

4 – Exceptions to discrimination in accommodation

Section 53 – Accommodation unsuitable for children

Section 53 provides that accommodation may be refused to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

53. Exception—accommodation unsuitable for children

A person may refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

This section permits age discrimination, and could potentially impede access to rental accommodation for families with children or young people seeking their own accommodation. There is no equivalent of this provision in other anti-discrimination legislation in Australia. The provision is very open-ended and gives no guidance on what types of risks are intended to be protected, or that this is intended to facilitate a transitional process whereby the premises can be made suitable for children. It places no obligation on the accommodation provider to alter their premises to make them safe for children. It does not clarify the type of safety issues it is directed towards.

The VEOHRC commented that it ‘appears the underlying purpose of this provision is to protect the health, welfare and safety of children in the area of accommodation ... This may be an acceptable limitation in that it is aimed at safety of children and if relied upon will need to be assessed in a manner consistent with the *Charter* to ensure a refusal is rational and proportionate to the risk posed – and the exception is not relied upon as an excuse to discriminate against children in accommodation.’

The Commission was of the view that:

in some circumstances there may be less restrictive means of ensuring the safety of children in accommodation, by imposing terms on the provision of that accommodation that the child be supervised by an adult. This would then *make this provision consistent with section 45* which permits a service provider to require as a term of providing that service that a child be accompanied or supervised by an adult due to a reasonable risk that the child might endanger themselves. Such an amendment would facilitate a more proportionate approach to the balancing of the rights and interests of the child in relation to their safety and ensure that they are not unreasonably refused accommodation where they may be reasonably accommodated with appropriate adult supervision.

An alternative suggestion was made by the Federation of Community Legal Centres, which noted that this exception could play a role in homelessness for young people. The Federation wrote:

We submit that this exception is too broad and relies simply on the belief of the person refusing accommodation. In the view of VCAT Deputy President, Cate McKenzie, the terms ‘unsuitable’ and ‘inappropriate’ are vague and imprecise. It may be that in some situations the

exception should apply for the protection of health and safety of children concerned, to protect the uniqueness of the property itself, or, for example, to exclude children from specially created senior citizen housing. However, this exception must not provide an excuse to give preference to older tenants or to those without children when providing accommodation, or to refuse to rent to someone because they have children or because they are under 18 themselves. In our view, 16- or 17-year-olds who are living away from their parents should not be refused an apartment because of their age.

In the current housing market where there is a limited supply of affordable housing, single parents and young people are increasingly being overlooked by landlords when they apply for rental properties. For many young parents or young people, the effect of a refusal to provide accommodation under this exception is to refuse them a lease, thereby leaving many of these people homeless.

Accordingly the provision should be repealed and replaced by the s 7(2) balancing test.

John Ryan also commented on the need for transparency to prevent abuse of this exception:

This exception should be qualified by a requirement that the exception can only apply where a responsible authority has determined that the premises are unsuitable for children. The responsible authority could be local government or one of several Government Departments or even not for profit community organisations.

In view of the *Charter*, this provision does need amendment to confine it to situations of necessity. It covers a range of situations from temporary to permanent accommodation and ages of children from babies and toddlers through to those aged 16 or 17.

Options for reform:

Option 1: No change.

Option 2: Section 53 should not apply when the young person's safety can be achieved by requiring the supervising presence of an adult.

Option 3: Amend s. 53 to allow guidelines and relevant criteria to be specified requiring an assessment of such factors as:

- The state of the premises and the reasons they are claimed to be unsafe for children.
- The age of the children involved.
- The nature of the accommodation sought.
- How long the risk has existed and whether it is reasonable to expect the landlord to repair or alter the premises to avoid the risk.
- Whether the refusal is proportionate to the risk involved and the needs of the applicant.

Option 4: Adopt a requirement that, where refusal of accommodation occurs on this ground, the person refusing must provide a written statement to the person refused within one day explaining the specific reason for the refusal and why there is no less restrictive method of ensuring their access.

Option 5: Amend s. 53 to provide that refusal of accommodation under it must be assessed in terms of the five factors outlined in the reasonable limitations test in section 7(2) of the *Charter*.

Section 54 – Shared accommodation

Section 54 allows a person to discriminate when they are selecting a person to live in shared residential accommodation with the person or a relative of theirs where the accommodation is for the person or their relative and no more than six other people.

54. Exception—shared accommodation

A person may discriminate in deciding who is to occupy residential accommodation—

- (a) in which the person or a relative of the person lives and intends to continue to live; and
- (b) that is for no more than 6 people in addition to the people referred to in paragraph (a).

The purpose of this exception is to allow a person to discriminate in deciding who is to occupy residential accommodation in which the person or his or her relative and no more than six other people live. It lends itself to the protection of privacy of the family and home (*Charter* s. 13) in that it facilitates choice about who is offered accommodation in a person's family home.

This provision allows discriminatory choices to be made when the person or their relative lives in the accommodation as well because the home is seen as a part of the private domain. The *EO Act* has to strike a balance between the aims of equal opportunity and a desire to infringe as little as possible into private spheres of life.

The number of people accommodated in the premises is the key to the use of this provision, because it identifies the number of people at which *the EO Act* regards a home as being subject to public sphere regulation rather than the protected private zone. The Public Interest Law Clearing House Homeless Persons Clinic highlighted the potential for s. 54 to be used to discriminate against homeless people and others in relation to small rooming houses, where the lessor's privacy may be less applicable.⁵⁰

All Australian anti-discrimination laws contain a similar exception. All other laws require that if a relative's home is involved, they must be a 'near relative'. Definitions of this term exist in the ACT (s. 26(2) and Age DA (Cth): s. 29(4). The NT and the *RDA* (Cth) simply allow discrimination in selection of a person to share the person's home. Among the other laws there is a range of numerical cut-offs. The federal SDA, DDA and ADA, as well as WA and Qld allow this exception where the number of people in the accommodation, is the person letting the space and their near relative, and up to three other people. In Tasmania the exception may apply where a total of four or less adults is accommodated (s. 27(1)(e)). In NSW it can apply only where the accommodation is for up to a total of six people. Only in ACT is the count similar to the *EO Act*, where it covers the person letting the space, their *near* relative, and up to six other people. So the Victorian provision is the most generous.

⁵⁰ PILCH Homeless Persons Clinic submission [5.3].

To render the *EO Act* more consistent with the remainder of Australian anti-discrimination laws and the federal laws as well, s. 54 could be changed to reduce the number of people in the accommodation to the person letting the space, their near relative(s) and three other people. This would exclude very large shared houses. In addition, the word 'relative' could be amended to 'near relative' for consistency with all other legislation.

Options for reform:

Option 1: No change.

Option 2: Amend s. 54(a) to refer to 'the person or one or more near relatives of the person'.

Option 3: Amend s. 54(b) to change the number from 6 to 3.

Section 55 – Welfare measures in accommodation

Section 55 allows accommodation in a hostel or similar institution to be refused to a person where the institution is established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief and the person is not of that particular sex, age, race or religious belief.

55. Exception—welfare measures

A person may refuse to provide accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief if the other person is not of that sex, age, race or religious belief.

The purpose of this exception is to allow hostels and other similar institutions providing residential accommodation to be run wholly or mainly for people of a particular sex, age, race or religious belief by excluding those who are not of that group.

The exception may also potentially facilitate promotion of the following rights depending on the facts and the context of welfare accommodation provided wholly or mainly for people of a particular attribute:

- respect for privacy – where it may be appropriate to restrict access to shared accommodation services where this may be appropriate for reasons of privacy and decency (*Charter* s. 13);
- freedom of thought, conscience, religion and belief – where a hostel or similar institution aims to facilitate an environment which respects the observance of a particular religion or belief (*Charter* s. 14);
- protection of families and children – to limit access to a hostel or similar institution to persons of particular attributes where this is in the best interests of families and/or children (*Charter* s. 17);
- protection and promotion of cultural rights – to provide an accommodation environment for people with shared experiences, understanding and awareness where this would promote their advancement or the enjoyment and practise of a particular culture (*Charter* s. 19).

This exception has an important public purpose in that it permits reasonable restrictions on welfare accommodation services where they are aimed at facilitating the welfare and advancement of the

groups they are wholly or mainly established for by permitting the exclusion of people who are not of the particular attribute that the hostel or institution caters for.

While the provision is in general legitimate and defensible, it may be able to be expressed more narrowly and still serve its purposes. The section does not contain any explicit test to ensure that the welfare service is addressing disadvantage. Similar arguments may apply here as apply in relation to educational institutions for particular groups, s. 38. The Uniting Church queried whether it was acceptable to allow exclusion on the basis of race in relation to such a measure, and suggested that it be removed from the list of attributes in *the EO Act*.

There are few similar provisions in other states and territories, as many may rely on a general special measures provision like s. 104 of the Qld ADA 1991:

104. Welfare measures

A person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act.

Example 2— It is not unlawful to restrict special accommodation to women who have been victims of domestic violence or to frail, older people.

Specific provisions exist in SA, only for the grounds of sex, marital status and age where accommodation 'is provided by a non-profit organization *only* for 'person of one sex' or 'of a particular marital status' (s. 40(4), or 'persons of a particular age' s. 85(4). In WA the exception is for provision of accommodation by a charitable or other voluntary body' solely for persons of a particular sex or a particular marital status (s. 21(3)(c), or persons of one race (s. 47(3)(b)), or person with a particular impairment (s. 66L(3)(b)) or of a particular age (s. 66ZG(3)(c)). The differences of wording in relation to several factors are potentially quite significant if a dispute arose.

One aspect of s. 55 that needs clarification, and affects the whole of the *EO Act*, is the status of a transgender person, either pre or post operatively, under the *EO Act*. Are they to be treated as a member of their affirmed sex, or their birth sex for the purposes of sex discrimination law? In *Hanover Welfare Services Ltd (Anti Discrimination Exemption)* [2007] VCAT 640, VCAT granted an exemption to Hanover Welfare Services allowing it to refuse to employ or accommodate a pre-surgical male to female transgender person in its women's services or young women's support services. The exemption was sought because it was not clear how s. 55 or s. 19 would apply to a pre-operative transgender person. The decision was consistent with the IOC guidelines discussed below in the context of the sporting exemption in s. 66, that surgical reassignment is a necessary precondition for being treated as the chosen sex, but it does not clarify the general questions of how a transgender person is treated vis a vis sex discrimination law. The rights of people with a gender identity are therefore unclear and the *EO Act* may benefit from greater clarity.

The Federation of Community Legal Centres suggested that more nuanced decision-making under s. 55 by following the factors in s. 7(2) relating to reasonable limitations would enable distinctions to be made between situations of discrimination and contexts where special measures are enacted.

Options for reforms:

Option 1: No change to s. 55.

Option 2: Amend s. 55 to remove the reference to 'race', or to permit race to be used when the accommodation is a special measure designed to reduce disadvantage.

Option 3: Delete the words 'or partly' in s. 55, and limit its scope to non-profit institutions.

Option 4: That the Department of Justice and the Department of Human services review the situation regarding people with a gender identity and clarify the status of such people under the EO Act.

Section 56 – Accommodation for students

Section 56 provides that an educational authority may provide accommodation wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular impairment at an educational institution wholly or mainly for students with that attribute.

56. Exception—accommodation for students

An educational authority that operates an educational institution wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular impairment may provide accommodation wholly or mainly for—

- (a) students of that sex, race, religious belief, age or age group; or
- (b) students with a general, or the particular, impairment.

This exception rests on section 38 that permits educational institutions to be conducted wholly or mainly for particular types of students. Section 56 essentially allows those institutions to provide student accommodation for those students.

The VEOHRC regarded its acceptability under the *Charter* as being similar to that of section 38.

However, the exception potentially has a very wide operation in relation to the grounds available and the ability to discriminate against some groups of students. It does not explicitly provide that the institution cannot discriminate against its own students. Since it need not be an institution wholly for students of a particular type, there is a possibility that it may have different groups of students, but there is nothing in this provision that requires non-discrimination in treatment as between different groups of students.

Under this section a distinction could be drawn on the grounds of race, sex, impairment, religion or any other ground. The Victorian provision is much the widest provision of this type in Australia. An exception that applies only to sex is present in the WA *EO Act* (s. 32(2)) and ACT ADA (s. 39(2)) and the *SDA* (Cth) (s. 34(2)), while equivalents in Queensland (s. 89) and the NT (s. 40(2)-(2B)) cover sex, religion and impairment. There is no equivalent exception in NSW, SA, Tasmania or the Commonwealth Age, Disability or Racial Discrimination Acts.

Options for reform:

Option 1: No change.

Option 2: This section should be reformed to provide that the educational institution cannot discriminate against groups of students within the institution in providing accommodation.

Option 3: This section be amended to restrict the available grounds to sex, religion and impairment.

Section 57 – Accommodation for commercial sexual services

Section 57 provides that a person may refuse to provide accommodation to a person if they intend to use the accommodation for, or in connection with, lawful sexual activity on a commercial basis. No change is proposed.

57. Exception—accommodation for commercial sexual services

A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

This provision is made necessary by the presence in *the EO Act* of the attribute of 'lawful sexual activity', defined in s. 4(1) as:

lawful sexual activity means engaging in, not engaging in or refusing to engage in a lawful sexual activity.

This ground was introduced in 1995 to parallel the 'private life' grounds in the 1984 *EO Act* of political or religious belief or activity. In 1993, the Victorian Law Reform Commission had recommended that a ground of sexuality be adopted,⁵¹ but 'sexual orientation' was not adopted as an attribute until 2000. Lawful sexual activity proved to be inadequate to cover discrimination against individual on the grounds of their sexual orientation, which might not necessarily be based on their lawful sexual activity.

This exception was opposed in two submissions and supported in two. The VEOHRC noted that:

this exception seeks to balance, on the one hand, the rights of a person to have equal opportunity to access accommodation and on the other hand, the rights of the provider of accommodation to have some input as to who occupies the accommodation and for what purpose it is used.

Whilst it is not clear as to the nature and extent of this limitation it expressed in the explanatory memorandum that the exception is intended to operate only in relation to persons who wish to provide commercial sexual services such as operate a licensed brothel. Again this provision seems to be about permitting prejudice in the area of accommodation when this crosses into the private domain. The Act is recognised generally as attempting to strike a

⁵¹ Victorian Law Reform Commission, Report on the *EO Act* 1984 (1993).

balance between the aims of equal opportunity and a desire to infringe as little as possible into private spheres of life.

The Commission was of the view that this exception could be justified in terms of the public private dichotomy in giving individuals choice about matters pertaining to themselves directly, in this case who by and for what purpose are their proprietary assets used. As this may be the least restrictive means to achieve the purpose of this exception, the limitation the exception places on the right to effective protection from discrimination is likely reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons.

The Federation of CLCs argued that the 'exception should be repealed, on the basis that the commercial sexual activity at issue is lawful. Providing an exception to discriminate therefore panders to moral judgments and prejudice. Any legitimate restrictions on the provision of accommodation are better dealt with by existing planning legislation and regulations.

A related view was put by the Disability Discrimination Legal Service: 'The conduct of lawful sexual activity on a commercial activity is regulated by both state and local governments. The Prostitution Control Act and the Town Planning Act define the nature, limitations and venues of this type of commercial activity. Hence, the discrimination envisioned by Section 57 is covered by the more relevant defence of compliance with the relevant statutes, regulations or by-laws. The regulation and control of such activity is better left within the purview of collective decision rather than to an individual who is effectively allowed to make a discriminatory decision based on what may be arbitrary grounds.

Family Voice Australia and the Festival of Light supported excepting this area, however they would prefer to do this by amending the definition of 'lawful sexual activity' to provide that it does not include commercial sexual activity.

There is no equivalent of this provision in any other Australian anti-discrimination law. However, not all laws contain an equivalent of the 'lawful sexual activity' ground. Lawful sexual activity is not protected in its own right, but *the EO Act* protects an individual from being treated less favourably on the basis of the attribute of their lawful sexual activity. It must be doubtful that an intention to operate a brothel, strip or lap dancing establishment in a premises would be regarded as being discrimination on the basis of lawful sexual activity. The aim of anti-discrimination laws is not to protect the right to run any type of business. Instead, it is to protect individuals from suffering discrimination on the basis of their attributes. The protected attributes are generally those that have been used in the past as a basis for disadvantaging some people and that are not seen as relevant to the making of the decisions in question. In this context, now that sexual orientation and gender identity is covered by *the EO Act* it is difficult to see what role the 'lawful sexual activity' attribute covers, and it may be that it should now be repealed. It is difficult to see why 'lawful sexual activity' should be covered as a ground in the legislation, as it has not historically been a basis for disadvantage or discrimination independently of sexual orientation, and it has now been superseded by the sexuality attribute.

Options for reform:

Comments are welcome on these questions, but no change to the legislation is proposed.