

## 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**Option 2:** That this exemption be repealed.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.’<sup>95</sup> 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- Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed?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.

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<sup>95</sup> Department of Justice, Exceptions Review, *Consultation Paper*, February 2008, 25.

'Enactment' is defined in s. 4(1) as 'a rule, regulation, by-law, local law, Order in Council, proclamation or other instrument of a legislative character.'

The Consultation Paper outlined the background to review of s. 69. The origin of s. 69 was in s. 39(e) of the 1984 *EO Act*, which was intended to operate for a period of time while a thorough review of existing legislation was undertaken to identify discriminating provisions. Instead, it was simply re-enacted when the 1984 Act was replaced by the 1995 Act. In 2003, SARC was requested to conduct an inquiry under s. 207 of the *EO Act* 1995 to identify provisions in Victorian Acts and enactments that operate to discriminate, or may lead to discrimination against any person:<sup>96</sup> The Consultation Paper summarised that inquiry in relation to s.69:

In the course of that review, SARC received a number of submissions in relation to section 69 of the Act. Section 69 is commonly referred to as the statutory authority exception. ... In its Final Report [*Discrimination in the Law Inquiry under section 207 of the Equal Opportunity Act 1995* (2005)], SARC characterised the statutory authority exception as placing the Act 'at the base of the legislative hierarchy'.<sup>97</sup>

SARC recommended that the statutory authority exception be repealed.<sup>98</sup> In the event that the exception was repealed, SARC proposed a three-year transition period to allow government departments and statutory entities to audit their Acts and enactments for compliance with the Act.<sup>99</sup> This is referred to as a sunset period.

SARC also concluded that proposed laws and enactments should be assessed for their compliance with equal opportunity principles. It favoured a proactive approach to the recognition and acceptance of everyone's right to equality of opportunity in Victoria. The introduction of the *Charter* responds to this recommendation for a 'front end review' mechanism and a standard of legislative scrutiny.<sup>100</sup>

The Government response to the SARC recommendations was that the Government would address this in conjunction with the development and implementation of the *Charter*. Now that the *Charter* has been enacted, it is an appropriate time to address the outstanding SARC recommendation.

Government Departments have already undertaken audits of their existing legislation as part of the implementation of the *Charter*. In some cases, amendments have been made to legislation that is inconsistent with the rights protected and promoted by the *Charter*.

Repealing s. 69 was widely supported in the submissions. There were some expressions of concern over how relationships with particular statutes would then be determined. Regarding legislation that potentially conflicts with the *EO Act*, organisations referred to legislation relevant to their own areas of

<sup>96</sup> Section 207 provides 'The Minister must cause a review of all Acts and enactments (other than municipal council by-laws or local laws) to be undertaken for the purposes of identifying provisions which discriminate, or may lead to discrimination, against any person.'

<sup>97</sup> Scrutiny of Acts and Regulations Committee (2005), *Final Report, Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995*, [Victoria] 2005, Chapter 3: Sections 69 and 207, 46.

<sup>98</sup> Id.

<sup>99</sup> As part of the implementation of the Charter, many government departments have been auditing Acts and enactments for compatibility with the rights set out in the Charter. In some cases, amending legislation has been introduced. It is possible that this process may have assisted in the identification of Acts and enactments that authorise discrimination.

<sup>100</sup> *Charter*, s 32.

operation, such as the Mental Health Act, Occupational Health and Safety laws, etc. Many organisations supported a shorter sunset period, although some were happy with three years.

The VEOHRC submitted that it:

regards it as critical that the outstanding recommendations of the SARC *Inquiry into Discrimination and the Law* (2005) be adopted, and that the subservience of the *EO Act* to all other statutes and statutory instruments cease. This is now more imperative following the introduction of the *Charter* enshrining the human right of recognition and equality before the law. The Commission is of the view that section 69 contradicts the central premise of the *Charter*, that legislation should be developed and interpreted consistently with human rights, and the rights may only be subjected to reasonable limits that are demonstrably justified in a free and democratic society.

The SARC recommendations that require implementation are:

- that section 69 should be repealed,
- any legislative provision which is intended to override the *EO Act* be prescribed in the *EO Act*,
- all existing legislation that is not intended to override the *EO Act* be amended.

Professor Margaret Thornton of the ANU supported this concern for the status of the *EO Act*:

The status of the *EO Act* is further enfeebled by virtue of its subordination to all other Acts by virtue of s69. This section makes clear that the *EO Act* does not even have the status of an ordinary Act of Parliament. The usual principle is that the most recent Act supersedes any previous Act to the extent that it is inconsistent. In contrast, the *EO Act* is subject to all past, present and future legislation. The retention of this provision is an ever-present reminder of the low status accorded human rights and the non-discrimination principle in Victoria.

Mental Health Legal Centre expressed its concern that much discrimination is based on legislation and that it is too readily exempted from the *EO Act*:

In our view there can be no justification for acceptance of discrimination which is necessary or authorised pursuant to legislation or regulations. The *Equal Opportunity Act* has built into it all the 'sound policy' balancing mechanisms, defences and exemptions that can be justified. In this sense any inconsistent legislation is simply not justifiable. ... This is indeed recognised in the comparable provision of the Commonwealth Disability Discrimination Act 1992, section 47(3), under which the exemption for acts done in compliance with other laws was the subject of a sunset clause. Indeed, that provision may well have also been considerably more strict, in that it only applied to anything done 'in direct compliance' with another law.

Further support was expressed by the Law Institute of Victoria and the Victorian Council of Social Service. The Disability Discrimination Legal Service noted that s. 69

is out of step with other Australian jurisdictions as pointed out in the Scrutiny of Acts and Regulations Committee Report 2005. This provision goes beyond those of the other jurisdictions and should be amended to be more in line with other jurisdictions or taken out altogether. The danger in keeping this section is confirmed by the fact that there are state

legislations that cannot be reconciled with human rights principles of anti-discrimination. For instance, the Transport (Ticketing and Conduct) Regulations 2005 allows discrimination of passengers who rely on an assistance animal because the provisions only afford protection where the animal is classified as a guide dog. The Act is also silent in relation to assistance animals. This failure to recognise assistance animals constitutes an implied exception from *the EO Act*.

### Provisions in other Australian jurisdictions

Section 69 is the widest formulation of the statutory exception among comparable legislation, because of the presence of subsection (2), and the fact that subsection (1) excepts not only things 'necessary to comply' with other legislation but also things 'authorised by' other laws. A table summarising the word formulae of the provisions was created as Appendix B to the Department of Justice Background Paper and is attached as Appendix C to this paper. Only NT also protects anything 'authorised by' past and future laws. Qld protects things 'authorised by' only in respect of pre-existing legislation. The NSW exception authorises only what is 'necessary to comply' with past and future legislation. Among other Australian jurisdictions, South Australia does not have any equivalent of this provision, nor does the *Racial Discrimination Act* (Cth). The other federal laws protect acts done 'in direct compliance' with other laws. Some laws only allow the defence in relation to legislation in force when the Act commenced, so that legislation passed later has no automatic precedence: WA s. 69(1), Qld s. 106(1)(a), and *SDA* (Cth) s. 40(2)-(6). Some also contained sunset provisions whereby parts of the exception expired at a certain time: WA, ACT, *DDA* (Cth), *ADA* (Cth). Many provisions also list specific Acts which prevail over the anti-discrimination legislation.

It was suggested that any conflicts with other legislation should be resolved within the context of the *EO Act*, 'Whenever there is a need to have an exception to the general operation of the Act or where there is a need to identify the pre-eminence of a specific basic right then that should occur within this Act and not in other enactments. Ultimately the debate over the balance between the promotion of equality of opportunity and other individual or group rights should take place within the context of this Act.'<sup>101</sup>

PILCH Homeless Persons Clinic supported its argument by reference to the *Charter*:

The *Charter* requires that all statutory provisions in Victoria must now be interpreted consistently with human rights. This means that section 69 of the *EO Act* is now subject to a human rights consistent interpretation. If a human rights consistent interpretation cannot be achieved, then section 69 may be declared inconsistent with the *Charter* under section 36. In addition, any current or newly proposed Act or enactment that engages and limits the right to equality and non-discrimination, by allowing discrimination in accordance with section 69, will be subject to a human rights consistent interpretation or a declaration of inconsistency.

Section 69 of the *EO Act* specifically enables discrimination, whereas the *Charter* specifically protects people's right to equality and non-discrimination by creating obligations on the three arms of government to ensure that legislation is consistent with the right to equality and non-discrimination. Section 69 of the *EO Act* is subject to the human rights obligations set out under the *Charter*. If challenged in court, it is possible that section 69 of the *EO Act* would be declared inconsistent with the *Charter* because it facilitates discrimination in a way that cannot

<sup>101</sup> John Ryan, submission.

be reconciled with the human rights obligations established by the *Charter*. Accordingly, section 69 of the *EO Act* should be repealed.

This argument is strongly supported by the fact that the scope of the *Charter* equality right can be amended by amending the *EO Act* (because the definition of discrimination refers to 'discrimination' within the *EO Act*), and the *EO Act* can be limited under s. 69 by any other piece of legislation, whether or not specific consideration has been given to this effect. In effect, the scope of *Charter* rights could be affected by the equality right being impinged on by any other piece of legislation, whether intentionally or not. This makes it essential to give effective protection to equality rights by repealing s. 69 and setting up a process for determining which laws should be given priority.

Opposition was expressed in a couple of submissions, but it appears to be mainly concerned with ensuring there is an effective mechanism for resolving conflicts between laws. The Victorian Bar Council identified three reasons for retaining s. 69, noting that it deals effectively with the problems of resolving legislative conflicts without significantly reducing the rights of the individual, and it also removes the need to be concerned about conflict with Commonwealth legislation under s. 109 of the Constitution, and was applicable only where necessary. The Australian Industry Group stated that it regarded the statutory authority exception as necessary in the employment area, referring to federal industrial relations provisions and identifying s. 47 of the *DDA* (Cth) as a useful model.

### **Are there any examples of Acts and enactments that cannot be reconciled with *the EO Act*?**

A number of submissions mentioned areas of legislation that the organisations dealt with as raising problems of reconciliation. These include occupational health and safety legislation, the Working with Children Act (Deakin University, in relation to students as trainees), the Uniform Consumer Credit Code (Australian Finance Conference), the *Mental Health Act 1986* ('MHA') (which was of concern to both the Victorian Institute of Forensic Mental Health and the Mental Health Legal Service). The latter also identified a wide range of other statutes that potentially conflict with the *EO Act*.<sup>102</sup>

The removal of the statutory authority exemption may be appropriate on a limited basis, however, the hidden cost of this removal would be an additional impost on mental health services or their insurers having to expend resources on establishing other defences for what are legally justifiable decisions.

The Law Institute referred to the recommendations made in the Final Report of SARC's *Discrimination in the Law Inquiry under section 207 of the Equal Opportunity Act 1995* (2005). While a comprehensive review was undertaken subsequently by government departments, businesses and other non-government organisations may need a further opportunity to draw attention to legislation that is of specific interest to them. This suggests that some transition period will be necessary, and careful attention needs to be paid to the mechanism adopted to facilitate resolving conflicts between state laws, and between the *EO Act* and federal laws.

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<sup>102</sup> *Mental Health Act 1986*; interaction with *Mental Health Act 1986*/*Medical Treatment Act 1988*; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, *Residential Tenancies Act 1997*, *Children, Youth and Families Act 2005*, *Summary Offences Act 1966* / *Vagrancy Act 1966*, *Juries Act 2000*, *Sentencing Act 1991*, *Wrongs Act 1958*, *Health Services (Conciliation and Review) Act 1987*.

## Is a mechanism to prescribe certain Acts under the Equal Opportunity Act 1995 necessary?

Most submissions agreed that if s 69 was to be repealed or limited, a process would be needed to resolve the issue of which laws should prevail over the *EO Act*. In its 2005 Review, SARC examined a range of possibilities for carrying out the function of dealing with legislation that discriminates, acknowledging that there will be circumstances in which some laws should operate despite the *EO Act*. The main options it discussed were:<sup>103</sup>

1. amending s. 69 to narrow its scope and prescribing laws that would override the *EO Act*
2. repealing or 'sunsetting' section 69 and relying on the normal rules of statutory interpretation
3. introducing a 'front-end review' model to deal with new legislation and audit existing enactments to determine which need to be given precedence over the *EO Act*.

SARC in 2005 preferred the third option, as it is proactive rather than reactive, and more likely to perform an educative function in relation to the principles of equality of opportunity than a reactive model that retrospectively reviews enactments already in force.<sup>104</sup> This approach also fits well with the presence of the *Charter* and its 'front end review' process.

No submissions supported the first option, of amending s. 69. While this could allow s. 69 to be aligned with the laws in other states, there is a great deal of variation in those laws, and no single identifiable model is preferred. Presumably the scope of s. 69 would need to be reduced in view of the *Charter's* adoption, so its application to laws passed later would have to be resolved. This approach does not necessarily resolve the basic problem of giving clear guidance to those who have to decide which law to comply with, nor does it have the advantage of a front-end review as is currently applied under the *Charter* of considering each piece of legislation specifically as it is adopted. Even if, as The Department of Justice suggested s. 69 was amended to allow discrimination where it is considered to be a reasonable limitation in accordance with the criteria in section 7 of the *Charter*, there would still remain the problem of giving clear advance guidance to people who need specific direction for their day to day operations. The standard this sets up would be the correct one, and it would have the effect of applying the same standard of scrutiny to existing Acts that is applied to new Acts. But a process that can clarify the question in advance would provide clearer guidance.

The second option, repealing or sunseting s. 69 and relying on the normal rules of statutory interpretation would not necessarily provide clear guidance to people who have to work out which law to comply with. Professor Margaret Thornton noted that:

Occasionally, there might be reason to uphold a provision in another Act that is inconsistent with the *EO Act*. The over-inclusiveness problem can be avoided by not having a s69-type exception at all, but by addressing any problem on a case-by-case basis at the time of the determination of a complaint. The burden of proving that the discriminatory provisions remain should shift to the respondent. The test should be carefully delimited on the ground of justifiability in circumstances where no other alternative is feasible ... such as compliance with

<sup>103</sup> SARC, Final Report of the Discrimination in the Law Inquiry (2005) Chapter 3. Available at [http://www.parliament.vic.gov.au/sarc/Equal\\_Opportunity/Final/Final\\_index.htm](http://www.parliament.vic.gov.au/sarc/Equal_Opportunity/Final/Final_index.htm).

<sup>104</sup> Id.

another Act is justifiable only if compliance with the *EO Act* would be likely to produce a greater discriminatory effect.

Most submissions focussed on the third option and how it could be put into operation. The relevant recommendations of the SARC in its 2005 Report were:

1. That any enactment identified as being incompatible with the equal opportunity principles, but which is intended to override the provisions of the *EO Act* be prescribed in a schedule to the *EO Act*.
2. That any enactment identified as being incompatible with the equal opportunity principles but is not intended to override the provisions of the *EO Act* be amended to remove the discrimination.
3. That all proposed enactments should be scrutinised against the equal opportunity principles.
4. That proposed enactments that are incompatible with the equal opportunity principles or that are intended to override the provisions of the *EO Act* should be accompanied by a Ministerial declaration or statement of reasons justifying such incompatibility at the time the enactment is introduced or tabled in the Parliament.
5. That a Committee of the Parliament should be required to review and report to the Parliament on any proposed enactment that is declared or identified as being inconsistent with the equal opportunity principles or which are declared to override the provisions of the *EO Act*.
6. That failure to comply with a procedural requirement (recommendations 8 and 9) in relation to an enactment should not affect the validity, operation or enforcement of any Victorian law.
7. That a primacy provision should be included in the *EO Act* or other legislation that provides that in interpreting a provision in an enactment, a construction that would promote the equal opportunity principles is to be preferred to a construction that would not promote those principles.

The Law Institute suggested that where an Act cannot be reconciled with the *EO Act* (and/or the *Charter*), an express override declaration should be included in the schedule to the Act, which should be subject to a (renewable) sunset clause, as provided for in s. 31 of the *Charter*. The VEOHRC also suggested that where an Act is allowed to override the *EO Act*, there should be a five year sunset provision on the override to ensure that such limitations are subject to review and reconsideration, similar to that which exists in relation to override declarations made by Parliament in relation to the *Charter*.

Job Watch suggested that laws that are intended to prevail over the *EO Act* could be prescribed under a provision similar to s. 47(2) of the *DDA* (Cth), or listed in a schedule to *the EO Act* (as recommended by the NSW Law Reform Commission when it reviewed the similar provision in the *ADA*).<sup>105</sup> Alternatively the Commission could be given power to declare that certain laws lead to discrimination or are inconsistent with *the EO Act*, similar to that in s. 67(1) of the *DDA* (Cth). In response to a report, Parliament could be required to act by amending the breach or declaring that the breach is to continue, with or without a sunset clause, similar to the Commission's obligations under Section 41 of the *Charter*. Job Watch's preference would be for both approaches to be adopted, because it argued:

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<sup>105</sup> NSW LRC Report of Inquiry into the *ADA* (1991) para 6.36.

Discrimination should not occur without explicit authorisation by Parliament. Parliament should be presumed not to intend to discriminate, and this should be reflected in the Act itself. This presumption should be even stronger where legislation is or has been enacted after the enactment of the Act. [These] options better meet a presumption that Parliament does not generally intend to allow discrimination to occur.

Generally, Job Watch opposes blanket exceptions to the Act. Beneficial legislation such as the Child Employment Act 2003 is an example of one piece of legislation that could be prescribed as overriding the Act. Without blanket exceptions, particular acts or practices of employers would still, however, be lawful if they fell into acceptable exceptions under the Act, for example relating to the inherent requirements of the position.

The Disability Discrimination Legal Service noted that the *EO Act* already contains a power to make regulations in s. 212(d) prescribing any matters necessary to give effect to the *Equal Opportunity Act*, which may be a sufficient mechanism to prescribe Acts in order to provide certainty about the interaction of the Equal Opportunity Act with other legislation.

**Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?**

Several submissions were happy with a three year sunset period, although Job Watch argued that 'in the meantime ... the Act should be urgently amended to expressly include the presumption that equal opportunity principles prevail over any inconsistent statutory provision unless that legislation specifically provides to the contrary. ... This would remove any doubt or confusion that may be generated on the part of those otherwise obliged to comply with possibly competing statutory obligations.'

Other submissions preferred a shorter period of time in view of time that has passed since the SARC inquiry report. The Law Institute of Victoria commented:

in 2005, SARC proposed a three year transition period to allow government departments and statutory entities to audit their Acts and enactments for compliance with the *EO Act*. Given that government departments have been auditing Acts and enactments for compatibility with the rights set out in the *Charter*, we do not consider a further three year transition period necessary. ... In light of this, we propose a sunset period of at most one year from the date of Royal Assent to the amending legislation.

The VEOHRC agreed that 'the 3-year transitional period SARC recommended to provide Departments time to audit and amend existing legislation is perhaps excessive and no longer justified. A minimal lead-time is more appropriate (such as 12 months from the royal assent of the repeal of section 69) given the implementation of the *Charter* and the transitional time, Departments have had to audit and amend legislation.'

The Commissioner for Equal Opportunity in WA advised that when WA repealed an equivalent provision, a two year transition period was adequate.

The continues to prefer a front end review model, to give certainty to people who have to comply with legislation and to place responsibility for making these decisions with the Parliament.

**Options for reform:**

**Option 1:** No change.

**Option 2:** Section 69 should be repealed, and:

- Any legislative provision which is intended to override the *EO Act* be prescribed in the *EO Act*,
- All existing legislation that is not intended to override the *EO Act* be amended,
- The VEOHRC be given power to report to parliament if it finds that a particular law is in conflict with the *EO Act*,
- Section 207 be repealed,
- A minimal lead-time is more appropriate (such as 12 months from the Royal Assent of the repeal of section 69),
- During the transition period, further consultation should occur with non government organisations to ensure that legislation that is important for compliance be brought to the government's attention.