

**SCRUTINY OF ACTS AND REGULATIONS COMMITTEE –
DISCRIMINATION IN THE LAW – INQUIRY UNDER SECTION
207 OF THE EQUAL OPPORTUNITY ACT 1995 –
GOVERNMENT RESPONSE**



March 2006

1. Submissions relating to discriminatory provisions in Acts where different groups of people are treated differently on the basis of an attribute protected under the *Equal Opportunity Act 1995*

1.1 Discriminatory provisions identified in submissions which the Committee considers may reasonably be amended.

Recommendation 1

That section 93F of the Accident Compensation Act 1985 be amended to address any anomalous situation that may arise concerning entitlements to weekly compensation in circumstances in which a person is injured prior to age 63 years and, while still employed beyond the age of 65, has an incapacity for work arising from that injury.

Supported in part. Workers over retirement age are not eligible to receive weekly benefits under the *Accident Compensation Act 1985* (the Act). Given the changing social landscape however, it is apparent that more Victorians are continuing to work past the traditional retirement age. Older workers with a work-related injury are some of the most vulnerable Victorians and some additional support is required to enable these workers to continue working.

In November 2005, the Government announced that it intended to amend the Act to provide up to 13 weeks of weekly benefits for injured workers over the age of 65 where they require surgery for an injury sustained and reported in the 10 years prior to their retirement. This ensures that those workers will receive the necessary support and services to enable them to continue to participate in the workforce.

The scope of this change is financially responsible and allows for the continued viability of the WorkCover scheme.

It is anticipated that this change will come into effect by mid-2006.

Recommendation 2

That the ANZAC Day Act 1958 be amended to provide for definitions of “dependant”, “partner” and “domestic partner” for the purposes of section 4A (ANZAC Day Proceeds Fund) consistent with the definition of those terms found in section 3 of the State Superannuation Act 1988.

Supported in part. Section 4A(3) of the *ANZAC Day Act 1958* currently provides for the distribution of the ANZAC Day Proceeds Fund by the Patriotic Funds Council of Victoria to organisations assisting ex-service men and women or their dependants. “Dependant” is not defined in the Act and SARC noted that the term may be construed to refer only to the heterosexual partner of an ex-service man or woman, or that it could be limited to a child under a particular age.

The *Veterans Act 2005* has amended section 4A of the *ANZAC Day Act*. Money standing to the credit of the Fund is to be distributed on the recommendation of the

Victorian Veterans Council to organizations whose principle object is to provide welfare to the ex-service community. Ex-service community is defined to include all veterans, all surviving partners and all dependants of veterans.

It is anticipated that the amendments will come into operation in 2006. While the amendments do not adopt the definitions of “dependant”, “partner” and “domestic partner” recommended by SARC, the Government is of the view that the amendments will ensure that money is distributed to organizations providing welfare to all partners of veterans irrespective of marital status or gender and to all dependants irrespective of age. However, the Government will monitor the operation of the amendments to the *ANZAC Day Act* to confirm that they are operating in a non-discriminatory way.

Recommendation 3

That section 35(1) of the Crimes Act 1958 be repealed and replaced with a new section defining the term “domestic partner” as a “person to whom the person is not married but with whom the person is living as a married couple on a genuine domestic basis (irrespective of gender)”.

That the term “de facto spouse” in sections 44(2), 51 and 52 of the Crimes Act 1958 be replaced with the term “domestic partner”.

Supported in part. The Victorian Law Reform Commission (VLRC) in *Sexual Offences: Final Report* (2004) recommended that sections 35(1), 51 and 52 of the *Crimes Act* be amended to replace 'de facto spouse' with the broader term 'domestic partner'. Those provisions related to specific defences in sexual offences where the accused believes they were married or in a de facto relationship with the victim. The VLRC did not recommend any amendment to the term 'de facto spouse' in section 44(2) of the *Crimes Act*.

The VLRC recommendations were addressed in the Crimes (Sexual Offences) Bill 2005 that was introduced into Parliament on 15 November 2005 and is due to be debated in early 2006. However the Bill does not replace the term 'de facto spouse' with 'domestic partner' in section 44(2) of the *Crimes Act* or repeal the definition of 'de facto spouse' in section 35 of the *Crimes Act*.

The Government will consider incorporating these reforms as part of any further reforms in relation to the VLRC's recommendations.

Recommendation 4

That the terms “married person” and “spouse” in sections 337, 338 and 339 of the Crimes Act 1958 be replaced with “domestic partner” so as to extend the limited liability of married persons to de facto heterosexual and same sex couples.

That the gender specificity of the marital coercion provision should be removed and that the defence of coercion be extended to include people who are in de facto and same sex relationships.

Supported subject to further consideration.

The current review of the *Crimes Act 1958* may result in the reformulation or replacement of certain provisions. If the substance of sections 337, 338 and 339 is retained, the Government would support the amendments recommended by the Committee.

Recommendation 5

That the terms “husband” and “wife” in section 400 of the Crimes Act 1958 be replaced with the term “domestic partner”.

That for the purposes of section 400 of the Crimes Act 1958, the term “domestic partner” be defined as 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)”.

That the term “step child or child of the accused’s domestic partner” be added to section 400(3) of the Crimes Act 1958.

Supported subject to further consideration. Under the Uniform Evidence Act (UEA), the accused’s spouse, de facto spouse, parent or child may object to giving evidence against the accused. The term ‘child’ has an extended definition and includes adopted and ex-nuptial children and children living with the person as if they were a member of the person’s family.

On 22 November 2004, the Attorney-General asked the Victorian Law Reform Commission to review the laws of evidence in Victoria and to advise on the action required to facilitate the introduction of the UEA, including any necessary modification of existing provisions.

The adequacy of the above and related provisions were considered by the VLRC as part of its review of the UEA (conducted in collaboration with the Australian Law Reform Commission and the New South Wales Law Reform Commission).

In *Uniform Evidence Law: Report* (December 2005) (the Final Report) the three Commissions recommended (amongst other things) that the UEA be amended to give a person in a same sex de facto relationship with an accused the same right to object to giving evidence.

The Government will consider possible amendments to laws in this area as part of any evidence reforms in response to this report.

Recommendation 6

That the definition of “child” in section 3 of the Children and Young Persons Act 1989 be amended so that it allows applications for protection orders to be made in relation to young persons who have turned 17 but who have not attained age 18.

Not supported.

Seventeen year olds are essentially young adults who, if experiencing problems in the home, do not usually wish to use child protection measures to address these problems. Rather they prefer to move out of home and access other social services if they are in need of support. Alternatively, 17 year olds, whether or not they are under a disability, can use the *parens patriae* jurisdiction of the Supreme Court to seek orders concerning their welfare.

Recommendation 7

(1) That the term “responsible adult” in sections 120(1)(b)(i) and 123(1)(c)(v) of the Liquor Control Reform Act 1998 (the Act) be retained and that the definition of “responsible adult” in section 31(1) of the Act be retained.

(2) That the word “his or her spouse, being a person of or over the age of 18 years, or” in sections 119(5)(a) and 123(2)(a) of the Act be deleted.

Supported in principle. The recommended amendments will remove the discrimination in the *Liquor Control Reform Act 1998* whilst furthering the objects of the Act, in particular the 2004 amendments to the Act. It will reduce the harm caused by underage drinking as minors will only be lawfully able to consume or be served with alcohol, when they are accompanied by their parents or guardian. The Government will consider implementing the recommended amendments when the Act is next amended.

Recommendation 8

That Part V of the Property Law Act 1958 should be repealed.

Supported in principle. The Government will consider repealing Part V after an examination to determine whether Part V has any continuing operation and whether appropriate transitional or other provisions may need to be developed.

1.2 Discriminatory provisions identified in submissions which the Committee considers do not require amendment

Recommendation 9

That Part 4A of the Births, Deaths and Marriages Registration Act 1996 should be retained.

Supported.

Recommendation 10

That section 5 of the Credit Act 1984 should be retained.

Supported.

Recommendation 11

That the exclusion of patients as defined under the *Mental Health Act 1986* in Schedule 2 of the *Juries Act 2000*, should be retained.

Supported.

Recommendation 12

That section 158 of the Occupational Health and Safety (Lead) Regulations 2000, which adopts the national Exposure Standards for Atmospheric Contaminants in the Occupational Environment, should be retained.

Supported.

Recommendation 13

That section 28LB of the Wrongs Act 1958 should be retained.

Supported.

1.3 Discriminatory provisions identified in submissions in relation to which the Committee has refrained from making substantive recommendations because the Acts are currently being reviewed by another body

Recommendation 14

That section 11 of the Adoption Act 1984 be retained pending review by the Victorian Law Reform Commission.

Supported. The report of the VLRC on *Assisted Reproductive Technology and Adoption* is due to be tabled in Parliament in 2006.

Recommendation 15

That section 15(1) of the Births, Deaths and Marriages Registration Act 1996 should be retained pending review by the Victorian Law Reform Commission.

Supported. The report of the VLRC on *Assisted Reproductive Technology and Adoption* is due to be tabled in Parliament in 2006.

Recommendation 16

That section 27 of the Evidence Act 1958 should be retained, pending review by the Victorian Law Reform Commission.

Supported.

Section 27 of the *Evidence Act* provides that husbands and wives do not have to disclose any communication between them while they are married, other than in criminal proceedings or bail proceedings. SARC received a submission contending that this discriminates against de facto and same-sex couples.

In *Implementing the Uniform Evidence Act: Report* (February 2006), the VLRC recommended that section 27 should be repealed. The report indicates that all persons are compellable witnesses in civil proceedings under the UEA, unless otherwise provided under the Act (there is no spousal privilege in civil proceedings under the UEA). Further, the lack of such a privilege has not been raised in the Final Report and therefore in the interests of uniformity, this section should be repealed.

The Government will consider possible amendments to laws in this area as part of any evidence reforms in response to this report.

Recommendation 17

That section 28 of the *Evidence Act* 1958 should be retained, pending review by the Victorian Law Reform Commission.

Supported.

Section 28 of the *Evidence Act* provides that a “clergyman” cannot be compelled to disclose a confession to him in his professional capacity according to the usage of the church or religious denomination to which he belongs without the consent of the person concerned. It was submitted to SARC that the use of the term “clergyman” was gender-specific and should be amended to be gender-neutral. SARC also noted that the term “medical men” was also used in section 28 which is a similarly gender-specific term.

In *Implementing the Uniform Evidence Act: Report* the VLRC recommended that section 28 should be repealed. Section 127 of the UEA provides for a religious confessions privilege. The UEA privilege is invoked at the discretion of the clergyman, whereas section 28 provides that a clergy man shall not divulge without the confessor’s consent.

The Final Report recommends the inclusion of a professional relationship privilege in the UEA as currently exists in section 126 of the *Evidence Act* 1995 (NSW). That provision encompasses the doctor-patient relationship. The protection is not absolute, but provides a framework for the court to determine whether the confidence is to be protected.

The Government will consider possible amendments to laws in this area as part of any evidence reforms in response to this report.

Recommendation 18

That section 8 of the *Infertility Treatment Act* 1995 should be retained, pending review by the Victorian Law Reform Commission.

Supported. The report of the Victorian Law Reform Commission on *Assisted Reproductive Technology and Adoption* is due in 2006.

Recommendation 19

That section 23 of the *Residential Tenancies Act* 1997 should be retained pending review by the Department of Human Services.

Partially supported insofar as the review of tenancy rights in disability legislation has already been completed and the Government supports the retention of section 23 of the *Residential Tenancies Act* 1997 (RTA).

The review of disability legislation undertaken in 2004 recommended that the RTA be amended to enable community residential units to come under the RTA. However, the granting of full tenancy rights under the RTA would have the consequence that disability service providers may be unable to fulfil their support obligations to a person receiving disability services without breaching provisions of the revised RTA. It was considered that the amendments could result in a system that is unworkable for disability service providers and potentially detrimental to people with a disability living in community residential units.

Therefore it was considered preferable for the proposed Disability Services Bill to include special provisions that create rights and obligations in residential services provided by disability service providers, including community residential units. This would grant important rights to people residing in disability services while still enabling their support needs to be met. The proposed Disability Services Bill provides an appropriate and sensitive balance between the obligations of disability service providers and the needs of people with a disability in supported accommodation, providing safeguards to ensure that those most vulnerable within the disability service system are not disadvantaged by the introduction of tenancy rights and obligations.

2. Submissions relating to provisions in Acts that may have a discriminatory impact on some groups because of the way in which they operate in practice

2.1 Discriminatory provisions identified in submissions that have a discriminatory impact and which the Committee considers may reasonably be amended.

Recommendation 20

That sections 13, 14 and 16 of the Summary Offences Act 1996 should be retained until a new regime for the management of public drunkenness has been enacted, at which point the sections should be repealed.

Supported subject to further consideration. The Government recognizes the importance of this issue and will continue to examine alternative regimes for managing public drunkenness.

2.2 Provisions identified in submissions that have a discriminatory impact, but which the Committee considers do not require amendment

Recommendation 21

That Schedule 7 of the Magistrates' Court Act 1989 should be retained.

Supported to the extent that the Committee recommended its retention because of the need for an infringements enforcement system. Although Schedule 7 is being replaced by the Infringements Bill currently before the Parliament, the new Act will provide for an improved system of enforcement. A concern raised with SARC was that enforcement of penalty infringement notices under Schedule 7 operated to discriminate against persons with mental illness as well as Indigenous Australians. In recommending the retention of Schedule 7 SARC noted that since 2002 the Magistrate's Court has run a diversion program called the Enforcement Review Program (ERP) which aims to assist the court in identifying people issued with penalty infringement orders who have a severe physical or intellectual disability or a diagnosed mental illness. It is noted that ERP will continue to run under the new Infringements Act and is being expanded to include those, for example, whose homelessness results in them being unable to control conduct constituting an offence.

Recommendation 22

That Regulation 21(1) of the Police Regulations 2003 should be retained.

Supported.

2.3 Submissions in relation to provisions that appear to have a discriminatory impact but in relation to which the Committee has refrained from making recommendations because the Acts are currently being reviewed by another body.

Recommendation 23

That section 4(3) of the Bail Act 1977 should be retained, pending review by the Victorian Law Reform Commission.

Supported. The VLRC issued its Discussion Paper on the *Bail Act 1977* in November 2005. It is anticipated that the VLRC will table its final report in late 2006.

Recommendation 24

That section 29(3) of the Coroners Act 1985 should be retained, pending review by the Victorian Parliamentary Law Reform Committee.

Supported. It is anticipated that the Victorian Parliamentary Law Reform Committee will table its report on the *Coroners Act 1985* in the second half of 2006.

Recommendation 25

That sections 100 and 101 of the *Evidence Act 1958* should be retained, pending review by the Victorian Law Reform Commission.

Supported.

Section 100 of the *Evidence Act* deals with the manner of administration of oaths. Section 101 provides for the swearing of an oath with an uplifted hand. SARC received a submission that these provisions discriminate against people other than Christians.

In *Implementing the Uniform Evidence Act: Report* the VLRC recommended that section 100 of the *Evidence Act 1958* should be retained in a new Oaths Act. The new section would be limited in its operation to the administration of oaths outside courts (oaths of office etc) and rewritten to reflect the UEA as recommended by the report of the Victorian Parliamentary Law Reform Committee. Section 21(4) and the Schedule to the UEA provide a flexible form of oath or affirmation in court.

The VLRC has recommended the repeal of section 101 of the *Evidence Act* because it is obsolete.

The Government will consider possible amendments to laws in this area as part of any evidence reforms in response to this report.

Recommendation 26

In view of the foreshadowed re-enactment of the provisions concerning begging (proposed new section 49A of the Summary Offences Act 1966) the Committee makes no recommendation.

Supported.

The provisions concerning begging were re-enacted in the *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* which came into operation on 14 September 2005.

Recommendation 27

The Committee was required by the terms of reference to note the objectives of the Equal Opportunity Act 1995 (EOA) which include (a) the promotion, recognition and acceptance of everyone's right to equality and (b) the elimination, as far as possible, of discrimination against people by prohibiting discrimination on the basis of various attributes.

In light of the terms of reference the Committee has concluded that the review provision in section 207 of the EOA is not an efficient or effective method of auditing Victorian enactments that discriminate or that may lead to discrimination against any person. The Committee has examined alternative review models and makes the following recommendations -

- 1. That section 69 of the EOA should be repealed with a sunset period of three years.*
- 2. That section 207 of the EOA should be repealed.*
- 3. That equal opportunity principles should be prescribed in the EOA or other legislation. These principles are to be used as a standard for scrutiny and should not, on their own, give rise to any legally enforceable right of action.*
- 4. That prior to the repeal of section 69 of the EOA, government departments and agencies undertake an audit of existing enactments administered by them against the equal opportunity principles.*
- 5. That any enactment identified as being incompatible with the equal opportunity principles, but which is intended to override the provisions of the EOA be prescribed in a schedule to the EOA.*
- 6. That any enactment identified as incompatible with the equal opportunity principles but is not intended to override the provision of the EOA be amended to remove the discrimination.*
- 7. That all proposed enactments should be scrutinised against the equal opportunity principles.*
- 8. That proposed enactments that are incompatible with the equal opportunity principles or that are intended to override the provisions of the EOA should be accompanied by a Ministerial declaration or statement of reasons justifying such incompatibility at the time the enactment is introduced or tabled in the Parliament.*
- 9. That a Committee of the Parliament should be required to review and report to the Parliament on any proposed enactment that is declared or identified as being inconsistent with the equal opportunity principles or which are declared to override the provisions of the EOA.*
- 10. That failure to comply with a procedural requirement (recommendations 8 & 9) in relation to an enactment should not affect the validity, operation or enforcement of any Victorian law.*
- 11. That a primacy provision should be included in the EOA or other legislation that provides that in interpreting a provision in an enactment, a construction that would promote the equal opportunity principles is to be preferred to a construction that would not promote these principles.*

The Government will consider this group of recommendations as part of the development and implementation of the proposed Charter of Human Rights and Responsibilities.