

Discrimination in the Law

Inquiry under Section 207 of the Equal Opportunity Act 1995

Discussion Paper

November 2003



Scrutiny of Acts and Regulations Committee

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Table of Contents

Chair's Introduction	v
Chapter One – Inquiry into Victorian Acts and Regulations	1
Chapter Two – What is Discrimination?	5
Chapter Three – Attributes protected under the Equal Opportunity Act 1995	13
Chapter Four – General Exemptions and Exceptions under the Equal Opportunity Act 1995	23
Chapter Five – General Exemptions and Exceptions in other Jurisdictions	31
Appendices	
1 – Referral of Inquiry to Scrutiny of Acts and Regulations Committee	33
2 – Committee Terms of Reference	35

The Inquiry and the Discussion Paper

This Discussion Paper is published by the Committee to assist people and organisations to focus on the issues and then make comments or submissions that are relevant to the Committee's Inquiry concerning Victorian laws (Acts and Regulations) that operate to discriminate, or that may lead to discrimination against any person.

The Inquiry is about discrimination that concerns one or more of the attributes listed in section 6 of the *Equal Opportunity Act 1995*. Each of these attributes, for example discrimination on the basis of age, is discussed in this paper. The Inquiry is *not* about Commonwealth laws nor is the Inquiry about matters not relevant to one of the attributes covered in this Discussion Paper.

An electronic version of this Discussion Paper is available on the Committee's website at www.parliament.vic.gov.au/sarc.

Making a Submission

The Committee invites comments or submissions that are relevant to the terms of reference set out in this Discussion Paper.

Anyone can make a comment or submission. It is not necessary to have legal or other special qualifications. The Inquiry raises issues of importance to all Victorians and it would be helpful to the Committee in its review of Victorian laws to receive the comments and submissions of the community at large, government departments and agencies, organisations and associations.

There is no set format for comments or submissions. Your contribution can take the form of a letter, a short briefing paper or a longer research document that provides details of the Victorian law that you have identified as discriminatory. A person with a disability or impairment may make a comment or submission by audio tape recording or other approved method or through a friend or advocate.

All comments and submissions are treated as public documents/ tapes unless confidentiality is requested.

The deadline for comments and submissions is 5.00 pm on Tuesday 1 June 2004.

The Inquiry Timetable

After the comments and submissions close the Committee may hold public hearings to take further evidence.

It is anticipated that the Committee will table an Interim Report in late 2004 and will then consider any comments or submissions in respect to its interim recommendations prior to presenting a Final Report to the Parliament in early 2005.

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Chair's Introduction

The Scrutiny of Acts and Regulations Committee is conducting an inquiry into Victorian laws that discriminate or may lead to discrimination against any person.. The focus of the inquiry is Victorian Acts and Regulations.

In Victoria, the Equal Opportunity Act 1995 is the Act that prohibits discrimination on the basis of various attributes or personal characteristics, for example a person's age, sex, race, impairment or religious belief. These are only a few of the attributes.

In some circumstances discrimination is not unlawful. This is where there is good reason for the discrimination. An example of this is where the discrimination is designed to promote equal opportunity for people with special needs, for women or people with impairment or who are elderly.

Under the Equal Opportunity Act something will not be unlawful discrimination if it is done to comply with another law. This is the focus of the Committee's Inquiry. The Committee has been asked to consider the policy reasons for such laws and to make recommendations for keeping the laws, changing them or repealing them.

The Discussion Paper explains discrimination law, the different types of discrimination, that it can be direct and indirect, as well as the attributes. Exemptions and exceptions are also explained. Wherever possible this has been done by also giving case examples.

The Committee welcomes responses to the Discussion Paper and input into the Inquiry.

Lily D'Ambrosio MP
Chairperson

Chapter One

Inquiry into Victorian Acts and Regulations

The Inquiry

Under the *Parliamentary Committees Act 1968*, the Scrutiny of Acts and Regulations Committee (“the Committee”) has been asked to inquire into, consider and report to Parliament on:¹

Provisions which discriminate, or may lead to discrimination, against any person as provided in section 207 of the Equal Opportunity Act 1995. In particular, the Committee is requested to:

- 1) *identify provisions in Victorian Acts and enactments that operate to discriminate, or may lead to discrimination, against any person;*
- 2) *consider policy considerations for the retention, amendment or repeal of the provisions; and*
- 3) *make recommendations as to whether the provisions should be retained, amended or repealed.*

In considering this reference the Committee should note the objectives of the Equal Opportunity Act 1995 which include:

- 1) *to promote recognition and acceptance of everyone’s right to equality; and*
- 2) *to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes.*

The review arises under section 207 of the *Equal Opportunity Act 1995* (“EOA”), which imposes an obligation on the Attorney-General as the Minister responsible for its administration. 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 purpose of identifying provisions which discriminate, or may lead to discrimination, against any person.

Background

The Committee is a joint parliamentary committee established in Victoria under the *Parliamentary Committees Act*.²

¹ For full text of terms of reference see Appendix 1.

² Terms of reference of the Committee are shown at Appendix 2.

A key function of the Committee is to consider Bills introduced into Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise—

- (i) *trespasses unduly upon rights or freedoms; or*
- (ii) *makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or*
- (iii) *makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions.*³

An additional function of the Committee is to review 'statutory rules' (regulations) against the terms of reference specified in the *Subordinate Legislation Act 1994*, including an examination of 'rights and freedoms' issues that may be raised by those regulations.

The Committee also has the responsibility to review any Act where required to do so by or under the Parliamentary Committees Act, in accordance with the terms of reference under which the Act is referred to the Committee.

Accordingly, a focus of the Committee's role is to examine how legislation provides or hinders access to human rights and freedoms and the operation of human rights principles for the Victorian community.

Human rights are the basic entitlements that belong to all people just because we are human beings. Everyone has the same human rights entitlements: men, women and children, rich and poor; black and white; all nationalities and faiths.

The primary objective of the EOA, is to promote recognition and acceptance of everyone's right to equality of opportunity. This is founded in universal principles of human rights. This is an unqualified goal where generality and breadth is emphasised by the assertion that it is the 'right' of everyone, and that acceptance and not merely recognition of these rights is important.

The election platform of the second Bracks Government included a commitment to the development of a Justice Statement. It may be argued that it would be appropriate that the protection of human rights in Victoria and the implications for particular people in Victoria, for example women, Indigenous people, people with disabilities, be included in a Justice Statement.

Approach of the Inquiry

The Committee views the inquiry as being one where the rights and freedoms focus of its own role and the objectives of the EOA to promote recognition and acceptance of everyone's right to equal opportunity and the elimination of discrimination, are strongly connected.

The principles and methodology of the review will ensure that the review is thorough and consistent with the objectives of the EOA.

³ *Parliamentary Committees Act 1968*, s4D.

The inquiry process is—

- Discussion Paper;
- Public submissions and consultation, including public hearings;
- Interim Report; and
- Final Report to the Parliament.

Overview of the Discussion Paper

All discrimination laws recognise the general principle that there is some legislation which may conflict with the content of anti-discrimination laws and principles.⁴ In many instances, the conflicts are based on sound policy and are in accordance with community values and expectations. Examples include where laws allow (i) specialist religious or other educational institutions, (ii) youth wages to be paid, (iii) an entitlement to an age pension, or (iv) insurance policies that discriminate on the basis of age or health status.

However, in other circumstances laws may be discriminatory or may lead to discrimination, and the basis of the law is either out-of-date or is unintended.

The task of the review is to examine Acts and Regulations which discriminate, or may lead to discrimination. Consequently, this Discussion Paper has identified some provisions in legislation by way of example which do discriminate against some people.

However, even preceding the examination of the provisions, an understanding of the concepts of discrimination is required. Therefore, Chapter Two examines the nature of discrimination law under the EOA and the various requirements for understanding when treatment that may appear to be unjust amounts to unlawful discrimination. Chapter Three explains the attributes or personal characteristics that form the basis of anti-discrimination law. Chapter Four discusses the way that exemptions and exclusions work and uses some examples of legislation that are discriminatory. Chapter Five examines the approach taken by some other jurisdictions in managing the balance between the principles of human rights in anti-discrimination law and the circumstances where discrimination should be permitted.

The Discussion Paper therefore covers the following questions:

- What is discrimination law?
- What is direct and indirect discrimination?
- What are attributes?
- What are exemptions and exceptions?
- What is meant by compliance with another Act?

Aim of the Discussion Paper

The aim of the Discussion Paper is to provide information to the Victorian community to assist them put their views to the Committee, whether individuals, interested bodies and organisations,

⁴ Ronalds, C., *Discrimination Law and Practice*, Federation Press, Sydney 1998, p.146.

or government. This can occur by way of consultation, written comments or submissions and/or evidence in public hearings.

It is anticipated that the Committee will table an interim report in late 2004, then consider all comments or submissions in respect to these interim recommendations, and then present a final report to the Parliament in early 2005.

Inquiry Questions

The questions set out below are intended to highlight the primary issues that will be considered in this Inquiry. The questions have been posed in order to assist the focus of the Inquiry. This should not be understood as excluding the consideration of other issues and questions that may arise in the Inquiry.

Discriminatory Acts and Enactments

Are there Victorian Acts and enactments that contain provisions which discriminate, or may lead to discrimination on the basis of an attribute? Are these discriminatory provisions acceptable on the basis of sound policy and because they accord with community values and expectations? Should these provisions be retained, amended or repealed? What are the policy considerations supporting the conclusion that the provisions should be retained, amended or repealed?

Effectiveness of section 69 of the EOA

Does section 69 of the EOA effectively deal with the existence of Acts and enactments that contain provisions which, if complied with, could give rise to discrimination? What are the arguments supporting any recommendation to retain or repeal section 69 of the EOA?

Alternatives to section 69 of the EOA

If section 69 were repealed, what are alternative ways Victoria could deal with provisions of Acts and enactments which, if complied with, would be discriminatory and inconsistent with the EOA? How do such alternatives compare with the provision of an exception such as section 69 in the EOA?

Chapter Two

What is Discrimination?

Discrimination generally means doing something in favour of, or against a person. This involves making a distinction between one person and another and treating him or her differently. Anti-discrimination law adopts a formulation of discrimination as being, not only different treatment, but also less favourable treatment.

Less favourable treatment indicates a sense of comparison between two people where one person is *treated less favourably* than another person. Discrimination is seen as being *against* one person,⁵ namely the one who has been treated in an unfair or unequal manner. In many situations this less favourable treatment will be unlawful under anti-discrimination law.

Discrimination can be direct or indirect. Direct discrimination requires a comparison to be made between the treatment of the person discriminated against and a different real or hypothetical person.⁶ Indirect discrimination involves treatment which appears to be neutral or fair but which has the effect of disadvantaging a particular group.

Direct discrimination tends to focus on a disadvantage suffered by one person, the notion of indirect discrimination centres more on group based disadvantage.⁷ However, this does not mean that direct discrimination happens only to individuals or that indirect discrimination happens only to groups.⁸

The making of a comparison between two groups involves an assumption that two groups or sorts of people can be compared and that they should be treated equally.⁹ This is not always possible as there are occasions when such a comparison is unhelpful or inappropriate, such as trying to compare pregnant women to men.

The Equal Opportunity Act 1995

It is discrimination as defined under the *Equal Opportunity Act 1995* (“EOA”) that is unlawful. However, the Act also provides that there are some situations when an act of discrimination will not be unlawful. This means that there is an excuse for the discrimination. Section 7 of the Act defines discrimination to mean direct or indirect discrimination on the basis of an attribute. It is

⁵ Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, p. 2.

⁶ *Oyekanmi v National Forge Operations Pty Ltd & Anor* (1996) EOC 92-797 citing *Boehringer Ingelheim v Reddrop* (1984) EOC 92-108 at 76,052; *Haines v Lewes* (1987) EOC 92-192 at 76,842.

⁷ Hunter, R., *Indirect Discrimination in the Workplace*, The Federation Press, Sydney, 1992, p. 11.

⁸ Hunter, R., *Indirect Discrimination in the Workplace*, The Federation Press, Sydney, 1992, p. 11.

⁹ New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Discussion Paper 30, 1993, p. 64.

the attributes (or personal characteristics) of a person that form the basis for anti-discrimination law.

Under the EOA, discrimination on the basis of an attribute generally includes discrimination on the basis—

- that a person has that attribute or had it at any time;
- of a characteristic that a person with that attribute generally has;
- of a characteristic that is generally imputed to a person with that attribute;
- that a person is presumed to have that attribute or to have had it at any time.

For example, as discrimination on the ground of a presumed or imputed HIV/AIDS status is unlawful, a person who is a member of one of the perceived “high risk” groups, such as a gay man, can rely on this provision if discrimination occurs as a result of an assumption that he is HIV positive or has an AIDS related condition.¹⁰

The attributes which are protected under the EOA are—

- (a) age;
- (ab) breastfeeding;
- (ac) gender identity;
- (b) impairment;
- (c) industrial activity;
- (d) lawful sexual activity;
- (e) marital status;
- (ea) parental status or status as a carer;
- (f) physical features;
- (g) political belief or activity;
- (h) pregnancy;
- (i) race;
- (j) religious belief or activity;
- (k) sex;
- (l) sexual orientation;
- (m) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Direct Discrimination

Section 8 of the EOA states—

- (1) *Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.*
- (2) *In determining whether a person directly discriminates it is irrelevant—*

¹⁰ CCH Reporter, *Australia and New Zealand Equal Opportunity Law and Practice*, CCH Australia Ltd, 7-870.

- (a) *whether or not that person is aware of the discrimination or considers the treatment less favourable;*
- (b) *whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.*

The ambit of the section extends to discrimination which has occurred as well as that which may not yet have occurred.

(1) The requirement of less favourable treatment

The test for direct discrimination is that the person is treated “less favourably”, for example because of his or her sex, race or disability. Different treatment is not enough, some sense of comparability is required.¹¹ Discriminating between people involves a genuine distinction made according to relevant and permissible considerations, whereas discrimination against a person involves treatment which is based on irrelevant or impermissible considerations.¹²

An example of discriminating between people is where Sam and Lin compete for the same job and Lin gets the job because of previous experience in the field. But in a different situation, Sam and Lin compete for the job and Lin doesn't get it because s/he is too short, which would be discriminatory.

Anti-discrimination law protects only the latter.

The decision of the Victorian Equal Opportunity Board in *Wardley v Ansett Transport Industries (Operations) Pty Ltd*¹³ illustrates the requirement that the treatment be less favourable.

In that case, a woman was refused appointment as a trainee pilot by Ansett because she was of child-bearing age. The evidence showed that she would have been appointed if she had been male. The Board rejected the submission that Ms Wardley should not be compared to a male applicant because she was in a materially different situation, being that she was about to be married, may become pregnant and pregnancy would render her unable to hold a licence. The Board held that Ansett had directly discriminated against her on the basis of sex.

(2) The requirement of ‘on the basis of’

The further test is that the less favourable treatment is *on the basis of* the person's particular attribute. In *Oyekanmi v National Forge Operations Pty Ltd*,¹⁴ the Victorian Equal Opportunity Board stated that “it is clear that ‘on the ground of’¹⁵ indicates a connection between the treatment and the race or colour”. But what kind of connection? There must be an identifiable causal link between the ground of discrimination and the decision or action complained about.¹⁶

¹¹ Thornton, M., *The Liberal Promise: Anti-Discrimination Legislation in Australia*, p. 1.

¹² *Waters v Public Transport Corporation* (1991) EOC 92-390 at 78,676 per Mason and Gaudron JJ.

¹³ (1984) EOC 92-002 at 5,133.

¹⁴ (1996) EOC 92-797.

¹⁵ (1996) EOC 92-797 at 78,895. It is noted that the reference to “on the ground of” is a reference to the wording of the 1984 Act whereas the 1995 Act refers to discrimination “on the basis of” an attribute. Under both the old and new Acts the test is the connection between the treatment and the attribute.

¹⁶ Ronalds, C., *Discrimination Law and Practice*, Federation Press, Sydney 1998, p.30.

A number of High Court judges have indicated that the attribute in the Act must be the “true basis” of the less favourable treatment.¹⁷

(a) *The meaning of awareness/consciousness*

Under the EOA it does not matter whether or not a person intended to discriminate against another person.¹⁸

(b) *The meaning of substantial reason*

The attribute must be a substantial reason for the treatment.¹⁹ This means a reason that is of more than a little significance.²⁰

Indirect Discrimination

Direct discrimination operates from the principle that all people in the same situations should be treated the same. The concept of indirect discrimination is that people who are not alike should not be treated the same. Indirect discrimination attempts to address structural discrimination by acknowledging that treating people as if they were the same when they actually differ in significant ways is just as discriminatory as penalising them directly for their difference.²¹

Section 9 of the EOA provides that indirect discrimination means imposing a requirement, condition or practice that—

- a person with an attribute is unable to comply with; and
- a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and
- it is not reasonable in the circumstances.

This means that indirect discrimination occurs when a requirement, condition or practice, which on its face appears to be neutral, in effect has a disproportionate impact on a particular group of people who are protected under the Act. Such a requirement may be “fair in form and intention but discriminatory in impact and outcome”.²²

(1) *The meaning of requirement, condition or practice*

Broadly, the words “requirement, condition or practice” include any policies, rules or practices which may appear neutral, but have a discriminatory effect in practice.

The requirement need not be explicit nor specific but the effect of it must be clear.²³

¹⁷ *Australian Iron and Steel v Banovic* (1989) EOC 92-271 at 77,733 per Gaudron and Deane JJ; *Waters v Public Transport Corporation* (1991) EOC 92-390 per Mason CJ, Gaudron and Deane JJ

¹⁸ *Equal Opportunity Act 1995*, ss8(2)(a) and 9(3).

¹⁹ *Creek V Cairns Post Pty Ltd* (2001) EOC 93-108.

²⁰ *Oyekanmi v National Forge Operations Pty Ltd & Anor* (1996) EOC 92-797 at 78,896.

²¹ Hunter, R., *Indirect Discrimination in the Workplace*, The Federation Press, Sydney, 1992, p. 6.

²² *The Secretary of the Department of Foreign Affairs & Trade v Styles & Anor* (1989) EOC 92-265 at 77,636.

²³ *Waters & Ors v Public Transport Corporation* (1991) EOC 92-390 at 78,675 per Mason and Gaudron JJ.

In *Waters & Ors v Public Transport Corporation*, the High Court found that the removal of conductors from trams indirectly discriminated against people with disabilities. The court found that requiring people to use trams without conductors was an unreasonable requirement condition or practice of using the service (and one that the complainants were unable to comply with). The requirement that trams be used without conductors provided a barrier to people with disabilities accessing tram services.²⁴

(2) *The meaning of differences*

Indirect discrimination operates from the assumption and acceptance of differences between groups of people with different attributes. The way in which differences between people affect their ability and capacity to meet the requisite standards imposed is broad ranging.

Persons of various attributes may not meet the physical or functional requirement, for example, average height or weight.

For example, a specific height/weight requirement may indirectly discriminate against women and persons of Asian origin because a significant proportion may be below what is required.²⁵

The cultural and religious traditions of persons may also subject them to indirect discrimination, for example in observing religious holidays or times of prayer during ‘working hours’. Another example is in working patterns.

In *Australian Iron & Steel Pty Ltd v Banovic*²⁶ a retrenchment policy of “last on-first off” had the effect of adversely affecting women because the company had only begun to employ women after many years of only employing men in the iron and steel industry. Therefore, the last-on first-off policy for retrenching workers adopted by the company discriminated against women.

(3) *The meaning of compliance*

The meaning of the term “does not or cannot comply with” has been interpreted broadly with the effect that compliance is considered as a matter of practicality²⁷ and not given a literal interpretation.

In *Byham v Preston City Council*²⁸ the complainant who had a mobility disability was considered unable to comply with the requirement that in order to attend council meetings he must be able to climb the stairs to the first floor, although he could in fact climb the stairs if assisted by a staff member or a family relative.

(4) *The higher proportion requirement*

As was noted with respect to the test of “less favourable treatment” in direct discrimination, anti-discrimination law generally requires a comparison to be made in order to determine whether indirect discrimination exists.

²⁴ (1991) EOC 92-390.

²⁵ This was the complaint made by two Vietnamese women in *Dao and Nguyen v Australian Postal Commission* (1987) EOC 92-193.

²⁶ (1989) EOC 92-271.

²⁷ *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889 at 77,238.

²⁸ (1991) EOC 92-377.

This requires a comparison between persons with the attribute and persons without the attribute, and a finding that a “higher proportion” of people with the protected attribute cannot meet the requirement.

In the *Banovic* retrenchment policy “last on-first off” case, the High Court said that the relevant proportions for comparison were the number of men who could comply as a proportion of all relevant men and the number of women who could comply as a proportion of all relevant women.²⁹

In the case of *Finance Sector Union v Commonwealth Bank of Australia*,³⁰ a broad calculation revealed that 98% of men and 91% of women were able to comply with a requirement that new positions be taken up within 4 weeks of the Bank’s restructure. This difference was held to be a substantially higher proportion.³¹

(5) *The meaning of reasonableness*

Unlike direct discrimination, the formulation of indirect discrimination includes a component of reasonableness.

The EOA provides the factors that need to be taken into account in assessing reasonableness. These include—

- the consequences of failing to comply with the requirement, condition or practice;
- the cost of alternative requirements, conditions or practices;
- the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.³²

Reasonableness must be assessed against the objectives of the EOA and the circumstances of the particular case.³³ A requirement, standard or condition which is merely for business convenience or because things have always been done in a particular way, may not be considered reasonable.

There should be a demonstrated nexus between the requirement or condition and the activity to be performed, so that it can be shown that the requirement is appropriate and adapted to the particular activity and not merely arbitrary.³⁴ Further, it needs to be determined whether an alternative requirement or condition could have avoided or lessened the disadvantage suffered by the complainant.

In *Cocks v State of Queensland*,³⁵ the requirement that patrons with mobility impairments enter the newly constructed Brisbane Convention and Exhibition Centre through a side entrance was held to be indirect discrimination. In that case, the detriment to the respondent was cost and the aesthetic effect of the installation of a lift. The benefit to those with an impairment was that they would feel welcomed into a major public building thereby enhancing their rightful acceptance as

²⁹ Op. cit., EOC at 4,620.

³⁰ (1997) EOC 92-889.

³¹ (1997) EOC 92-889 at 77, 240.

³² *Equal Opportunity Act 1995*, s9(2).

³³ *Waters v Public Transport Corporation* (1991) EOC 92-390.

³⁴ *Finance Sector Union v Commonwealth Bank of Australia* (1997) EOC 92-889 at 77,242.

³⁵ (1994) EOC 92-612.

members of the community with equal dignity. This would be in furtherance of the objects of the Act. It was estimated that this would affect about 10% of the population of Queensland.³⁶

³⁶ (1994) EOC 92-612 at 77, 284.

Chapter Three

Attributes Protected Under the EOA

The *Equal Opportunity Act 1995* (“EOA”) addresses what is understood to be the main types and areas of discrimination that currently exist in public life and provides recourse for complaints of unlawful discrimination to conciliation, compensation and education.

Under the EOA, exceptions apply in certain circumstances and where such exceptions apply discrimination is permitted. This means that there is an excuse for the discrimination. Exceptions and exemptions will be discussed in more detail in the next chapter.

This chapter contains an examination of the attributes which are protected under the EOA.

Age

It is unlawful to discriminate on the basis of age. This means that discrimination against people of any age may be unlawful under the Act. It is also recognised in the exceptions provided in the EOA³⁷ that in some circumstances distinctions made on the basis of age are desirable, reasonable and/or justifiable, and in accordance with community expectations. For this reason, there are numerous exceptions in relation to age, for example, to cover concessional fares, sporting competitions and the age of majority.

Where an exception applies discrimination is not unlawful under the EOA.

For example, an exception is provided for services which promote the welfare or advancement of older persons, such as a nursing home for elderly people.³⁸

However, it is also recognised in the exceptions provided in the EOA, that in some circumstances, distinctions made on the basis of age are desirable, reasonable and/or justifiable. Where an exception applies discrimination is not unlawful under the Act.

³⁷ The *Equal Opportunity Act 1995* provides exceptions in relation to age in the areas of —
Employment: s16 Domestic or personal services, s17 Genuine occupational requirement, s19 Welfare services, s20 Family employment, s21 Small business, s26 Compulsory retirement of judicial officers, s27 Youth wages. *Education*: s38 Educational institutions for particular groups, s41 Age-based admission schemes and age quotas. *Goods and Services*: s43 Insurance, s44 Credit provider, s45 Supervision of children. *Accommodation*: s53 Accommodation unsuitable for children, s54 Shared accommodation, s55 Welfare measures, s56 Accommodation for students. *Clubs and club members*: s62 Clubs and benefits for particular age groups. *Sport*: s66 Competitive sporting activities. *General exceptions*: s71 Pensions, s73 Superannuation: New fund conditions, s79 Legal incapacity and age of majority, s81 Age benefits and concessions, s82 Welfare measures and special needs, s84 Exemption: compulsory retirement in the public sector.

³⁸ *Equal Opportunity Act 1995*, s19.

Breastfeeding

Under the EOA it is unlawful to treat a woman unfairly or harass her because she is breastfeeding a child. Breastfeeding includes the act of expressing milk. The Equal Opportunity Commission provides this example:

Lee went to the movies with her baby and a friend. While she was waiting to go into the cinema, Lee breastfed her baby. An usher approached her and told her she could not feed her baby in the foyer as it was embarrassing other patrons. The cinema is directly discriminating against Lee on the basis of breastfeeding.

Gender identity

The EOA defines gender identity as meaning –

- (a) *the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)—*
 - (i) *by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or*
 - (ii) *by living, or seeking to live, as a member of the other sex; or*
- (b) *the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such)—*
 - (i) *by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or*
 - (ii) *by living, or seeking to live, as a member of the other sex.*

The EOA acknowledges that a person may identify as a member of a particular gender by their style of dress, a change of name or gender reassignment by medical intervention. Medical intervention, in this sense, may include any relevant attention or treatment, including hormone therapy, counselling and sex reassignment surgery.

Impairment

Impairment (also referred to as disability) is defined to mean—

- (a) *total or partial loss of a bodily function (eg hearing loss);*
- (b) *the presence in the body of organisms that may cause disease (eg HIV/AIDS virus);*
- (c) *total or partial loss of a part of the body (eg loss of fingers on one hand);*
- (d) *malfunction of a part of the body including—*
 - (i) *a mental or psychological disease or disorder (eg schizophrenia);*
 - (ii) *a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder (eg Down syndrome);*
- (e) *malformation or disfigurement of a part of the body.³⁹*

The Act covers impairments (or disabilities) which people—

³⁹ *Equal Opportunity Act 1995, s4.*

- have now;
- had in the past (for example, a past episode of mental illness);
- may have in the future (for example, a family history of a disability which a person may develop in the future);
- are believed to have (for example, if a person is thought to have AIDS).

Unfair treatment can be caused by the assumption that a person with an impairment cannot perform adequately or to the same standard as a person without impairments.

Discrimination experienced by people with physical disabilities will often relate to physical access and assumptions about their limitations. Indirect discrimination often arises because buildings and public transport are designed only for people who are independently mobile.

In *Byham v Preston City Council*,⁴⁰ the complainant who had a mobility impairment was indirectly discriminated against because the only way he could attend Council meetings, which were held on the first floor, was to climb the stairs. Even though Mr Byham could have used the staircase with the assistance of another, the discrimination was that he could not access the first floor in the same manner as someone without a mobility impairment. Similarly, in *Cocks v State of Queensland*,⁴¹ it was held that people with impairments were entitled to access the Brisbane Convention Centre through the front entrance, as requiring them to use a side entrance diminished their right to equal dignity.

The discrimination suffered by persons living with the HIV/AIDS virus will often arise from fear, anxiety and misunderstanding about the virus and the way in which it is spread.

For example, two HIV positive prisoners who were in good health were segregated, confined to the infectious diseases unit of the prison and denied access to many of the prison's facilities.⁴² This was unlawful discrimination.

Vision impaired people also experience discrimination. One such example is Bruce Maguire who is blind and uses 'web to braille' technology to access the Internet. He complained of discrimination against the Sydney Organising Committee of the Olympic Games ("SOCOG"). The SOCOG web site did not comply with the accessibility guidelines and Mr Maguire was unable to use the site. He argued that this prevented him from accessing detailed information about the Olympics that was not available elsewhere and the costs to SOCOG of making the site accessible would be minimal and therefore not unreasonable. HREOC found that Mr Maguire had been discriminated against on the basis of his disability.⁴³

In relation to the attribute of impairment the EOA provides for a number of exceptions whereby discrimination is not unlawful.⁴⁴ Most notably, the Act provides an exception whereby an

⁴⁰ (1991) EOC 92-377.

⁴¹ (1994) EOC 92-612.

⁴² *A Complainant & Anor v The State of Western Australia* (1994) EOC 92-610.

⁴³ *Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games (SOCOG)* – 18 November 2000.

⁴⁴ The *Equal Opportunity Act 1995* provides exceptions in relation to impairment in the areas of —
Employment: s16 Domestic or personal services, s17 Genuine occupational requirement, s19 Welfare services, s20 Family employment, s21 Small business, s22 Special services or facilities, s23 Reasonable terms of employment, s32 Special services or facilities: firms, s33 Reasonable terms of partnership, s36 Reasonable terms of qualification. *Education*: s38 Educational institutions for particular groups, s39 Special services or facilities. *Goods and services*: s42 Insurance, s46 Special manner of providing a service. *Accommodation*: s54 Shared accommodation, s56 Accommodation for students. *Sport*: s66 Competitive sporting activities. *General*

employer does not have to provide special services and facilities to assist a person perform the genuine and reasonable requirements of employment where it is unreasonable in the circumstances to do so.⁴⁵

Industrial Activity

The Act makes it illegal to discriminate on the basis of lawful industrial activity. Industrial activity means—

- being or not being a member of, or joining or not joining or refusing to join, an industrial organisation;
- participating in, not participating in or refusing to participate in a lawful activity (such as a strike) organised or promoted by an industrial organisation.

Industrial organisation is defined as an organisation of employees (such as a trade union), employers (for example the Australian Industry Group) or any other organisation established for the purpose of people who carry on a particular industry, trade, profession, business or employment (such as the Law Institute of Victoria).

The Act provides some exceptions in relation to this ground which make discrimination not unlawful in particular circumstances.⁴⁶

Lawful Sexual Activity

It is unlawful to discriminate on the basis of a person's lawful sexual activity. Lawful sexual activity is defined as engaging in, not engaging in or refusing to engage in a lawful sexual activity. A person's lawful sexual activities are regarded as a private matter and should not form the basis of discrimination.⁴⁷

The exceptions provided in the Act⁴⁸ make discrimination not unlawful in certain circumstances.

Marital Status

Under the EOA there are equal rights for couples regardless of gender or marital status. It is unlawful to discriminate against a person on the basis of their marital status. Marital status includes being single, married, a domestic partner, married but living separately and apart, divorced, or widowed.

exceptions: s73 Superannuation: New fund conditions, s79 Legal incapacity, s80. Protection of health, safety and property, s82 Welfare measures and special needs.

⁴⁵ *Equal Opportunity Act 1995*, s22.

⁴⁶ *Employment:* s16 Domestic or personal services, s20 Family employment, s21 Small business. *Accommodation:* s54 Shared accommodation.

⁴⁷ *Hansard Legislative Assembly* 13 April 2000.

⁴⁸ *Employment:* s16 Domestic or personal services, s19 Welfare services, s20 Family employment, s21 Small business. *Accommodation:* s54 Shared accommodation, s57 Accommodation for commercial sexual services. *Clubs and club members:* s61 Clubs for disadvantaged people or minority cultures.

- Single

In *Sullivan & Ors v Department of Defence*,⁴⁹ single members of the Australia Defence Force were treated less favourably in that they were refused certain allowances that were available to ‘members with families’.

- Married

Discrimination against people who are married relates often to assumptions made about the marriage relationship. Characteristics presumed to apply to marriage relationships include the disclosure of confidential information and access to spouses’ income.⁵⁰

In *Boehringer Ingelheim Pty Ltd v Reddrop*⁵¹ a woman was unsuccessful in applying for a job because she indicated to the employer that her husband worked at a rival firm. The New South Wales Court of Appeal held that the grounds of marital status does not cover the identity of the woman’s spouse. It also held that being prone to disclosing confidential information to their spouse was not a characteristic generally imputed to married women.

This case was distinguished in *Waterhouse v Bell*⁵² in which the New South Wales Court of Appeal found that the refusal of the Australian Jockey Club to give the complainant (a married woman) a horse trainer’s licence was based on a characteristic imputed to married women — that all wives are liable to be corrupted by their husbands. On that basis, the refusal constituted discrimination on the ground of marital status.

- Domestic partner

Under the EOA a domestic partner of a person means a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis, irrespective of gender.

Sarah and Ann have been living together for fifteen years. Sarah has a brother Sam in New Zealand. Sarah is in the terminal phase of an illness and is in a hospice. Ann is very distressed that some hospice staff do not accept that they are a couple and that she is Sarah’s next of kin. Ann is worried that staff may try to contact Sam as next of kin.

This example would also involve a complaint of discrimination on the basis of sexual orientation.

Parental status or status as a carer

- Parental status

It is unlawful to discriminate against a person on the basis of their parental status. Parent includes step parent, adoptive parent, foster parent or guardian. Questions in an employment

⁴⁹ (1991) EOC 92-366.

⁵⁰ In *Lamberti v TRW Carr Pty Ltd* (1984) EOC 92-114, the Full Industrial Court of South Australia held that it is a general or presumed characteristic of married women that, if they lose their jobs, they have access to and obtain benefit from their working husbands’ income.

⁵¹ (1984) EOC 92-108.

⁵² (1991) EOC 92-376.

interview about how the applicant would deal with a sick child during work hours and what arrangements would be made for children over the holidays have amounted to discrimination on the basis of parental status.⁵³

In the case of *Song v Ainsworth Game Technology Pty Ltd*,⁵⁴ Raphael SM of the Federal Magistrates Service found that Ms Song had been discriminated against by her employer who made changes to her practice of splitting her lunch hour. Ms Song had been taking a half hour at lunch time and another half hour in the afternoon break when she collected her children from kindergarten to take them to a carer and then returned to work.

- **Status as a carer**

It is also unlawful to discriminate against another person on the basis of his/her status as a carer. Carer is defined to mean a person on whom another is wholly or substantially dependent upon for ongoing care and attention, other than a person who provides that care on a wholly or substantially commercial basis.⁵⁵ A carer could be someone who is a family member, hospice volunteer, or a man caring for a male partner or friend with AIDS.⁵⁶

Physical Features

It is unlawful to discriminate on the basis of a person's physical features in an area of activity covered by the Act. Physical features mean a person's height, weight, size or other bodily characteristic over which a person may not have much control.

A bodily characteristic, such as hair, does not cease to be a bodily characteristic because a person can make changes to it. Hair length and arrangement, whether shaven or unshaven all relate to physical features. Accordingly, discriminatory remarks in relation to a person's facial or head hair could amount to discrimination.⁵⁷

Tattoos are also physical features within the meaning of the EOA.⁵⁸

Political Belief or Activity

It is unlawful to discriminate on the basis of political beliefs or activities.

Political belief or activity is defined to mean—

- holding or not holding a lawful political belief or view;
- engaging in, not engaging in or refusing to engage in a lawful political activity.

As the attribute covers both political beliefs and activities, a range of behaviour beginning with the mental state of belief, including the expression of that belief (holding a view) and also embracing the action itself, is protected.⁵⁹

⁵³ *Bridges v Ballarat University College* (1993) EOC 92-527.

⁵⁴ [2002] FMCA 31.

⁵⁵ *Equal Opportunity Act 1995*, s4.

⁵⁶ Chapman, A., 'The Impact of the Equal Opportunity Act 1995 (Vic) on Paid Work Relationships' (1996) 9 *Australian Journal of Labour Law* 1, 7.

⁵⁷ *Fratras v Drake International t/a Drake Jobseek* (2000) EOC 93-038.

⁵⁸ *Alan Jamieson v Benalla Golf Club Inc* (2000) EOC 93-106.

For a belief or activity to be political, it must have some bearing on government - such as its role, structure, feature, purpose, obligations or duties.⁶⁰ Further, political belief or activity will also bear on government if it concerns the relationship between the government and the governed, that is the citizens of the society in question.⁶¹

Pregnancy

It is unlawful to discriminate on the basis of pregnancy. This means that it is against the law to treat a woman less favourably because she is pregnant (or because she is a woman and therefore capable of becoming pregnant).

It is also unlawful to ask for information about a woman's pregnancy which may be used for discriminatory purposes. Discrimination against pregnant women occurs particularly in the area of employment.

For example, a pregnant woman was dismissed from her job as a bar attendant because her employers thought there may be a danger that she might slip and fall. The respondents argued that they were concerned for the employee's welfare and safety and for the unborn child. The Western Australian tribunal held that this was unreasonable and unlawful discrimination against the pregnant woman.⁶²

In the Gardner case, the Australian Netball Association imposed an interim ban preventing players who were pregnant from playing in a national tournament. Federal Magistrate Raphael found that Ms Gardner had been discriminated against in the decision to prevent her playing netball.⁶³

Race

Under the EOA it is unlawful to discriminate on the basis of race. Race is defined broadly and includes—

- colour;
- descent or ancestry;
- nationality or national origin; and
- ethnicity or ethnic origin.

Ethnic origin includes groups such as Sikhs and Jews who can be distinguished from others by a combination of customs, beliefs, traditions and characteristics derived from a common past.

⁵⁹ *Nevil Abolish Child Support and Family Court v Telstra Corporation*, Anti-Discrimination Tribunal, 28 October 1997, p.13.

⁶⁰ *Nestle Australia Ltd v The President and Members of the Equal Opportunity Board & Ors* (1990) EOC 92-281 at 77,874; *CPS Management Pty Ltd v The President and Members of the Equal Opportunity Board & Ors* (1990) EOC 92-232; *Laroche v Equal Opportunity Board*, Supreme Court of Victoria, Gobbo J, 18 March 1991.

⁶¹ *Nevil Abolish Child Support and Family Court v Telstra Corporation*, Anti-Discrimination Tribunal, 28 October 1997, p.13.

⁶² *Allegratta v Prime Holdings Pty Ltd t/a Phoenix Hotel and Anor* (1991) EOC 92-364.

⁶³ *Gardner v AANA Ltd* [2003] FMCA 81.

Discrimination on the basis of race can include discrimination because of such characteristics as a person's accent and difficulties with the English language.⁶⁴

In *Murray v Ministry of Education*, a teacher, who was born and trained in India was found to have been treated less favourably than a new teacher who had Australian qualifications and experience. The Board found that the school staff applied a preconceived view of Indian education institutions, qualifications and schools to the complainant, concluding that she could not be a competent teacher because of that background.⁶⁵

A failure to take account of a person's cultural practices and beliefs (for example in the wearing of head coverings) may result in discrimination on the basis of race.⁶⁶

Religious Belief or Activity

It is unlawful to discriminate on the basis of religious belief or activity. Religious belief or activity means—

- holding or not holding a religious belief or view
- engaging in, not engaging in or refusing to engage in a lawful religious activity.

Requirements or conditions which impact on a person's ability to maintain their religious observance may constitute indirect discrimination under the Act.

Workplace dress codes which require employees to be clean shaven will indirectly discriminate against employees whose religious belief may forbid them from shaving, for example, Jewish men. Additionally, forbidding a Muslim woman from wearing traditional Muslim dress will be discriminatory unless it is reasonable in the circumstances, for example to observe occupational health and safety standards.

Sex

It is unlawful to discriminate on the grounds of a persons sex whether they are male or female. However, complaints of sex discrimination are predominantly made by women.⁶⁷

Characteristics that generally concern women include interrupted periods of employment for the purposes of child bearing and rearing⁶⁸ and the capacity to have children.⁶⁹

In *Speering v Ministry of Education*,⁷⁰ a school policy that temporary teachers work one year full-time before becoming permanent constituted indirect discrimination against a female teacher who could not work full-time because of her family responsibilities. The Tribunal held that as 87% of the temporary teachers were women, more women than men would be affected by the school's measure to reduce the number of temporary teachers.⁷¹

⁶⁴ *Campos v Tempo Cleaning Service* (1994) EOC 92-648 at 77,432.

⁶⁵ (1992) EOC 92-469.

⁶⁶ In Victoria, the issues and principles of human rights prohibiting racial discrimination have been strengthened by the introduction of the *Racial and Religious Tolerance Act 2001*.

⁶⁷ EOCV Annual Report 2001/02, p. 30.

⁶⁸ *Kemp v Minister for Education & Anor* (1991) EOC 92-340 at 78,372.

⁶⁹ *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1990) EOC 92-002.

⁷⁰ (1993) EOC at 92-513.

⁷¹ (1993) EOC 92-513 at 79, 621.

Discrimination on the ground that a person does not possess qualities considered appropriate to a person of a particular sex has been held to be sex discrimination.

Sexual Orientation

It is unlawful to treat someone unfairly or harass them because of their actual or assumed sexual orientation or lawful sexual activity. Under the EOA sexual orientation means homosexuality (including lesbianism), bisexuality or heterosexuality.

It is unlawful to ask for information about a person's sexual orientation that could be used for discriminatory purposes.

The case brought by Jacqui Griffin against the Catholic Education Office under the Commonwealth *Human Rights and Equal Opportunity Commission Act 1986* involved the refusal of an application by Ms Griffin for classification as a teacher in Catholic schools. The principal reason for the refusal was Ms Griffin's high profile in an organisation of gay and lesbian teachers and students and her public statements on these issues. The Human Rights and Equal Opportunity Commission found that Ms Griffin had suffered discrimination in employment on the basis of her sexual preference.⁷²

Personal Association

This attribute protects people who are discriminated against because of their association, whether as a relative or otherwise, with a person who is identified by reference to any of the attributes⁷³ listed in section 6 of the Act. An example of unlawful discrimination on the basis of personal association is where Kate is treated less favourably than other students because her mother is lesbian.

In the case of *Meeuwissen v Hilton Hotels of Australia Pty Ltd*,⁷⁴ a woman who was subject to asthmatic tendencies was treated less favourably as she was not able to tolerate the environmental tobacco smoke of a nightclub and had to leave. A friend who was accompanying her and also left the nightclub was found to have been discriminated against because of his personal association with her.

⁷² Human Rights And Equal Opportunity Commission, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation*. HRC Report No. 6 1998.

⁷³ *Hansard Legislative Assembly* 4 May 1995 p. 1251.

⁷⁴ Human Rights and Equal Opportunity Commission, Commissioner Innes, 25 September 1997.

Chapter Four

General Exemptions and Exceptions under the EOA

Under the *Equal Opportunity Act 1995* (“EOA”) exemptions and exceptions can apply in certain circumstances. Where they apply, discrimination is not unlawful under the Act; that is there is an excuse for the discrimination. Such exemptions and exceptions can be positive and beneficial in assisting the promotion and protection of equal opportunity.

Exceptions allow a person to discriminate in limited circumstances. If a complaint is made about the discrimination it is the responsibility of the person who is relying on the exception to raise and prove an exception as a defence to a complaint.

Exemptions can be granted by the Tribunal if it believes that doing so would further the goal of promoting equal opportunity. This means that discrimination will be exempt from the provisions of the EOA. Temporary exemptions apply for the period of time set by the Tribunal, which cannot be longer than three years. During the exemption period the discriminatory behaviour will be lawful.

There is a general exemption in relation to special services, benefits or facilities that are designed to meet the special needs of people with a particular attribute or to prevent or reduce a disadvantage suffered by those people in their education, accommodation, training or welfare. For example, special measures may exist for women, people with a disability or people within a particular age or religious group.

The case of *Stevens and Ors v Fernwood Fitness Centres*⁷⁵ involved a women only gym. The Tribunal said it would look at whether there was some public interest to justify the granting of the exemption; whether the exemption was within the spirit although not the letter of some of the express exception provisions, and whether it would promote an objective of the Act. The Tribunal granted the exemption to allow a women only gym.

Discrimination based on statutory authority

All discrimination laws recognise the general principle that there is some legislation which may conflict with the content of anti-discrimination laws and principles.⁷⁶ In many instances the conflicts are based on sound policy and are in accordance with community values and expectations. Examples include where laws allow (i) specialist religious or other educational institutions, (ii) youth wages to be paid, (iii) an entitlement to an age pension, or (iv) insurance policies that discriminate on the basis of age or health status.

⁷⁵ (1996) EOC 92-782.

⁷⁶ Ronalds, C., *Discrimination Law and Practice*, Federation Press, Sydney 1998, p. 146.

However, in other circumstances laws may be discriminatory or may lead to discrimination and the basis of the law is either out-of-date or is unintended.

In Victoria, discrimination which is necessary to comply with or is authorised by a legislative provision is not unlawful under the EOA. Section 69 provides—

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 purposes of sub-section (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.*

An enactment referred to in the section includes a rule, regulation, by-law, local law, order, Order in Council proclamation or other instrument of a legislative character.⁷⁷ In order for the provision to come into operation it is not necessary that the provision in another Act or enactment refer to discrimination. It must however authorise or necessitate the relevant conduct that would otherwise constitute discrimination.

In the decision of *Public Transport Commission v Waters*,⁷⁸ the High Court considered a similar provision in the 1984 *Equal Opportunity Act*.⁷⁹ Three of the judges considered that the section should be construed narrowly so as to refer only to something which is done in order to comply with a specific obligation directly imposed by an actual provision of another Act.

In *Heinz Company Australia Ltd v Turner*⁸⁰ the Supreme Court of Victoria considered the extent of the requirement, ‘necessary to comply’. The Court decided that it was lawful for an employer to refuse an employee to work overtime because it would exacerbate a work related injury. The refusal discriminated against the employee on the basis of his impairment but was necessary in order to comply with the *Occupational Health and Safety Act*.

A managerial policy or directive made under an Act does not come within the exception as it has not been gazetted or introduced into parliament.⁸¹

Discrimination in Legislation

Set out below are several examples of Victorian Acts which contain provisions that if complied with, could result in discrimination:

- Age

The Victorian *Guardianship and Administrative Act 1986* provides that any person may apply to the Tribunal for an order appointing a guardian for a person with a disability who has attained

⁷⁷ CCH *Australian & New Zealand Equal Opportunity Law & Practice* 74-940.

⁷⁸ *Waters v Public Transport Corporation* (1991) 173 CLR 349.

⁷⁹ *Equal Opportunity Act 1984* (Vic), s39(e).

⁸⁰ (1999) EOC 92-964.

⁸¹ *X v Western Australia* (1997) EOC 92-878.

the age of 18 years.⁸² This provision discriminates on the basis of disability and age. However, as the purpose of the legislation is for the appointment of guardians (and administrators) for persons who because of a disability are in need of a guardian and/or administrator, the discriminatory provision is beneficial and can be supported on policy grounds.

The issue however, is whether the age of 18 is the appropriate minimum age at which a person can have a guardian and/or administrator. For example, in the New South Wales Act, an application for a guardianship order may be made for a person who is 16 years and older. In light of the NSW legislation, it is questionable whether 18 years as the minimum age at which one can have a guardian and/or administrator appointed in Victoria, is based on sound policy and representative of community values.

- Impairment

Occupational health and safety legislation may contain provisions that could give rise to discrimination. For example, in *Hawes v NSW Ambulance Service*,⁸³ the New South Wales Tribunal held that the dismissal of an ambulance officer subject to epileptic seizures was not unlawful discrimination on the ground of disability, as the employer was required to comply with occupational health and safety law. It is argued that such discrimination is justified and based on sound policy given that the continued employment of this officer could have placed him in danger as well as his co-workers and the general community.

- Marital Status

The *County Court Act 1958* creates an entitlement to a pension for the widows of judges.⁸⁴ The entitlement persists until remarriage, at which time it will terminate. As it is, the provision does not contemplate the provision of a pension to the widowers (male partners) of female County Court Judges. Additionally, no pension is payable to the spouse of a former judge where the marriage occurred after the judge's resignation or retirement. The provision therefore specifically discriminates against a person on the basis of sex and marital status and sexual orientation for same sex partners.

- Race

Under the Victorian *Coroners Act 1985*, a person who is a senior next of kin can object to the carrying out of an autopsy.⁸⁵ The lack of inclusion of other persons who may have a specific interest in whether or not an autopsy is performed may lead to discrimination. In addition, an objection to an autopsy on the basis of custom or cultural belief cannot, for example, be raised by an elder.

In the case of *Green v Johnstone*,⁸⁶ the Supreme Court considered whether an order should be that no autopsy should be performed on the grounds that Aboriginal cultural and religious law prohibited the mutilation of a body. The Court said that great weight should be given to the cultural and spiritual laws and practices of groups forming our society and great care should be taken to ensure that their laws and practices, if otherwise lawful, are not disregarded or abused.

⁸² *Equal Opportunity Act 1995*, s19.

⁸³ (1994) EOC 92-586.

⁸⁴ *Equal Opportunity Act 1995*, s14.

⁸⁵ *Equal Opportunity Act 1995*, s29.

⁸⁶ [1995] 2 VR 176.

The Court decided that if an autopsy was contrary to Aboriginal culture and law, then no autopsy should be performed.

- Sex

Under the *Control of Weapons Act 1990*, it is an offence to possess or carry a dangerous article without lawful excuse.⁸⁷ Considering provisions similar to section 7 of the Victorian Act, the High Court in *Taikato v The Queen*⁸⁸ considered the possession of an irritant spray for self-defence. The majority of the Court dismissed the appeal, and found that there was no lawful purpose or reasonable excuse for Ms Taikato to keep the canister for the purpose of self-defence.

One judge considered that Australian courts should look at relevant and contemporary Australian conditions which he stated, include the danger which is faced by women in certain circumstances and at certain times in Australian cities. They also include the dangers faced by other vulnerable groups, such as the old, the young, ethnic minorities and homosexuals. On this view, the decision by the High Court that no legal right of self-defence arises until there is a reasonable apprehension of attack by the person assaulted, leads in effect to discrimination against women.

Other exceptions and exemptions

The EOA provides a number of exceptions and exemptions whereby certain discrimination is not prohibited and therefore not unlawful. The exceptions and exemptions which are within the EOA itself rather than by reference to other Acts include—

Section 22 – Special services or facilities

Pursuant to section 22 of the Act, an employer may discriminate against another person as a job applicant or employee on the basis of impairment if, in order to perform the “genuine and reasonable requirements of the employment”—

- the person with a disability requires special services or facilities;
- and it is not reasonable in the circumstances for those special services or facilities to be provided;
- or the person could not adequately perform the genuine and reasonable requirements of the employment even after the provision of special services or facilities.

In deciding whether or not a person can perform the requirements of the employment, all relevant factors and circumstances must be considered, including the person’s training, qualifications, experience and current performance in the position where applicable.

In the case of *Vanderhorn v VYMP International Pty Ltd known as Artflo Design*,⁸⁹ an employee with a hearing impairment required a device to be fitted to the telephone so that she could hear incoming calls. In that case, the employer argued that he was not in breach of the Act as he came within the special services and facilities exception. The Board held that the employer did

⁸⁷ *Equal Opportunity Act 1995*, s7.

⁸⁸ (1996) 139 ALR 386.

⁸⁹ (1992) EOC 92-402.

not make sufficient inquiries as to the cost and availability of arrangements that could be made to assist the employee. The Board found that the employer had not fulfilled the requirement of showing that the special services or facilities could not have reasonably been provided.

Section 23 – Reasonable terms of employment

An employer may set reasonable terms of employment, which correspond to the genuine and reasonable requirements of the employment.

An employer can also make reasonable variations to those terms, to take into account—

- any special limitations that a person’s impairment or physical features imposes on his or her capacity to undertake the reasonable and genuine requirements of the employment;
- or any special facilities that are required to enable the person to undertake or facilitate the employment.

Section 26 – Compulsory Retirement of Judicial officers

Although the Act abolished compulsory retirement, an exception is provided to this abolition with respect to the retirement, or failure to appoint (on the basis of age)—

- a Supreme Court or County Court judge
- a Magistrate
- a bail justice.

Section 27A – Early retirement schemes

Although compulsory retirement is unlawful, in deciding the terms on which to offer an employee an incentive to resign or retire, an employer may take into account the age of the employee and the eligibility of the employee to receive retirement benefits from a superannuation fund.

Section 66 – Competitive sporting activities

A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant. This does not apply to sporting activities for children under the age of 12 years. A person may restrict participation in a competitive sporting activity to people—

- who can effectively compete;
- of a specified age or age group;
- with a general or particular impairment.

Section 71 – Pensions

Discriminatory provisions in relation to pensions are not unlawful. It can be argued that although this section applies to discrimination against the immediate recipient of the pension, the exception does not extend to discrimination against other persons who may be entitled to receive the benefit of the pension by virtue of their relationship with the recipient.

Section 72 & 73 – Superannuation

There are four specific exemptions in relation to superannuation and age discrimination. Discrimination which is exempted from the Act is that which—

- occurs in the application of standards under the *Superannuation Entities (Taxation) Act 1987* or the *Superannuation Industry (Supervision) Act 1993*;
- is required to comply with, to obtain benefits or avoid penalties under any other Commonwealth Act;
- is based on actuarial or statistical data or any other data on which it is reasonable to rely and is reasonable having regard to any relevant factors;
- if none of the above apply, the discrimination is reasonable having regard to any relevant factors.

This exception is designed to allow discrimination on the basis of age, where a decision is based on sound actuarial information. For example, a person's age and expected number of years in employment and in retirement have a bearing on the person's income, level of contribution and financial needs.

Section 75 & 77 – Religious bodies and people

Religious bodies are permitted to discriminate in appointing religious ministers and people to perform other religious functions, and more generally where it is necessary to avoid injury to the religious sensitivities of people of the religion.

Section 79 – Legal incapacity and age of majority

Section 79 states that a person may discriminate against another person who is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved. This may be relevant if a person with a disability lacks legal capacity in relation to their financial and legal affairs.

Further, the Act is not intended to affect the law in relation to “the age of majority”. A person may discriminate against another person who is subject to a legal incapacity that is based on their age. It is recognised that children do not have many of the rights which adults enjoy.

For instance the voting age, age limits on obtaining a driver's licence, restrictions on working in or entering a bar where alcohol is sold and age restrictions on entering into a binding contract are not affected by the Act.

Section 80 – Protection of health, safety and property

A person may discriminate on the basis of a person’s disability or physical features if the discrimination is “reasonably necessary” to protect—

- the health or safety of any person (including the person discriminated against);
- the general public;
- any private or public property.

Further, a person may discriminate on the basis of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against).

In the case of *Allegrata v Prime Holdings Pty Ltd*,⁹⁰ an employer’s concerns that a pregnant bar attendant may slip over, thereby putting her own and her baby’s health and safety at risk were held not to be reasonable grounds for her dismissal. The Board held that the employer’s health and safety obligations were to take all reasonable precautions to prevent injury for all employees and that in this case all employees faced the same risk as the complainant.

Section 81 – Age benefits and concessions

A person may provide benefits, including concessions, to another person based on age. For example, a cinema may provide discounts to patrons or a shop may provide “pensioner discounts”.

Section 83 – Exemptions by the Tribunal

The Victorian Civil and Administrative Tribunal can grant certain exemptions from the provisions of the Act. The exemption can be granted for a specified period up to 3 years and may be renewed or revoked on application to the Tribunal.

The granting of the exemption is at the Tribunal’s discretion. Generally, it will take into account the following factors in assessing whether an exemption is appropriate—

- that an exemption will not be unnecessary;
- that an exemption will not be granted where this will be futile;
- how the exemption may promote the objectives of the Act;
- whether there is an overriding public interest involved;
- all the relevant circumstances of the particular case.⁹¹

For example, an exemption was granted to an applicant to advertise for and employ only female drivers to drive for a taxi service for the carriage only of women, unescorted children or a family group that includes a woman or child.⁹²

⁹⁰ (1991) EOC 92-364.

⁹¹ *In the Matter Of An Application For Exemption By Australian Olympic Committee Inc.*, Anti-Discrimination Tribunal of Victoria, 12 February 1998, p.3 citing *Re Fernwood Fitness Centre* (1996) EOC 92-782; *Re Balmforth*, Anti-Discrimination Tribunal of Victoria, 4 November 1996.

⁹² *Re Balmforth*, Anti-Discrimination Tribunal of Victoria, 4 November 1996.

Chapter Five

General Exemptions and Exceptions in Other Jurisdictions

In 1993 the Committee reported on its review of the 1984 *Equal Opportunity Act*.⁹³ Examining general exemptions and exceptions from overseas and some Australian jurisdictions, the committee reported that in some jurisdictions anti-discrimination legislation overrides provisions in other legislation unless those legislative provisions are specifically exempted.

There are provisions in all other Australian States and Territories (other than South Australia) that contain a provision that makes lawful an act that discriminates against a person when it is authorised by another law. Similarly to Victoria, in Western Australia there is also an obligation to review legislation, government policies and practices.

In the Australian Capital Territory, the Minister may declare that the protection for anything done that is necessary to comply with another law expires on a day stated in a declaration.⁹⁴

At a Federal level, the *Racial Discrimination Act 1975* allows no exception for acts done under legislative authority. However, the *Sex Discrimination Act 1984*⁹⁵ and the *Disability Discrimination Act 1992* (“DDA”)⁹⁶ both provide an exemption in these circumstances.

From the commencement of the DDA until 1 March 1996, a protection existed for an act that was done in compliance with another Federal, State or Territory law.⁹⁷ This protection operated for three years after which time the provision had no force. There is however a protection for laws that are prescribed by the DDA, but there are no laws that have yet been prescribed.

New Zealand

Until 31 December 2001 when the statutory immunity (like that in Victoria) expired, the New Zealand Government had a partial exemption from the *Human Rights Act 1993*. Under the Act, the Government is now liable for discrimination in the public sector. The Government will only be able to discriminate if the enactment or practice in question can be “demonstrably justified in a free and democratic society”.

The Act empowers the Human Rights Review Tribunal to declare that another law is inconsistent with the Human Rights Act. The Tribunal cannot overturn other laws but a

⁹³ *Review of the Victorian Equal Opportunity Act 1984, Final Report*, November 1993.

⁹⁴ *Discrimination Act 1991* (ACT), s30.

⁹⁵ *Sex Discrimination Act 1984* (Cth), s40.

⁹⁶ *Disability Discrimination Act 1992* (Cth), s47.

⁹⁷ *Disability Discrimination Act 1992* (Cth), s47(3).

Declaration of Inconsistency must be reported to Parliament by the responsible Minister along with suggestions on what the Government's response will be.

United Kingdom

A process similar to that in New Zealand is available where laws in breach of the European Convention on Human Rights are declared inconsistent under the UK *Human Rights Act 1998* by the European Court of Human Rights. The UK model empowers the Court to declare legislation inconsistent with human rights, and requires the Parliament to act, whether to remedy the breach or to declare that the breach of human rights is to persist deliberately, subject to a sunset clause.

Canada

In Canada, for example, the *Ontario Human Rights Code 1981* provides that where a provision in an Act or regulation, enacted more than two years after the Code came into force, purports to require or authorise conduct that is in contravention of the Code's non-discrimination principles, the Code applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding the Code.

The above examples describe the approach taken by other jurisdictions in managing the balance between the principles of human rights in anti-discrimination law and the circumstances where discrimination should be permitted in a free and democratic society.

Appendix 1

Parliamentary Committees Act 1968

REFERRAL OF INQUIRY TO SCRUTINY OF ACTS AND REGULATIONS COMMITTEE OF PARLIAMENT

Inquiry under section 207 of the **Equal Opportunity Act 1995**

Order in Council

The Lieutenant-Governor as the Governor's deputy, with the advice of the Executive Council, under section 4F of the **Parliamentary Committees Act 1968**, requests that the:

Scrutiny of Acts and Regulations Committee of Parliament inquire into, consider and report to Parliament on:

Provisions which discriminate, or may lead to discrimination, against any person as provided in section 207 of the **Equal Opportunity Act 1995**. In particular the Committee is requested to:

- 1) identify provisions in Victorian Acts and enactments that operate to discriminate, or may lead to discrimination, against any person;
- 2) consider policy considerations for the retention, amendment or repeal of the provisions; and
- 3) make recommendations as to whether the provisions should be retained, amended or repealed.

In considering this reference the Committee should note the objectives of the **Equal Opportunity Act 1995** which include:

- 1) to promote recognition and acceptance of everyone's right to equality; and
- 2) to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes.

The Committee is required to report to Parliament by 31 March 2004.

Dated 3 June 2003

Responsible Minister:
STEVE BRACKS
Premier

BRIAN TUKE
Acting Clerk of the Executive Council

Appendix 2

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 4D of the *Parliamentary Committees Act 1968* are –

- (a) to consider any Bill introduced into a House of the Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise –
 - (i) trespasses unduly upon rights or freedoms; or
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions; or
 - (iiia) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*; or
 - (iiib) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*; or
 - (iv) inappropriately delegates legislative power; or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny; and
- (b) to consider any Bill introduced into a House of the Parliament and to report to the Parliament –
 - (i) as to whether the Bill by express words or otherwise repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) where a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable; or
 - (iii) where a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue; and
- (ba) to consider any Act passed at any time after 25 February 2003 and before the commencement of section 7 of the *Parliamentary Committees and Parliamentary Salaries and Superannuation Acts (Amendment) Act 2003* and to report to the Parliament with respect to that Act on any matter referred to in paragraph (a) or (b); and
- (c) such functions as are conferred on the Committee by the *Subordinate Legislation Act 1994*; and
- (ca) such functions as are conferred on the Committee by the *Environment Protection Act 1970*; and
- (cb) such functions as are conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*; and
- (d) to review any Act where required so to do by or under this Act, in accordance with terms of reference under which the Act is referred to the Committee.

