.

Discriminatory conditions on superannuation are not inevitable. In the US, sex discrimination in superannuation was held to be discriminatory as long ago as 1978.⁵⁵ The WA Commissioner for Equal Opportunity commented that the WA *EO Act* confines exemptions in relation to super funds to gender history, impairment and age, as the exception for conditions discriminating by sex has been repealed. Recent inquiries in Australia⁵⁶ have drawn attention to the higher rate of poverty that women suffer in old age, so sex discrimination in superannuation payments should be of serious concern. Allowing discriminatory terms in superannuation that are justified by actuarial data is not an answer to the policy question. Actuarial data may well justify racial differences in superannuation benefits, but as a matter of policy that would be unacceptable. The question of sex differences in superannuation benefits, even where actuarially justified, is a similar policy issue.

The Pro-Vice Chancellor Students at Victoria University raised the problem of superannuation fund conditions that still discriminate against people in same sex relationships:

The exclusion of partners for people in same sex relationships from death benefits continues to be lawful. The *Superannuation Industry (Supervision) Act*, does not include same sex partner or non-biological children of same sex relationships as dependants of the contributor unless a relationship of interdependency can be proven. The complex evidence and cumbersome procedures involved and lack of benefit mean that few, if any, funds have changed their rules. Consequently, same sex staff at VU are disadvantaged because they are required to prove the existence of particular type of relationship compared with their heterosexual colleagues in an equivalent relationship.

While this is of concern, the Victorian *EO Act* does not contain any exception for discriminatory conditions relating to sexual orientation, and it can have no impact on the provisions of federal legislation.

Since this is a specialist area, there may be a need for review of section 73 to see whether it is still needed, or whether there are ways it could be varied to improve compliance with the *Charter*. Submissions on these points are welcomed.

Options for reform:

No legislative change is currently proposed in respect of this exception.

The Committee invites submissions on the compliance of sections 72 and 73 with the *Charter* and the impact of changing them.

⁵⁵ *City of Los Angeles v Manhart* 1978, 435 US 702.

⁵⁶ See for example the works cited in *Australia's Future Tax System (Retirement Income System)*, Australian Human Rights Commission Submission to the Review Panel on Australia's Future Tax System (February 2009), available at http://www.hreoc.gov.au/legal/submissions/2009/20090227_tax.html.

Section 74 – Charities

Section 74 permits discrimination where it is in accordance with the provisions of a charitable deed or will.

74. Charities

- (1) Nothing in Part 3 (including sections 47 and 58)—
 - (a) affects a provision of a deed, will or other instrument that confers charitable benefits, or enables charitable benefits to be conferred;
 - (b) prohibits anything that is done in order to give effect to such a provision.
- (2) This section applies to an instrument made before, on or after the commencement of this section.
- (3) In this section *charitable benefits* means benefits exclusively charitable according to Victorian law.

The purpose of this exception is to provide a general exception for charities. The exception therefore facilitates freedom of choice in relation to the conferral of a charitable benefit.

The VEOHRC submitted that 'This is an important purpose in that it is reasonable for a donor to decide upon whom to confer a charitable benefit, therefore the limitation is rational and proportionate to the purpose.'

There are no less restrictive means to achieve this 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:

No legislative change is proposed in respect of this exception.

Section 75 – Religious bodies

Section 75 provides protection against discrimination claims on any ground (but not against sexual harassment claims) for anything done:

- By a *religious order* in relation to training selection and ordination of officials or members, or people performing functions or participating in religious observance or practice
- By a *body established for religious purposes* where the action either
 - o conforms with the doctrines of the religion
 - o or is necessary to avoid injury to the religious sensitivities of people of the religion.
- Subsection (3) makes clear that this includes actions in relation to the employment of people in an educational institution under the control of a body established for religious purposes.

75. Religious bodies

- (1) Nothing in Part 3 applies to—
 - (a) the ordination or appointment of priests, ministers of religion or members of a religious order;
 - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.
- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—
 - (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.
- (3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

Sections 75, 76 and 77 of the *EO Act* have the task of protecting freedom of religion, which is an important component of the right to freedom of thought and belief and a fundamental human right. The religious exceptions are of great concern to a large number of people and organisations, attracting by far the largest number of submissions to the Consultation Paper. Among them were 450 brief submissions from individuals, ministers and church officials, and some congregations, opposing any restrictions on ss. 75, 76 and 77 on the basis that they are essential to the protection of freedom of religion. Most of these submissions were in a standard format, with some variations, and many did not discuss the detail of the existing *EO Act* or the obligations imposed by the *Charter*. They provide evidence of the importance attached by religious believers to the right to freedom of religion and the legal provision of the *EO Act* that protect it and express general support for according specific legal protection for freedom of religion.

There were also submissions from more than 20 religious organisations, including substantial submissions from the Catholic Church, the Anglican Church, the Uniting Church, and the Presbyterian Church as well as Australian Christian Lobby, Australian Evangelical Alliance, Christian Parent Controlled Schools Ltd, Salt Shakers, and Christian Schools Australia, as well as submissions from Festival of Light and Family Voice Australia. Submissions made from the perspective of minority religions by the B'Nai B'Rith Anti-Defamation Commission and Sikh Interfaith Council of Victoria were less focussed on ss. 75-77, and more concerned to protect the rights of minority communities in a number of areas, not just religious observance.

Submissions commenting on the religious exceptions were also received from the VEOHRC, the Law Institute of Victoria, and organisations representing groups who tend to face discrimination and disadvantage, who are protected by *the EO Act*, including disability groups, gay and lesbian interests, transgender groups, and the Victorian Independent Education Union. There were no submissions in response to the Consultation Paper from women's organisations, although submissions were made to

the Senate Committee Inquiry into the Commonwealth Sex Discrimination Act on the equivalent provisions in the *SDA* (Cth).⁵⁷

The arguments put in submissions were in conflict with each other, with religious organisations arguing for no reduction, and in some cases an expansion, of their protection, while many other organisations pointed to the impact of the religious exceptions and argued that they should be narrowed and confined, or even repealed in order to better comply with the *Charter*, especially with the requirements of s. 7(2) for resolving conflicts between rights. The VEOHRC considered that ‘there is a limited understanding within the community in terms of what type of conduct the exceptions would or would not permit by religious bodies and religious schools and scant case law in this area provides limited clarity’.

The challenge for Victorian law is to ensure that both the important values of freedom of religion and equality are protected appropriately, no more extensively than is justified, but no more narrowly than is necessary. Sections 75-77 have to be assessed for compliance with the *Charter* on the same basis as the other exceptions in the *EO Act*. In addition, any limits on the right to be free from discrimination should be reasonable and reflect accepted community attitudes and standards, which have changed over the past decades. Some of the existing exceptions date back to the 1970s and may be out of touch with community attitudes and national and international standards.

The *Charter* and Conflicts of Fundamental Rights

Both freedom of religion and equality rights are fundamental rights of each individual person. Both are recognised and protected by the *Charter*, and the role of the *Charter* is to ensure that they are both respected to the highest level possible. Where rights come into conflict with each other, the mechanism provided for resolving that conflict is s. 7(2) of the *Charter*. The *Charter*'s protection of freedom of religion is found in s. 14:

14. Freedom of thought, conscience, religion and belief
 - (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
 - (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

The s. 7(2) balancing mechanism is worth repeating here:

7. Human rights—what they are and when they may be limited
 - (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

⁵⁷ Senate Legal and Constitutional Committee *Inquiry into the Sex Discrimination Act* July 2008, see note 16 above.

- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- (3) Nothing in this *Charter* gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this *Charter*) or destroy the human rights of any person.

Protection is clearly extended by s. 14 to the core ‘internal’ aspects of freedom of religion such as the right to have or adopt a religion and the freedom to demonstrate it in observance, practice or teaching individually or in a community, in private or public. Section 14 does not explicitly extend protection of a religion outside this area, so the issue will be to determine what the scope of this area should be. It is not clear from s. 14 is how broadly the right extends. For example, it may extend to running a religious school, but does it also extend to running other religious organisations? How far should it extend to a religious organisation that undertakes ‘business’ activities such as providing accommodation or renting out premises, or providing services of various kinds, which are further away from the core activities of religious observance practice and teaching?

Sections 75-77 have struck this balance in the *EO Act* since 1995. But balancing of rights should now occur pursuant to s. 7(2) of the *Charter*, so they must be assessed according to the ‘reasonable limitations’ test. Because the provisions of s. 75 are fairly complex, they will be discussed one at a time.

1. Section 75(1) – protection for religious orders in selection training and ordination of officials, members, or people performing functions or participating in religious observance or practice

- (1) Nothing in Part 3 applies to—
 - (a) the ordination or appointment of priests, ministers of religion or members of a religious order;
 - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

This provision protects the core functions of a religious order to carry out observance, practice and teaching within s. 14 of the *Charter*. The protected actions relating to selection and training of official personnel are undoubtedly clearly justified by s. 14. Although the provision provides blanket protection on all attributes without any further criteria, and is very wide in allowing discrimination on all

attributes, including race and impairment, it was generally supported by virtually all submissions because it relates to core functions of a religion. The VEOHRC commented that:

the limitation this sub-section has upon the right to equality is appropriate and justified as it permits specific discriminatory actions that are reasonable and legitimate in terms of the freedom of religion in the context of observance, practice and teaching (s. 14).

Since s. 75(1) covers core internal matters, it falls squarely within s. 14 of the *Charter*, and is in accordance with the United Nations *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief*.⁵⁸

The Catholic Archdiocese of Melbourne sought an extension of the protection given by s. 75(1) by adding a new subsection '(d) the selection or appointment of people to perform senior management functions of a religious body':

the Church has, since the enactment of the Act, found it increasingly necessary to engage persons from outside the Church in senior management positions. Generally, it is not essential for the holders of those positions to conform to particular religious doctrines, beliefs or principles in order to perform their functions. However, the Church believes that, as in the past, its senior management overall (but not necessarily on an individual basis) ought to retain a close connection with Catholic doctrines, beliefs and principles. For that purpose, it is desirable that the Church be able to take account of the religious standing of potential occupants of these positions. Proposed section 75(1)(d) addresses that issue.

Since this would take s. 75(1) outside the scope of core activities of religion, it would not be appropriate for such protection to be granted in the blanket fashion that s. 75(1) uses, especially as the rationale does not require this power in every case. An exception relating to a religious body rather than a religious order may be better located in s. 75(2). A more appropriate response may be to allow for an authorisation process whereby certain positions could be approved in advance for selection on the basis of religion, where the need to maintain a certain level of religious commitment in senior management may be a justifying factor. This approach was suggested by John Ryan, who expressed concern about the inability of a church drug support agency to select counselling staff who were sympathetic with the aims of the organisation. An 'inherent requirements' approach has the advantages of:

- Focussing attention on the needs of the position
- Not being a blanket process, but narrowly focussed.

For such an approach to operate effectively, a set of relevant criteria should be adopted. Applications could be made to the VEOHRC, which could make an administrative decision, subject to appeal to VCAT. See further the procedural discussion below at s. 83.

⁵⁸ This declaration specifically affirms the right to appoint religious personnel as one of the freedoms of belief it covers.

Options for reform:

Option 1: No change.

Option 2: Add a provision to s. 75(2) that VCAT may grant an exemption to allow discrimination on the ground of religious belief or activity in relation to the selection or appointment of people to perform senior management functions of a religious body where religious belief or activity is a genuine and reasonable requirement of the position.

2. Section 75(2) provides protection against discrimination claims on any ground (but not against sexual harassment claims) for anything done by a body established for religious purposes where the action either conforms with the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion.

- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—
- (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

The scope of this subsection

Subsection (2) can be analysed in terms of three elements: who is protected, what activities are covered, and the nature of the protection. It protects not a 'religious order' like 75(1), but a 'body established for religious purposes'. This term is not defined in *the EO Act*. It is not clear that this would (or should) necessarily extend to every organisation associated with a religion.

The scope of the activities it covers is not defined or limited in this subsection. It can operate both within the core internal functions of religious observance, practice or teaching, and outside them, reaching a broader range of activities that may include running schools and other educational institutions, providing welfare services and many other types of activities.

It applies across all attributes, and provides blanket protection for 'anything done that conforms with the doctrines of the religion' or 'is necessary to avoid injury to the religious sensitivities of people of the religion'. The provisions relating to sexual harassment continue to apply. It does not require any assessment of the reasonableness of the action, and part (a) does not even require it to be necessary to conform with the doctrines. Part (b) sets a fairly low threshold, as it does not require 'serious offence' and it is not clear how sensitive 'religious sensitivities' are intended to be. There is no test of the weight of the doctrine or the religious sensitivities involved, even though if they are to prevail over equality rights this should not occur lightly. The Act does not provide guidance on how the genuineness or weight of the doctrine or importance of the sensitivity should be tested, leaving the situation open to an assertion by the religious body that may be difficult for a complainant to oppose. These uncertainties can operate to deter challenges, as it is not clear exactly what must be proved.⁵⁹ For example, how can the fact of a doctrine be established or contested? What exactly is a 'religion': is it the Christian religion, or perhaps a particular denomination within that, such as Catholicism,

⁵⁹ This concern was expressed by the Uniting Church Justice and International Mission, and the Federation of Community Legal Centres, which gave the example of a gay and lesbian welfare organisation that was refused conference accommodation by a religious organisation, and until it obtained legal advice, assumed it could not complain of this discrimination.

Anglicanism or a particular evangelical group? From where is knowledge of doctrine to be obtained? Is it taken to be that of the most liberal group within a denomination or the most conservative, and if not, where in between and on what basis is the choice to be made? Must doctrine be both uniform and absolute?

By way of contrast, the equivalent provision in the UK *Sex Discrimination Act 1975*, s. 19 covers all religious exceptions including the 75(1) core areas as well. It applies only to specific employment requirements, and contains narrower criteria for the second limb. (Note that protection in relation to some other attributes is found in other legislation in UK.) It permits limited forms of sex discrimination in employment (a requirement to be of a particular sex, not undergoing gender reassignment, not to be married or in a civil partnership, or, for partnered people, not to have a living former partner, or to the nature of a divorce) for purposes of *an organised religion*:

- so as to comply with the doctrines of the religion or
- because of the *nature of the employment and the context in which it is carried out*, so as to avoid *conflicting with the strongly-held religious convictions of a significant number of the religion's followers*.(emphasis added)

This formulation sets higher thresholds and a narrower scope. In particular the idea of conflict with religious convictions is clearer and more weighty than the idea of offence to religious sensitivities. The idea of the 'nature of the employment and the context in which it is carried out' imports elements of an inherent requirements approach, whereby the position itself and what is necessary for it be carried out effectively becomes the central issue, so that the question must always take account of the specific facts involved.

However all Australian anti-discrimination laws contain a provision similar to s. 75(2), referring sometimes to 'religious susceptibilities' and sometimes to 'religious sensitivities'. The requirement to conform with s. 7(2) of the *Charter* may provide an occasion to clarify the scope of s. 75(2). This is especially important in the area of employment, since depending on how widely 'religious body' applies, many people working for religious entities may be left with no protection against any form of discrimination in employment, including unequal pay or conditions, or opportunities for advancement.

This provision attracted significant disagreement. Arguments were put for it to be expanded in scope by the Catholic Church, Australian Christian Lobby and other religious groups. Other organisations supported it in its present form.⁶⁰ Still others argued that it should be conditioned on a test of reasonableness and necessity because it conflicts with the fundamental right of equality.

Proposed changes to take account of the *Charter* protection of the right to equality

75(2)(a)

There is concern about the blanket nature of s. 75(2)(a), as it does not incorporate any test of reasonableness or necessity. It provides no opportunity to consider the factors in *Charter* s. 7(2) relevant to the reasonable limitations test, and hence it risks a declaration of incompatibility. The VEOHRC argued that the religious exceptions need to be framed in a manner that recognises the

⁶⁰ The Anglican Archbishop of Melbourne considered that the tests of necessity and conformity in s. 75(2) and (3) rendered them a reasonable limitation on the right to equality, and that s. 76 was important and adequately confined. The Uniting Church supported these exceptions.

religious/secular divide in order to help identify the correct balance. Accordingly, it suggested, religious exceptions should not be drafted so broadly and unlimited that they do not respect this divide. They should be drafted to include moderating language which facilitates a more balanced consideration of and respect for competing rights.

VCAT, in applying s. 75(2)(a)⁶¹ has held that it was enough if the conduct involved conformed with the doctrines of the religion, and the test was not whether the conduct was reasonably necessary to conform with religious doctrines. This exception could permit discriminatory actions when it is merely convenient to act in a discriminatory manner which conforms with religious doctrines, as opposed to where it is necessary and reasonable to do so. The VEOHRC noted that although actions taken to conform with religious doctrine are important and protected by the freedom of religion, where another right is at stake, they must be balanced against competing rights in the circumstances. Several other rights could be in issue, including not only equality but also the right to privacy and reputation (*Charter* s. 13) and freedom of expression (*Charter* s. 15). The test in s. 75(2)(a) does not consider whether the conduct was reasonably necessary to conform with the doctrines of the religion, and hence it may not meet the requirement of s. 7(2)(e) of the *Charter* to consider 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.'

The VEOHRC suggested that any conduct to which s. 75(2)(a) applies should be subject to an analysis of whether it is reasonable, rational and proportionate to the objectives for which the alleged discriminatory actions are taken. Accordingly, it 'recommended that a constraint be added to ensure discriminatory actions taken are 'reasonably necessary' to conform with religious doctrines. This would enable such actions to be examined objectively in terms of whether they are reasonable, rational, and proportionate and balanced in relation to competing rights.' This argument was also put by the Law Institute of Victoria. This is likely to require attention to the factors that the *Charter* requires considered in a balancing test.

75(2)(b)

The VEOHRC noted that the test in 75(2)(b) is a higher test than convenience or reasonableness, because it only applies to permit conduct by a religious body:

that is *necessary* to avoid injury to 'religious sensitivities' of people of a particular religion. The *sensitivities must have some connection with the religion itself*. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable. This limitation on the right to equality in the context of religious bodies being permitted to discriminate where this is necessary to avoid injury to the adherents of their faith can be regarded as reasonable and demonstrably justifiable in that it recognises and promotes observance to religion (s. 14); has an inbuilt constraint in that the discriminatory actions must be 'necessary'; and the sensitivities of adherents must have a causal nexus with a particular religion.

However, s. 75(2)(b) can be interpreted to give it a very extensive scope. For example the Salt Shakers, a religious group, claimed that 'the employment of anyone by the church' was covered by the s.75 exceptions, which must be retained. Unless a person met doctrinal conditions and the 'religious sensitivities' of people of the religion, they could not be employed: 'Hence a woman living in

⁶¹ *Jubber v Revival Centres International* [1998] VADT 62, where a code of conduct preventing church attendance by a man wearing an earring was upheld as conforming with the doctrines of the religion.

a de facto relationship when that is not allowed by the church, should not have to be employed as a receptionist.’ This is a very broad interpretation of these exceptions.

The limits of the claim to religious freedom in a diverse society and the meaning of the important public value of tolerance were highlighted in the following points made in a legal opinion from Kristen Walker attached to the Victorian Independent Education Union submission:

[23.] ... The right to freedom of religious practice does not extend so far as a complete protection from injury to sensitivities; it is significantly more confined than that. ...

[26.] [Quoting from a Canadian Supreme Court decision in *Chamberlain v Surrey School District* [2002] 4 SCR 710]. McLachlin CJ ... stated:

Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance involves. As my colleague points out, the demand for tolerance cannot be interpreted as the demand to approve of another person’s beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people’s entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

Job Watch expressed its concern about the potential for misuse of this s.75(2), especially where it is applied to employees whose religion is not relevant to the work they do, for example, teaching mathematics, cleaning, or administrative work in a school. Job Watch argued that this provision is only acceptable if it is interpreted narrowly, and it would be preferable to repeal it and instead rely on an inherent requirements exception.

An ‘inherent requirements’ approach to employment in religion-related organisations would place the focus on the position involved and the need for the exception, rather than on the preference for discrimination. This should be done either through prior authorisation (applying for an exemption) or by requiring a focus on those factors when deciding whether an exception applies. An intermediate approach would be to adopt the formulation of the UK *Sex Discrimination Act (quoted above)*, which requires a focus on ‘the nature of the employment and the context in which it is carried out’. The protection of equality rights could be further improved by changing the reference in s. 75(2)(b) from ‘religious sensitivities’ to ‘religious convictions’.

Section 75(2) is similar in format to exceptions that exist in all other state and territory laws and in the *SDA* (Cth). However, the commencement of the *Charter* may now require more stringent justification of discriminatory conduct outside the core functions of the religion. That is not to say that discrimination should not be permitted to prevail in the interests of religious freedom, but that it should be recognised as a limitation on the rights of others and this should be considered in making the decision whether or not it is reasonably necessary to act in a discriminatory way.

Support for adopting the reasonable necessity approach and the elimination of the blanket aspect of the exemption was given by the Ministerial Advisory Council on Gay, Lesbian, Bisexual, Transgender

and Intersex (CLBTI) Health and Wellbeing (MAC GLBTI) which argued there should not be a blanket exception:

Sections 75 and 76 should be amended so that they only cover 'internal matters' (ie matters that only concern their own members, and do not involve public services or public funds). In any case, the applicability of exceptions should be based on objective evidence, to conform with the *Charter's* reasonable limitations test, and be the least restrictive measure.'

Blind Citizens Australia also argued that the exception should be based on need in the specific case, rather than a blanket exception because of its impact on disadvantaged people:

Religion is a critical part of civil life for many Victorians. To deny access to religious buildings and services to the most vulnerable in the community is not acceptable. BCA believes that religious organizations should have the same right to argue the need for case-specific exceptions on the basis of religious sensitivities rather than having the automatic right to exclude people on those grounds. ... This is particularly important because religious sensitivities are not defined by boundaries. For instance, it is perfectly reasonable for a Mufti to ban a guide dog from entering a mosque because it may be offensive, but it is far less reasonable for a Muslim waiter to refuse a guide dog entry to a restaurant.

In submissions to the Senate Legal and Constitutional Committee in 2008, women's organisations expressed the opinion that there should not be an automatic exception for religious organisations. The fact that the exception applies to all grounds leaves women in religious organisations without any protection against gender based discrimination, whether in employment or in other areas. This affects all women employed within churches, and in many cases would be over-broad.⁶² It was argued that it should be more difficult, not easier, to obtain the religious exceptions, as community standards have moved much further towards integration of women, and the *Charter* requires their equality interests to be given serious weight. Any limits on the right to be free from discrimination should be reasonable and reflect accepted community attitudes and standards. Section 75((2) is an old provision of *the EO Act*, and may be out of touch with community attitudes and national and international standards.

The Federation of Community Legal Services commented on section 75 and 77 that:

In our view, applying the s 7(2) *Charter* test, these exceptions fail to strike a proportionate balance between the conflicting rights to freedom of religion and to freedom from discrimination, with the consequence that the right to freedom from discrimination is likely to be subject to unreasonable limits. We therefore consider that either: ... Sections 75 and 77 should be repealed, or [t]hey should be expressly limited so that the exceptions are not available to religious bodies/individuals who are otherwise engaging in 'mainstream/secular' activities such as the provision of accommodation, goods and services, employment, education etc. In support of narrowing the potential for exceptions, even the broad definition of 'private club' in s 78 excludes those clubs which occupy Crown land or receive any financial assistance from the State or a municipal council.

In further support of removing or at least narrowing these exceptions, the Second Reading speech to the Equal Opportunity Bill 1995 made it clear that the exception was intended to

⁶² Senate report, note 57 above, 95-96.

protect 'religious activities'.⁶³ In *Jubber v Revival Centres International*,⁶⁴ the Victorian Anti-Discrimination Tribunal noted that the exception is not intended to permit discrimination in a secular activity unrelated to observance or practice of a religion. The Tribunal quoted with approval the decision of the NSW Equal Opportunity Tribunal in *Burke v Tralaggan*,⁶⁵ in relation to the NSW exception similar to Victoria's s 75:

[The exception] protects the members of religious orders or bodies established to propagate religion in relation to its own members and its own structures. The section does not operate to allow the members of any religion to impose their beliefs on secular society, so as to exempt them from the operation of the law.⁶⁶

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

We also have concerns about religious organisations using exceptions to exclude non-heterosexual people from access to various community services. In our experience, the exceptions are a factor in discouraging potential complainants from lodging a complaint of discrimination.

It is clear that religious organisations have a different view about where the line is to be drawn between 'religious activities' and secular activities of a religious organisation, and what makes the organisation or the particular activity religious. It would be desirable for the *EO Act* to encourage organisations that want to rely on these exceptions in relation to extended activities (ie outside the core or internal area) to identify and state what makes the position or activity inherently religious.

Wider activities of religious organisations

Because most controversy arises in relation to the extended activities of religious organisations, they are discussed here in more detail. Although s. 75(3) purports only to clarify the position with regard to religious schools, discussion of religious schools will be located under s. 75(3) and 76.

Some religious organisations in Victoria run substantial educational and social services, and many have been expanded over the last decade with the trend towards contracting out the provision of government services in many areas of activity. For example, the Catholic Church in Victoria is involved in 482 schools (378 primary, 87 secondary, 15 combined and 2 special schools), 11 hospitals, 40 nursing and convalescence homes, and 12 children's welfare institutions.⁶⁷ Issues that can arise in this context are very diverse.

⁶³ Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1254 (Jan Wade, Attorney-General).

⁶⁴ [1998] VADT 62 (unreported, 7 April 1998).

⁶⁵ [1986] EOC 92-161.

⁶⁶ *Burke v Tralaggan* [1986] EOC p. 96, 588 cited in *Jubber v Revival Centres International* [1998] VADT 62 (unreported, 7 April 1998).

⁶⁷ Quoted in submission of the Catholic Archdiocese of Melbourne.

1. Can a religious organisation decide to employ only co-religionists in the provision of welfare services or other activities?
2. Can an organisation exclude from the services it provides particular classes of people – for example homosexuals or unmarried mothers? Can a religious organisation discriminate between unmarried mothers and unmarried fathers by excluding one but not the other?
3. Should it make a difference to the answer if the activities are publicly funded? At present the presence of public funding is not a matter that is considered in the religious exceptions, but should it be? A proxy for public funding is used in s. 78 relating to private clubs, so there is some acknowledgement that public funding may be relevant to whether discrimination is acceptable, even aside from the *Charter*.

The size and scope of the activities reliant on s. 75 makes it of critical importance to determining the rights of people who are employed or receiving services from such organisations. It contains significant uncertainty on a number of issues, so that it may deter those affected from challenging discriminatory actions.

At present *the EO Act* applies a single standard to all the broader areas of activity of religious organisations. Objections to the breadth and impact of these exceptions could be reduced by ensuring that they are better adjusted to each attribute and area of activity involved, taking account of the purposes and activities involved. For example, in the UK, exemptions from employment discrimination are available only for purposes of an 'organised religion', while religious exemptions in relation to the provision of goods and services are open to any 'organisation relating to religion or belief'.⁶⁸

The attributes in respect of which there is an exception could also be more specifically identified. For example in many situations one would not expect a religious body to seek to discriminate in these wider areas on the grounds of race or impairment, as the main concerns appear to be with pregnancy and marital status, sexual orientation and gender identity. This process of refining the grounds on which exemption is actually most necessary has progressed in relation to religious schools, where some states and territories already allow the exception to cover only limited attributes (see discussion in relation to s. 76). If religious concerns are focussed on ensuring heterosexuality and no pregnancy outside marriage, then this limited range of exceptions would be sufficient to ensure that employment selection decisions, or in some cases termination decisions, could be made where necessary. There may be no need to allow an exception in relation to sex discrimination at all, or in relation to terms and conditions of employment. Defining the exceptions as narrowly as possible will help to ensure that they are robust against challenge under the *Charter*. The inherent requirements of the job approach, if that is used, will ensure that the rationale of any particular job has been thought through and the need for religious discrimination has been thoughtfully assessed. A similar approach could be applied to activities.

Undertaking this analysis is beyond the scope of the current inquiry due to the complexity and detail necessary. It is proposed that only necessary changes are made at this stage to ensure that basic criteria are adequately confined, and that further consultation occurs in future to develop a more nuanced approach to excepting particular activities of bodies established for religious purposes where justified.

⁶⁸ Sandberg, Russell and Doe, Norman, 'Religious Exemptions in Discrimination Law' (2007) 66 *Cambridge Law Journal* 302.

Proposed expansion of 75(2)

Submissions from the Catholic Archdiocese of Melbourne and the Australian Christian Lobby noted the fundamental importance of these provisions to religions and argued that the scope of these provision should be expanded. The Catholic Church noted the drafting differences between the provisions in the *EO Act* and the *Charter*, and suggested that they should be harmonised by adopting the terminology of the *Charter* in the *EO Act*. This would expand the religious exceptions in two ways. First, s. 75 would apply to a 'religious body' as defined in s. 38(5) of the *Charter*, which is a much wider definition as it goes beyond a 'body established for a religious purpose' to '*educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles*'. However, unless there is a 'religious purpose,' it is difficult to see why such bodies should be accorded a blanket exception. Secondly, protection would be extended to 'religious doctrines, beliefs or principles' as used in s. 38(5), rather than just religious doctrine as is currently in s. 75(2). Section 38(4) and (5) of the *Charter* provides:

Charter 38. Conduct of public authorities

- (4) Sub-section (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.
- (5) In this section 'religious body' means—
 - (a) a body established for a religious purpose; or
 - (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

Section 38 is not, however, part of the definition of the rights protected by the *Charter*. It operates only against public authorities, whereas *EO Act* limits everyone, not just public authorities. Section 38 provides no basis for expanding the religious exceptions in the Act to harmonise the *EO Act* with s. 38 of the *Charter*, rather than s.7(2) and 8, especially since these changes would result in diminished protection for equality and other rights. Section 38 was not included in the initial drafts of the *Charter*. It was added during the *Charter's* Parliamentary passage, without having been subject to the same debate and consultation as every other part of the *Charter*. This definition of religious body is much wider than 'body established for religious purposes' in s. 75(2), and adopting it would expand the exception in the *EO Act* substantially to a wider range of organisations.

Similarly, 'religious doctrines beliefs or principles' would be much wider as a basis for exceptions than merely religious doctrines, especially since there is no test of necessity in s. 75(2)(a). So these changes would be a substantial expansion of protection. To make out support for this sort of change it would be necessary to document reasons and evidence of why the current level of protection is inadequate and how such an expansion would enhance the balancing of the conflicting rights involved. This has not been done.

The Catholic Archdiocese also suggested that the definition of 'religious belief or activity' should be amended to cover bodies other than natural persons and 'to reflect the recognition in s. 38(4) of the *Charter* of the right of religious bodies to act in conformity with their religious doctrines, beliefs and

principles.’ However human rights are enjoyed only by natural persons (Charter s. 6(1)), and organisations enjoy protection by the exceptions only to protect the individual’s right to freedom of religion exercised in community with others. Religious organisations are protected by exceptions to the *EO Act*, and it would be arguably inappropriate to alter the definitions of *the EO Act* in this way.

Australian Christian Lobby argued that the scope of protection under s. 75(2) needs to be clarified, as it was concerned that a ‘body established for a religious purpose’ may be narrowly construed to mean only an organised (and possibly incorporated) Christian or Jewish or Muslim or other religious denomination and will not cover other organisations formed for religious purposes.’ It thought that para-church organisations such as inter-church groups, ministry organisations, associations, clubs and societies (whether incorporated or unincorporated) which are formed for religious purposes including the advancement or propagation or teaching of a religion should be covered. However, any such expansion beyond the core areas of religion may not justify the high level of protection that is currently given.

Options for reform:

Option 1: No change.

Option 2: Amend s. 75(2)(a) to ensure that only actions ‘reasonably necessary’ to conform with religious doctrines are excepted’.

Option 3: Amend s. 75(2)(b) to require that in deciding whether the exception applies in an employment context, attention should be paid to ‘the nature of the employment and the context in which it is carried out’.

Option 4: Amend s. 75(2)(b) by changing the words ‘religious sensitivities’ to ‘religious convictions’.

Option 5: Adopt a further subsection of s. 75 that requires the consideration of factors similar to those in s. 7(2) of the *Charter* in deciding whether or not the exception applies.

Subsection 75(3) and section 76 – Religious Schools

Religious schools are protected by both s. 75(3) and 76. The existence of schools for particular religious groups is permitted (with other types of schools for particular groups) by s. 38 of the *EO Act*, which authorises discrimination in relation to admission of students to such a school. Section 75(3) makes clear that actions in relation to the employment of people in an educational institution under the control of a body established for religious purposes are covered by s. 75(2), that is, that they are exempted from all the prohibitions on discrimination if the actions are undertaken to conform with the doctrines of a religion or are necessary to avoid injury to the religious sensitivities of people of the religion. Such schools may well have broader protection under s. 75(2)(a) as well, in relation to areas of operation other than employment, such as education, provision of goods and services, and accommodation.

Section 76 applies to educational institutions that are not run by a body established for religious purposes. It protects a person or body that establishes or directs, controls or administers an educational institution in accordance with religious beliefs or principles from all prohibitions on discrimination, including employment discrimination, that are ‘in accordance with the relevant religious beliefs or principles.’ The sexual harassment provisions still apply to both types of religious schools.

75. Religious bodies

...

- (3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

76. Religious schools

- (1) This section applies to a person or body (other than a body established for religious purposes) that—
 - (a) establishes an educational institution to be conducted in accordance with religious beliefs or principles; or
 - (b) directs, controls or administers an educational institution conducted in accordance with religious beliefs or principles.
- (2) Nothing in Part 3 applies to anything done by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution (including the employment of people in the institution) that is in accordance with the relevant religious beliefs or principles.

This structure is complex and confusing, because different criteria and language are used in s. 75(2) and 76, and neither allows for the *Charter's* requirements for balancing competing rights. Section 76 is a blanket exemption that is wider than s. 75(3) in having no intermediate criteria for the exceptions to apply. Section 75(3) at least requires the conditions in s. 75(2) to be established. The VEOHRC commented on s. 76 that:

like section 75, s. 76 seeks to balance the relevant rights of an individual (freedom from discrimination (s8), right to privacy and reputation (s13), freedom of religion (s14) and freedom of expression (15)) with the group rights of the religious school and the school community (freedom of religion (s14), protection of families and children(s17), and cultural rights (s19)). However the test in s.76 is a lower one than s.75(2) [and 75(3) where] ... the potential limitation is limited by reference to conformity with religious doctrines or necessity to avoid injury to religious sensitivities. [s.76] is confined only to actions in accordance with 'the relevant religious beliefs or principles'.

Whilst the purpose of this limitation is reasonable and demonstrably justified, as it is currently drafted this exception is expressed too broadly. It gives rise to an almost unrestrained limitation on the right to equality and other possible rights of individual teachers. The Commission is of the view that a less restrictive and more balanced drafting is possible to achieve the purpose of this exception. This could be facilitated by only making discriminatory actions excepted by section 76 where they are reasonably necessary to conform with religious doctrines or necessary to avoid injury to the religious sensitivities of the adherents of a religion.

There was disagreement in the submissions over the appropriate scope of these provisions. In particular, the areas of concern included the bodies to whom the exceptions apply, and which jobs were or should be covered by the employment discrimination exceptions. There was relatively little

discussion of the impact of these exceptions outside the area of employment, although that is potentially problematic as well.

There is a lot at stake in the provision relating to employment in religious schools. There are many non-government schools in Victoria run by various religions, of which the Catholic system is the largest. The distribution of schools in Victoria is:

- 1594 – government schools with 538,116 students
- 484 – Catholic schools with 186,177 students
- 218 – independent schools with 117,759 students⁶⁹

Victoria has around 40,000 teachers, although data provided by the Department of Education and Early Childhood Development is not broken down by system. Extrapolating from the schools data, around 1/3 of teachers in Victoria may be working in a religious or independent school, the majority of which are aligned with a religious denomination or order. If widespread exceptions to discrimination are permitted in the non-government school system, then teachers' employment is substantially affected, especially for those one in three teachers who work in the private system. Because it involves a significant limitation on the rights to employment equality of a substantial number of employees, there is an argument that the limitations on their rights should be narrowly tailored to meet the requirements of religious freedom, but no more.

Attributes on which discrimination should be permitted

Both sections allow discrimination on the basis of all attributes, which means there is potentially no redress for racial discrimination, sex discrimination, age discrimination, or impairment discrimination in these schools at any stage, whether in recruitment, or in the terms and conditions of employment. Many religious schools may in fact comply with the law on these aspects, perhaps in acknowledgment that non-discrimination is also part of Christian doctrine. If that is the case, then it seems that this exception may be broader than needed. Blind Citizens Australia argued that s. 76 should be repealed because of this impact. The Commissioner for Equal Opportunity in WA commented 'it is difficult to see how discrimination by a religious school against person with ... [the attributes of race, impairment or age] could, or should, be justified on religious grounds.'

From the submissions, the areas that are most sensitive and on which the schools most want the exception to operate are religious belief (to be able to exclude non-religious people or select only from members of their own religion), the combination of marital status and pregnancy or parental status (many seek to exclude or terminate the employment of women who become pregnant outside marriage; presumably the same sanction would be applied in a non-discriminatory way to an unmarried father) and sexual orientation / gender identity (many assert the fundamental nature of heterosexuality). If s. 76 allowed exceptions only on these attributes, this may cover the needs of the schools, and would have the advantage of not disadvantaging employees by race, impairment or sex. If any attribute outside these was necessary, there could be provision for it to be justified on the basis of an inherent requirements argument, or an exemption could be sought in respect of the position.

⁶⁹ Source: Summary Statistics for Victorian Schools, March 2009 at <http://www.eduweb.vic.gov.au/edulibrary/public/publ/research/publ/Brochure2009March-brc-v2.0-20090331.pdf>. See also Australian Bureau of Statistics, Government and Non-Government Schooling. at <http://www8.abs.gov.au/AUSSTATS/ABS@NSF/Previousproducts/9FA90AEC587590EDCA2571B00014B9B3?opendocument>.

Arguably this would better reflect community standards, and would be consistent with the views and opinions of a large proportion of parents of children being educated in non-government schools.

Arguments can be made against the inclusion of unmarried motherhood or parenthood, and sexual orientation, in the list of exceptions on the basis that in fact these features are becoming increasingly well accepted in Australian society today, and intolerance of them should not be funded with public money or encouraged by government legislation. The Victorian Independent Education Union submission highlighted the demographic and social changes in the Victorian community since 1977, 1984 and 1995 when the various religious exceptions were adopted. Parenthood outside marriage is well accepted in Australian society. De facto relationships today represent 15% of couple relationships, and the number of the total population aged 15 and over living in this way has grown from 5.2% in 1996 to 7.7% in 2006.⁷⁰ The increasing community acceptance of such relationships suggests that there should not be an exception for the combination of marital status and pregnancy. Allowing these grounds would operate to the detriment of women, as men cannot get pregnant and therefore could not be penalised for unmarried pregnancy, although they could be for the combination of marital status and parental status. In practice, however, this judgment is mainly made against women.

Strong arguments against accepting discriminatory treatment on the grounds of sexuality were made by gay and lesbian organisations, and against accepting discrimination on the basis of gender identity by transgender support organisations. These arguments pointed out the unacceptable consequences of societal and religious discrimination for people of same sex orientation or transgender people. But they fail to engage with where the boundary between religious freedom and equality rights should be located, that is, with what area should legitimately be reserved as an exception.

Comparable provisions in some other states and territories are varied, but many do not give immunity in respect of all attributes. There is no specific religious schools exception in the legislation of NSW, Qld, or in the *RDA* (Cth), *DDA* (Cth) and *ADA* (Cth). Any protection in these jurisdictions would have to be provided by the basic provision that parallels s. 75(1) and (2). In SA s. 50(2) excepts discrimination on the ground of 'sexuality or cohabitation with a person of the same sex as a couple on a genuine domestic basis' where it is 'founded on the precepts of that religion'. In NT, s. 37A allows discrimination on the grounds of religious belief or activity, or sexuality where it is 'in good faith to avoid offending the religious sensitivities of people of the particular religion'. Finally, Tasmania's provisions only provide for discrimination on the basis of gender if required by the doctrines of the religion (s. 27(1)(a), or of religious belief or activity if the discrimination is 'in order to enable or better enable the institution to be conducted in accordance with the tenets beliefs teachings principles or practices of the religion involved' (s. 51(2)).

The *SDA* (Cth), WA and ACT laws cover all grounds, but are narrower than s. 76 because they include a criterion like that in s. 75(2)(b), although slightly more strongly worded. For example the *SDA* provides:

- 38 (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy *in connection with employment as a member of the staff* of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so

⁷⁰ ABS, *Lifestyle Marriage and Divorce trends, 2007* cited by Victorian Independent Education Union Submission, 4.3.

discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Equivalent sub-sections allow discrimination in relation to contract workers and the proviso of education on the same basis. The WA and ACT legislation is in the same terms as the SDA, except that they allow discrimination on all grounds. In WA, the exceptions for employees and contract workers in s. 73 allow discrimination on all grounds where it is done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed' and subsection (3) allows discrimination in favour of some students on the basis of any ground *except* race, impairment or age.

Limiting the attributes in these provisions would have the advantage of protecting female teachers, who predominate in the teaching profession, ethnic minority staff and staff with a disability from gender-based, race or disability discrimination at work. In particular, a submission to the Commonwealth Inquiry on the Effectiveness of the Sex Discrimination Act argued that:

It is unacceptable for educational institutions conducted by religious organisations (the preponderance of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the *SDA* (Cth) and CEDAW about the position of women and girls in contemporary Australian society. As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds.⁷¹

The same argument can be made in relation to sexual orientation, although it falls into the core area on which schools seek the right to discriminate based on their doctrine, so it may need to be reconciled with claims of freedom of religion. This may involve balancing the rights of employees and students who are gay or lesbian with the relevance of the areas involved to the core claims of freedom of religion, rather than accepting a blanket exclusion. The Rainbow Network, a state-wide network of community and school staff who work with GLBTI young people commented:

Our focus on teachers employed in the Catholic education sector stems from the fact that one impact of the exception is to create a climate in Catholic schools where same sex attracted young people can feel isolated and unsupported.

The Network noted the consequences for young people of the s. 75 (and s. 76 in other school system) exemptions:⁷²

Given that both national and international research states that approximately 10% of young people are same sex attracted ...it is not an unlikely scenario to suppose that some 6,000 Catholic Secondary School students could express or exhibit attraction to the same sex at some time during their adolescence.

⁷¹ Senate Cttee at 99.

⁷² See Australian Research Centre in Sex, Health & Society, *Writing themselves in Again – 6 years on*, surveying 1749 young people from across Australia who identified as same sex attracted. Jesuit Social Services, *Not So Straight* (2006) report examined how Catholic Schools can best respond to the needs of same sex attracted students, and includes both cases studies of good practice and recommendations that impact on pastoral care, staff development, curriculum and the shaping of school culture to ensure that all students are respected in secondary schools.

The implementation of Section 75 serves to illustrate to young same sex attracted people that:

- being gay or lesbian may make you an undesirable employee,
- it might be difficult to find employment as gay or lesbian adult,
- coming out is to be discouraged, and
- keeping a large part of your personality and identity invisible is the safest thing to do.

For students with gay or lesbian parents the existence of Section 75 can also indicate that there is something immoral or inappropriate about their parents and their family structure. Further the implication of Section 75 is that if you identify as Catholic or Christian and same sex attracted, it is difficult to reconcile one aspect of your personality and self with the other.

This experience was confirmed by the Coordinator of Way Out, Rural Victorian Youth and Sexual Diversity Project, which commenced in 2002 as a youth suicide prevention project, who noted that:

research estimates that same sex attracted young people are 4-6 times more likely to attempt suicide than their heterosexual peers. ..Our project believes that same sex attraction is both a natural and healthy aspect of the range of human sexualities. We consider that the difficulties experienced by young people stem from the isolation and discrimination that occurs in their environment.

Finally, the ALSO Foundation, a membership organisations for GLBTI people, commented on the way that the exceptions are used by some religious organisations:

Many of these groups adopt practices that suggest that the exceptions are a 'licence to discriminate.' This has direct and harmful consequences in situations as broad as health care settings, schools, foster and substitute care as well as in access to a range of social welfare services and organisations. This is particularly problematic as it impacts on the young and people in vulnerable circumstances. Young people are often uncertain of the nature and status of their sexuality and or gender identity and may be put at risk therefore of not only unfavourable but shaming, humiliating and intimidatory behaviour perpetrated by personnel in institutional settings. This has direct mental health and well being consequences...

Some concern among religious organisations and individuals may be based on a confusion of homosexuality with paedophilia, some may also be based on a fear of proselytizing for homosexuality.⁷³ But schools cannot responsibly ignore the possibility that a proportion of their students, at least in secondary school, may be finding their sexual identity to be other than heterosexual, and may need pastoral care and assistance. More detailed examination of exactly what the concerns of schools are may be needed, and could occur if there was a requirement to base exceptions in religious doctrine, as there is for s. 75(2).

Submissions indicated that a number of the school systems have clear written policies on discrimination and codes of conduct,⁷⁴ but that does not necessarily mean that such policies are

⁷³ *Griffin v Catholic Education Office* may fall into this category, where a lesbian activist was refused classification as a teacher within the Catholic Education office and hence could not apply for a teaching position in a Catholic school: Human Rights and Equal Opportunity Commission, *Discrimination on the Ground of Sexual Preference: Report of Inquiry into Complaints of Discrimination in Employment and Occupation*, HRC Report No. 6 (1998).

⁷⁴ Catholic Archdiocese of Melbourne, Christian Schools Australia.

derived from religious doctrine and should therefore be protected as exercises of religious freedom. Even where school systems have clear and discriminatory policies, submissions expressed concern that they are often applied inconsistently, so that teachers are in a state of uncertainty about whether the rules will be enforced against them. Such arbitrariness is arguably unacceptable in governing work in the modern world, and would tend to support the argument that the exceptions should be restricted where possible to positions for which the need is actually established.

Bodies to whom the exception should apply

The Law Institute of Victoria argued that the definition in s. 76(1) of the person or organisations given protection is too broad and should be narrowed. The argument it put was as follows:

The LIV notes that only persons have human rights. The right to freedom of religion does not extend to an organisation, although we recognise that individuals have the right to demonstrate their religion in worship, observance, practice and teaching 'in community'. In this context, we suggest that the current framing of the religious schools exceptions is too broad in its definition of 'religious body'.

The LIV notes that the current Victorian exceptions for religious education providers broaden the previous 'religious body' exception in the 1977 *EO Act*. We understand that the scope of the exception was broadened to reflect a trend for religious schools to incorporate separately from the religious institutions with which they may have been originally associated, for taxation or other reasons. These new corporations delivered 'religious-style' education programs to students.

The public policy justification for the wider exception for 'religious education providers' was clearly linked to the need to respect religious faith and observance. Interpretation and application of the principles of faith, religious observance and codes of conduct in schools were subject to the overriding governance of religious bodies.

Given that many schools no longer have any links to a formal religious body, the LIV queries whether it is still appropriate to exempt schools run on 'religious grounds'.

The LIV suggested that the exceptions should only be available for schools that were subject to the discipline of a religious body. Once eligibility for the exceptions was allowed by the 1995 Act to expand beyond a 'body established for religious purposes' in s. 75(2), to any body that establishes or conducts an 'educational institution to be conducted in accordance with religious beliefs or principles' (s. 76), the width of the exception became potentially huge. This is inappropriate for a blanket exception on all attributes that affects so many employees, who may have very little choice to avoid encountering it (since one in three teaching jobs is in the non-government sector). This width of application could be problematic for compliance with the requirements of the *Charter* for balancing of conflicting rights s. 7(2)). While it is not suggested that religious schools should have to seek approval to get access to this exception, it greatly strengthens the suggestion that a narrow approach should be taken to the attributes that are allowed, and the criteria on which exception should be allowed, which affects the range of positions covered.

Jobs to which the general exception should apply

Submissions were again in conflict on this issue. The Law Institute argued that 'ordinarily, it will only be reasonable for religious bodies and schools to discriminate against employees and contract

workers who have a direct role in worship, observance, practice or teaching. This will necessarily include teachers, chaplains, and related support staff with pastoral responsibilities.'

Some religious bodies on the other hand argued that control was necessary over the entire staff:

this exception relating to employment must continue to cover all people employed by the institution, including non-teaching staff such as gardeners.

The position adopted by Queensland, where schools could not refuse to employ people living in a homosexual or de facto relationship so long as they only did it outside school hours, would be untenable.

One cannot separate such behavioural conditions in a religious setting since this flows over into all of life.⁷⁵

Such a broad claim does not appear to accord respect to equality rights, or acknowledge any limits to the freedoms claimed by religious groups. The freedom valued on this approach is the right to appoint only co-religionists to employment positions and to exclude anyone who does not meet the criteria the group has set, since s. 76 does not require restrictions to be based in religious doctrine.

John Ryan supported the legitimacy of the claims to educate children in accordance with their parents' religious values:

The right of a person to hold and practice specific religious beliefs includes the right to have their children taught about that religion. This right of religious freedom would be destroyed if it was not possible to prevent persons who did not share your religious beliefs from participating in the teaching and educational institutions of your religion.

What a nonsense it would be if the Equal Opportunity Act could be used by a Christian fundamentalist to get employed in a Muslim school. The very presence of a Christian fundamentalist in a Muslim school would be an attack on the integrity of the Muslim education process. The same situation would apply if a fundamentalist Muslim could use the Equal Opportunity Act to get to teach in a Catholic school.

In 2007 the Review of the WA *EO Act*⁷⁶ recommended that the exception relating to employment of staff at religious educational institutions be confined to those employees or contract workers with teaching or pastoral responsibilities only.

Which employment positions should have a 'religious requirement,' that is, to which positions is it acceptable to appoint only members of the religion? This is unlikely to be a matter governed by religious doctrine or necessarily affecting religious sensitivities, so s. 75(3) may not provide guidance and it may also not be a matter 'in accordance with the relevant religious beliefs or principles' within s. 76. It may be appropriate to allow an exception that can be made available on the basis of an inherent requirements analysis of the particular position, as suggested by Mr Ryan and Job Watch. Job Watch explained the justification of this proposal as follows:

⁷⁵ Salt Shakers.

⁷⁶ Review of the Equal Opportunity Act 1984 (WA) (May 2007) available at <http://www.equalopportunity.wa.gov.au/publications.html#rev>.

[s.76] raises the potential for conflict between different but equally important human rights, namely the right to freely practise religious beliefs and the right to equal opportunity in employment.

Job Watch supports the value of the exception in allowing religious freedom. However, this support is on the proviso that it is applied narrowly, that is, strictly in accordance with the intention that it protect the exercise of genuine religious beliefs. We submit that this exception can only be validly invoked if a particular attribute is of such relevance as to constitute an inherent requirement of a position.

However, we are concerned that there is potential for this exception to be misused if it is relied upon to exclude certain groups from employment on no more than a pretence. For example, while the marital status or sexual orientation of an employee may be of relevance if that person is a religious instructor, these attributes are of limited, if any, significance for persons performing roles such as teaching maths, cleaning or administrative duties, and should not be claimed in any circumstances other than limited ones involving genuine religious content in the relevant job.

If this exception is to be retained, we recommend that its application be limited to positions in religious bodies and schools which genuinely require adherence and commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position.

The alternative 'inherent requirements' provision (discussed below) would be a more justifiable limitation under the *Charter* as its scope is confined to the actual requirements of a position and not just the employer's preferences. On this view, this exception, in its current form, may not be a 'reasonable limitation' under the *Charter* because it is too broad in scope, making it open to abuse.

The inherent requirements analysis would enable a proper assessment of the nature of the requirements for the particular job, and in many cases the question will be whether the occupant's religion is relevant to the particular employment position. An administrative officer or secretary is not in the same position as a teacher. While a maths teacher is not in the same position as a teacher of religious education, they may be a significant role model, depending on the nature of the religious organisation operating the school. An inherent requirements exception would enable these judgments to be tailored to the situation in question rather than made available on a blanket basis that ends up being too wide and undermining the equality rights of staff more than is necessary. The Australian Christian Lobby commented that:

Of particular interest to the Christian community are the exceptions provided that allow for Christian schools to foster an educational environment that reflects the choices made by families to have their relational framework, values and beliefs supported. Teachers are more than simply conduits for passing on knowledge from one generation to another. They are also role models, perhaps even more so in a religious school where they are not only teaching the particulars of their subject but also demonstrating the value and relevance of the religion itself. For these reasons, it is directly relevant to their employment that they share and faithfully practice the religious beliefs of the school and can model these to students. The exceptions provided here are central to the argument for the need to protect religious freedom.

The relevance of public funding

The religious education examples raise the question of the relevance of public funding, as even religious schools are in receipt of substantial amounts of public funding. Discrimination that may be more tolerable when funded entirely by the community involved may be more questionable when it is undertaken at the public expense. The Ministerial Advisory Council on GLBTI commented:

Blanket religious exceptions under the Equal Opportunity Act should be removed. These exceptions are not appropriate, particularly given that religious schools are involved in delivering a public service using public funds. It is unacceptable for bodies receiving public funding to be able to discriminate.

Simply adopting a rule that there could be no exemptions where there is public funding would fail to accord any protection at all to the right to freedom of religion. But the fact that public funds are being used may have some impact on what level of discrimination can be tolerated. Where public money is spent on activities that are argued to be excepted from equality rights, there is a responsibility to consider the people whose rights are limited to provide freedom of religion. While some minor limitations may be acceptable, it may be difficult to justify the religious exceptions at their current levels in a large number of publicly funded institutions such as non-government schools, because of the systemic impact on the employment and equality rights of women and gay teachers. There is also a public interest in educating children for future community harmony, ensuring that all children educated with public money learn about others who are different from them and that there are many different paths in life. The presence of public funding may provide an additional reason to define these exceptions as narrowly as can be justified by arguments based not on preference but on the necessity to comply with doctrine in relation to core areas of religious observance.

Especially since the contracting out of service provision by government developed strongly, private provision with public funding cannot be a matter of only private interest. While it may be desirable to engage religious organisations in providing services or education, that should not mean that the source of the funding, or the responsibility of the government to ensure observance on the equality rights of each individual, can be completely overlooked.

The *Charter* provides a useful framework for applying this exception to appropriately balance competing rights and ensure that prejudices are not used as a basis to unreasonably discriminate. The limitations posed by this s. 75(3) will also be lessened if amendments are made to confine s. 75(2)(a).

Options for reform:

Option 1: No change.

Option 2: Amend s. 76 to introduce conditions similar to those in s. 75(2) to ensure that discriminatory actions are allowed under s. 76 only on limited attributes and where they are reasonably necessary to conform with religious doctrines or necessary to avoid injury to the religious sensitivities or convictions of the adherents of a religion.

OR

Option 3: Redraft s. 76 on the same basis as s. 51(2) of the ADA (Tas) to permit discrimination where it is to 'enable or better enable the educational institution to be conducted in accordance with' the doctrines, etc of the religion.

Option 4: Limit the attributes to which the exception applies to religious belief or activity alone, or together with sexual orientation and gender identity. Allow the possibility of further attributes being excepted on the basis of an inherent requirements analysis.

Option 5: Add provision for an inherent requirements analysis that can be used to extend protection where it is shown that the inherent requirements of a particular position justify this in respect of a particular position.

Option 6: Amend to provide that the religious exception is only available as of right to institutions that are subject to the oversight of a religious body or order.

Option 7: Include a provision listing the *Charter* s. 7(2) factors as relevant to assessing the acceptability of any particular religious exception.

Option 8: Expressly provide that the onus of proof of all matters relevant to the exception lies on the institution claiming it.

Section 77 – Religious beliefs or principles

This provision applies to allow individuals to discriminate where it is necessary for a person to comply with their genuine religious beliefs or principles.

77. Religious beliefs or principles

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

The VEOHRC Commission recommended that s. 77 be repealed because it is far too broad, and also unnecessary in view of the protection conferred by ss. 75 and 76 and:

'various other exceptions across other areas of the *EO Act* which could be relied upon to legitimately discriminate where religious freedom is concerned. For example, a person may be permitted to discriminate on religious grounds when employing someone to provide personal or domestic services in their own home (s. 16); educational institutions may exclude people who are not of a particular religion from that institution if the institution caters wholly or mainly for students of a particular religion (s. 38); a person may discriminate on the basis of religious belief and activity in deciding who is to occupy shared accommodation in which that person or their relative lives (s. 54).

As a result, the VEOHRC did not regard s. 77 as a reasonable and justified limitation on the right to equality. It may be relied upon by any person in relation to anything prohibited by *the EO Act* and is only constrained by reference to actions being necessary to comply with subjectively held genuine religious beliefs or principles. It is:

'neither reasonable nor necessary as there are adequate exceptions in *the EO Act* which can maintain an appropriate balance between freedom of religion and freedom from discrimination. Accordingly, it is not a justified limitation on the right to equality and should be repealed.'

This was supported by the Law Institute of Victoria, which also commented that s. 77 is too broad and too subjective, going far beyond the right to religious freedom as protected in s. 14 of the *Charter*. The LIV notes that other exceptions adequately protect the home and private sphere, including: ss. 16 (domestic and personal services) and 54 (shared accommodation); s. 38 (educational institutions for particular groups) and as proposed to be modified, s. 76 and s. 75(2)(3). The LIV also recommended that s. 77 be repealed.

By contrast, the Australian Christian Lobby and many other religious organisations thought 'the protections found in section 77 are appropriately broad, recognising that religious beliefs affect public as well as private behaviour.' It opposed any reduction of s. 77. The Anglican Archbishop of Melbourne said that although s. 77 is broad in effect, the test of necessity and genuine religious beliefs make it a reasonable limitation that is consistent with s. 14(1) of the *Charter*.

The Salt Shakers argued that 'regarding religious beliefs, one ought to be able to act according to religious principles without the state acting to limit that.' They did not acknowledge any appropriate limits on this at all, but the examples they gave would all fall within the other exceptions mentioned above. In the public sphere of activity, equality rights arguably require that people cannot act on their prejudices, even if they are based in some form of belief. Religious freedom cannot be not an absolute right to act in disregard of the rights of others.

No other Australian jurisdiction has a provision like s. 77. As expressed, it purports to prioritise any claimed religious belief over any other human right, regardless of the situation and relative importance of the two. It may be unlikely to survive scrutiny under s. 7(2) of the *Charter* unless it is read down significantly. To dispense with equality rights on the basis of a subjective assertion only is unlikely to meet the standard required by the *Charter*.

As the Uniting Church pointed out, there is no indication that religious freedom is not respected in the rest of Australia because such a provision is absent. This provision could be amended to allow an application to be made for such an exemption, with criteria that the belief is serious or weighty and objectively confirmed, that the claim is proportionate, and the exemption would be reasonable and proportionate in light of the deprivation experienced by the person whose rights would be limited.

Vision Australia also supported the repeal of s. 77, saying that such choices as it seeks to protect should only be protected in the private domain and not the public sphere:

that is, where a person is lawfully seeking the purchase of a good or service or admission to a public event, this exemption should not apply. An example of this can be highlighted by the several cases recently in the media of persons with dog guides being refused taxi services based on religious grounds. Upholding this section as it stands, may make it lawfully permitted to discriminate in such a circumstance and therefore diminishing the human rights of guide dog users in accessing public goods and services and therefore in contravention of the *Charter*.

Options for reform:

Option 1: No change.

Option 2: Section 77 be repealed.

Option 3: Section 77 be amended to allow an application for an exemption to be granted where:

- The religious claim is objectively validated.
- It is reasonable and proportionate (within s. 7(2) of the *Charter*) in light of the restriction of other people's rights that would result.

Section 78 – Private clubs

Section 78 allows discrimination on all attributes in relation to exclusion of people from a private club provided it does not occupy and Crown land or receive directly or indirectly financial assistance from state or local government.

78. Private clubs

- (1) Nothing in Part 3 applies to the exclusion of people from a private club or from any part of the activities or premises of a private club.
- (2) In this section, *private club* means a social, recreational, sporting or community service club or a community service organisation, other than one that—
 - (a) occupies any Crown land; or
 - (b) directly or indirectly receives any financial assistance from the State or a municipal council.

The purpose of this exception is to protect freedom of association by allowing private clubs to discriminate, but the exception is very broad. The VEOHRC commented:

This exception seeks to facilitate a balance between freedom from discrimination (*Charter* s8) and promotion of freedom of association (*Charter* s16) of like minded people and/or for sharing of mutual interest. The limitation relates to exclusion from the activities and premises of private clubs. This limitation is significant in that private clubs are permitted to discriminate on the basis of sex or race or any other personal characteristic which would normally be protected under the *EO Act* just because they may want to maintain exclusivity for whatever reason. The current breadth of this exception is unlikely to be reasonable and justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

The basic tension around this exception appears to focus on single sex clubs, and was summarised succinctly by the Victorian Bar Association in its submission:

There are strong views held in respect of this exception. On the one hand there is a view that same-sex clubs assist and maintain the social and business networks and opportunities of members while diminishing the prospects of those who are not and cannot be members on such grounds as sex or religion. On the other hand, there are members of clubs who regard

the existence of same-sex clubs and venues permitting men, or women as the case may be, to enjoy social interaction in company of their own sex. It is not easy to reconcile these views.

There is a substantial overlap between this provision and the provisions relating to discrimination by clubs in Division 6 of Part 3 of *the EO Act*, which prohibits discrimination in relation to offering membership (s. 59) and in relation to the benefits offered to different classes of members (s. 60). There are three exceptions in Division 6: sections 61, 62 and 63 that exempt clubs for disadvantaged people or minority cultures, clubs and benefits for particular age groups, and preserve separate access to benefits for men and women respectively. These exceptions allow clubs to discriminate in relation to membership, and in some circumstances the benefits associated with membership.

Section 78 by contrast provides a much wider exemption from all provisions of part 3 for 'private' clubs, that is, clubs that do not occupy Crown land and do not indirectly or indirectly receive financial assistance from the state or local government. It would cover employment of staff, the conduct of sporting activities, provision of accommodation and any other activity covered in Part 3, and any attribute such as sex, race, sexual orientation, impairment gender identity political or religious belief and so on. The exemptions granted by the two different sets of clubs provisions (ss. 61-63 and s 78) are very different, and much more latitude is given by s.78 to private clubs. In this way, s. 78(1) is more similar to the exemptions given to religious organisations in s.75-77 than to the clubs exemptions in ss. 61-63.

There is no equivalent of this provision in any other Australian anti-discrimination legislation, and several submissions suggested that it should be reassessed and the exemption given to private clubs limited.⁷⁷ There are two possible paths for reform. One is to retain but vary the private clubs exemption, possibly varying the definition of club and the scope of activities and attributes exempted. The latter is to abandon the *EO Act's* model of a private club altogether and adopt the model of a 'club' set up by the *SDA* (Cth), which is the most common model in other Australian anti-discrimination legislation. This would still allow the existence of single sex clubs. A third alternative is to remove the exemption for single sex clubs altogether.

Freedom of association

The justification for an exception for clubs or associations rests on the fundamental rights of freedom of association in s. 16(2) of the *Charter*:

16. Peaceful assembly and freedom of association

(2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

Possible reforms

Reforming the areas and attributes to which the exception applies.

It is arguable that the exemption for private clubs should not apply beyond the area of membership, and possibly the benefits offered to different categories of members where that is reasonable. Freedom of association does not appear to justify a private club discriminating in relation to its

⁷⁷ VEOHRC and LIV submissions.

employees, or sporting or other activities. It has also been pointed out⁷⁸ that the wording of s. 78(1) appears too wide in several respects which appear to be unintended:

- it would apply to a club that was paying a commercial rent if it was renting premises on crown land.
- it would apply to club premises even if they were hired out to non-members by the club.
- it would apply even where a club held an activity for non-members.

These features make it important that the scope of the activities exempted by s. 78 be better defined and justified.

Reforming the definition of private club

Section 4(1) of *the EO Act* defines a (non-private) club as:

a social, recreational, sporting or community service club, or a community service organisation—

(a) that occupies any Crown land; or

(b) that directly or indirectly receives any financial assistance from the State or a municipal council;

The distinction drawn between a (non-private) club in s. 4(1) and a private club in s. 78 turns entirely on whether the club is on Crown land, or receives any financial assistance from state or local government. This appears to be trying to distinguish between clubs that are entirely self-funded and those that operate with some form of public subsidy. This does not track the public / private distinction other than in a very rough way, and many of the clubs that fall within s. 78 may in fact be larger and wealthier than clubs that have some public support. It has already been noted that some clubs occupying Crown land may in fact pay market rents. The Law Institute of Victoria noted that many clubs that fall within s. 78 have no element of the 'private sphere' in terms of the public private distinction but are very much of the private *commercial* or business sphere, and in many cases should be subject to regulation by the *EO Act*.

The LIV submits that many private clubs today do not constitute a projection of the private sphere of individuals. Rather, they enter the public sphere by activities such as advertising and offering a range of membership services, activities and benefits in much the same way as other profit-making service providers. Many clubs are large-scale enterprises with hundreds, sometimes thousands of members, sharing common interests and pursuits. Given the diversity of size and activities of many private clubs, the LIV does not consider a blanket exception for private clubs to be a reasonable limitation on the right to be free from discrimination.

The DDLS noted that s. 78:

greatly reduces the effectiveness of Part 3, Division 6 prohibiting discrimination by a club. The definition of private club is so broad as to exempt most clubs and effectively allows discrimination in membership for majority of clubs i.e. those that fall outside the definition in

⁷⁸ Submission from David South.

78(2). In order to prove that there is discrimination under the *EO Act* the club must occupy Crown land or receive government/council funding. This means that clubs that may actually be very public in nature and have a very large membership but as they are not either occupying Crown land or receiving financial assistance they may discriminate.

Since most private clubs would fall within the definition of s. 78, they are in effect immunised from the application of the *EO Act*. Blind Citizens Australia pointed out the harm to freedom of association created by allowing such a broad range of clubs to discriminate so widely:

The ability to join a private club such as a local issues lobbying group is critical to civil and political participation, and a broad exception for private clubs arguably prevents freedom of association which is protected under the Victorian *Charter of Human Rights and Responsibilities*. Although these incompatibilities could be eliminated by providing a clear definition of a private club, we believe this would not remedy the underlying problem: the onus should be on clubs to prove that they ought to be allowed to discriminate.

The *Sex Discrimination Act 1984* (Cth) provides an alternative definition that attempts to draw a line between clubs that should be covered by anti-discrimination law and those that should not:

3(1): *club* means an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that:

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises.

Discrimination by clubs in relation to membership or benefits provided to members is prohibited by ss. 25(1) and (2), but single sex clubs are permitted by *SDA* s. 25(3):

25. (3) Nothing in subsection (1) or (2) renders it unlawful to discriminate against a person on the ground of the person's sex if membership of the club is available to persons of the opposite sex only.

In comparable legislation around Australia, WA, NT and Tasmania have the same definition of club as the *SDA* (Cth). The ACT and NSW definitions are linked to their registered clubs legislation or licensing laws, while Queensland's focuses on the club having a profit making purpose. Every jurisdiction allows single sex clubs, and all except Tasmania and Queensland allow exceptions for clubs for particular age groups. Adopting the *SDA* definition would be a significant step in harmonising the law around Australia on clubs and compliance with discrimination law.

The purposes of a private club

If a private clubs exception is to be retained, there is an argument that clubs should only be able to qualify for the exception if they serve particular types of interests. The VEOHRC and LIV suggested that the exemption should only be available to clubs that pursued particular purposes.

The Commission's view is that: private elitist clubs are old fashioned and outdated and have no place in the 21st Century, however, at the same time the Commission recognises that

freedom of association is also an important right. Accordingly the current limitation this exception gives rise to should be constrained to ensure a less restrictive and more balanced approach to achieve the purpose of recognising freedom of association. This exception should be amended to ensure a more balanced and justified approach to the promotion of freedom of association. Specifically, clubs wishing to discriminate and maintain exclusionary membership policies should demonstrate that such policies are justified by reference to a specific purpose and/or interests.

The LIV suggested that protection under s. 78 could be limited to clubs established to promote the interests of groups protected by the *EO Act*.

The LIV recognises the policy tension arising in equal opportunity and human rights law relating to regulation of the public versus the private sphere. ... The *Charter* also recognises that limitations should be placed on government interference in the affairs of private citizens, in ss 13 (privacy and reputation) and 16 (peaceful assembly and freedom of association).

...

The LIV notes that many private clubs discriminate in an attempt to address historical disadvantage experienced by particular groups of people. We recognise the importance of these private clubs in assisting members to overcome systemic discrimination. The LIV submits that such clubs are adequately protected by exceptions in ss 61-63 of the *EO Act*. Further, the LIV notes that charities are protected under s74, where the discrimination is in accordance with the provisions of a charitable deed or will.

The LIV recommends amendment to s78 to recognise that unless a private club is established to promote the interests of a group entitled to protection under the *EO Act*, (a 'special measure'), the restriction of membership of a club to a particular attribute should not be subject to exception from the *EO Act*.

These approaches would address the concern that clubs can be used to illegitimately preserve advantages of various kinds for their members, in which case discriminatory exclusion raises serious concerns. However, this would be at the cost of the right to freedom of association, which is an entitlement of all individuals, not only those from disadvantaged groups.

In contrast, Clubs Victoria and John Ryan in their submissions emphasised the importance of freedom of association and the need to allow some leeway of exclusivity for private social associations. Clubs Victoria preferred the federal approach to clubs in the *SDA* (Cth) that allows single sex clubs, commenting that:

It is a basic human right for people to associate freely. If the reason for the association is not unlawful (eg to commit a crime or to indulge in paedophilia) it is submitted that it is counterproductive to make the association itself unlawful because of the unprotected attribute of the people who are associating. It seems illogical to outlaw the formation of a club for men, because it is considered that men are not disadvantaged, whereas it is lawful to form a club for women because women are considered disadvantaged.

Clubs are private associations, not public organisations. Clubs are groups of like-minded persons, like a group of friends. It is not unlawful for persons to discriminate on grounds of protected attributes in respect of whom they have as friends – this is a manifestation of the

right to free association. Hence it should not be unlawful for persons to form clubs (associations) with other persons regardless of their protected attributes.

In fact the prohibition on membership of clubs is 'observed in the breach', and has the potential to outlaw many acceptable community associations. For example, mothers clubs, singles clubs, card groups etc. None of these groups operate principally to prevent or reduce disadvantage. They operate to provide the company of compatible persons. It is simply over-kill to suggest that the regular poker night is unlawful and that uninvited persons have recourse to the courts to force their inclusion. People should be at liberty to decide to play poker with only men, only women, only Danish people, only grandmothers, whomever they want. The reality is that people do form clubs with their friends and often membership is denied to people with protected attributes, and this should not be illegal.

Clubs should be entitled to discriminate in respect of membership and rights of members when the club is established for a particular purpose that is not otherwise illegal, and the discrimination promotes the purpose. It is not illegal for a group of men to associate – therefore it should not be illegal for a group of men to form a club for men and to discriminate against women for membership.

These justifications seem appropriate to smaller non-commercial groupings of people, more similar to clubs that fall outside the definition of club in s. 4 of the *SDA* (Cth). John Ryan commented:

The right to freedom of association is destroyed if the Equal Opportunity Act could be used by a person to force their way into an association, club or group in which they were not welcome.

One persons right to freedom of association would in this instance effectively destroy the individual rights of a group that have freely associated.

There are very real dangers in a general provision outlawing discrimination in areas where freedom of association is the underlying individual right.

Freedom of association represents one of the subjects where it is easier to deal with the matter by reversing the approach adopted in the Act. ...

I am of the very strong view that the pursuit of equality of opportunity should only be elevated above the right to freedom of association in circumstances where the association has such a privileged state within the social framework that allowing the association to exclude persons would effectively deprive the excluded person of personal rights and benefits which they could not access elsewhere.

This suggests another approach to limiting which clubs have exceptions from discrimination law to ensure that it is not abused. If the club controls any resource that is in some way essential, such as access to an occupation, control of a sport, or some benefit that was necessary and could not be obtained in any other way that may justify limiting its freedom to discriminate in relation to membership.

Options for reform:

Option 1: No change.

Option 2: Repeal section 78, and the current definition of club in s. 4(1). Adopt the definition of club in s. 4(1) of the *SDA* (Cth), and possibly the exemption in s. 25(3).

Option 3: Amend s. 78 to provide that the exception applies only in relation to membership of the club, and that the exception does not apply where the club controls access to any benefit that is necessary for an occupation, sport or other area of activity, or alternatively, applies only to clubs that can demonstrate their exclusiveness is justified by a specific purpose and/or interests.

Section 79 – Incapacity and age of majority – where a person is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved

The purpose of this exception is to make it clear that nothing in the *EO Act* is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority. The *Age of Majority Act 1977* specifies 18 as the age in which a person attains full age and capacity.

79. Legal incapacity and age of majority

- (1) Nothing in this Act is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority.
- (2) A person may discriminate against another person who is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved.

Note that the discrimination permitted in subsection 2 is not restricted to discrimination only on the ground of age or impairment – it could cover any ground. The VEOHRC acknowledged that s. 79(2) is broader than necessary:

Sub-section 79(2) permits a person to discriminate against another person who is subject to a legal incapacity where that incapacity is relevant to the transaction or activity in which the parties are involved. For instance a person may refuse to enter into a contract with a person who is under 18 years of age. The nature and extent of the limitation of sub-section 79(2) is confined in that it extends only to those transactions in which legal capacity is an issue. There is the potential for this exception to be applied broadly which may unduly restrict the types of activities and transactions of people with certain attributes such as age and impairment and thereby limit their right to equality.

Vision Australia expressed its concern at the potential operation of s. 79(2), and suggested that the section refer only to age of majority, and not legal incapacity, commenting:

Vision Australia through our advocacy work is aware of cases where legal incapacity has been granted on the sole grounds of blindness in relation to power over ones financial affairs. Part 2 of this section as it stands, a relevant transaction to the legal incapacity in the above case, may afford an undue refuge for lawful discrimination by any element of the community that can draw a reasonable parallel to financial affairs. It should be the merits of one's direct involvement with a particular element of the Act that determines one's opportunity for inclusion. If a legitimate claim can be made, it should be decided upon by application for exemption to VCAT.

Given these concerns about its use in cases of impairment, the formulation of this exception should be improved to ensure compatibility with the *Charter*. It is not clear how common is this experience, or how important in practice this exception is. There may be no need for the provision, because if an

impairment leads to incapacity, then it is likely to affect the enforceability of the contract and would render the circumstances not materially similar, so it is unlikely that any direct discrimination could be shown from a refusal to enter a contract with a person. Logically, the provision is not necessary.

There is no equivalent provision in either the *Age DA* or *DDA* (Cth) at Commonwealth level, and among the comparable state laws, provisions refer only to incapacity due to age in NSW s. 49ZYQ, SA s. 85M, ACT s. 57G, Queensland, NT and Tasmania include age or impairment in their provision, but Queensland and NT legislation refers only to transactions (not activities), while Tasmania refers only to activities.

Options for reform:

Option 1: No change.

Option 2: Amend the provision to authorise only discrimination on the basis of the particular incapacity involved.

Option 3: Repeal sub-section (2).

Section 80 – Protection of health, safety and property

Section 80 allows discrimination on the basis of impairment or physical features for the purposes of protecting the health, safety or property of any person (including the person discriminated against or the public generally, and on the basis of pregnancy where it is necessary to protect health or safety.

80. Protection of health, safety and property

- (1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary—
 - (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally;
 - (b) to protect the property of any person (including the person discriminated against) or any public property.
- (2) A person may discriminate against another person on the basis of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against).

Both the VEOHRC and Job Watch regarded this provision as justified because of the importance of health and safety requirements, and therefore as a reasonable limitation on the right to equality. However, disability organisations were more concerned. The VEOHRC identified the 'equally important' rights protected by s. 80 that are potentially in conflict with the right to equality as the protection of life (*Charter* s. 9); the right to security of person (s. 21); and the protection of children in terms of safety of pregnant women (*Charter* s. 17). It commented that:

The interpretation of this provision to date by VCAT (see *Hall v VAFA* (1999) and *Kilburn v State of Victoria (Victoria Police)* (2007)) facilitates an interpretation and application of this provision that is consistent with the *Charter* in that it requires an examination of reasonableness, rationality and proportionality of conduct taken for the purpose of protecting

health and safety in terms of whether it was 'reasonably necessary'. This application to date indicates that the provision is reasonable and demonstrably justified in a free and democratic society. There are no less restrictive means to achieve such purposes.

In its submission, Job Watch supported this assessment:

Health and safety in the workplace are of fundamental importance and justify a specific exception to ensure that an employer can act for the protection of others, without concern that taking such action will result in claims of unlawful discrimination. Likewise, an employee's capacity to perform their duties without genuine risk of harm to him or herself, others, or the employer's property justifies this exception as it is obviously an inherent requirement of employment, which is consistent with an employee's common law duties to their employer. ...

It should be noted that in an employment context, this exception should only apply if it is not reasonable in the circumstances for special services and facilities to be provided to accommodate an employee's impairment so as to reduce any risk they may present to health and safety in the workplace.

VicSport also expressed its support for the provision, which offers important support for sporting clubs:

Protecting the health and safety of participants is always the primary concern for any club or organisation offering a sport or physical activity opportunity. It is important this exception remain in place to allow groups to take steps to protect the health and safety of all if required. In regard to the issues of playing or competing in sport or physical activity pursuits whilst pregnant, many sports, such as netball for example, have policies specifically outlining issues regarding competing whilst pregnant. In general, these policies indicate medical guidance should be sought to determine the suitability of the mother-to-be to participate. With appropriate medical advice, participation is at the discretion of the mother-to-be. These policies should be referred to as part of any discussion regarding Section 80.

However, a concern was expressed by the Uniting Church Justice and International Mission Unit, Synod of Victoria and Tasmania that this provision may be used to avoid making reasonable adjustments of premises or facilities and therefore to continue discrimination. The Uniting Church suggested that reliance on this provision should be monitored to ensure that was not occurring. This concern could be addressed by adopting a reasonableness criterion or balancing factors in the section, but would be most readily addressed by adopting an express duty to make reasonable adjustments in all areas to which the *EO Act* applies, not only the workplace. This would allow for a defence of unjustifiable hardship which allows for appropriate adjustments to the circumstances of the individual situation.

Vision Australia, however, argued that section 80 should be repealed, on the basis that safety concerns should be dealt with as such, not as a reason to discriminate:

It should not be a matter of lawful discrimination in the case of public safety where a person's disability can be seen as a safety risk but a legitimate concern for safety in itself. This is to say that in the case of a health and safety risk on legitimate grounds, other legislative components such as occupational health and safety should be employed and measures undertaken for this purpose. In other words, one's right to equal opportunity as stated in *the EO Act* should be

upheld, and health and safety concerns should be addressed through the relevant channels and measures.

Blind Citizens Australia was also concerned that the exception was too subjective and believed there should be evidence of the threat to safety:

It is important that this exception exists, however BCA is concerned that there is some danger that it allows for discrimination on the basis of perceived threats to health, safety or property rather than real ones. For example, there may be the perception that allowing a person who is blind or vision impaired to work in a reception role is unsafe because they will not see potentially dangerous customers. In reality, it is very rare for any receptionist to face this problem and a receptionist who is blind or vision impaired may not be at a disadvantage if the danger cannot be seen from some distance away.

BCA recommends that the wording of this exception be changed to reflect the need for evidence that there is a reasonable expectation of a direct threat to health, safety or property, rather than a perception of a threat which may or may not come to pass.

It is also arguable that the wording of s. 80 sets the threshold too low where equality rights can be overridden by a threat of unspecified danger to someone's property. Unless there was a serious threat of substantial harm to property, such a restriction of a fundamental right may not amount to a reasonable limitation.

John Ryan opposed this exception in its current form, looking at its impact in the workplace, and his was the only submission to comment on subsection (2):

Under the OHS legislation in Victoria there is a requirement for the provision of a healthy and safe workplace subject to a 'reasonably practicable' test. If the Act is to allow an exception based on health and safety then the exception should only be treated where it is not reasonably practicable for the discriminator to provide a healthy and safe environment for the person who would be subject to discrimination.

The exception in relation to discrimination against pregnant women should not be retained in its present form. If there is to be any actual discrimination against pregnant women then this should only be permitted in the form of a tightly worded defence to a complaint of discrimination. A heavy onus of proof should be placed on the person wanting to use the defence.

Comparable provisions in other Australian laws vary, but none allows a limitation on discrimination law rights solely to protect property. Among state and territory laws, only South Australia does not have an equivalent provision and all provisions are more circumscribed than s. 80. None of the federal laws contain any similar exception: only the *DDA* (Cth) in s. 48 contains an exemption relating to public health and infectious diseases. Some provisions appear to be directed at public health and infectious diseases rather than employment health and safety (NSW s. 49P, WA s. 66ZM, Tasmania s. 47 and *DDA* (Cth) s. 48). Other state Acts contain provisions that specifically refer to occupational health and safety as well as public health, such as WA and Queensland.

None of these laws contain any equivalent to the provision relating to pregnancy.

Since the *Charter* was adopted, equality rights are now acknowledged as fundamental human rights. While it may be important to retain a provision to make it clear that some limitations based on health and safety requirements should prevail over equality rights, perhaps the case for any such exception should have to be made out by the person relying on it. Otherwise it could not be regarded as a reasonable limitation on rights. The statutory models in Queensland (ss. 107 and 108) and WA (ss. 66ZM and 66U) provide alternative models that could be considered. It would be preferable for a review of s. 80 to be linked with a general review of the interaction of employment discrimination and occupational health and safety provision that would cover s. 69 as well as ss. 22, etc.

Options for reform:

Option 1: No change.

Option 2: Recommend further review along with other provisions relevant to employment discrimination and the making of reasonable adjustments.

Option 3: In the interim, amend s. 80 to delete the references to property, and to add a subsection (3) that requires an assessment of the reasonableness of the proposed discrimination, including the efforts that have been undertaken to avoid the health and safety risk other than discriminating; any less restrictive alternative; the impact on the person affected and any other relevant factors. The onus of showing that any such discrimination is necessary should be explicitly on the person asserting it.

Section 81 – Age benefits and concessions – the provision of benefits, including concessions, to another person based on age

The purpose of this exception is to allow a person to provide benefits, including concessions, to another person based on age.

81. Age benefits and concessions

A person may provide benefits, including concessions, to another person based on age.

The VEOHRC commented on this provision:

This exception has an important purpose of permitting benefits and concessions based on age. This is a reasonable limitation which is proportionate and rational to the purpose of the exception.

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 provision preserves such practices as student transport concession cards and so on. Benefits for children would be generally accepted, although benefits for older people simply on the basis of age and not of need may be less generally acceptable. Further review could be undertaken in future to develop a policy on what sorts of age related benefits or concession should be supported by such an exception.

Equivalent provisions exist in all states and territories except South Australia, but there are no equivalents in federal legislation, so any such benefit may contravene the *Age Discrimination Act* (Cth) if it applied.

Options for reform:

Option 1: This provision needs no amendment, and no submission commented on it.

Section 82 – Welfare measures and special needs

Section 82 provides that nothing done in relation to provision of special services, benefits or facilities to people with a particular attribute designed to meet their special needs to prevent or reduce a disadvantage they suffer in education, accommodation, training or welfare will contravene the prohibition on discrimination. Subsection (2) makes clear this covers special treatment of women in relation to pregnancy and childbirth, and holiday tours for specific age groups.

82. Welfare measures and special needs

- (1) Nothing in Part 3 applies to anything done in relation to the provision to people with a particular attribute of special services, benefits or facilities that are designed—
 - (a) to meet the special needs of those people; or
 - (b) to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.
- (2) Without limiting the generality of subsection (1)—
 - (a) a person may grant a woman any right, privilege or benefit in relation to pregnancy or childbirth;
 - (b) a person may provide, or restrict the offering of, holiday tours to people of a particular age or age group.

This provision, together with several other sections of *the EO Act*, authorises the taking of measures to prevent or reduce disadvantage. The other provisions include exceptions for:

- employment in welfare services (section 19).
- welfare measures in accommodation (section 55).
- clubs for disadvantaged people or minority cultures (section 61).

These exceptions are in principle consistent with, although much narrower than, the ‘special measures’ provision of the *Charter*, s. 8(4) of which provides that:

Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Section 8(4) ensures that people can take positive steps to reduce disadvantage by targeting certain groups for employment, services or access to clubs. Such provisions recognise that special measures are not discriminatory, but may be necessary to promote equality for those who have

suffered discrimination in the past and as a result are in a disadvantaged position. Such an exception appears in the main international human rights conventions⁷⁹

The definition of direct discrimination in the *EO Act*, like all other Australian anti-discrimination laws, identifies any departures from equal treatment as prima facie unlawful discrimination unless an exception or defence applies (see eg *Gerhardy v Brown* [1985] HCA 11; (1985) 159 CLR 70). However, in some situations where people are not similarly situated, it may be necessary to treat them differently to achieve equality. If positive measures to reduce disadvantage could not be taken, the *EO Act's* model of equality would be limited to equal treatment or same treatment, as discussed above,⁸⁰ which would prevent any action from being taken to assist specific disadvantaged groups of people. For example, people of a non-disadvantaged ethnic or national origin may be able to challenge as discriminatory services or programs to reduce disadvantage for ethnic groups or people of a specific national origin who are disadvantaged. The special measures provision is the way in which anti-discrimination laws can take account of the specificity of historical disadvantage.

The Gardner Review commented on s. 82 and the *Charter*:

1.69. There are inconsistencies between the special measures exception, which appears in both the *Charter* and the Act. The *Charter* provides that, measures taken for the purpose of assisting or advancing people who are disadvantaged because of discrimination, do not constitute discrimination. The Act provides a more limited special measures exception. The *Charter* provision for special measures sits better with the recommended framework for the proposed Equality Act and should be included in the Act. This would provide a legal basis to support the objectives of progressively achieving substantive equality. ...

1.88. The Review proposes that the substantive equality objective be supported by ... the clear statement that special measures are not discriminatory;

As a consequence, the Gardner Review recommended that a special measures provision reflecting s. 8(4) of the *Charter* should be adopted as part of the *EO Act*:

Recommendation 4

The existing provision in the *Charter* that provides that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated in the Act.

If this recommendation is implemented, then s. 82 is likely to be replaced with a more general special measures provision along the lines of the *Charter*. This can reflect a difference in thinking about the role of this sort of provision, because a special measures provision does not operate as an exception, but as part of the definition of discrimination by providing that if an action falls within its scope, it is simply not discrimination. By contrast, s. 82 operates as an exception, so it only comes into play if a case of discrimination is made out.

However, even if a new provision is adopted, there are some specific issues that may need to be identified for consideration, so this Paper proceeds to briefly consider reforms to s. 82 that may be desirable.

⁷⁹ See note 6 above.

⁸⁰ See discussion of the limits of an equal treatment model of equality in Background: General Questions in this Paper.

Views on s. 82

Section 82 is too wide in some respects and too narrow in others. It protects 'anything done' for the listed purposes, which is a very broad form of protection and may well extend to aspects of special services benefits or facilities that should not be protected, such as employment of staff. The Law Institute of Victoria said the risk that this area might be immunised 'must be removed'. However it applies only to the areas of education, training, accommodation and welfare, leaving out the area of employment.

Special measures can cover a wide range of different approaches, from the provision of special services for people with a disability or language limitations, to positive action schemes to encourage employment or advancement of disadvantaged groups; for example, it may be appropriate to allow special searches for indigenous or women candidates for employment positions in which they are underrepresented. Section 82 appears to be drafted with only the first of these models, service provision, in mind, and it needs to be clarified that it applies to permit a person who seeks to take positive action to do so in relation to employment programs as well as other areas. The Queensland AD Act refers to these categories as 'welfare measures' and 'equal opportunity measures': see ss. 104 and 105.

Special measures can be taken by the government or private bodies or organisations. The aim of a special measures provision is not to require any body, government or private, to take special measures (although in some situations a failure to take special measures may be indirect discrimination against a disadvantaged group), but to ensure that if they choose to do so their actions will not contravene the prohibition of discrimination. Challenges to special measures programs could occur either through a complaint from a member of a group outside the disadvantaged group the program is designed to assist, or from complaints by people within the group being assisted that they are unlawfully excluded from it. Because resources for service and program provision are limited, a program may not cover every person in the excluded group, and selection on some reasonable basis may be needed along with a right to exclude those not selected.

Section 82 has been considered by the Supreme Court in *Colyer v. State of Victoria* [1998] 3 VR 759. The Court of Appeal held that the test for whether or not a special service fell within s. 82 was whether or not it *had been designed* to meet the purposes in (1)(a) or (b). Provided it was genuinely designed to do that, it was not relevant whether it could reasonably do so, or even whether people subject to it regarded it as further disadvantaging them. This consequence flows from the fact that the Court in *Colyer* refused to read in an objective element (to the effect: "and is capable of actually reducing disadvantage") into the test. As it stands, section 82 could potentially operate to reduce rather than advance the rights of marginalised and disadvantaged groups. Subsequent comments on s. 82 by Morris P in VCAT in *Mangan v Melbourne Cricket Club* [2006] VCAT 73 have not resolved this point.

Issues to be considered

In relation to any special measure there are a number of relevant aspects to consider:

- What sort of measure is proposed? Is it service provision or another form of assistance such as an equal employment opportunity program?
- For whom is the measure designed?

- What sort of disadvantage is being redressed – does the measure correspond to a specific disadvantage or is its justification more generally the disadvantage of the group?
- How will the measure address the disadvantage (if specific) or reduce it (if general)?
- Who is eligible for the benefit of the measure and who can be excluded?

The VEOHRC has expressed its concern to ensure that exclusion of people from any special services provided under s. 82 should be protected from any claim of discrimination, given the limited resources that are often available for such purposes:

The Commission in its 2005 submission to the Attorney-General recommended that the section should be amended to, like its predecessor, be restricted to the exclusion of people from a special service, benefit or facility (i.e. eligibility only rather anything done in relation to the provision of that service). Given the uncertain application of this provision and its likely incompatibility with the *Charter* in that it significantly limits freedom from discrimination in relation to the administration of welfare services it should be either amended or repealed to clarify its application and ensure that only a limited exception operates which permits reasonable restrictions on eligibility to services, benefits and facilities where such services, benefits and facilities are designed to meet the special needs of particular groups.

The VEOHRC further commented:

The Productivity Commission in its 2004 review of the *DDA* (Cth) considered that the reason for introducing the special measures exemption in that Act, to ensure that it is lawful to do things for the benefit of people with disabilities, is still a relevant objective, but it had been misinterpreted or misunderstood. Similarly to section 82 it had been interpreted as protecting any act done in the course of administering a beneficial service and not just beneficial acts, but services themselves. Because of this the Productivity Commission recommended that the exemption in the *DDA* (Cth) for 'special measures' be amended to clarify that it exempts the establishment, eligibility criteria and funding of these measures designed to benefit particular groups within the community and clarified to ensure that it does not exempt the general administration of special disability services.

The Commission was of the view in its 2005 submission and remains of the view that the special measures provisions of the *EO Act* cannot be permitted to operate in a manner that denies already disadvantaged individuals and groups their rights under the Act.

... the Commission would support the introduction of an express provision, which recognises that measures taken for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. Examples should also be provided to assist understanding of this including the ones referred to in sub-section 82(2).

No submission argued against these significant points of reform. Thus it may be necessary in the end to have two provisions, one that provides that special measures are not discrimination and another that gives more specific guidance on what can be regarded as a special measure and delimits what actions taken in the course of a special measure are protected. The factors mentioned here could be taken into account, although it would not be desirable for any such list to confine narrowly the scope for such services and programs. In a 2009 submission, the VEOHRC included notes for approaches that should and should not be included in a special measures provision. These are useful guides.

Should special measures be specifically approved?

Finally, positive measures and services could be approved through a temporary exemptions process or a process of registration with the VEOHRC (see proposal for an additional process in relation to s. 83) instead of or in addition to having a fixed exception in *the EO Act*. This could be attractive to some organisations because it enables them to get advance approval for a program if they are uncertain of its legality. However, having to seek an exemption for every such program would be an administrative burden that would be a substantial disincentive to undertake them, as well as a burden for the agency that has to register / approve them. Special measures should not be deterred because they are necessary in order to move towards substantive or actual equality. In addition, the idea of a special measure is that it is carved out of the definition of discrimination, so an exception or exemption is not needed (see for example s. 7D of the *Sex Discrimination Act 1984* (Cth) below).

Comparison with other legislation

Section 82 is worded very differently from the special measures provisions in other Australian anti-discrimination laws. It falls far short of the type of exception that would be needed to ensure that programs designed to achieve equality in substance do not breach the prohibition on direct discrimination, which requires sameness of treatment. It should be updated to reflect the exceptions in federal and more recent state and territory laws, none of which have resulted in any problems of application. The formulations in the South Australian *EO Act* (ss. 47, 65 and 82), *SDA* (Cth) s. 7D and *Age Discrimination Act 2004* (Cth) s. 45 (subject to the comments above), provide models for a different approach. (Extracted in Appendix B)

Options for reform:

Option 1: No change.

Option 2: Amend s. 82 to make clear that it covers programs other than service provision, to clarify that it protects only the nature of the program, its funding, and selection for it, and that a valid program must not only be designed to assist the disadvantaged group but must be objectively capable of doing so, and must be a reasonable response to the disadvantage being addressed.

Option 3: In addition to option 2, introduce a provision that excepts special measures from discrimination, to reflect s. 8(4) of the *Charter*.

Section 83 – Exemptions by the Victorian Civil and Administrative Tribunal

Section 83 provides a mechanism for the Victorian Civil and Administrative Tribunal (VCAT) to grant an exemption from any of the provisions of the *EO Act* in relation to a person or a class of people or an activity or class of activities. This mechanism effectively enables VCAT to create specific exceptions to the *EO Act* to allow for competing interests.

The *Consultation Paper* asked:

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

83. Exemptions by the Tribunal

- (1) The Tribunal, by notice published in the Government Gazette, may grant an exemption—
 - (a) from any of the provisions of this Act in relation to—
 - (i) a person or class of people; or
 - (ii) an activity or class of activities; or
 - (b) in the circumstances referred to in section 28; or
 - (c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.
- (2) An exemption remains in force for the period, not exceeding 3 years, that is specified in the notice.
- (3) The Tribunal, by notice published in the Government Gazette—
 - (a) may renew an exemption from time to time for the period, not exceeding 3 years, specified in the notice;
 - (b) may revoke an exemption with effect from the date specified in the notice, which must be a date not less than 3 months after the date the notice is published.
- (4) An exemption may be granted or renewed subject to any conditions the Tribunal thinks fit.
- (5) An exemption may be granted, renewed or revoked—
 - (a) on the application of a person whose interests, in the opinion of the Tribunal, are or may be affected by the exemption; or
 - (b) on the Tribunal's own initiative.

All submissions concerning s. 83 acknowledged its importance in ensuring flexibility in Victoria's equal opportunity regime, and thought that it should continue but that amendments were needed in relation to both the criteria for granting an exemption and the process through which exemptions are granted.

The power is used in two main situations: first, to give advance approval for measures that are likely to amount to welfare measures within s. 82, and secondly, to grant a dispensation from compliance with the *EO Act* where a different right or interest is allowed to prevail in the particular situation. Only the second situation leads to a limitation of equality rights. Criteria and process will be discussed separately.

A. Criteria for granting exemptions

Section 83 does not provide any criteria at all on which the exercise of the power is to be based. The way the power is exercised was described by the Department of Justice in its Background Paper (Ch. 4) as follows:

The existing framework was identified in the case considering the application by Fernwood Fitness Centre to establish female only gyms in Victoria.⁸¹ According to the framework set out in that case, VCAT will consider the following factors when assessing an application for an exemption:

⁸¹ ([1996] EOC 92-782.

- whether it is necessary to grant the exemption (ie would the conduct constitute unlawful discrimination under the Act?);
- whether an exception already applies to the conduct;
- whether the proposed exemption is appropriate in light of the objectives and scheme of the Act;
- all the relevant circumstances of the particular case.

More recently, however, concerns were expressed in relation to the recent VCAT decision granting a further exemption to Boeing (to follow an earlier exemption granted in 2003).⁸² The exemption allowed Boeing to discriminate on the basis of nationality in the area of employment, which it claimed was required by the terms of security technology licensing restrictions set out by the USA government in its International Traffic in Arms Regulations and Export Administration Regulations. These precluded transferring licensed technologies to a 'national of a third country,' so Boeing sought an exemption to allow it to exclude employees who were not Australian citizens from that part of its workforce. The exemption was granted subject to conditions. VCAT accepted that an 'overriding public interest' existed to justify conduct being taken outside the statutory prohibitions on discrimination. This decision was followed in two subsequent cases to grant similar exemptions to other companies.⁸³ It was controversial because it involves granting an exemption on the ground of nationality, as aspect of racial discrimination, when the *Racial Discrimination Act 1975* (Cth) has no provision for temporary exceptions of any kind. The decision has been criticised as an inappropriate example of an exemption that privileges economic interests over a person's right to equality. The Law Institute of Victoria commented on:

... the recent case of Boeing,⁸⁴ in which President Morris held that the test to be considered is 'whether the proposed exemption is necessary or desirable to avoid an unreasonable outcome.' The LIV submits that the *EO Act* should be amended to set out the circumstances in which VCAT may grant an exemption and the criteria for granting that exemption. The LIV considers the test propounded by Justice Morris in Boeing to be vague and open-ended and we are concerned that it would allow an exemption whenever the costs outweigh the benefits. The LIV reiterates that the right to equality is a fundamental human right and should not be subject to a costs/benefit analysis.

We note that following the commencement of the *Charter*, s83 should be interpreted in a way that is compatible with human rights.⁸⁵ Given that exemptions effectively represent a limitation on human rights, (specifically the right to equality), the LIV supports the submission of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in Boeing that when

⁸² *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532. In this decision VCAT recently renewed an exemption granted to Boeing. The exemption was from certain sections of the Act and allowed Boeing to discriminate on the basis of nationality in the area of employment. The exemption was granted (with a number of conditions) to enable Boeing to comply with the security laws of the Department of State of the United States of America (and other American government entities). This is an example of VCAT accepting an "overriding public interest" argument to justify conduct being taken outside the statutory prohibitions on discrimination.

⁸³ *ADI Limited (Anti-Discrimination)* [2007] VCAT 2242; *Raytheon Australia Pty Ltd & Ors Exemption Application (Anti-Discrimination)* [2007] VCAT 2230.

⁸⁴ *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 (*Boeing*).

⁸⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s. 32.

exercising its discretion under s83 of the *EO Act*, VCAT should apply a reasonable limitations test, as set out in s7(2) of the *Charter*.⁸⁶

Several submissions supported the obligation of VCAT to use a reasonable limitations analysis in any future s. 83 applications as a result of the *Charter*.⁸⁷ Others suggested that the reasonable limitations test should be adopted within s. 83 as an explicit guide to the exercise of this discretion (PILCH Homeless Persons Legal Clinic, recommendation 7). The Federation of Community Legal Centres supported:

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

Another reason for having criteria expressed in *the EO Act* would be to emphasise the seriousness of the power. The VEOHRC noted that: 'Permitting an individual or organisation to operate outside the requirements of the *EO Act* is an incredibly significant decision.' The s. 83 power should not be lightly exercised, as should be clear in any amendment to it. At federal level, the Sex Discrimination Commissioner has published guidelines on the criteria that will be applied to considering an application for exemption under the *SDA* (Cth).⁸⁸ In NSW where exemptions decisions are made by the Attorney-General, regulations under the *AD Act* specify some relevant criteria, which are quite similar to those under s. 7(2) of the *Charter*.⁸⁹

Short or long term exemptions

The exemption power has been used quite extensively in recent years, and there is a tension around whether it can be used for short term adjustments only, or whether some activities can be exempted from *the EO Act* on a long term basis, such as women-only gyms, which suggest that the exemption is likely to be very long term. In principle, any activity that is receiving a series of exemptions adding up to long term or permanent exemption from *the EO Act* should not be dealt with through the s. 83 power. A review of any such exemption should be undertaken at a policy level with adequate consultation and either a principled exception adopted within *the EO Act* or a decision made that the area is not suitable for an exemption. For example, in line with the discussion of single sex sporting competitions at s.66, it may be legitimate to say that due to body image concerns women-only gyms and exercise programs should be dealt with under a redrafted s. 66, or under a redrafted s. 82 (welfare, equal opportunity and special measures) rather than under s. 83. Areas in which exemptions are regularly granted on similar arguments should, if they are legitimate, be recognised as exceptions to the operation of *the EO Act*. To implement this principle would require a full review

⁸⁶ *Boeing*, at [34].

⁸⁷ Human Rights Law Resource Centre submission at [96].

⁸⁸ See *Exemptions Under the Sex Discrimination Act* at http://www.humanrights.gov.au/legal/exemptions/sda_exemption/sda_exemption.html

⁸⁹ See *Anti Discrimination Amendment (Exemptions) Regulation 2004* (NSW), and the guidelines at http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_exemption_guidelines.

of the applications for exemption made to VCAT, including reasons for granting or refusing them, followed by analysis of how the areas are best dealt with.

Getting advance approval

On the other hand, several organisations commented on the importance of being able to have proposed actions approved in advance. Netball Victoria commented on the importance of certainty and risk management in a situation where resources are limited and there is high dependence on volunteer administrators. La Trobe University commented on the importance of knowing in advance that any special programs they propose to assist disadvantaged groups cannot be challenged under the *EO Act*. It may be that a separate process for granting advance approval to special measures programs should be provided that could be administered by the VEOHRC, rather than requiring a full hearing by VCAT in every instance. Applications could be identified for this path by their purpose of providing a benefit for members of a disadvantaged group.

The VEOHRC said that the vast majority of exemptions granted are 'routine', in the sense that they are designed to avoid a technical operation of *the EO Act* giving rise to outcomes that are contrary to equal opportunity principles. An example of such an exemption would be one granted to permit a comprehensive recruitment and training strategy designed to increase Indigenous recruitment and retention within a government department, which is clearly compatible with the principles of equal opportunity and human rights. In the absence of a temporary exemptions framework, the operation of such initiatives could be distracted (or worse discouraged) by having to respond to complaints of discrimination.

At the same time however, unusual applications are not uncommon, where the application raises issues not previously considered, or may in fact seek an exemption that is contrary to the principles of the legislation. In addition, there is a growing appreciation that exemptions from the *EO Act* can sometimes be used as a strategic compliance tool – ie using the 'carrot' of a fixed-term exemption, to secure undertakings, and allow time for an organisation to transition to non-discriminatory conduct and processes.

Reliance on the reasonable limitations test from s. 7(2) of the *Charter* may exclude the possibility of strategic use of short term exemptions for compliance purposes.

Dissatisfaction with denials of exemptions

Some dissatisfaction was expressed with VCAT decisions denying applications for particular groups. Salt Shakers, a religious organisation, commented that an exemption had been refused to a church seeking exemption to employ only Christians in an incorporated body it had set up to run welfare assistance for the church. They regarded this situation as unacceptable:

Either the exemption system needs some work to ensure this doesn't happen or the definition of a religious body, as defined in section 75, needs to be expanded so no exemption would need to be sought.

Adopting a clear set of criteria for exemptions and developing guidelines for the application of the criteria may help to clarify these issues.

B. Process for granting exemptions

Many submissions agreed that the process for granting exemptions needs reform to be more transparent and accessible. As presently set up, the *EO Act* provides no particular procedural requirements for publicity to ensure transparency, or that there be a participator in the decision-making process to represent the interests of those who will be affected by the decision. The Department of Justice Background paper summarises a number of the proposals for reform:

Strengthening the role of Victorian Equal Opportunity and Human Rights Commission (the Commission) in exemption process

One issue identified in submissions is that the role of the Commission in the granting of exemptions should be strengthened and formalised. At present, the Commission does not have a formal role in the granting of exemptions from *the EO Act*. In its submission, the Commission supports formalising the role assumed by the Commission in this process.

This could include:

- Applicants for an exemption from the Act could be required to provide a copy of their application to the Commission;
- The Commission could have standing under the Act to appear or make submissions in relation to applications for an exemption from the Act; and
- The Commission could have standing to seek review, variation or revocation of an exemption that has previously been granted by VCAT.

Enhancing the transparency of the exemption process

A number of measures to improve the transparency of the exemption process were also suggested by submissions. It is considered that a more transparent exemption process could improve people's understanding of rights and obligations under the Act. Such measures could include:

- publication of pending exemption applications;
- inviting interested parties (such as representative organisations) to make submissions to VCAT to assist their consideration of exemption applications;
- setting out the criteria to be considered in assessing exemption applications under the Act;
- setting out timeframes for decisions regarding exemptions from the Act;
- developing guidelines relating to the circumstances in which an exemption may be granted by VCAT; and
- online publication of all exemptions granted by VCAT.

Enhancing the efficiency of the exemption process

In addition to the measures above, a number of measures to improve the efficiency of the exemption process have been suggested. These measures could include:

- introducing a review mechanism rather than requiring people to reapply for exemptions every three years;

- requiring an exemption applicant to consider the necessity of the exemption on an ongoing basis; and
- introducing a streamlined process for the assessment and endorsement of programs that may be described as 'special measures' or other routine exemptions.

Increasing the information available to VCAT in assessing exemption applications

Increasing the information available to VCAT was also favoured in some submissions. Some of these suggestions for reform include:

- allowing VCAT to seek submissions from peak bodies, associations and other organisations in assessing applications for exemptions from the Act;
- further training for VCAT members to assist and inform their consideration of exemption applications.

Notification of the application

There was widespread support for publishing all applications for a minimum time, say 2 or 4 weeks, in an accessible location such as the web site of the VEOHRC.

However, participation in the decision making process may be less straightforward.

The VEOHRC in its submission outlined the informal role it plays in relation to exemption applications. It is notified of them by VCAT and acts as an *amicus curiae* by making submissions where necessary. While this role is valuable in the absence of any rights by any other parties to oppose exemption applications before they are granted, in practice VCAT has usually allowed other parties to appear and raise arguments at exemption applications. However, the selection of those parties is entirely at VCAT's discretion, and in the absence of a process for advertising all applications, many people and organisations who might have been interested to participate (at least through written submissions) may only find out about an exemption after the decision is made. This is hardly a transparent process. At a minimum, VEOHRC's participation should be formalised. The Commission recommended that:

Whilst the operation of this informal arrangement with VCAT has been satisfactory, the Commission believes there is merit in formalising the Commission's role in relation to exemptions in legislative provisions. Specifically the Commission recommends the following:

- applicants for an exemption from the *EO Act* should be required to provide a copy of their application to the Commission;
- the Commission should have standing under the Act to appear or make submissions in relation to applications for an exemption from the *EO Act*, and
- the Commission should have standing to seek review, variation or revocation of an exemption that has previously been granted by VCAT.

Participation in the decision-making process

While the decision-making process could be unworkable if it was open to anyone who wanted to object participating in the hearing, there seems no reason why there should not be an opportunity to

make a written submission,⁹⁰ and some opportunity to participate in discussions to select one or a few parties who could speak on behalf of the opposers. John Ryan commented that:

No exemption should be granted without a full an open hearing with interested persons being given the right to be heard on the proposed exemption. There should be adequate advance notice that an exemption is being considered by the Tribunal so as to effectively enable interested parties an opportunity to be heard.

Unless those affected are given an adequate opportunity to put their arguments, the exemption process could be one-sided. No matter how careful the tribunal, it may be unaware of factual material or relevant arguments that can only be put forward by those affected.

However, the VEOHRC noted that the legal complexities of the process may make it difficult for those affected to participate:

The Commission's own anecdotal experience has been that the exemption application process can be challenging for some applicants in terms of understanding whether the conduct they propose to undertake is potentially unlawful discrimination and whether they would require an exemption. This may be partly because there is some uncertainty around the meaning and scope of the general and certain specific special measures exceptions in the Act, which has possibly resulted in some applicants seeking exemptions for reasons of legal certainty. It is the Commission's view that individuals and entities should not be unduly burdened or discouraged from undertaking affirmative action programs because of legal uncertainty and the need to obtain an exemption.

.... the Commission recommends, that as part of the Exceptions Review, the Department reflect upon the types of exemptions granted by the Tribunal to ensure there are appropriate and relevant exceptions in the Act capable of obviating the need to obtain routine exemptions which are consistent with the spirit and objects of the Act. This may lead to possibly extending some exceptions to include common and unobjectionable exemption applications that the Tribunal routinely receive and grant such as women working from home and wishing to restrict their services to women only and/or inserting examples of excepted conduct into existing exceptions. The Commission would welcome the inclusion of examples in the *EO Act* of conduct designed to promote special measures programs for which exceptions apply.

An alternative process

Applications that are not contrary to equality rights may justify a different procedural approach. The LIV noted that:

We note that currently many 'routine' exemptions are granted on paper without a hearing, where they are special measures designed to achieve substantive equality or correct historical disadvantage. The LIV suggests that these applications could be dealt with more easily by incorporating s8(4) of the *Charter* into the *EO Act*, providing that 'measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

⁹⁰ This was also supported by the Federation of Community Legal Centres.

It may be appropriate to have different processes in place for applications that are essentially special measures and for other types. The special measures applications could be dealt with through a revised s. 82 exception, but there would still be a need from some organisations to be able to have advance approval for an investment of time and money. One suggestion was an alternative process whereby certain exceptions could operate by way of application. The applicant would apply to the Commission specifying the program they sought to provide and the justification for it. All applications should be published and easily accessible, and the applicant should be required to notify all people potentially affected by it of the details. The exception would come into effect on the lodgement of the application. It could be challenged by any person affected by it or with an interest in it lodging an objection to it. If and when that occurred, then the application and objection would be dealt with by the Tribunal with the applicant being required to bear the onus of proof in relation to the exception, and the Tribunal could confirm, vary or terminate the exception. This sort of procedure would allow exceptions to operate in less clear areas but without denying those affected an opportunity to challenge them.⁹¹

The LIV pointed out that:

Under federal legislation, the Human Rights and Equal Opportunity Commission (HREOC) is able to grant temporary exemptions from some parts of the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). HREOC has sought to make accountable decisions by publishing criteria and procedures and seeking public comment on exemption applications before making a decision. The LIV submits that Victorian exemption applications should be similarly published to enable interested parties to make submissions during the exemption process. Further, we suggest that the current practice of notifying VEOHRC of exemption applications should be formalised as a requirement under the *EO Act*.

Procedures in other Australian jurisdiction are variable, as outlined by the VEOHRC:

In the ACT (section 91 *Discrimination Act 1991*), Qld (section 91 *Anti-Discrimination Act 1991*), Tasmania (section 98 *Anti-Discrimination Act 1998*) and the NT (section 59 *Anti-Discrimination Act 1992*) exemptions are granted by the equivalent body to the EOCV. Federally, exemptions can be sought from HREOC under the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*. In NSW exemptions are granted by the Minister on the advice of the Anti-discrimination Board (section 126 *Anti-Discrimination Act 1977*). In both SA and WA exemptions are granted by the equivalent body to VCAT, in SA the Commissioner for Equal Opportunity has automatic standing (section 92 *Equal Opportunity Act 1984*), whilst in WA the Commissioner can apply to intervene (section 135 *Equal Opportunity Act 1984*).

South Australia's provisions specify who has rights to appear at the hearing of an application, while NSW provides that the President of the ADB can consult whoever he or she chooses (which the *DDA* (Cth) also provides), and that exemptions can be for up to ten years. In WA the tribunal must give notice of the applications, and exemptions can last up to five years. In Queensland there is provision

⁹¹ This process was suggested by John Ryan in relation to s.23 of the Act (power to set reasonable terms and conditions of employment). Elly Bromberg also suggested a similar process based on the planning process where application for an exemption would be made to the VEOHRC, which would advertise it and receive objections, then make a decision. Either party could then appeal the decision to VCAT.

that the Commission must be notified of all exemption applications, and in ACT the Act specifies guidelines for the discretion to grant exemptions.

VCAT process and conditions in exemptions

Community and sporting groups that had been involved with exemption applications suggested that a fixed timetable for responses and adequate notice before an application was brought on for hearing would be helpful. Netball Victoria commented:

We do believe that VCAT exemption process could be improved: it currently can be a lengthy and costly process. In our experience, the timeframes were not clear and there was a considerable gap between our application and the hearing and the notification time for the hearing was very short – which did not allow for any updating of the application material.

The current structure where there is no timeframe for when an application is made to when a response will be received could be improved by having a minimum / maximum number of weeks for initial response.

Additionally, 7 days notice of a Hearing and the requirement that additional information is required to be presented places a very large burden on individuals and organisations – particularly those who are not for profit (as previously stated, many of these organisations have limited financial and human resources.) A system which has defined timelines and which minimises the need for the use of legal representatives would greatly assist organisations such as Netball Victoria.

The process should remain, as far as possible, accessible without the need for legal representation as this would add to the cost and reduce its accessibility:

Efforts to streamline the hearing process and keep costs to a minimum, in particular for community groups, would be appreciated at all levels.⁹²

Several comments were made on the types of conditions that should be included in every exemption:

the grant of an exemption should be made conditional on the requirement for ongoing review by the applicant of the need for, and operation of, the exemption.⁹³ ...

section 83 should be amended to incorporate a requirement that the applicant holding the exemption must, over the period of the exemption, review the necessity and implementation of the exemption in a manner that is consistent with section 7(2) of the *Charter*.⁹⁴

State Trustees suggested that:

VCAT should be empowered to grant longer exemptions but subject to safeguards and reviews such as that circumstances not have changed. In its orders VCAT ought to provide that a material change in circumstances obliges the party who has the exemption to advise the tribunal as soon as possible. Non-compliance could result in a fine.

⁹² VicSport submission.

⁹³ Federation of Community Legal Centres submission.

⁹⁴ PILCH Homeless Persons Legal Clinic submission, Recommendation 8.

A general review mechanism every three years would be more practical [sic] method of utilising the Tribunal's time instead of a new application made on repeated grounds. The review mechanism is a feature of other types of sensitive matters within the Tribunal's brief such as guardianship and admin orders.

Finally some general comments were made on VCAT's role in hearing *EO Act* matters:

State Trustees suggested that VCAT should be empowered to issue declaratory orders, as a faster and less expensive way to promote the operation of the Act, and to emphasise prevention and assisting parties to understand the law rather than litigation. However this might pose difficulties for VCAT in having to decide an interpretation without a fully developed dispute before it.

The Federation of Community Legal Centres expressed their concern with the difficulties faced by transgender and intersex individuals in *EO Act* matters:

... we refer to discrimination/exemption matters concerning transgender and intersex individuals, on the basis that the experiences of the most severely disadvantaged function as a litmus test for the efficacy of anti-discrimination legislation. With respect, we believe that VCAT members require more rigorous training in their use of the Act, particularly with regard to matters involving transgender/intersex applicants.

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

Options for reform:

Option 1: No change.

Option 2: Section 83 should be amended to provide guidelines for the exercise of the power in the form of the criteria from s. 7(2) of the *Charter* as the basis for granting exemptions. An exemption should only be granted if it is compatible with the purposes of the Act and with the protection of human rights.

Option 3: An alternative procedure should be created that allows exemptions that are special measures to come into effect on notifying VEOHRC, subject to subsequent challenge in VCAT. This could be limited to certain areas of operation, such as where exceptions previously generally available have criteria that are difficult to challenge.

Option 4: The procedure for deciding on an exemption application should ensure:

- Any application is publicly advertised for some weeks before a decision is made
- A contradictor is available to appear, and appears, at any hearing convened to decide on an application.; this could be a party who will raise the issues adequately, or if there is no such party, the VEOHRC.

Option 5: Exemptions should be available for a maximum of five years, with a presumption that the normal period would be three years. Renewals of exemptions should be available by review towards the end of this period rather than re-application. Exemptions should be subject to such conditions as VCAT prescribes, including an obligation to monitor the progress of and need for the exemption.

Section 84 – Exemptions to allow compulsory retirement in the public sector

This provision allows for the Minister responsible for the administration of *the EO Act*, upon receipt of a written request from any other Minister, to grant an exemption from the discrimination provisions of the Act to allow compulsory retirement on the basis of age of any class of people employed under the *Public Sector Management Act 1992*; the *Teaching Service Act 1981*; the *Police Regulation Act 1958*; or by a public hospital within the meaning of the *Health Services Act 1988*.

84. Exemptions to allow compulsory retirement in the public sector

On the application of any Minister, the Minister, in writing, may grant an exemption from Part 3 to allow the compulsory retirement on the basis of age of any class of people employed—

- (a) under the *Public Administration Act 2004*;
- (b) under Part 2.4 of the *Education and Training Reform Act 2006*;
- (c) under the *Police Regulation Act 1958*;
- (d) by a public hospital within the meaning of the *Health Services Act 1988*.

Compulsory retirement ages are arbitrary and contrary to the prohibition of age discrimination in the *EO Act*. No other state or territory law has an equivalent provision, nor does the federal *Age Discrimination Act 2004* provide an exemption for compulsory retirement ages.

The VEOHRC commented that:

The fact that this exception is limited to the public sector emphasises its arbitrariness. It is the Commission's view that the limitation this exception gives rise to is unreasonable and disproportionate given other less restrictive means are available to manage public sector competency such as performance management. ... the underlying objective is able to be realised in a manner less restrictive of human rights.

Job Watch commented that:

compulsory retirement schemes result in the termination of employment on the basis of the attribute of age, rather than on the sound basis of ability and merit. They are also inconsistent with the abolition of compulsory retirement in Victoria from 1 January 1997 and do not sit comfortably with the principles of the Act.

Furthermore, there are no apparent public policy arguments to support the granting of a special exemption for employees engaged under the listed legislation. From the perspective of the *Charter*, this exception cannot be seen as a 'reasonable limitation' on human rights.

Options for reform:

Option 1: No change.

Option 2: That this exemption be repealed.

Option 3: The operation of this clause be limited only to people employed as at a particular date and not to any later new employees, so that its operation eventually ceases.

8 – Relationship with other Acts

Section 69 – Statutory authority exception

Section 69 provides a general exception from discrimination where the conduct is necessary to comply with, or is authorised by an Act or enactment. In resolving conflicts with other legislation, it gives compliance the other laws priority over the *EO Act*.

In relations to the statutory authority exception, the Consultation Paper stated that ‘It is now proposed to repeal this exception with a sunset period of three years. An appropriate mechanism for prescribing those Acts that cannot be reconciled with *the EO Act* and the *Charter* may also be developed.’⁹⁵ The Consultation Paper asked the following specific questions relating to the statutory authority exception, section 69:

- Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?
- Are there any examples of Acts and enactments that cannot be reconciled with *the EO Act*?
- Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?
- Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

69. Things done with statutory authority

- (1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of—
 - (a) an Act, other than this Act;
 - (b) an enactment, other than an enactment under this Act.
- (2) For the purpose of subsection (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.
- (3) Section 47(3) and 58(1) prevail over this section to the extent of any inconsistency between them.

⁹⁵ Department of Justice, Exceptions Review, *Consultation Paper*, February 2008, 25.