Introduction

The Scrutiny of Acts and Regulations Committee of Parliament (SARC) has been requested to inquire into, consider and report to Parliament on **whether any amendments should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995*** (the *EO Act*). This will require it to consider whether there should be any amendments made to:

– the exception provisions in the Act (see list of provisions in Appendix A);

– the Victorian Civil and Administrative Tribunal (VCAT) exemption process (section 83); or

– the statutory authority exception (section 69).

SARC has been requested to provide its interim report to Parliament by the 30 April 2009. SARC has been requested by the Attorney-General (by letter of March 10 2009) to **outline some key principles** which could underpin the exceptions and exemptions in the Act, including

– the types of exceptions and exemptions that should be available as of right in the Act,

– those exceptions which should not be included at all, and

– those which should be the subject of an exemption application at the Victorian Civil and Administrative Tribunal.

The background to this inquiry begins with the Equal Opportunity Review conducted by Mr Julian Gardner for the Department of Justice (DOJ) in 2007-2008. In August 2007 the Attorney-General announced a Review of the *Equal Opportunity Act 1995* (Vic) (the Gardner Review), with a focus on how best to eliminate discrimination and promote equal opportunity through reforms to modernise the *EO Act*. Review of exemptions and exceptions was excluded from its terms of reference. That review proceeded with the release of a Discussion Paper in November 2007, the submission of responses, the release of an Options Paper in March 2008, and receipt of comments, culminating in the Final Report, *An Equality Act for a Fairer Victoria*, provided to the Government in June 2008 (the Gardner Report).[1] The Report recommended that the *EO Act* focus more on systemic discrimination, and on enhancing prevention, compliance and enforcement.

At the same time, the Department of Justice began an Exceptions Review and released a Consultation Paper in February 2008, seeking comments on the need for amendments of any of the exceptions and exemptions in the Act. Over 500 submissions were made to the Department in

[1] All documents and submissions to the Review are available at http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+-+Documents.

response to this paper.[2] Subsequently, the Scrutiny of Acts and Regulations Committee was given this reference, and has been given access to the non-confidential submissions made in response to the Consultation Paper, together with a Background Paper prepared by the Department of Justice. In addition, several submissions have been received by SARC in 2009, although there has been no further public call for submissions. There is an opportunity to make submissions to the Committee in response to this paper.

Documentation available to this inquiry includes:

1. Papers and Submissions from the Gardner Review of the *EO Act* (December 2007 to June 2008)
2. Consultation Paper for the Exceptions Review (DOJ 2008).
3. Non-confidential Submissions to the Exceptions Review (2008).
4. Background Paper for SARC prepared by DOJ (2008).

It is not yet clear to what extent amendments will be made to the *EO Act* based on the Report of the Gardner Review. As a result, this paper focuses on the exceptions and exemptions as they are in the *EO Act* at present. The exceptions necessary if the new attributes (homelessness (recommendation 46) and irrelevant criminal record, recommendation 48) are added as recommended by the Gardner Review will be considered in a future report, and submissions are sought on these aspects.

The Gardner Review also recommended that:

– The existing provision in s. 8(4) of the *Charter* that provides that 'measures taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination,' should be incorporated in the Act. (Recommendation 4), and
– The Act should be amended to include an express requirement to make reasonable adjustments for people with impairment in relation to all areas protected by the Act and in public spaces. Reasonableness should be clarified in the legislation. (Recommendation 43).

These recommendations have broad implications for a number of exceptions and exemptions in the *EO Act*, and are discussed where they are relevant in the context of each exception provision, and in particular in the context of s. 82 (special measures) and ss. 22, 23, 32, 33, 36, 39 and 46 (reasonable adjustments for people with impairment). The other recommendations of the Gardner Review do not at this stage appear to have any implications for the exceptions and exemptions.

Structure of this paper

The Department of Justice Consultation Paper asked the following questions, and many of the submissions to that Paper addressed some or all of them. They will be used to guide the structure of this paper.

[2] See Exceptions review web site at http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+The+Exceptions+Review+-+A+review+of+the+exceptions+and+exemptions+in+the+Equal+Opportunity+Act+1995.

General questions

Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?

What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?

Exceptions and exemptions

Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?

Should any exceptions be repealed? If so, which exceptions and why?

Should any exceptions be amended? If so, which exceptions and why?

Is the Victorian Civil and Administrative Tribunal (VCAT) exemption process appropriate? How could it be improved?

Statutory authority exception

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 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?

This Paper begins with a discussion of background issues, including the general principles underlying the exceptions from discrimination as defined by the *EO Act*, and the reasons for reviewing and possibly changing some of these provisions. This is followed by a consideration of options in relation to each of the 50 sections of the *EO Act* dealing with exceptions or exemptions. Then the need for change to the temporary exemption power and process (s. 83) is considered, followed by the proposal for repeal of *s.* 69 and what sort of provision should be substituted for it. This Paper draws on the non-confidential submissions made to the Department of Justice in response to the Exceptions Review Consultation Paper. While submissions that simply expressed support for particular provisions have been noted, this Paper draws most heavily on submissions that provided argument or information in support of the issues they discussed.

The purpose of this Paper is to provide a basis for consultation and expression of views on the desirability of reforming the exceptions and exemptions in the Act. The Options listed in this Paper are not exhaustive, and the Committee welcomes all responses on issues relating to the exceptions and exemptions, whether or not foreshadowed in this paper. In seeking responses to this Options Paper, the Committee is interested in hearing opinions from any person or organisation on any proposed options, and particularly the reasons for holding that opinion and any experiences, facts or evidence on which that opinion is based. Opinions that are based on evidence or experience are very useful, especially where they are supported by examples of the consequences (good or bad) that would be likely to follow from the change.

Background: General Questions

The general questions asked in the Department of Justice Consultation Paper of 2008 were:

> *Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?*
>
> *What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?*

The starting point of this inquiry is the role of the exceptions and exemptions in the *EO Act*, and the reasons that might be put forward to support changing them.

The role of exceptions and exemptions and the need for reform

The exceptions and exemptions are an integral part of the definition of discrimination. Their role can be explained as follows:

> "anti-discrimination law is justifiable if it is directed against differential treatment of others which is unfair. In Australian society, organisations and individuals should not, when providing access to a benefit or resource, treat a person unfairly because of an attribute of the person which is irrelevant to the benefit or resource or the context of its provision.
>
> The Act does not use the concept of unfair treatment, although it is used in other legislation such as the Fair Trading Act. Instead the Act prohibits certain 'different and less favourable' treatment, assuming that such treatment is unfair and objectionable.
>
> 'Unfairness' is a much richer concept than 'different and less favourable'. To decide something is 'unfair' requires a more nuanced judgment balancing the motivations, circumstances, rights and responsibilities of the provider of the benefit or resource with those of the person seeking access to the benefit of the resource and the expectations of society of each of them. … Because 'different and less favourable' is the Act's thin proxy for the richer standard of 'unfairness', the Act will have an overbroad application to a range of 'different and less favourable' treatment which is not in context unfair. This definitional over-breadth in the Act is one reason why the Act needs to have exceptions – to capture as many circumstances as possible where 'different and less favourable' does not mean 'unfair'. A second justification for exceptions is to accommodate some of the legitimate disagreement there will be in a pluralistic society such as Australia's as to:
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> - When different treatment is less favourable (or in the case of indirect discrimination when apparently neutral treatment does affect some people less favourably); and

- Which attributes should be irrelevant to the provision of different benefits and resources and in what context."[3]

If discrimination in the *EO Act* merely required people who are similarly situated to be treated the same, then the idea of equality in the Act would be equal treatment or same treatment. But equal treatment of people who are not in a similar situation can be the opposite of equality. For example, if an employed woman did not have access to adequate maternity leave because men don't have it, then there is equal treatment, but because men and women are situated differently in relation to parenthood, it leads to inequality. So anti-discrimination law has to be fine-tuned, rather than just requiring same treatment. An argument that all exceptions in the *EO Act* should be repealed fails to acknowledge their essential role in fine tuning the definition of discrimination, as part of a sophisticated scheme defining the scope of non-discrimination claims in Victoria.

If the law is to prohibit only unfair discrimination, it is necessary to identify the type of discrimination that is unfair, and this is done by a range of means. The exceptions are very important in doing this. The exceptions and exemptions fall into two groups:

(i) Measures to assist in moving towards equality

The first group supports a more nuanced idea of equality as fairness, not just equal treatment. Such measures are aimed at improving equality in the face of systemic discrimination and the effects of historic disadvantage. This includes indirect discrimination, and special measures and welfare measures for the benefit of disadvantaged groups, as well as the grant of temporary exemptions that serve this purpose. Merely prohibiting discrimination is not by itself enough to ensure equality in practice; the law must not prevent the taking of action to ameliorate the effects of past discrimination.[4] A law that required equal treatment would prevent such action.[5] Section 8(4) of the *Charter* specifically provides that 'measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.' The Victorian Council of Social Service (VCOSS) submission summarised the legal basis for these types of measures as follows:

> Some provisions recognise that in order for substantive equality to be achieved, it is sometimes necessary to permit conduct that is prima facie discriminatory. Examples include Indigenous employment programs, or women-only sporting programs. International human rights law and jurisprudence recognise the need for 'temporary special measures' ('TSM') to achieve de facto equality among groups experiencing structural disadvantage caused by past and present discriminatory laws and

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[3] Australian Christian Lobby submission, 4-5.

[4] Mark Bell *Extending EU Anti-Discrimination Law: Report of an ENAR (European network against racism) Ad Hoc Expert Group on Anti-Discrimination Law* (ENAR, Brussels, 2008) 13.

[5] Australia has very few requirements for any positive action to be taken, and those that exist require only reporting that a plan has been developed and acted on: for example the *Equal Opportunity for Women in the Workforce Act 1999* (Cth) or the requirements of some state anti-discrimination laws for similar EO actions in relation to public employment: ADA (NSW) Part 9A, EOA (WA) Part IX. By contrast, USA and UK have gone further in requiring stronger forms of positive action to be taken to move towards practical equality, for example the UK has imposed an equality duty on public authorities requiring some positive action to reduce inequality.

> practices.[6] General Recommendation No. 25 on the non-discrimination provision in CEDAW [*Convention on the Elimination of All Forms of Discrimination Against Women*] notes that the application of TSM 'is one of the means to realize *de facto* or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.'[7]

In Australian courts, 'special measures' has been interpreted to mean that to qualify as such, the measure in question needs to confer a benefit; the benefit must be conferred on members of a class, and membership of this class must be based on an identified characteristic; and the measure taken must be to secure their advancement.[8] It is generally also a requirement that the people affected have consented to its introduction.

(ii) Measures that excuse a person or organisation from the prohibition of discrimination

The second group of exemptions protects some existing practices from being challenged, and is justified by a range of reasons such as allowing flexibility and adjustment to the needs of individual situations. This is the category that includes most of the specific exceptions provisions in the *EO Act*. VCOSS said this group of exemptions and exceptions involves 'permitting discriminatory conduct, often because it is believed that it would impose unreasonable hardship to ensure compliance,' giving as examples s. 76(2) exempting religious schools and s. 22, exemption for special services or facilities, which permits 'discriminatory conduct on the basis that it would be unreasonable to compel compliance.' VCOSS argued that 'such exceptions and exemptions need urgent review according to whether they constitute 'reasonable limitations' to the right to be free from discrimination so as not to defeat the object of the *EO Act*. If an exception and exemption is granted, it should ideally be subject to a sunset clause provision, or regular review.'

The central issue for this inquiry is whether the current exceptions and exemptions are drawn in the correct location. Because they protect conduct that might otherwise be discrimination, the exceptions and exemptions should not be used too widely or inappropriately, and they should keep up with social changes and modern understandings of equality. In its submission, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) suggested that there were four rationales for the exceptions:

> Exceptions and exemptions are an integral part of the *EO Act*. Exceptions are recognised as providing a balance between the rights and freedoms of individuals by providing limited exceptions where discrimination prohibited by the *EO Act* in specified circumstances will not be unlawful. Exemptions provide a mechanism for individuals and entities to seek permission from the VCAT to discriminate in specified circumstances. Such an approach is necessary to avoid a purist application of the principle of non-discrimination which can lead to counter-intuitive results that reinforce disadvantage. The majority of exceptions in the Act and exemptions granted by VCAT are designed to mitigate or overcome this risk.

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6 These include *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), Article 1(4), *International Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) Article 4 (1), and the ILO *Discrimination (Employment and Occupation) Convention* 1958 (No. 111).

7 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: Temporary special measures*, Thirtieth session, 2004, para 14.

8 *Gerhardy v Brown* (1985) 159 CLR 70 at 126.

The common rationales behind current exceptions in the *EO Act* can be categorised loosely as:

- *special measures* – designed to promote and facilitate the provision of benefits, programs, opportunities aimed at addressing disadvantage experienced by particular groups of people in society because of historic and lingering disadvantage that these groups may have experienced arising from discrimination.
- *private conduct* – designed to ensure people's personal and private choices are infringed as little as possible.
- *transitional* – facilitating protection for specific conduct or complex regulatory areas where further reform is required to remove discriminatory practices.
- *reducing regulatory burden on business* – seeking to infringe as little as possible with Victorian businesses enabling them to regulate the conduct of their own affairs.

These may seem compelling and important rationales; however, the effective elimination of discrimination in Victoria requires reflection upon whether the current exceptions strike an appropriate balance in Victoria today through interrogating whether they are reasonable limits on rights and freedoms which can be justified in a free and democratic society based on human dignity, equality and freedom.

The rationales and criteria for reviewing the exceptions and exemptions

The social and economic costs of discrimination, and the need to reduce it, have been recently considered in the context of the Gardner Review and need not be covered again here. A range of reasons have been suggested as to why there is a need for review of the exceptions and exemptions, including:

1. The need to improve the protection of Victorians from discrimination and inequality through both strengthening the *EO Act* and improving its effectiveness and efficiency.
2. The need to ensure that the *EO Act* is in harmony with the rights now protected by the Victorian *Charter* of Human Rights and Responsibilities.
3. The need to modernise the law and ensure exceptions are still appropriate, relevant, efficient and effective.
4. Deal with any consequential implications flowing from the Gardner Review.
5. The desirability of harmonising Victorian law as far as possible with that of the Commonwealth and the other states and territories, provided that the content of that law is acceptable to the Victorian Parliament and people.
6. Improving the expression and structure of the Act in a number of ways to make it easier to use and understand.

Each is considered in more detail here to identify the sorts of criteria that might be used in reviewing the exceptions and exemptions.

1. Improve fairness and protection from discrimination

The government expressed its commitment to improving the legal protection of equality in the *Justice Statement 2* and *A Fairer Victoria*.[9] These policies seek to address disadvantage and recognise the links between discrimination and disadvantage. The goals of anti-discrimination and equal opportunity law are to 'combat discrimination and promote social inclusion'.[10] The *EO Act* contains no fewer than 53 provisions relating to exceptions and exemptions, which is a large number of areas to except, and makes it a complex piece of legislation. Reviewing the exceptions and exemptions to see whether they are still necessary and justified will contribute to the achievement of these goals. The question is what, if any, limitations on the achievement of equality rights are justified in light of the government's general policy goals and the rights protected or policies served by the exception.

2. Ensure the *EO Act* is not inconsistent with the rights protected by the *Charter*

A number of submissions to the DOJ Consultation Paper suggested that a closer alignment between the protection from discrimination in the Act and the rights protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*) could and should be a primary aim of the Exceptions Review.[11] Victoria's *Charter* began operation on 1 January 2007, and came into full operation on 1 January 2008. Among the rights protected by the *Charter* is the right to equality, which includes the right to be protected from discrimination: s. 8. There is a need to review the limits on rights in the *EO Act* to ensure that they are compatible with and justified under this new legal framework. This is necessary both in principle, and also to ensure that there is little risk that the Supreme Court might, in a case involving the *EO Act*, make a declaration of incompatibility with the *Charter* in relation to the *EO Act*.

The VEOHRC expressed its opinion that the vast majority of exceptions in the *EO Act* are on their face compatible with the *Charter* or capable of being interpreted consistently with the *Charter*. However some exceptions are in its view incompatible with the *Charter*, because they are not justifiable limitations on human rights. Such provisions would require repeal or amendment to clarify their operation or reduce their potential for limiting rights to promote a more balanced application.

The right to equality is included among the rights protected by the *Charter*, along with other rights potentially in conflict with it, such as the rights to protection of privacy and reputation, to freedom of thought, conscience, religion and belief, freedom of expression, peaceful assembly and freedom of association, protection of families and children, the right to take part in public life and cultural rights. Section 8 of the *Charter* provides:

> 8. Recognition and equality before the law
>
> (1) Every person has the right to recognition as a person before the law.
>
> (2) Every person has the right to enjoy his or her human rights without discrimination.

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[9] *Justice Statement 2: The Next Chapter* (Department of Justice, 2008), see also Justice Statement 1: *New Directions for the Victorian Justice System 2004 – 2014*: Attorney-General's Justice Statement, May 2004; *A Fairer Victoria: Progress and Next Steps*, June 2006.

[10] EU research paper.

[11] This view was put by the VEOHRC, and in the joint Human Rights Law Resource Centre (HRLRC) and Public Interest Law Clearing House (PILCH) submission.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has *the right to equal and effective protection against discrimination*.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. (emphasis added).

Subsections (2), (3) and (4) are directly relevant to the *EO Act*, not least because of the way that 'discrimination' is defined in s. 3 of the *Charter*:

3. (1) …

"discrimination", in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 1995**) on the basis of an attribute set out in section 6 of that Act;

Note: Section 6 of the **Equal Opportunity Act 1995** lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

There is uncertainty about whether the reference to discrimination in the *Charter* as 'discrimination (within the meaning of the *Equal Opportunity Act 1995*)' includes merely the definitions of discrimination in ss. 7-9, or all the exceptions and exemptions as well. The first view would exclude all exceptions, including special measures as well as exceptions that reduce rights, and would produce a concept of equality as identical treatment. This view appears to be contrary to s. 12 of the *EO Act*,[12] and its consequences would be unacceptable, as discussed above in the context of the two types of exceptions. However, because of the definition in s. 3, non-discrimination rights are in a different position to other rights protected by the *Charter*. Amending the *EO Act* will, through this definition, change the scope of the right protected by s. 8(3) of the *Charter*.

It is clear there is a close and direct link between the scope of protection from discrimination under the *EO Act*, and the scope of the equality and non-discrimination right in the *Charter*. This review provides an important opportunity to review the Act for consistency with broader human rights protection in the *Charter*.[13] The exceptions in the Act have attempted to balance competing rights and interests in specific situations rather than setting out general principles regarding circumstances where discrimination is not unlawful. By contrast, the *Charter* acknowledges that rights cannot be absolute, and addresses conflicts between rights, and between rights and other interests in general terms, by allowing reasonable limitations on human rights, including the right to be free from discrimination. Section 7 provides:

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.

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12 Section 12 of the *EO Act* provides that 'This Act does not prohibit discrimination if an exception in Part 3 (whether or not in the same Division as the provision prohibiting the discrimination) or Part 4 or an exemption under Part 4 applies.'

13 Although s. 8(2) of the *Charter* refers to the right to enjoy all human rights without discrimination, the *EO Act* actually protects rights only in the specific areas covered by its prohibitions, rather than in relation to all areas protected by human rights. If protection was to be given in terms of s. 8(2), the areas of operation of the *EO Act* would be broadened to include all areas of human rights, not merely the specified areas of employment, education, etc. This is how the *Racial Discrimination Act 1975* (Cth) is drafted.

(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.

The *EO Act* does not have an equivalent provision. Subsection 7(2) lists the five factors that must be considered, along with any other relevant matters, in deciding whether or not a particular restriction is a reasonable limitation. This test can be used when it is necessary to balance conflicting human rights against each other and competing public interests, and it determines whether a limitation on a right is reasonable and can be upheld or falls outside the test and is invalid. This can arise in three contexts:

(i) In assessments of the human rights compatibility of new legislation before Parliament in both the statement of compatibility made by the Member proposing a Bill, as well as the human rights assessment conducted by the Scrutiny of Acts and Regulations Committee;

(ii) In the interpretation of other laws (including the *EO Act*) consistently with the *Charter*, including the power of the Supreme Court to make declarations of inconsistent interpretation; and

(iii) In discharge of the duty now on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights in the course of making decisions.

This test was used by the VEOHRC in its submission which assessed each exception provision against the five criteria in s. 7(2) for reasonable limitations on rights. The basic idea underlying these factors is that restrictions on rights must be reasonable. They should only be those that are really necessary and justified, and there should be proportionality between the restriction and the purpose it serves, and reasonably available less restrictive means should be considered. Many of the exceptions in the Act contain no such limitations, and an important element of reviewing them for compliance with the *Charter* is to consider whether they should be amended to fit better with the *Charter*'s limitation provision. On the other hand, where there is no specific exemption in the *EO Act*, there is no basis on which it can be argued that a particular restriction is reasonable and justified. The VEOHRC suggested that the principles in s. 7 of the *Charter* could be adopted as part of s. 12 of the *EO Act* which gives the exceptions and exemptions their effect.[14] However this proposal could introduce significant uncertainty into the *EO Act*. At the least, however, the reasonableness and justification for each exception provision should be considered in terms of the factors identified in s. 7 of the *Charter*.

[14] VEOHRC submission.

3. Modernise and update the Act

It is over 30 years since the *EO Act* was first adopted in 1977, and although extra attributes on which discrimination is forbidden have been added over the years, the basic mechanisms of the Act (such as the definitions of discrimination, the scope of activities covered (including exceptions and exemptions), and the processes for dealing with complaints of infringements of rights) have changed very little over that time.[15] The VEOHRC submitted that when the 1977 and 1984 Acts were introduced, some exceptions were described as transitional, but they remain in the Act, and that all provisions that were expressed as transitional should be reviewed to determine whether they are still necessary and/or justified. Where the justification has passed, provisions could be repealed on the basis that a temporary exemption can be sought if it is still needed.

Over the last three decades, social standards and practices have changed significantly in a wide range of areas. Even provisions that were not expressed to be transitional may have become out of date by modern social standards. In addition, much experience and knowledge has been accumulated since the 1970s about the effects and operation of legislation prohibiting discrimination. For example, the experience of multiple or intersectional discrimination has been recognised, and the inadequacy of anti-discrimination law's approach to it acknowledged. The Gardner Review considered how to respond to this problem but similar issues may be raised in relation to the exceptions and exemptions.

4. Deal with any consequential implications for the exceptions and exemptions flowing from the recommendations of the Gardner Review into the effectiveness of the *EO Act*

The Gardner Review identified the need to refocus equal opportunity legislation on achieving effective or practical rather than formal equality, and on addressing prevention and compliance with the law, rather than merely processing complaints after infringements have occurred. This review of exceptions should consider ways in which the determination and administration of exceptions and exemptions can be made clearer and more efficient in the interests of all parties. Particular formats for exceptions may contribute to efficiency and fairness by making it easier to determine when the exception applies.

The interests of fairness might suggest a presumption against blanket exemptions from the law without a very clear justification and only where the scope of the exemption can be clearly defended. In most cases, an exception should be justified on the facts on each occasion that it is claimed, whether specifically in the individual situation, or to VCAT when a temporary exemption is sought seeking an exemption, or in terms of the *EO Act's* exception provisions. Improving the transparency and consultativeness of the process for obtaining a temporary exemption would also contribute to the *EO Act's* fairness and effectiveness.

5. Harmonising with other Australian anti-discrimination laws

It would be valuable for all people and organisations that operate outside as well as inside Victoria for there to be a greater degree of harmonisation between the *EO Act* and other Australian anti-discrimination laws. This has been identified as a goal by the Standing Committee of Attorneys-

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[15] VEOHRC submission.

General.[16] Clearly, this should not be at the cost of imposing legal content that is unsuitable, but in the absence of a strong reason to retain a different provision, then adopting a formulation more consistent with other Australian laws would be a valuable step towards reducing legal complexity and encouraging greater knowledge of and compliance with the law. There are unresolved questions at the constitutional level about the extent of the differences in the provisions of the state and federal anti-discrimination laws that are acceptable under s. 109 of the Commonwealth Constitution.[17] For example, it is not clear what is the significance of the existence of an exception for recruitment by small businesses under s. 21 of the *EO Act*, but not the Commonwealth anti-discrimination laws, or the grant by state and territory tribunals of an exception from racial discrimination law where none can be granted under the *Racial Discrimination Act 1975* (Cth). All anti-discrimination laws from the Commonwealth and other states and territories referred to are listed with their full names in the Abbreviations section of this Report.

6. Improve the wording and structure of the Act where possible

As part of the process of amending the Act, there is an opportunity to improve its structure and expression to ensure more economical and consistent use of terminology that could contribute to making the Act easier to use and understand. This could be achieved by a number of measures identified by the Department of Justice in its Background Paper, including:

- **Using familiar legal concepts and making thresholds and standards consistent throughout the Act**
  - Existing exceptions use a variety of different words to describe when discrimination is allowed. Words such as 'rational', 'reasonable', 'genuine' are used in different places in the Act. Where possible, the Act should adopt consistent language and easily identifiable thresholds and standards to ensure that people understand their obligations and rights under the Act.
- **Updating exceptions to reflect community attitudes**
  - Any limits on the right to be free from discrimination should be reasonable and reflect accepted community attitudes and standards. Some of the existing exceptions date back to the 1970s and may be out of touch with community attitudes and national and international standards.
  - Submissions to the DOJ Consultation Paper identified a number of areas where the existing exceptions may be out of touch and in need of revision, such as the role of the gender identity ground in s. 66, the sports exception.
- **Remove old or transitional exceptions**
  - Some exceptions may no longer have any utility. There are some exceptions in the Act that were designed to ensure a smooth transition from the 1984 Act to the 1995 Act. In addition, there are other exceptions that have been included from time to time to assist in the transition to the protection of new attributes.

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[16] 'First national EO reforms "expected" at Nov SCAG,' *Discrimination Alert*, 30 August 2008, 1.

[17] Section 6A(1) of the RDA provides "This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act." What, if any, limits are imposed by the final clause have not been explored, but there may be a question whether provisions that differ substantially would be acceptable within this test.

- **Consolidation of existing exceptions**
  - As noted above, some existing exceptions in the Act could be consolidated to improve the operation of the Act and add clarity to people's rights and obligations. For example, provisions relating to impairment exceptions for reasonable adjustments, inherent requirements and unjustifiable hardship would enable several exceptions to be combined into one provision.
- **Clarification of scope of existing exceptions**
  - There are some exceptions in the Act that may not achieve their purpose. This may be because of a lack of clarity as to the scope of the exception, or due to external factors. For example the status of transgender people in the definition of sex is not clear, and s. 23(a) appears in a provision apparently directed towards impairment, but is not itself limited to impairment in its operation.

Finally, it is valuable to ensure that all (or as many as possible) of the tools needed to interpret the *EO Act* are found within the Act. To require it to be read with other pieces of legislation, or with the *Charter*, makes interpretation more complex and difficult, and will make it harder for individuals to know their rights.

Reviewing the Exceptions: Approaches and Principles

Accepting that in some cases an exception or exemption will be necessary, the question arises of how they are best structured. The aim of designing and drafting any amended exceptions and exemptions should be to give the clearest guidance possible about the purpose of and criteria for the provision, while also minimising transaction costs involved in claiming or challenging them.

At present there are three different sorts of provisions:

1. 'Specific': Exceptions that are specific to the particular attribute and area or just the area of activity, such as s. 17, the genuine occupational requirement exception in relation to sex and impairment discrimination. These all appear in Part 3 of the *EO Act* along with the prohibitions of discrimination in the various areas it applies to. A useful table listing each exemption and the grounds to which it applies was created by the Department of Justice for its background paper and is reproduced as Appendix A to this report.
2. 'General': Exceptions that are expressed to apply generally, such as the exceptions for insurance, superannuation, religious organisations, etc. These are mainly located in Part 4 of the Act.
3. Temporary exemptions that are granted by VCAT on application by a particular individual or organisation. The Act provides no specific guidance on the principles that should be relied on in deciding such applications, and an accepted practice that they should be granted on the basis of compatibility with the aims of the Act has recently been departed from.[18]

Although the exceptions in category 1 above appear to be limited in their operation to specific contexts, s. 12 provides that the exceptions in Part 3 (the specific exceptions) apply generally to other divisions of Part 3 than the one in which they are located. So there may in reality be little difference between the 'specific' and 'general' exceptions. The need for and intended meaning of this provision is not clear, nor is its effect.

Despite its 30 years of existence, few of the exception provisions in the Act have been clarified through litigation. This throws great importance onto the legislative drafting of the exceptions, as it is likely that they will have to be given effect without assistance from interpretation by a court. Unless drafting is very precise, ambiguities leave it open for an exception to be relied upon very widely in circumstances where no individual affected has the resources or energy to challenge it. Such ambiguities tend to advantage potential respondents because they can simply rely on the broader interpretation, and then leave the person affected to take legal action to seek redress. Thus the risks arising from ambiguity tend to fall on the party who has to take action to seek a remedy.

[18] See discussion of the guidelines in *Fernwood* and the *Boeing* case at s. 83 below.

How could the format of exceptions be changed to assist the achievement of equality in Victoria?

1. Structure of the exceptions within the Act

As already mentioned there are 53 sections of the *EO Act* that refer to exceptions and exemptions. Provisions that could be relevant to a situation are sprinkled throughout the Act in different locations, making a high level of expertise necessary to work out which exceptions may apply and whether or not they do. It would be beneficial to simplify the structure of the Act; for example, to have the definitions of discrimination collected together in one part of the Act, and then to have all the exception and exemption provisions collected together in a separate part, perhaps with introductory sections listing the exceptions that could apply in relation to each attribute or area.

2. Process: should there be exceptions defined in the Act, or should those who seek an exemption have to seek approval for it in each case?

Both of these methods are used in the current Act. Defining the exceptions in the legislation has the advantage of making them more specific and increases the possibility of clarity if the exceptions are narrowly and clearly expressed. However, it puts the onus of challenging an exception on the party to whom it is applied. It is very difficult for individuals to bring discrimination cases, and there are relatively few such challenges, so in practice there may be little oversight that the exception provisions are being applied in accordance with fundamental rights.

Vision Australia suggested that this could be the exclusive way of accessing exclusions:

> The exceptions in their current form put an emphasis on individuals who feel that they are being discriminated against, to take action either through a Victorian Equal Opportunity and Human rights Commission (VEOHRC) conciliation or a complaint to the Victorian Civil and Administrative Tribunal (VCAT). A suggestion to re-focus the responsibility could be to remove the exceptions and to legislate that if an entity or individual wished to operate outside the remaining prohibitions, then it would be their responsibility to seek an exemption from VCAT under their existing powers.

This alternative would require a person or organisation that wants to rely on an exemption to seek approval for it, either on a once-off basis or on every occasion. The current power for VCAT to grant temporary exemptions in s. 83 does this to some extent. This approach would impose a burden on both the organisation that seeks the exemption, and the agency that deals with and decides applications.

Most likely, neither approach is the complete solution, and there will be some areas in which each of these approaches is the most suitable. This would need to be determined in the context of each exemption. These issues are discussed further in relation to s. 83 later in this Options Paper.

3. Would a general limitation clause rather than specific exceptions be preferable?

All or some of the exception provisions could be replaced by a general exceptions clause relying on the reasonable limitations criteria of s. 7(2) of the *Charter*. This question arises whichever of the two approaches identified above is chosen as the format for exceptions. This issue was canvassed in the Senate Legal and Constitutional Committee's *Inquiry into the Effectiveness of the Sex Discrimination*

Act 1984 in Eliminating Discrimination and Promoting Gender Equality.[19] A generalised provision based on the reasonable limitations criteria would have the advantages of flexibility, in that decisions about exemptions would be made in each case on the specific facts, and openness to arguments that could be made in each case. It would be consistent with a human rights approach. However, in practice, these advantages may be difficult to achieve. They depend on cases being taken through to litigation to set guidelines. The evidence in discrimination law is that this is very difficult for individual complainants in many areas, although in some cases support organisations may assist in raising issues and supporting litigation. Where litigation does not occur, a general provision may not provide adequate guidance on when limitations are permitted and when they are not.

The conclusion of the Senate Committee was that although the idea of a general limitations clause and its benefits was attractive, especially because 'it would allow the Act to evolve with prevailing community attitudes rather than freezing the exceptions at a particular point in time,' as a major change to the Act it required more extensive consideration and consultation than was possible in the space of that inquiry, especially given the diverse range of groups likely to be affected.[20] The VEOHRC has made the point that whether or not the format of a general exception modelled on the *Charter* is adopted, the principles that underpin general limitations clauses (reasonable, justified, proportionate, rational and balanced) should be used to guide the formulation of any amendments to the Act in relation to specific exceptions and exemptions. Use of those principles, whether in a general exception or to inform the requirements for specific exceptions, will also ensure maximum consistency between the exceptions and exemptions and the obligation in the *Charter*.

In theory, the more specific the provision, the easier it should be to apply to any given situation and the less argument should be possible over its scope. On this view adopting a general limitation clause in the form of s. 7 of the *Charter* would not be desirable, because it would increase the space for argument around the scope of protection. Unless a litigation fund was created or more legal aid made available for discrimination litigation, this would tend to disadvantage individuals who may be exposed to discrimination. The systemic effects of such structural features can be significant.[21]

Identifying relevant criteria for each exception and expressing them in the particular exception provision allows the principles of the *Charter* to be adopted while still providing clearer guidance. This would provide the benefits of tailoring the exceptions to the specific areas. Examples of the formats of current provisions such as s. 27B and s. 28 (independently of their content) are discussed below. To avoid technical argument over the details of such fairly specific provisions, a general statement of purpose about the aims of the Act as a whole and interpretation of the exceptions provisions in particular should be included as an interpretive direction to courts and tribunals. The problem of lack of flexibility could be addressed by a requirement to ensure a review the content and use of 'fixed' exceptions on a regular basis, perhaps every 5 or 10 years.

Exceptions can and should be tested against the *Charter* reasonable limitations test, but this could occur at a number of stages. It could be undertaken through this review process, or through SARC's *Charter* compatibility reporting on any amending legislation. Alternatively, it could be undertaken by

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19 See Senate Legal and Constitutional Standing Committee, *Report of Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) at [7.10] to 7.16].

20 Ibid. at [11.64]-[11.65].

21 In particular there are systemic effects for gay teachers in non-government schools, as outlined in the discussion of s. 25 and ss. 75 and 76.

the parties (in the first instance) and by VCAT if the criteria of s. 7(2), or a reference to s. 7(2) of the *Charter* were adopted as part of the Act, or if a set of relevant factors is adopted as part of the specific exemption provision. Provided the issues are considered overall, it is a strategic choice where they are structured into the process.

4. What alternative formats could be used?

Limiting discrimination seems to be best served by ensuring that exceptions and exemptions are as tightly targeted as possible, and that the criteria for relying on them are as clear and specific as possible. General criteria for this where other rights are involved must ultimately be derived from s. 7(2) of the *Charter*. But more specific criteria could be drawn from existing case law, or based on research, and exception provisions could take a range of styles. A range of possible ways of expressing exceptions could be used.

1. *Blanket exception*: Allow the exception without the need for a specific reason to be shown: all cases in a specific area of activity or area and attributes (such as private schools or insurance) would be exempt without specifying any particular criteria that need to be satisfied in the specific case. An example is s. 27A, which is a blanket prohibition excluding the *EO Act* from applying to judicial retirement or appointment on the grounds of age, and s. 75(1) which extends blanket protection to the core functions of religions in choosing and training their officials.
2. *Limiting the attributes and areas of an exception*: Ensure exceptions are expressed to be confined to those areas that are necessary to serve their function, in terms of attributes and areas of activity. For example, where control is needed over selection of staff, the exemption should not extend to permitting sex based discrimination in pay, conditions or promotion. The exemption should be tailored to the needs of the situation.
3. *Require a condition before an exception applies*: Allow the exception only where a specific criterion or criteria is present. In some areas this could be under a specific provision of the Act, for example genuine occupational requirement or artistic veracity; in other cases it might be through an application to VCAT.
4. *Require assessment based on a range of factors before an exception applies*: Allow an exception only where is it justified based on an assessment of a range of factors listed in the Act (whether in the section itself or a more general list). Specific exception provisions in the Act would be expressed as conditioned on, or discretionary based on, consideration of the range of relevant factors. An example of this sort of provision is s. 27B(2) relating to gender identity, which lists the factors relevant to deciding whether the exemption should apply. Identifying the relevant factors would assist with a purposive interpretation of the exception. Another example is s. 28, which authorises VCAT to grant an exemption where specific circumstances are made out in the particular case.[22] This gives limited power to VCAT, rather than an open-ended discretion, but also means that each case must be dealt with individually.
5. *Express the exceptions as defences to discrimination claims.* The Law Institute of Victoria submitted that in some circumstances, 'defence' provisions may be more appropriate than certain blanket exceptions. This would allow consideration of the facts of a particular case and shift the burden to respondents in a similar way to the 'unjustifiable hardship' test under federal anti-

[22] Section 28 Exemption for single sex accommodation provides: 'The Tribunal, by granting an exemption under section 83, may authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.'

discrimination legislation. Blind Citizens Australia also argued that casting exceptions as defences would be a better approach:

> We believe that while all circumstances should be taken into consideration, it would be more appropriate for them to be dealt with by providing potential defences as per the *Disability Discrimination Act 1992.* Doing this would remove the onus from the complainant to show why an exception does not apply to them, meaning that they would need to prove that discrimination had occurred and the respondent would need to prove why that discrimination was necessary or unavoidable. In practice, this would mean that some of the exceptions we have recommended for repeal ... , such as the exception for small businesses, could still be brought to bear in a conciliation case where the facts were relevant.

6. *Require specific steps before an exception or exemption applies*: For some exceptions there could be specific requirements for action to be taken by the proponent in advance if they seek to rely on the exception, as there currently is for temporary exemptions. This would enhance the *EO Act*'s emphasis on prevention and compliance. It would enable the specific facts and issues in each such case to be considered to some extent and promote some degree of flexibility. It could apply to exceptions seeking substantive equality if certainty was sought, or only to those exceptions that seek authorisation to discriminate. These issues of process and advance approval are discussed further in the context of s. 83, below. Alternatives could include:
   (a) Specify guidelines to VCAT for the exercise of its discretion to grant temporary exemptions under s. 83, and require all applicants to make out a case within those guidelines. At present that discretion is open-ended under the legislation. After 30 years' experience, it is reasonable to expect that some guidelines should be included in the *EO Act* in relation to the exercise of this power. These procedures could then be extended to some of the exceptions to ensure that they are used only minimally and in appropriate cases.
   (b) Allow an exception where some extra requirement is complied with, such as provision of notification or a statement of reasons, identifying evidence relied on, the approval of the VEOHRC, or registration with the VEOHRC or VCAT. Several submissions suggested creating a new procedure to deal with some exceptions. For example, John Ryan, Senior Industrial Officer with the Shop, Distributive & Allied Employees Association (SDA), suggested in a personal submission a procedure for application to the VEOHRC to set 'reasonable terms of employment' under s. 23 that would come into effect automatically but be subject to challenge in VCAT by any party, with the employer bearing the onus of showing that the terms were reasonable. Similar proposals were made for the s. 83 process to make it more user-friendly (see discussion of s. 83). A similar proposal was made by the Victorian Law Reform Commission in its 1993 Report on its *Review of the EO Act 1984*.[23]

Requiring a person or organisation seeking to rely on an exception to follow a specific procedure, such as advising the person affected in writing within a certain time of the facts relied on and the rationale for claiming the exception would protect complainants, but at the cost of increased burdens on organisations affected. It may be that this approach is suitable for some exceptions only. In any event, reliance on an exception should be clearly identified as a defence under the Act, so that the respondent carries the onus of proof in relation to it.[24] This could be done by amending section 12.

[23] Victorian Law Reform Commission, Report No. 36, *Review of the Equal Opportunity Act* (1993) at 161, proposed new s.457.

[24] The onus of proof was discussed by Coghlan DP in *South v RVBA* [2001] VCAT 207, and the absence of a provision in the *EO Act* regarding the onus of proof of exceptions was noted. In that case, it was held that since s.66, which was relied on, was

After 30 years' experience with this legislation, there should be very few situations where an unforseen need for non-compliance with the Act arises. Hence a requirement for open-ended or unjustified exceptions should be minimal, and those that are necessary could be expected to be handled through the VCAT temporary exemption process in accordance with specific guidelines.

A closer look at the reasonable limitations test of the *Charter*[25]

A discussion of the implications of the *Charter*'s reasonable limitations test was provided by the VEOHRC in its submission to the Consultation Paper:

> "A reasonable limitation test is about striking a balance between the various interests and considerations that require adherence to and protection of human rights principles, but which also need to accommodate the infrequent situations where a departure from this may be necessary. Decisions in Canada and New Zealand have held that such limits will be reasonable where the exercise, or full exercise of a particular right would be 'inimical to the realisation of collective goals of fundamental importance'. Identified factors that may be relevant to reasonableness include social, legal, moral, economic, administrative and ethical considerations.
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> The Supreme Court of Canada has held that this requires the following values to be taken into consideration:
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> - respect for the inherent dignity of the human person;
> - commitment to social justice and equality;
> - accommodation of a wide variety of beliefs;
> - respect for cultural and group identity; and
> - faith in social and political institutions which enhance the participation of individuals and groups in society.
>
> The obligation to consider these matters is then reinforced by the identification of particular considerations that rigorously test the need or rationale for limiting rights, and even if a limitation is shown to be warranted, ensure the limitation is minimised. The reasonable limitations test in the *Charter* identifies five non-exhaustive considerations:
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> - regard must be had to the specific right that may be limited, including its importance, purpose and the values that inform it. A particular aspect of this analysis is whether the particular right is regarded as an absolute right in international law.
> - alongside the meaning and significance of the particular right there must be consideration and assessment of the importance of the purpose or reason underlying the proposed limitation. Courts have held that the relevant purpose should reflect societal concerns that are pressing and substantial in a free and democratic society. It has also been held that limitations must have a specific purpose rather than being based merely on a general

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not part of the definition of discrimination, it should be treated similarly to a defence and the onus of proving it applied was for the respondent. This leaves an implication that the exceptions that form part of the same section as the prohibition of discrimination may be treated as an element of the definition of discrimination for the respondent to establish. This would not be justifiable, and it would be preferable to clarify this expressly.

[25] This discussion is substantially based on the Background Paper and VEOHRC submission, as well as the combined submission of HRLRC and PILCH.

concern. Courts have grappled with the significance to be accorded to economic considerations and whilst of themselves they will generally not support a limitation, financial crises or economic factors relating to broader social considerations may be treated differently.

- in order to fully understand and assess the proposed limitation consideration must be given to the means by which it achieves the purpose it is intended to achieve, i.e. there must be clarity about the manner and extent to which the particular right will be limited and interfered with.
- it must be shown that there is a rational connection between the nature and extent of the limitation and its identified purpose, in other words a limitation must address the identified need. This analysis guards against permitting limitations that on closer analysis are in fact arbitrary, irrational or ineffective. A further dimension of this analysis is assessing the proportionality between the purpose of the proposed limitation on a right, and the means used to achieve that purpose. Put colloquially, it is about ensuring a sledgehammer isn't being used to crack a walnut.
- wherever the analysis of a proposed limitation identifies a means of achieving the relevant purpose without restricting a right, or subjecting it to a lesser degree of restriction, this will be a strong indicator that the proposed limitation is not reasonable. At the same time, however, courts have held this is not a requirement that the least restrictive option must be used to achieve a particular purpose, rather the strategy employed must be from the range of reasonable responses available to address a particular purpose."

Putting the reasonable limitations test into the *EO Act*

Submissions to the *Consultation Paper* supported the use of the reasonable limitations test as the benchmark for assessing whether conduct should be excepted from the prohibition of discrimination. This could be achieved a number of different ways. For example, the reasonable limitations test could be incorporated into s. 12 of the Act, which sets out the impact of the exceptions and exemptions on the prohibition of discrimination. Section 12 could be amended to clarify that it is not discrimination if the limitation on the right to equality is a reasonable limitation under the *Charter*, and the five factors could be listed in a subsection of s. 12. Alternatively, where Parliament intends to provide for specific situations where discrimination is lawful, the particular sections could set out certain criteria for assessing whether the discrimination is reasonable and therefore not unlawful. They could take the form of the reasonable limitations test in s. 7(2) of the *Charter*.

The VEOHRC suggested that it is for the government in adopting restrictions on rights (in the form of exceptions in the *EO Act*) to prove they are necessary based on adequate evidence. In contrast, Christian Schools Australia argued that it is for the person seeking to change the law to justify why change is needed. Wherever the onus lies, the most useful resource for decision-making is to better understand how the current system has operated, and its strengths and weaknesses based on evidence and experience. Such evidence and knowledge may be limited, given the limited resources available for research and analysis of data in this area, but decisions should be made on the best evidence available.