SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

56th Parliament

Exceptions and Exemptions to the Equal
Opportunity Act 1995

Final Report

November 2009

Ordered to be Printed
N° 249 Session 2006-09
Scrutiny of Acts and Regulations Committee

Members

Mr Carlo Carli MLA (Chairperson)
Mr Ken Jasper MLA (Deputy Chairperson)
Mr Colin Brooks MLA
Mr Khalil Eideh MLC
Mr Telmo Languiller MLA
Mr Edward O’Donohue MLC
Mrs Inga Peulich MLC
Ms Jaala Pulford MLC
Mr Ryan Smith MLA

Staff

Mr Andrew Homer Senior Legal Adviser
Ms Helen Mason Legal Adviser, Regulations
Mr Simon Dinsbergs Assistant Executive Officer
Mrs Victoria Kalapac Committee Administration Officer

Consultant

Associate Professor Beth Gaze, Equal Opportunity Advisor

Address

Parliament House, Melbourne Victoria 3002

Telephone

(03) 8682 2895

Facsimile

(03) 8682 2858

Email

andrew.homer@parliament.vic.gov.au

Internet

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the Parliamentary Committees Act 2003 are —

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
   (i) trespasses unduly upon rights or freedoms;
   (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
   (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
   (iv) 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;
   (v) 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;
   (vi) improperly delegates legislative power;
   (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
   (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament —
   (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the Constitution Act 1975, or raises an issue as to the jurisdiction of the Supreme Court;
   (ii) if a Bill repeals, alters or varies section 85 of the Constitution Act 1975, whether this is in all the circumstances appropriate and desirable;
   (iii) if 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;

(c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill —
   (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of each Parliament; or
   (ii) within 10 sitting days after the Act receives Royal Assent —

whichever is the later, and to report to the Parliament with respect to that Act or any matter referred to in those paragraphs;

(d) the functions conferred on the Committee by the Subordinate Legislation Act 1994;

(e) the functions conferred on the Committee by the Environment Protection Act 1970;

(f) the functions conferred on the Committee by the Co-operative Schemes (Administrative Actions) Act 2001;

(fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.
Terms of Reference

INQUIRY INTO THE EXCEPTIONS AND EXEMPTIONS IN THE EQUAL OPPORTUNITY ACT 1995

a) The Governor, with the advice of the Executive Council, under section 33 of the Parliamentary Committees Act 2003 requests that the Scrutiny of Acts and Regulations Committee of Parliament (the Committee) inquire into, consider, and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act 1995.

b) The Committee is requested to provide its final report to Parliament by 30 April 2009.

Victorian Government Gazette, G51, 18 December 2008
In this paper the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADA (Cth)</td>
<td>Age Discrimination Act 2004 (Cth)</td>
</tr>
<tr>
<td>ADA (NSW)</td>
<td>Anti-Discrimination Act 1977 (NSW)</td>
</tr>
<tr>
<td>ADA (NT)</td>
<td>Anti-Discrimination Act 1992 (NT)</td>
</tr>
<tr>
<td>ADA (Qld)</td>
<td>Anti-Discrimination Act 1991 (Qld)</td>
</tr>
<tr>
<td>ADA (Tas)</td>
<td>Anti-Discrimination Act 1998 (Tas)</td>
</tr>
<tr>
<td>AHRC</td>
<td>Australian Human Rights Commission</td>
</tr>
<tr>
<td>AIG</td>
<td>Australian Industry Group</td>
</tr>
<tr>
<td>AISV</td>
<td>Association of Independent Schools of Victoria</td>
</tr>
<tr>
<td>ASU</td>
<td>Australian Services Union</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>DA (ACT)</td>
<td>Discrimination Act 1991 (ACT)</td>
</tr>
<tr>
<td>DDA (Cth)</td>
<td>Disability Discrimination Act 1992 (Cth)</td>
</tr>
<tr>
<td>DOJ</td>
<td>Department of Justice</td>
</tr>
<tr>
<td>EO Act (SA)</td>
<td>Equal Opportunity Act 1984 (SA)</td>
</tr>
<tr>
<td>EO Act (WA)</td>
<td>Equal Opportunity Act 1984 (WA)</td>
</tr>
<tr>
<td>EO Act</td>
<td>Equal Opportunity Act 1995 (Vic)</td>
</tr>
<tr>
<td>HRLRC</td>
<td>Human Rights Law Resource Centre</td>
</tr>
<tr>
<td>ICA</td>
<td>Insurance Council of Australia</td>
</tr>
<tr>
<td>ICA (Cth)</td>
<td>Insurance Contracts Act 1984</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>IR</td>
<td>Industrial relations</td>
</tr>
<tr>
<td>LIV</td>
<td>Law Institute of Victoria</td>
</tr>
<tr>
<td>PILCH</td>
<td>Public Interest Law Clearing House</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>RDA (Cth)</td>
<td><em>Racial Discrimination Act 1975 (Cth)</em></td>
</tr>
<tr>
<td>SDA (Cth)</td>
<td><em>Sex Discrimination Act 1984 (Cth)</em></td>
</tr>
<tr>
<td>TUV</td>
<td>Tenants Union of Victoria</td>
</tr>
<tr>
<td>VACC</td>
<td>Victorian Automobile Chamber of Commerce</td>
</tr>
<tr>
<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
</tr>
<tr>
<td>VCOSS</td>
<td>Victorian Council of Social Service</td>
</tr>
<tr>
<td>VECCI</td>
<td>Victorian Employers’ Chamber of Commerce and Industry</td>
</tr>
<tr>
<td>VLRC</td>
<td>Victorian Law Reform Commission</td>
</tr>
</tbody>
</table>
Chair’s Foreword

The Scrutiny of Acts and Regulations Committee is pleased to present its final report concerning an inquiry into the exceptions and exemptions provisions in the Equal Opportunity Act 1995 (the ‘Act’). The terms of reference of the inquiry were very broad asking the Committee to make recommendations whether any amendments should be made to the Act.

In brief the current Act provides that direct and indirect discrimination is unlawful if the discrimination is on the basis of one of the attributes provided in section 6 of the Act, including amongst others, discrimination on the basis of age, religious belief or activity, sex, race, sexual orientation, political belief, impairment and marital status. In Parts 3 and 4 of the Act exceptions and exemptions are included to permit discrimination on the basis of one or more attributes.

Exceptions and exemptions in the Act cover such matters as –
• Single sex clubs (eg. men’s clubs, women-only gymnasiums)
• Religious institutions and organisations (eg. schools, counselling services)
• Schools for particular groups
• Sporting competition (eg. age range or single sex)
• Employment exceptions (genuine occupational qualification, requirement to make reasonable adjustments for impaired employees, small businesses)

In May 2009 the Committee released an Options paper to explain the current provisions and provide options on how the law may be reformed. The Committee invited written submissions in respect to these options over a period of nearly 3 months and then held public hearings in early August 2009.

Following this process of evidence gathering and analysis the Committee has decided to make 59 recommendations to Parliament in this report.

The Committee again expresses its gratitude to the inquiry consultant, Associate Professor Beth Gaze for her commendable contribution in preparing comprehensive legal and background advice for the Committee’s consideration in respect to both the Options Paper and this Final Report. The Committee also thanks Simon Dinsbergs for his considerable and timely support in the production of this report and Victoria Kalapac for her administrative support and for the cover design for the Final Report.

Carlo Carli MP
Chairperson

October 2009
# Table of Contents

Committee Membership iii
Terms of Reference v
Abbreviations vi
Chair’s Foreword ix
Table of Contents xi
Recommendations xv
Introduction 1
  The Committee inquiry 1
  Other inquiries concerning the Equal Opportunity Act 1995 2
  Evidence available to the Committee 3
  Structure of this Report 4
  Guiding principles for review 4
    Consistency with the Charter of Human Rights and Responsibilities 4
    Providing the clearest guidance possible to the community 5
    Reconciling conflicts of rights and the format of exceptions 5
    The Committee’s recommendations and the Equal Opportunity Review (Gardner Review) 6
  General Issues 6
    Competing rights – direction for interpreting exception provisions 8
When is discrimination prohibited? 11
  Employment 11
    Domestic or personal services in the home 11
    Genuine occupational requirements 12
    Political employment 16
    Welfare services 17
    Family employment 18
    Small Business 18
    Special services or facilities 20
    Duty to make Reasonable Adjustments 21
  Setting reasonable terms and conditions of employment or partnership 23
    Reasonable terms of employment 23
    Reasonable terms of partnership 23
    Standards of dress and behaviour – set by employer 24
    Care of Children 25
    Compulsory retirement of judicial officers 26
    Youth wages 27
    Early retirement schemes 28
<table>
<thead>
<tr>
<th>Scrutiny of Acts and Regulations Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender identity</td>
</tr>
<tr>
<td>Single sex accommodation</td>
</tr>
<tr>
<td>Employment-related areas</td>
</tr>
<tr>
<td>Establishing firms and partnerships</td>
</tr>
<tr>
<td>Special services and facilities</td>
</tr>
<tr>
<td>Reasonable terms of partnership</td>
</tr>
<tr>
<td>Reasonable terms of qualification</td>
</tr>
<tr>
<td>Education</td>
</tr>
<tr>
<td>Educational institutions for particular groups</td>
</tr>
<tr>
<td>Special services or facilities</td>
</tr>
<tr>
<td>Standards of dress and behaviour – in schools</td>
</tr>
<tr>
<td>Age based admission schemes and age quotas</td>
</tr>
<tr>
<td>Provision of goods and services and disposal of land</td>
</tr>
<tr>
<td>Insurance</td>
</tr>
<tr>
<td>Credit providers</td>
</tr>
<tr>
<td>Supervision of children</td>
</tr>
<tr>
<td>Special manner of providing a service</td>
</tr>
<tr>
<td>Disposal by will or by gift</td>
</tr>
<tr>
<td>Accommodation</td>
</tr>
<tr>
<td>Discrimination by refusing to allow alterations</td>
</tr>
<tr>
<td>Discrimination by refusing to allow guide dogs</td>
</tr>
<tr>
<td>Accommodation unsuitable for children</td>
</tr>
<tr>
<td>Shared accommodation</td>
</tr>
<tr>
<td>Welfare measures in accommodation</td>
</tr>
<tr>
<td>Accommodation for students</td>
</tr>
<tr>
<td>Accommodation for commercial sexual services</td>
</tr>
<tr>
<td>Clubs and club members</td>
</tr>
<tr>
<td>Clubs for disadvantaged people or minority cultures</td>
</tr>
<tr>
<td>Clubs and benefits for particular age groups</td>
</tr>
<tr>
<td>Separate access to benefits for men and women</td>
</tr>
<tr>
<td>Sport</td>
</tr>
<tr>
<td>Competitive sporting activities</td>
</tr>
<tr>
<td>Local government</td>
</tr>
<tr>
<td>Political belief or activity in local government</td>
</tr>
<tr>
<td>General Exceptions and Exemptions</td>
</tr>
<tr>
<td>Things done with statutory authority</td>
</tr>
<tr>
<td>Things done to comply with orders of the courts and tribunals</td>
</tr>
<tr>
<td>Pensions</td>
</tr>
<tr>
<td>Superannuation</td>
</tr>
<tr>
<td>Charities</td>
</tr>
<tr>
<td>The religious exceptions</td>
</tr>
<tr>
<td>Protection for religious orders and religious observance or practice</td>
</tr>
<tr>
<td>Religious bodies – protection in other activities</td>
</tr>
<tr>
<td>Religious Schools</td>
</tr>
<tr>
<td>Religious beliefs or principles</td>
</tr>
</tbody>
</table>
The recommendations of the Report are set out below.

**Objectives of the Act**

**Recommendation 1** [page 7]

The Committee recommends that the Act be amended to provide that an objective of the Act is to ensure protection from discrimination to the greatest extent possible consistent with the rights in the *Charter of Human Rights and Responsibilities Act 2006*.

**Regular review of exceptions**

**Recommendation 2** [page 7]

The Committee recommends that the Act should require that the exceptions and exemptions in the Act be reviewed at least every 10 years to determine whether they should be retained, amended or repealed.

**Competing rights – direction for interpreting exception provisions**

**Recommendation 3** [page 8]

The Committee recommends that Section 12 be amended to provide:

- the circumstances in which exceptions within one Division of Part 3 may be applied to conduct outside that Division;
- that the onus of proof establishing that an exception is justified rests with the person seeking to rely on the exception; and
- that where there is doubt as to the construction of a provision the reasonable limitations test in Charter s. 7(2) is to be used as a guide to resolve the doubt.

**Domestic or personal services in the home**

**Recommendation 4** [page 11]

The Committee recommends that section 16 should be amended to permit discrimination in relation to the provision of domestic or personal services in the home of the employer, the person on behalf of whom the act was done, or a relative of either of those persons.
Genuine occupational requirements

Recommendation 5 [page 13]

The Committee recommends that section 17 should be replaced with a provision that authorises discrimination in relation to employment on specified attributes where a person cannot perform the inherent requirements of the particular employment. In relation to impairment or physical features, this should be assessed only after any reasonable adjustments have been made.

Political employment

Recommendation 6 [page 16]

The Committee recommends that section 18 be retained without amendment.

Welfare services

Recommendation 7 [page 17]

The Committee recommends that section 19 be amended to allow employment preference a person of the same attribute in delivery of welfare services for people with that attribute when:

- the service provision is intended to and objectively capable of advancing the interest of that group, and
- either employment of persons possessing the same attribute is reasonably regarded as central to the employment involved, or the services can be provided much more effectively and appropriately by members of that group.

Family employment

Recommendation 8 [page 18]

The Committee recommends that section 20 be repealed.

Small Business

Recommendation 9 [page 19]

The Committee recommends that section 21 be repealed.

Special services or facilities

Recommendation 10 [page 20]

The Committee recommends that sections 22, 32, 39 and 46 be incorporated in a general provision that creates an express duty to make reasonable adjustments to accommodate a person with an impairment or physical feature. The duty should apply in all areas covered by the Act, including the provision of accommodation. The scope of the duty should –

1. require reasonable adjustments to be made where the cost or disruption involved would not be disproportionate and identify the factors that are relevant to assessing the reasonableness of the adjustments; and
2. exist only where making the adjustments would allow the person to perform the inherent requirements of the job, or to benefit from the education, service or accommodation. If the person could not perform the requirements of the employment or benefit from the education, accommodation or service provided were the adjustments to be made, the discrimination would be permitted.

The Committee recommends that for consistency the duty to make reasonable adjustments should also extend to the attributes of pregnancy and carer’s responsibilities.

Reasonable terms of employment and reasonable terms of partnership

Recommendation 11 [page 23]
The Committee recommends that sections 23 and 33 be repealed.

Standards of dress and behaviour set by employer

Recommendation 12 [page 24]
The Committee recommends that section 24 should be amended to remove the reference to behaviour.

The Committee further recommends that a dress or appearance requirement should be subject to the reasonable limitations test in Charter s. 7(2).

Care of Children

Recommendation 13 [page 25]
The Committee recommends that section 25 be retained without amendment.

Compulsory retirement of judicial officers

Recommendation 14 [page 26]
The Committee recommends that section 26 should be repealed.

If it is not immediately feasible to repeal the section the Committee recommends that further consideration be given to an alternative process that may be implemented in respect to the question of compulsory retirement of judicial officers.

Youth wages

Recommendation 15 [page 27]
The Committee recommends that section 27 should be amended to allow for trainee wages related to the level of experience or training of a person without reference to their age.
Early retirement schemes

Recommendation 16 [page 28]
The Committee recommends that further research and consideration be given to the area of early retirement schemes with a view to assessing the feasibility of repealing the current exception.

Gender identity

Recommendation 17 [page 29]
The Committee recommends that the exception in respect to ‘gender identity’ in section 27B should be repealed.

Single sex accommodation

Recommendation 18 [page 30]
The Committee recommends that section 28 be retained unamended.

Establishing firms and partnerships

Recommendation 19 [page 30]
The Committee recommends that sections 30 and 31 be retained unamended.

Reasonable terms of qualification

Recommendation 20 [page 32]
The Committee recommends that section 36 be amended to require any reasonable terms of occupational qualification or reasonable variations, to be consistent with the reasonable limitations test in Charter s. 7(2).

Educational institutions for particular groups

Recommendation 21 [page 34]
The Committee recommends that section 38 be retained unamended.

Special services or facilities

Recommendation 22 [page 35]
The Committee recommends that section 39 should be amended to provide a duty to make reasonable adjustments for a person with an impairment or physical feature. However, the duty would not apply if the person would derive only minor benefit from the education if the reasonable adjustments were to be made.

The Committee recommends that the exception should incorporate reference to the educational authority’s obligation to comply with the Disability Standards for Education 2005 made under the Disability Discrimination Act 1992 (Cth).
Standards of dress and behaviour in schools

**Recommendation 23 [page 36]**

The Committee recommends that section 40 should be amended to remove reference to behaviour. The Committee further recommends that the exception should provide that in assessing the reasonableness of the standards set by an educational authority, the following factors should be considered –

- whether the views of the school community have been taken into account in adopting the standards of dress or appearance and whether the standards are subject to any review, and
- whether the standards are a reasonable limitation on other rights having regard to the test in Charter s. 7(2).

Age based admission schemes and age quotas

**Recommendation 24 [page 37]**

The Committee recommends that section 41 be retained unamended.

Insurance

**Recommendation 25 [page 38]**

The Committee recommends that section 43 should be amended to apply only to the attributes of sex, impairment and age, and permit discrimination in relation to each of these attributes, only in circumstances where it is permitted by the applicable Commonwealth law.

The Committee further recommends that when requested to do so, insurance providers should be required to give reasons for their unfavourable underwriting decisions.

Credit providers

**Recommendation 26 [page 39]**

The Committee recommends that section 44 should be amended to apply the same test for allowing discrimination applicable in relation to credit providers under the *Age Discrimination Act 2004* (Cth).

The Committee further recommends that when requested to do so, credit providers should be required to give reasons for their decisions to deny credit.

Supervision of children

**Recommendation 27 [page 40]**

The Committee recommends that section 45 be retained unamended.
Special manner of providing a service

Recommendation 28 [page 41]

The Committee recommends that section 46 should be amended to provide a duty to make reasonable adjustments for a person with an impairment or physical feature. The duty should be to make only those adjustments that are reasonable, and would not apply where the person would not benefit from the services if the adjustments were to be made.

Disposal by will or by gift

Recommendation 29 [page 41]

The Committee recommends that section 48 be retained unamended.

Discrimination by refusing to allow alterations

Recommendation 30 [page 42]

The Committee recommends that section 51 be amended to include a provision that there is an obligation to make reasonable adjustments for a person with an impairment or a physical feature. The duty should only apply to those adjustments that are reasonable, and the duty should not apply where the person could not benefit even if the adjustments were to be made.

Discrimination by refusing to allow guide dogs

Recommendation 31 [page 43]

The Committee recommends that the definition of ‘guide dog’ be amended so as to expand the ambit of the exception beyond the current prescribed impairments of vision, hearing or mobility.

Accommodation unsuitable for children

Recommendation 32 [page 43]

The Committee recommends that section 53 be repealed.

Shared accommodation

Recommendation 33 [page 44]

The Committee recommends that section 54 be retained.

The Committee recommends that a definition of ‘near relative’ should be included for the purposes of this section.
Welfare measures in accommodation

**Recommendation 34 [page 45]**

The Committee recommends that section 55 be amended to delete the words 'or mainly' so that the exception would be confined to the provision of accommodation established wholly for the welfare of people of a particular sex, age, race or religious belief.

The Committee further recommends that the provision should apply only to non-profit organisations.

Accommodation for students

**Recommendation 35 [page 46]**

The Committee recommends that section 56 should be amended to provide that an educational institution may not discriminate against groups of students within the institution in providing accommodation.

Accommodation for commercial sexual services

**Recommendation 36 [page 47]**

The Committee recommends retention of section 57 pending a further review as to the appropriateness of retaining such an exception in the Act.

Clubs for disadvantaged people or minority cultures

**Recommendation 37 [page 49]**

The Committee recommends that section 61 be retained unamended.

Clubs and benefits for particular age groups

**Recommendation 38 [page 49]**

The Committee recommends that section 62 be retained unamended.

Separate access to benefits for men and women

**Recommendation 39 [page 50]**

The Committee recommends that section 63 should be amended to include a list of factors that should be considered by a club's governing body in respect to decisions concerning separate access.

The Committee recommends that one of the factors to be considered should be whether the club has taken steps to improve gender equality in access to benefits.
Competitive sporting activities

Recommendation 40 [page 52]

The Committee recommends that a more detailed review be undertaken in respect to the appropriate provisions that should be made in equal opportunity law governing exclusion from participation in competitive sports.

Political belief or activity in local government

Recommendation 41 [page 53]

The Committee recommends that section 68 be retained unamended.

Things done with statutory authority

Recommendation 42 [page 54]

The Committee recommends that –

1. Section 69 should be repealed within a reasonable time following Royal Assent.
2. A provision in an enactment which is intended to override the Act be prescribed in the Act (perhaps in a schedule).
3. A provision prescribed in the Act which is intended to override the Act should be subject to a sunset or review provision.
4. Existing enactments that are not intended to override the Act should be identified and amended where necessary.
5. The Victorian Equal Opportunity and Human Rights Commission be given a function requiring it to report to Parliament where it considers that a provision in an enactment is incompatible with the Act.
5. On the assumption that the other recommendations of the Committee are adopted, concerning the review of incompatible provisions in legislation, section 207 be considered redundant and be repealed.
6. In the interim, prior to repeal of section 69, the section be amended to ensure that enactments passed prospectively do not automatically prevail over the Act unless they are prescribed in the Act.

Things done to comply with orders of the courts and tribunals

Recommendation 43 [page 56]

The Committee recommends that section 70 be retained unamended.
Pensions

Recommendation 44 [page 56]

The Committee recommends that an expert review be undertaken concerning the need to retain section 71.

Superannuation

Recommendation 45 [page 57]

The Committee recommends that section 72 should be retained without amendment.

The Committee recommends that section 73 should be amended to treat discrimination in superannuation on the basis of age in the same way as discrimination on the basis of sex, marital status, or impairment is treated, by applying the test in the Age Discrimination Act 2004 (Cth).

Charities

Recommendation 46 [page 59]

The Committee recommends that section 74 be retained unamended.

Protection for religious orders and religious observance or practice

Recommendation 47 [page 62]

The Committee recommends that section 75(1) be retained unamended.

Religious bodies – protection in other activities

Recommendation 48 [page 62]

The Committee recommends that the exception in section 75(2) should be retained but should be narrowed so that it does not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.

Religious Schools

Recommendation 49 [page 64]

The Committee recommends that the exception in section 76 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.

Religious beliefs or principles

Recommendation 50 [page 66]

1. The Committee recommends that the exception in section 77 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.
2. The Committee recommends that section 77 should be amended to allow an exception for conduct necessary for the person to comply with genuine religious beliefs or principles provided that any limitation of another person’s rights is justified within the test in Charter s. 7(2).

Private clubs

Recommendation 51 [page 67]

The Committee recommends that section 78 should be amended to provide that –

1. private clubs should be permitted to discriminate on the basis of attributes necessary for the purposes of the club, so that private clubs can select but not exclude members on the basis of an attribute.

2. private clubs should be permitted to discriminate in relation to selection of members and, if necessary, benefits provided to members, but the exception should not extend to areas such as employment or other areas of activity covered by the Act that are not essential to the provision of benefits to the club’s members.

Incapacity and age of majority

Recommendation 52 [page 68]

The Committee recommends that section 79 should be amended so that it authorises discrimination only on the basis of the particular incapacity involved.

Protection of health, safety and property

Recommendation 53 [page 70]

The Committee recommends that section 80 be amended to provide that discrimination is permitted only where it is reasonably necessary –

• in relation to impairment or physical features, after consideration of any obligation to make reasonable adjustments for the person,

• where there is no less restrictive alternative reasonably available, and

• it is proportionate to the risk being avoided, and

• where the action meets the reasonable limitations test in Charter s. 7(2).

Age benefits and concessions

Recommendation 54 [page 71]

The Committee recommends that section 81 be retained unamended.
Welfare measures and special needs

Recommendation 55 [page 72]

1. The Committee recommends that section 82 be amended to declare that special measures do not constitute discrimination.

2. The Committee recommends that criteria for a program of special measures should include that the program addresses an identified disadvantage, such as a need for protection or advancement of a group of people identified by one or more attributes.

3. The Committee recommends that the following conditions should apply to the special measures exception:
   - the special measure should be temporary, so that it does not continue after the identified disadvantage has been eliminated,
   - progress of the measure towards equality should be regularly evaluated and monitored,
   - be undertaken in good faith to give effect to its purpose,
   - is objectively capable of moving towards the purpose,
   - is a reasonable response to the disadvantage being addressed,
   - the onus of proof to establish the necessity for a special measure should be on the person proposing to provide the special measure, and
   - be solely for the purpose or substantially for that purpose.

Exemptions by the Victorian Civil and Administrative Tribunal

Recommendation 56 [page 74]

The Committee recommends that section 83 be amended in relation to the criteria for granting temporary exemptions and the process involved in considering applications.

Criteria for granting a temporary exemption:

The Committee recommends that a temporary exemption should be granted on the basis of an individual application where there is an arguable case of discrimination, where the exemption is consistent with the objectives of the Act and where the exemption is a reasonable limitation within the meaning of the test in Charter s. 7(2).

Process for granting a temporary exemption:

The Committee recommends that the process for granting temporary exemptions should:

- be transparent and accountable, and
- provide an opportunity for a person affected or an independent contradictor to put the case against granting the temporary exemption.

In particular, the Committee recommends that:

- the Tribunal should keep a public record of all exemptions granted, with sufficient information to allow a person to understand the scope and reasons permitting the temporary exemption.
the Tribunal should be required to publish notice of any application received for at least two weeks before any determination is made, and the applicant for an exemption (or the Tribunal) should be obliged to provide a copy of any such application to the Commission.

the Tribunal should call for and receive submissions from people whose interests would be affected by the proposed exemption before it makes a determination.

the Tribunal’s procedure should remain generally at its discretion.

with the Tribunal’s leave, the Commission, or a person whose interests would be directly affected, should have standing under the Act to appear or make submissions in relation to an application for an exemption.

an application for an exemption should be dealt with by the Tribunal within a reasonable time.

the Tribunal should be required to publish reasons for any decision relating to a temporary exemption.

with the Tribunal’s leave, the Commission, or a person whose interests would be directly affected, should have standing to seek a review, variation or revocation of an exemption that has previously been granted by the Tribunal.

The Committee recommends that when an exemption is granted it should be –

valid for three years with a discretion to allow a longer period of up to 5 years in appropriate and justified circumstances,

subject to such terms and conditions as the Tribunal specifies,

subject to an obligation to monitor the operation of and need for the exemption on a regular basis;

applicable only in such circumstances or in relation to such activities as the Tribunal specifies;

if necessary and justified be renewable by the Tribunal (rather than re-application);

the onus on a renewal application should remain on the applicant to show that the need for the exemption continues and provide an opportunity for submissions from people affected or likely to be affected.

Exemptions to allow compulsory retirement in the public sector

Recommendation 57 [page 77]

The Committee recommends that section 84 should be repealed.

The treatment of transgender and intersex people in the Equal Opportunity Act

Recommendation 58 [page 79]

The Committee recommends that a further review be undertaken concerning the legal standing of transgender and intersex people in the context of their protection in anti-discrimination law. Pending the outcome of any review, the Committee recommends that interim measures be taken to clarify the status of transgender and intersex people in relation to sex discrimination under the Act.
The position of volunteers under the Act

Recommendation 59 [page 82]

The Committee recommends that the question of whether to extend the protection of the Act to volunteers should be considered.
The Committee inquiry

The Scrutiny of Acts and Regulations Committee of Parliament (the ‘Committee’) was requested by Governor in Council Order to inquire into, consider and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act 1995 (the ‘Act’).

In summary the Act provides that direct and indirect discrimination is unlawful if the discrimination is on the basis of one of the protected attributes listed in section 6 of the Act, and where the discrimination occurs in one of the areas of activity to which the Act applies. In Parts 3 and 4 of the Act a number of exceptions and exemptions are provided that permit discrimination that would otherwise be prohibited.

The protected attributes in section 6 of the Act, as numbered in the Act, are —

(a) age;
(ab) breastfeeding;
(ac) gender identity;
(b) impairment;
(c) industrial activity;
(ca) employment 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.

Having regard to the terms of reference the Committee considers that the inquiry required the Committee to consider whether there should be any amendments made to:

• the exception and exemption provisions in the Act (see list of relevant provisions in Appendix A); and
• the exemption process in the Victorian Civil and Administrative Tribunal (the ‘Tribunal’), section 83; and
• the statutory authority exception provided by section 69 (discrimination permitted by other Acts).

Having received its terms of reference in December 2008 the Committee was originally requested to provide its report to Parliament by 30 April 2009. However the Committee considered that this was an untenable timetable given the need to engage in a reasonable period of public consultation. The Committee considered that a reporting timetable of October or November 2009. The Committee considered that whilst this timetable was still very ambitious given the scope of the subject matter was, nevertheless achievable.

The Committee determined that an Options Paper should be prepared to inform and enliven the debate within the community and as a basis for receiving informed written submissions relevant to the major options identified for reform, including the preservation of the status quo.

The Committee released the Options Paper in early May 2009 and a period of nearly three months was allowed for receipt of written submissions. Public notification of the inquiry and the inquiry process was published in the press, on the Committee website and through a comprehensive series of direct contact campaigns made by the Committee Secretariat, the Department of Justice, the Victorian Equal Opportunity and Human Rights Commission (the ‘Commission’) and a number of other peak bodies who circulated the Committee’s call for submissions through their own methods of member contact such as newsletter, website or by other means. Further, all persons and organisations that had already made submissions to the previous Department of Justice review (the ‘Exceptions review’) of the same subject matter were advised of the Committee inquiry and were all invited to make additional comments or fresh submissions to the Committee if they wished to do so. Persons or organisations making submissions to the Exceptions review were also advised that their submissions would be considered by the Committee as though they had been made directly to the Committee for the purpose of the inquiry.

In all the Committee has considered over 1800 submissions and many hundreds of comments received in petition form opposing any changes principally in regard to the exemptions concerning religion. A list of submissions is provided in Appendix C.

Given the level of public interest evidenced by the written submissions and petitions the Committee decided to hold public hearings on 4 and 5 August 2009. The list of witnesses including significant or peak bodies who gave evidence to the Committee is shown at Appendix D.

Other inquiries concerning the Equal Opportunity Act 1995


---

1 See page 3.
entitled *An Equality Act for a Fairer Victoria.* The Gardner Review made 93 recommendations to government, in essence recommending that the Act have a clearer focus on eliminating systemic discrimination, and on matters including prevention, compliance and enforcement. However a detailed review of exemptions and exceptions provided in the Act was not included in the terms of reference of the Gardner Review.

The Committee notes that as a consequence of the Gardner Review the government has already acted to amend the Act with respect to the governance of the Commission by introducing the *Equal Opportunity Amendment (Governance) Bill 2008* in December 2008. That Bill received Royal Assent on 7 April 2009 and its provisions commenced on 1 October 2009.

Contemporaneously with the Gardner Review, the Department of Justice commenced a review in respect to the exceptions and exemptions in the Act and released a Consultation Paper in February 2008. The consultation paper sought comments on the desirability of reform and modernisation of the exceptions and exemptions in the Act. In response to this paper over 500 submissions were received by the Department. However prior to the Department releasing a report on its community consultation, the Scrutiny of Acts and Regulations Committee was given a reference on the same subject matter by the Attorney General in December 2008. The Department thereupon transferred the non-confidential submissions received by it to the Committee for its analysis in accordance with the Attorney’s terms of reference. The Committee resolved that these submissions would be treated as though they had been made directly to the Committee. Further the Department of Justice, at the Committee’s request, contacted all persons who made confidential submissions to it and requested authority to release these to the Committee. The Department of Justice also prepared a Background Paper for the assistance of the Committee.

**Evidence available to the Committee**

The Committee has had the assistance of the following reports, submissions and evidence in respect to its inquiry:

2. The Department of Justice’s Consultation Paper for the departmental Exceptions review (February 2008).
3. Submissions made to the Department of Justice in the course of the departmental consultation on Exceptions review (2008).
4. Background Paper prepared by the Department of Justice for the Committee (December 2008).
5. Submissions made to the Committee before and after release of the Committee’s Options Paper (May 2009).
6. Evidence received by the Committee during public hearings on 4 and 5 August 2009.

---

7. Submissions concerning the Committee’s inquiry addressed to the Victorian Premier and Attorney-General (forwarded by the Department of Justice).


Structure of this Report

The Report commences by outlining the Committee’s approach to the inquiry, including its guiding principles. In the body of the report each exception and exemption provision is discussed in the order in which they currently appear in the Act (sections 16 to 84).

Guiding principles for review

Consistency with the Charter of Human Rights and Responsibilities


The Committee observes that whilst there is no legal obligation to amend the Act to comply or be compatible with the Charter, there may be an indirect obligation in two respects. First, the Act could be held by the Supreme Court to be inconsistent with the Charter under sections 36 and 37 of the Charter if a case arose in which the operation of an exception or exemption was in issue. Second, the Charter reflects the expression of legislative policy adopted democratically by the Parliament on behalf of the people of Victoria, and should be considered in determining the content of other legislation, especially when considering human rights.

The Committee notes that the Charter not only protects all the important rights under consideration in the context of the exceptions (non-discrimination, privacy, freedom of association, freedom of religion etc, as does the International Covenant on Civil and Political Rights (‘ICCPR’) on which it is based), but it also provides a mechanism for dealing with conflicts of rights, and an obligation for public authorities not to act contrary to the rights contained in the Charter. The Committee observes that the Commission, which has the responsibility under the Act of receiving complaints, conducting investigations and attempting to resolve matters by conciliation in discrimination complaints, is a public authority within the meaning of Charter, and s. 38 makes it unlawful for the Commission to act in a way that is inconsistent with a human right protected by the Charter.

Charter ss. 4(1) and (2) define ‘public authority’ for the purpose of defining the public bodies that must act in conformity with the Charter.

Charter sections 36 and 37 respectively concern the making of a declaration of inconsistent interpretation by the Supreme Court and the action taken by the relevant Minister as a consequence of such a declaration.

Charter, s. 38.
Providing the clearest guidance possible to the community

The Committee observes that although most exceptions are either compatible with the Charter, or capable of being construed so as to be compatible with the Charter it is aware that their purpose is also to give guidance as to lawful conduct in respect to discrimination related matters.

The Committee considers that law reform must also consider the challenges of enforcement and especially the difficulty that potential complainants may experience in accessing sufficiently expert and affordable legal advice. These factors lead the Committee to reject proposals to repeal all existing exceptions, and to allow exceptions only through a single exception provision expressed in the terms of the test in Charter s. 7(2), or by application to the Tribunal for a temporary exemption through the section 83 process. The Committee considers that where an exception is clearly justified, or can be expressed to identify the specific relevant factors that need to be considered for justification, the most specific statement of the exception is the preferred approach.

The Committee observes that anti-discrimination laws exist in all Australian jurisdictions and notes that as a consequence there is a proliferation of provisions made and approaches taken to specific attributes and areas of activity. These jurisdictional variations lead to confusion and complexity as to obligations under the respective laws. Therefore in undertaking this inquiry the Committee has also been mindful of the desirability, wherever possible, of harmonising provisions with other jurisdictions to minimise jurisdictional complexity.

Reconciling conflicts of rights and the format of exceptions

The Committee observes that the exceptions and exemptions from the Act’s prohibitions on discrimination generally exist to allow rights other than non-discrimination rights to be balanced and respected. The Committee observes that exceptions and exemptions often relate to situations where there are rights that conflict with the right to non-discrimination, such as freedom of association, privacy, or religious freedom, which are also covered by the Charter. The Committee observes that the Charter provides a method for resolving those conflicts through Charter sections 7(2) and (3). The relevant provisions provide –

7. Human rights—what they are and when they may be limited

... 

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.
Charter section 7(2) requires consideration of the five factors in the context of a specific case. Therefore a key consideration for the Committee was whether the provision of broad or blanket exceptions in the Act which do not balance or consider other rights is likely to be inconsistent with the Charter approach to limitation of rights.

The Committee has not adopted rigid rules about what format is appropriate for exceptions, given the importance of providing the clearest guidance as well as ensuring competing rights are balanced effectively. Within these basic guidelines, different formats may be appropriate for different exceptions. For example some blanket exceptions may be acceptable if they are expressed to cover a narrow area of activity or range of attributes, such as section 16 which excepts employees performing domestic work in a private house. The Committee considers that such exceptions should be rare as they preclude consideration of the competing rights involved. In other situations, the need for an exception should be assessed on the facts of the specific case, so that an assessment of the balance of the competing rights can be made in context of the reasonable limitations test set out in Charter s. 7(2).

The Committee’s recommendations and the Equal Opportunity Review (Gardner Review)

Other than the amendments made to the Act concerning governance matters in late 2008 the Committee has conducted this review without knowledge of any further reforms intended to be made to the Act flowing from the recommendations made in by the Gardner Review. The Committee does refer in its report to a number of recommendations made by the Gardner Review where they are relevant to the Committee’s terms of reference. In particular recommendations:

- 2, 3 and 9 which concern general issues – discussed below;
- 4 which concerns the special measures exception – discussed in the context of s. 82;
- 43-46 which concern disability rights – discussed in the context of s. 22.

In addition, the Committee noted some recommendations made by the Gardner Review in areas related to this inquiry that do not require a response from this Committee: They are recommendations –

- 48-50 concerning a proposed new attribute of irrelevant criminal record, and
- 52-53 concerning the use of companion animals for people with a disability.

General Issues

Recommendations 2, 3 and 9, of the Gardner Review, provide:

Recommendation 2

The objectives of the Act should also recognise the Commission’s obligations to protect and promote the human rights contained in the Charter, particularly (but not exclusively) the right to recognition and equality before the law.

---

8 Equal Opportunity Amendment (Governance) Bill 2008, which commenced on 1 October 2009.
Recommendation 3

The Act should reaffirm the requirement in the Charter that all acts and decisions of the Commission be performed and made in a way that is cognisant of, and compatible with, the human rights contained in the Charter.

Recommendation 9

The Act should contain a duty to eliminate discrimination as far as possible.

The Committee endorses these recommendations, which require amendments at the general level rather than in relation to specific exceptions or exemptions. The Committee recommends a number of changes that would contribute to ensuring that the rights in the Act are read consistently with the Charter. The equality rights in the Charter are found in section 8, which provides:

8. Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

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

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

Objective of the Act

Recommendation 1.

Objectives

The Committee recommends that the Act be amended to provide that an objective of the Act is to ensure protection from discrimination to the greatest extent possible consistent with the rights in the Charter of Human Rights and Responsibilities Act 2006.

The Committee notes that the purposes of the Act as currently stated in section 3 do not contain an objective relating to the elimination of discrimination. In light of Charter section 8 the Committee regards it desirable that the Act include a statement that it is one of the objectives of the Act to promote non-discrimination consistently with the rights found in the Charter of Human Rights and Responsibilities Act 2006.

Regular review of exceptions

Recommendation 2.

Review of exceptions and exemptions

The Committee recommends that the Act should require that the exceptions and exemptions in the Act be reviewed at least every 10 years to determine whether they should be retained, amended or repealed.

The Committee observes that the existing exceptions and exemptions have not been reviewed since the Act was adopted in 1995. The Committee observes that while it is the Committee’s preferred structure and content to have exception provisions that are as specific as possible, the Act should
nevertheless provide for regular review to ensure that the provisions continue to reflect community support.

**Competing rights – direction for interpreting exception provisions**

The Committee has concluded that guidance should also be given in relation to balancing non-discrimination rights against other competing human rights or other claims in accordance with the test required by Charter s. 7(2). The Committee’s preferred method of doing this is to adopt guidance on balancing competing rights in s. 12, which states the effect of the exceptions.

12 *Exceptions and exemptions*

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

**Recommendation 3.**

*Exceptions and exemptions*

The Committee recommends that Section 12 be amended to provide:

- the circumstances in which exceptions within one Division of Part 3 may be applied to conduct outside that Division;
- that the onus of proof establishing that an exception is justified rests with the person seeking to rely on the exception; and
- that where there is doubt as to the construction of a provision the reasonable limitations test in Charter s. 7(2) is to be used as a guide to resolve the doubt.

**Should exceptions apply to Divisions of Part 3 other than the one in which they are located?**

The Committee considers that the words “whether or not in the same Division as the provision prohibiting the discrimination” appear to undermine the purpose of creating the specific exceptions in particular Divisions of Part 3 relating to specific areas of activity. The effect of these words is that the exceptions in the various divisions have potential to operate as if they were general exceptions as those in Part 4. The Committee considers such a construction may not have been intended by Parliament.

In the Commission’s submission to the Committee, it discussed the Tribunal cases that have touched on section 12, and the conflicting principles that could apply to its interpretation. It commented, in its experience of the operation of section 12, that:

> it is most likely to be expressly raised … in situations where the alleged discriminatory conduct may be characterised as occurring in more than one public area of life covered by the Act. Examples of these commonly include the intersection between the area of goods and services in connection with clubs, sport, and accommodation, qualifying bodies or education. Additionally, [although the Commission had not experienced this] an ordinary reading of section 12 may also permit a

---

9 Part 3 – *When is discrimination prohibited?* includes ss. 13-68 of the Act, which define the areas to which the prohibitions on discrimination apply, and contain many specific exceptions. Part 4 – *General exceptions to and exemptions from the prohibition of discrimination*, includes ss. 69-84, the general exceptions that apply to all areas of activity.
respondent to rely upon an exception in one area to justify discrimination prohibited under another area – in circumstances where the conduct is only captured by one area...\(^{10}\)

The Commission was concerned that such an interpretation may not have been Parliament’s intention and in any event would now be unlikely to be compatible with the Charter.

The Committee concluded that, the possibility of section 12 being interpreted as applying exceptions to different Divisions was a possible construction of the provision, and its intended application should be clarified.

**Onus of proof**

The Committee notes that as a general principle in law a person seeking to rely on a proviso, defence or exception bears the onus of establishing that it is made out on the balance of probabilities. The Committee notes in the context of discrimination law, the obligation would ordinarily arise where a prima facie case of discrimination has been made out by the complainant. The Committee notes that it has been contended before the Tribunal that the onus of proving an exception did not rest on the party seeking to rely on it, but the Tribunal has held that the general rule applies.\(^{11}\) The Commission supported clarifying in the Act:

> the meaning and operation of section 12 consistent with its original purpose to provide that exceptions are a defence to discrimination and that the person claiming the exception bears the onus of proving the exception applies to their circumstances.\(^{12}\)

On the whole the Committee considers that it is desirable for clarity and consistency that the Act makes it clear that the general principle should apply to all exceptions.

**General guidance in construing the exceptions in the Act**

The Committee considers that it is desirable that the Act provide clear guidance concerning the principles to be followed in balancing non-discrimination rights against other competing human rights to assist effective interpretation of the exceptions and exemptions. The reasonable limitations principle in Charter s. 7(2) could be applied to the Act where appropriate. The Committee’s preferred reform of the provision in the Act is to locate the guidance provision in section 12 of the Charter so that it refers to interpretation of the exceptions by express reference to the reasonable limitations test in Charter s. 7(2).

The Committee notes that this recommendation is also supported by the Gardner Review –

> Recommendation 3

> The Act should reaffirm the requirement in the Charter that all acts and decisions of the Commission be performed and made in a way that is cognisant of, and compatible with, the human rights contained in the Charter.\(^{13}\)

---

\(^{10}\) Victorian Equal Opportunity and Human Rights Commission, submission (7), pp. 6-9.

\(^{11}\) *South v RVBA* [2001] VCAT 207.

\(^{12}\) Op cit. n.10.

When is discrimination prohibited?

Employment

Domestic or personal services in the home

16 Exception—domestic or personal services

An employer may discriminate in determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any person's home.

Recommendation 4.

Domestic or personal services

The Committee recommends that section 16 should be amended to permit discrimination in relation to the provision of domestic or personal services in the home of the employer, the person on behalf of whom the act was done, or a relative of either of those persons.

The Committee considers that retention of section 16 is justified on the basis of the protection of privacy recognised by the Charter and the International Covenant on Civil and Political Rights.

The Committee notes that a person's privacy right in their home is a competing human right that should be considered and balanced against the right to non-discrimination. The Committee notes section 13 of the Charter which provides –

13. Privacy and reputation

A person has the right—

(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; …

The Committee considers that section 16 protects privacy rights against unlawful or arbitrarily interference. However, the Committee is concerned that as currently expressed s.16 may be unnecessarily broad and result in perhaps unintended consequences, by allowing discrimination in relation to “any person's home” and also extending to work “in relation to” the home, not just work in the home. By way of example on its present construction the Committee considers it may authorise an employment agency that provides domestic staff for employment in domestic homes to discriminate in choosing staff even in circumstances where the agency is not acting on the instructions of the home owner. The Committee considers that section 16 should be redrafted and clarified so that the exception more closely follows the privacy right it protects.
Several submissions advocated complete repeal of section 16, however the Committee considers that the reform recommended is more consistent with provisions found in other jurisdictions.

Further the Committee notes that the recommended reform was also favoured by the Commission and the Youth Affairs Council of Victoria.

Genuine occupational requirements

17 Exception—genuine occupational requirements

(1) An employer may limit the offering of employment to people of one sex if it is a genuine occupational requirement of the employment that the employees be people of that sex.

(2) Without limiting the generality of subsection (1), it is a genuine occupational requirement to be a person of a particular sex in relation to employment if—
   (a) the employment can be performed only by a person having particular physical characteristics (other than strength or stamina) that are possessed only by people of that sex; or
   (b) the employment needs to be performed by a person of that sex to preserve decency or privacy because it involves the fitting of clothing for people of that sex; or
   (c) the employment includes the conduct of searches of the clothing or bodies of people of that sex; or
   (d) the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex; or
   (e) the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress.

(3) An employer may limit the offering of employment—
   (a) to people of a particular age, sex or race;
   (b) to people with or without a particular impairment—
       in relation to a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

(4) An employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment.

---

14 Victorian Gay and Lesbian Rights Lobby (678), the Federation of Community Legal Centres (691), JobWatch (670) and the Australian Services Union (743).
15 Submission (7).
16 Submission (751).
**Recommendation 5.**

**Genuine occupational requirements**

*The Committee recommends that section 17 should be replaced with a provision that authorises discrimination in relation to employment on specified attributes where a person cannot perform the inherent requirements of the particular employment. In relation to impairment or physical features, this should be assessed only after any reasonable adjustments have been made.*

The Committee considers that this exception should be retained with appropriate amendments. The Committee notes that although section 17 is narrowly expressed, the test for “genuine occupational requirement” may not be sufficiently clear and sufficient to identify the reasons why a particular requirement in the employment should be regarded as a genuine requirement.

The Committee notes that a similar terminology is used in section 22(1)(b) (‘genuine and reasonable requirements of the employment’) to limit the obligation of an employer to provide special services and facilities to a person with an impairment. The Committee also notes that an equivalent provision exists in section 32(1)(b) in relation to firms and partnerships.

The Committee recommends that the test for ‘genuine occupational requirements’ in section 17 should be replaced with a test for the “inherent requirements of the particular position.” The test for ‘genuine and reasonable requirements’ in sections 22(1)(b) and 32(1)(b) should also be replaced with the ‘inherent requirements of the particular position’ to provide a single standard within the Act.

The Committee considers that the ‘inherent requirements of the employment’ test more appropriately focuses attention on what is a justifiable limitation in respect to discrimination and takes an approach that would sit more comfortably with the test in Charter s. 7(2).

The Committee observes that many stand alone exceptions can be seen to be examples of inherent requirements, such as section 18 relating to discrimination on the basis of political belief or activity in political employment. An amended section 17 could provide some guidance by listing factors relevant to making this assessment, or by giving examples in a manner similar to the ADA (Qld), section 25(1).

The Committee notes that the concept of ‘inherent requirements of the employment’ is well established in both international and federal law. The term is used in the *Disability Discrimination Act 1992* (Cth) s. 21A, and is used in the International Labour Organisation *Convention No 111 Concerning Discrimination in Occupation and Employment*. The Committee notes that this Convention is a schedule to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and is given effect by parts of that Act and by certain provisions found in the *Fair Work Act 2009* (Cth). By way of example section 351 of the *Fair Work Act* dealing with discrimination in employment provides that inability to perform the inherent requirements of the employment is an exception to the prohibition on discrimination in employment. The Committee considers that adopting this terminology in the Act will enhance consistency with the relevant Federal provisions. The Committee observes that consistency in terminology is also a desired approach in respect to reducing the regulatory burden on employers.

---

17 *Convention 111, A 1.2: “Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”*
The Committee acknowledges that the terminology of ‘inherent requirements’ may involve a narrower inquiry than the ‘genuine occupational requirement’ approach as the question would then shift to a consideration of what is necessary to be able to perform the core elements of the employment, rather than considerations of what may be considered merely convenient or habitual. There are two steps involved in the ‘inherent requirement’ test, firstly, there would be a requirement to identify the inherent requirements of the position, and then to assess the ability of the person to carry out those inherent requirements. The Committee observes that in the context of impairment or physical features (such as height) the assessment would take into account any reasonable adjustments required to accommodate the person’s disability (as discussed in relation to section 22 below).

The Committee recommends that an amended provision should give guidance as to appropriate test involved by including a list of factors that are relevant in determining whether a particular requirement is “inherent” to a particular job. The factors could be based on the relevant jurisprudence concerning ‘inherent requirements of the employment’ as may arise for example from cases engaging such issues under the DDA (Cth), Workplace Relations Act 1996 (Cth) and the Fair Work Act 2009 (Cth)). The Committee considers that these factors may include –

- What is the defined position and what range of tasks does the employment necessarily include.
- What skills and qualifications are reasonably required to perform the employment.
- Whether and in what way a particular task is genuinely essential to the employment. This could include consideration of the factors that have commonly been held to justify discrimination in relation to employment, such as public standards of decency, artistic credibility, necessary physical characteristics particular to people of one sex (other than strength or stamina) or the preservation of decency or privacy.\textsuperscript{18}
- Whether the employment could be performed with modifications (reasonable adjustments) being made to accommodate the performance of the employment by a person with an impairment.
- Whether there is any less restrictive alternative.

To which attributes should the exception apply?

The Committee considers that the exception for inability to perform the inherent requirements of the employment should only apply to the attributes and the areas in respect of which it is essential. These can be identified by the need to replace the existing provisions that are in closely related areas, namely, sections 17, 22(1)(b) and 32(1)(b), as well as the need to introduce this exception in relation to the activities of religious bodies (see discussion under section 75(2)). Political employment (s. 18) and Welfare services (s. 19) can also be seen as specific examples of inherent requirements of the employment. At present, a general exception is provided only in relation to sex (s. 17(1)) and impairment (s 22(1)(b) & 32(1)(b)). The exceptions for other attributes are either specific to a particular context, or are relevant only in specific areas of activity. The Committee proposes that the amended exception should apply specifically in relation to the same attributes and areas of activity as the current provisions. Thus, in replacing–

\textsuperscript{18} A list of proposed factors was put forward by JobWatch in its proposal for the inherent requirements exception: see Submission (670) at p. 21-22. It also suggested factors such as “most effective delivery of welfare services to a particular group’ and ‘whether adherence and commitment to the particular beliefs and tenets of a religion are required in order to carry out the fundamental requirements of a position with a religious body or religious school".

- sections 17(1) and (2) – the exception should apply to the attribute of sex in relation to employment involving issues of public decency and personal privacy or the need for physical characteristics of the particular sex. This would cover situations such as the need for a school staff member to supervise a boarding house;

- section 17(3) – the exception should apply to the attributes of age, sex, race and impairment in relation to dramatic or artistic performance, entertainment, photographic or modelling work where it is necessary for reasons of authenticity or credibility. The Committee notes that s. 17(3) which currently extends to “or any other employment” is too wide, and should apply only to selection of performers, and only to the listed types of work or similar employment.

- section 17(4) – the exception should apply to the attribute of physical features in relation to dramatic or artistic performance, photographic or modelling work or any similar employment. The Committee recommends that this exception should apply only to selection of performers, and only to the listed types of work or similar employment.

- sections 22(1)(b) and 32(1)(b) – which apply to the attribute of impairment, in employment and firms and partnerships respectively, the exception should be similar to the equivalent exception in the DDA (Cth) s. 21A, and would operate as a limit to the obligation to make reasonable adjustments that is proposed for an amended section 22. The Committee considers that this would also improve the consistency of the Act with the DDA (Cth).

The Committee considers there is good reason to retain as separate provisions some sections that are specific examples of an inherent requirements exception, such as the attribute of political belief or activity in political employment (s. 18) and to any attribute where it is necessary to most effectively deliver services to members of that group (s. 19), both are discussed elsewhere in this report.

The Committee also recommends that the inherent requirements exception should apply to assist bodies established for religious purposes. In relation to such bodies, the Committee recommends that they should be able to discriminate by not employing a person where they are unable to perform the inherent requirements of the particular position. This protection should be available to religious bodies in relation to the attribute of religious belief, so that discrimination should be allowed where a person without the necessary attribute cannot perform the inherent requirements of the particular employment. An exception for religious bodies could either be located with the relevant religious exceptions or as part of an amended section 17.

‘Irrelevant criminal record’ as an attribute

The Committee considers that if criminal record is introduced in the Act as a protected attribute (as the Gardner Review recommended), provided the attribute is defined as “irrelevant criminal record”, there would be no need for an inherent requirements exception for this attribute. Provided the

---

19 22(1)(b) the other person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of special services or facilities.

20 32(1)(b) the person or partner cannot or could not adequately perform the genuine and reasonable requirements of partnership in the firm even after the provision of special services or facilities.

21 Subsections 25(2) and (3)(b) of the ADA (Qld) provide an example of a genuine occupational requirement exception for religious bodies. Subsection 25(3)(a) is a provision that responds to the concerns of religious bodies about employees who may act in a way contrary to their religious beliefs. Additionally, both apply where the “the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs.” (s. 25(2)(b)).

attribute is defined as ‘irrelevant’ criminal record, then the presence of a criminal record relevant to the position would not be within the scope of the protected attribute and could be used as a basis for lawful discrimination. The Committee considers that there would be no need for an inherent requirements exception, because a requirement of the employment would implicitly be the absence of a relevant criminal record.

The Committee does not consider it necessary to introduce a generalised inherent requirements exception with regard to age, race, political belief or activity, or other attributes. The Committee observes, however, that it is possible that an inherent requirements approach could provide an avenue for considering matters such as those raised in the *Boeing* case relating to workforce ethnic composition and transfer of security related technology.\(^{23}\) Should the changes the Committee has recommended to section 83 in respect to exemptions granted by the Tribunal be enacted it is unlikely that such an exemption could be granted under that section in the future, so an inherent requirements exception may provide an avenue for assessing the nature of any work involving specialised restrictions.

The Committee notes that an employer who seeks to rely on the defence of inability to perform the inherent requirements of the particular employment could be required to provide on request to a person affected, a statement identifying the specific inherent requirement of the employment, why the requirement is inherent, and the basis for the assessment that the person could not perform the requirement.

### Political employment

**18 Exception—political employment**

An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

---

**Recommendation 6.**

**Political employment**

*The Committee recommends that section 18 be retained without amendment.*

The Committee received several submissions that contended that on principle this exception should be repealed.\(^{24}\) These submissions asserted that this exception could be adequately replaced by an ‘inherent requirements of the employment’ type exception. The Committee notes that it is manifestly clear that the political belief or activity of an employee is relevant to political employment, such as in the employment of staff by a Minister or Member of Parliament.

The Committee considers that this exception would be justified as ‘genuine occupational’ or ‘inherent’ requirement of the employment and that where an exception is clearly justified as a specific application of a broader principle, then retention of the more specific exception is justified and provides clarity to the unique circumstances.

---

\(^{23}\) *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption) [2007] VCAT 532. Also see discussion under s. 83 below.*

\(^{24}\) See submissions from Human Rights Law Resource Centre / Public Interest Law Clearing House (676), Federation of Community Legal Centres (691) and JobWatch (670).
Welfare services

19 Exception—welfare services

An employer may limit the offering of employment to people with a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

Recommendation 7.

Welfare services

The Committee recommends that section 19 be amended to allow employment preference a person of the same attribute in delivery of welfare services for people with that attribute when:

- the service provision is intended to and objectively capable of advancing the interest of that group, and
- either employment of persons possessing the same attribute is reasonably regarded as central to the employment involved, or the services can be provided much more effectively and appropriately by members of that group.

The Committee notes that on its present construction section 19 appears to be a blanket exception and that the test in section 19 of whether services can be ‘provided most effectively’ may be unclear and involve a question of judgment that may be difficult to predict. Not every situation that falls within section 19 can necessarily be justified as either a special measure to achieve equality or an inherent requirement of the employment. In some situations it will be an inherent requirement that a person with the same attribute undertake the employment. In other circumstances the employment may be undertaken competently by people with a wide range of attributes, and the question would appear to be whether a preference for a person with the same attribute is appropriate in the context of discrimination law. In situations where the preference amounts to a special measure to reduce disadvantage it may amount to discrimination. The Committee notes that not all situations covered by section 19 necessarily fall into that category.

The Committee does not recommend that this exception be retained in circumstances where it is neither an inherent requirement of the job nor a special measures provision and considers that criteria should be included to determine when the exception is appropriate. The inclusion of criteria would also have the benefit of avoiding the large number of applications currently made to the Tribunal for section 83 exemptions in situations that may well fall under section 19.25

The Committee considers that where the employment preference meets the tests for either a special measure or an inherent requirement of the particular employment, then it would not be discriminatory under the amendments to sections 82 and 17 (respectively) proposed by the Committee.

The Committee considers that it is preferable to have a specific exception relating to employment in welfare services that clarifies the circumstances in which an employment preference is not discriminatory. It considers that merely relying on the general tests for special measures, inherent requirements, and reasonable limitations on rights may not give sufficient guidance. The Committee notes that the Commission proposed that, drawing on Tribunal case law, section 19 should identify

25 See Commission submission (7).
when the employment preference will be considered an inherent requirement of the job. The Commission proposed that in relation to “the creation, advertisement and offering of positions that require a person to be of a particular attribute, to deliver services to particular disadvantaged groups,” an exception should be allowed in the circumstances proposed in the Committee’s recommendation. This would avoid the need to show disadvantage that would otherwise be required to establish a special measure.

The Committee notes that section 19 in its current form is the broadest of the equivalent provisions in any Australian jurisdiction. The provisions in other jurisdictions are conditioned on the attribute being a genuine occupational requirement, and apply only to limited listed attributes. The Committee considers that its recommended amendments to section 19 will bring a measure of consistency to the equivalent provisions in other jurisdictions.

Family employment

20 Exception—family employment

(1) An employer may limit the offering of employment, in a business carried on by him or her, to people who are his or her relatives.

(2) For the purposes of this section a person who holds a controlling interest in a body corporate is to be taken to be—

(a) carrying on the business; and

(b) the employer of the employees—

of the body corporate.

Recommendation 8.

Family employment

The Committee recommends that section 20 be repealed.

The Committee observes that section 20 allows an employer to preferentially offer employment to a relative. This is not an exemption for family businesses or small businesses from the operation of the Act. However the Committee considers that the section heading may be misleading, as it may be assumed that it is an exception relating to family businesses. The Committee observes that the true construction of the section is to allow positive selection on the basis of relationship, and not exclusion or disadvantage on the basis of an attribute. The Committee considers that section 20 has no useful purpose as it is unlikely that discrimination based on a protected attribute could be made out in such a case. Employment of family members is likely to occur without public notification or advertising and any discrimination or equal opportunity concerns are unlikely to arise.

Small Business

21 Exception—small business

(1) An employer may discriminate in determining who should be offered employment if the employer employs no more than the equivalent of 5 people on a full-time basis (including the people to whom employment is offered).
(2) In ascertaining the number of people employed for the purposes of subsection (1), the following people are not included—

(a) relatives of the employer; and

(b) people employed to provide domestic or personal services in, or in relation to, the employer’s home.

(3) For the purposes of this section—

(a) a person who holds a controlling interest in a body corporate is to be taken to be the employer of the employees of the body corporate;

(b) a body corporate is to be taken to be the employer of the employees of any of its related bodies corporate (within the meaning of section 9 of the Corporations Act);

(c) full-time basis means a minimum of 30 hours a week.

Recommendation 9.

Small business

*The Committee recommends that section 21 be repealed.*

The Committee observes that section 21 overrides the right to non-discrimination in selection for employment within small businesses.

The Committee considers that it is almost impossible for an applicant for employment to know when this exception is engaged as, for example, the test for the number of employees in the business may be impossible for the applicant to ascertain. The difficulty for a person to correctly characterise the legal status of the small business (i.e. 5 full-time positions) may of itself promote discrimination and provide a screen for small business to hide behind and promote an over reliance on this exception.

Further the Committee considers that section 21 is misleading in two other respects. First, the exception is popularly understood as meaning a broad exemption from compliance under the Act when in fact a closer reading of the provision provides that the exception applies only to the selection of employees, providing that ‘in determining who should be offered employment’ the employer may discriminate. Secondly, the Committee notes that there is no equivalent of section 21 in any of the Commonwealth anti-discrimination laws (RDA, SDA, DDA and ADA) that apply in Victoria and that as a consequence a discriminatory selection process could still be the subject of a complaint under the relevant Commonwealth law. As a consequence, the Committee considers that section 21 could be misleading to small businesses by erroneously suggesting that they are immune from a discrimination claim in relation to selection for employment on the grounds of race, sex, impairment or age, or as mentioned before, immune in all areas of activity including selection.

The Committee received a submission and evidence opposing any change to this section from the VACC expressing concern as to the regulatory burden that small business operators would have to deal with if the exception were to be repealed.\(^{26}\) However in contrast VECCI in it’s evidence to the Committee expressed no objection to the sections repeal.\(^{27}\)

\(^{26}\) Transcript of evidence, Victorian Automobile Chamber of Commerce, 4 August 2009.

\(^{27}\) Transcript of evidence, Victorian Employers Chamber of Commerce and Industry, 4 August 2009.
The Committee notes that the basic principle in discrimination law is the prohibition of less favourable treatment on the basis of an attribute and that this has been law in this State for over thirty years. The principle already applies under the Act to every decision made by small businesses other than the selection of an employee, and to all other activities under Commonwealth law including selection on the grounds of race, sex, disability and age. The Committee considers that it is now appropriate to apply the basic non-discrimination principle to all businesses in Victoria and to all the activities of small businesses.

Special services or facilities

22 Exception—special services or facilities

(1) An employer may discriminate against another person on the basis of impairment in any of the areas specified in section 13 or 14 if—
   (a) in order to perform the genuine and reasonable requirements of the employment—
      (i) the other person requires or would require special services or facilities; and
      (ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or
   (b) the other person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of special services or facilities.

(2) In determining whether or not a person can or could adequately perform the requirements of the employment, all relevant factors and circumstances must be considered, including—
   (a) the person’s training, qualifications and experience;
   (b) the person’s current performance in the employment, if applicable.

Recommendation 10.

Special services or facilities

The Committee recommends that sections 22, 32, 39 and 46 be incorporated in a general provision that creates an express duty to make reasonable adjustments to accommodate a person with an impairment or physical feature. The duty should apply in all areas covered by the Act, including the provision of accommodation. The scope of the duty should –

1. require reasonable adjustments to be made where the cost or disruption involved would not be disproportionate and identify the factors that are relevant to assessing the reasonableness of the adjustments; and

2. exist only where making the adjustments would allow the person to perform the inherent requirements of the job, or to benefit from the education, service or accommodation. If the person could not perform the requirements of the employment or benefit from the education, accommodation or service provided were the adjustments to be made, the discrimination would be permitted.

The Committee recommends that for consistency the duty to make reasonable adjustments should also extend to the attributes of pregnancy and carer’s responsibilities.
Duty to make Reasonable Adjustments

The Committee observes that the Act currently provides for a person with a disability by reference to their need for ‘special services or facilities’ or a ‘special manner of providing a service’ in specific areas of activity including employment (s. 22), firms and partnerships (s. 32), education (s. 39) and provision of services (s. 46). The Act contains no provision requiring adjustments to be made for impairment in the area of accommodation. The Committee considers that there would be advantage in clarifying the duty to make reasonable adjustments for a person with an impairment or physical feature. Accordingly the Committee recommends the adoption of an express duty to make reasonable adjustments to accommodate a person with an impairment or physical feature. 28 The following sections would be affected by such a provision –

- Section 22 – Special services or facilities in employment;
- Section 32 – Special services and facilities in firms and partnerships;
- Section 39 – Special services or facilities in education; and
- Section 46 – Special manner of providing a service.

The Committee notes the approach to reasonable adjustments for a person with an impairment proposed by the Commission 29 in its submission, that sections 22, 32, 39 and 46 be amended to provide an express reasonable adjustments obligation, and should as guidance list in the Act factors relevant to assessing reasonableness of adjustments. The Committee recommends that whether these sections are consolidated to operate as one provision or kept as separate provisions, they should nevertheless be expressed to make clear that there is a duty to make reasonable adjustments to accommodate the needs of people with an impairment or physical feature, and that this duty should also apply to the attributes of pregnancy and carer’s responsibilities.

The Committee considers that the duty should apply in relation to all areas covered by the Act, including accommodation.

How should the duty be expressed?

The Committee observes that a similar duty is imposed by sections 13A, 14A, 15A and 31A of the Act relating to carer’s responsibilities, which prohibit an employer from unreasonably refusing to accommodate the caring responsibilities of an employee. The Committee notes that those provisions clearly identify the employers’ obligations and the relevant factors to be considered, however the duty of an employer is expressed as a double negative, a duty not to unreasonably refuse to accommodate. The Committee considers that it would aid the construction of the provision if the expression could be expressed as a positive duty in the context of impairment. 30

---

29 Submission (7).
30 Recent amendments to the DDA (Cth) have also made clear that there is an express duty to make reasonable adjustments in that Act: see definition of ‘reasonable adjustments’ in s. 4(1) and its use as part of the definitions of discrimination in ss. 5(2) and 6(2).
What should be the limits of the duty?

**Adjustments that are reasonable**

The Committee recommends that the duty should extend only to the provision of adjustments that are reasonable having regard to a number of factors. The Committee considers that adjustments that require disproportionately high expenditure or disruption would clearly be unreasonable.\(^{31}\) Factors relevant to assessing the reasonableness of an adjustment should be listed in each section where an exception is provided, Alternatively if the relevant exceptions are consolidated (as proposed by the Committee) the factors could be listed in a general section. The factors to be considered may include matters such as the relative resources of the parties; the costs and nature of the activity and the adjustment needed; the risks and benefits to each party; the proportionality of the adjustment required to the cost and disruption; and the benefit to be gained.\(^{32}\)

The Committee considers that the limit to the duty to make reasonable adjustments should be consistent with the reasonable limitations test in Charter s. 7(2).

The Committee observes that the corresponding limit in the DDA (Cth) is ‘unjustifiable hardship,’ however the Committee prefers the test of ‘reasonable adjustments’ in the Act, to emphasise that the adjustments required are only those that are reasonable in a particular context. The Committee considers that the approach of reasonableness and proportionality is more consistent with the reasonable limitations test in Charter s. 7(2).

**Inherent requirements of the particular employment**

The Committee recommends that the defence of inability to perform the inherent requirements of the employment (referred to in section 17) would, if the Committee’s recommendations are accepted, replace the current defence of inability to perform the ‘genuine and reasonable requirements’ of the employment in sections 22 and 32. For the reasons given under section 17 of this report the Committee considers that ‘genuine and reasonable requirements’ of the employment should be the appropriate test.

The Committee observes that similar to the scope of the ‘unjustifiable hardship’ defence in the DDA (Cth), the defence should be available only in relation to selection, terms and conditions of employment and dismissal; to ensure consistency with the provisions adopted in the Act with the DDA (Cth) in the areas of employment that are covered by the obligation to make adjustments.\(^{33}\)

The Committee notes that the inherent requirements limitation to the duty to make reasonable adjustments would apply to sections 22 and 32, which provide similar exceptions relating to employment and to firms and partnerships.

---


\(^{32}\) The Commission listed proposed factors in its submission (7).

\(^{33}\) See DDA (Cth) s. 21A(4).
Setting reasonable terms and conditions of employment or partnership

Reasonable terms of employment

23 Exception—reasonable terms of employment
An employer may set reasonable terms or requirements of employment, or make reasonable variations to those terms or requirements, to take into account—
(a) the reasonable and genuine requirements of the employment;
(b) any special limitations that a person’s impairment or physical features imposes on his or her capacity to undertake the employment;
(c) any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment.

Reasonable terms of partnership

33 Exception—reasonable terms of partnership
A firm, or a person intending to establish a firm, may set reasonable terms or requirements of partnership, or make reasonable variations to those terms or requirements, to take into account—
(a) the reasonable and genuine requirements of partnership in the firm;
(b) any special limitations that a person’s impairment or physical features imposes on his or her capacity to undertake the obligations of partnership in the firm;
(c) any special services or facilities that are required to enable him or her to undertake those obligations or to facilitate the performance of those obligations.

Recommendation 11.

Reasonable terms of employment and reasonable terms of partnership

The Committee recommends that sections 23 and 33 be repealed.

The Committee considers that sections 23 and 33 will be redundant if the Committee's recommendations are accepted in respect to introducing an express duty to make reasonable adjustments in the context of employment and firms and partnerships (sections 22 and 32 – Recommendation 10.) with an exception of inability to perform the inherent requirements of the employment as recommended in section 17.

The Committee notes that the Tribunal has held in Davies v State of Victoria (Victoria Police) (VCAT, unreported, 5 January 2000), that sections 23(b) and (c) of the Act authorise only requirements or variations that assist the impaired person to access employment, but not requirements or variations that disadvantage them. In view of the Committee’s recommendations that a general obligation to make reasonable adjustments should be adopted (section 22 – Recommendation 10.), and that there should be an exception where the person is unable to perform the inherent requirements of the employment (section 17 – Recommendation 5.), there appears to be no need to retain sections 23

and 33. Any variations to terms and conditions will be implicit in the process of providing reasonable accommodation for the person, where it applies.

The Committee notes that concern was expressed in one submission whether the repeal of section 23 would prevent an educational institution from requiring staff to be able to discharge the institution’s duty of care for supervision of its students. The Committee considers that the ability to carry out such a central aspect of teacher’s responsibilities would be an inherent requirement of the employment, and would therefore be protected by the proposed inherent requirements provision.

The Committee observes that section 33 parallels section 23 in the area of firms and partnerships, and the Committee recommends that this exception should also be repealed for the same reasons that apply to sections 23. The Committee considers that in view of its recommended changes to sections 17, 22 and 32, section 33 will also be redundant.

**Standards of dress and behaviour in employment**

___

**24 Exception—standards of dress and behaviour**

An employer may set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.

---

**Recommendation 12.**

*Standards of dress and behaviour set by employer*

The Committee recommends that section 24 should be amended to remove the reference to behaviour.

The Committee further recommends that a dress or appearance requirement should be subject to the reasonable limitations test in Charter s. 7(2).

---

The Committee notes that section 24 covers issues that are normally dealt with in the context of an employment contract and in industrial relations law. The Committee observes that a general clothing or appearance requirement by an employer is unlikely to be discriminatory unless the requirement was directly based on an attribute, or has an unreasonable disproportionate impact on a group with a particular attribute. The Committee considers that if a requirement has a disproportionate effect the indirect discrimination provision of the Act would direct inquiry to inquire whether the requirement was reasonable.

The Committee observes that no equivalent exception is provided in other Australian jurisdictions.

However, the Committee considers that as a re-statement of the common law and for the avoidance of doubt the exception should be retained with amendment. The Commission noted in its submission that it received a number of inquiries about dress and appearance, and considers that section 24 has a useful educative role that would justify its retention.

---

35 The Association of Independent Schools Victoria, submission (701), argued against change to s. 23 on the basis that schools need to be able to ensure that their staff can carry out the school’s duty of care to provide adequate supervision of students.

36 See recommendations 5. and 10.

37 Submission (7).
The Committee considers that section 24 should not extend to standards of behaviour and considers that the issue of behaviour is more appropriately dealt with under employment law rather than in discrimination law.

The Committee considers that section 24 should be made expressly subject to the reasonable limitations test in Charter s. 7(2), so that competing human rights, such as the right to religious observance (for example in the wearing of religious clothing) should not be excluded from consideration without a reasonable limitations analysis.

The Committee notes that employer dress requirements can limit other important rights protected by the Charter, for example by suppression of religious clothing, or requirements to dress in sexually stereotyped ways or in ways that allow the exploitation of employee's sexuality which may be contrary to rights of religious freedom or sex equality. The Committee recommends that the standard of reasonableness should be explicitly subject to a reasonable limitations analysis under the Charter, to ensure that, for example, an employer cannot unreasonably refuse to accommodate religious clothing or other competing rights. Clubs Victoria in its submission noted that employers often needed guidance to understand what the test of ‘reasonableness’ requires employers to consider. The proposed test would provide guidance by incorporating the five factors that identify the issues that employers should consider.

The Committee notes that concern was expressed in some submissions that it was necessary to retain section 24 to allow a religious school to have a dress code that requires teachers dress consistently with religious beliefs, or modestly. The Committee considers that these concerns are protected by the Committee’s recommendations and are also protected by the religious exceptions in sections 75 to 77.

Care of Children

25 Exception—care of children

(1) Nothing in section 13 or 14 applies to discrimination by an employer against an employee or prospective employee if—

(a) the employment involves the care, instruction or supervision of children; and

(b) the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children; and

(c) having regard to all the relevant circumstances, including, if applicable, the conduct of the employee or prospective employee, the employer has a rational basis for that belief.

Recommendation 13.

Care of children

The Committee recommends that section 25 be retained without amendment.

The Committee acknowledges the importance of protecting children from physical and emotional harm, and as a result decided that this provision should not be repealed.

---

Concerns about this were expressed by the Sikh Interfaith Council in its submission and evidence to the Committee, and by the Islamic council of Victoria at the Committee hearings on 5 August 2009.
The Committee also observes that since section 25 was first enacted there has been extensive regulation in Victoria in the area of working with children specifically in regards to the teaching profession and generally with the enactment of the Working with Children Act 2005. Nevertheless, the Committee believes that section 25 still has a role to play in extending the protection of children from harm.

Compulsory retirement of judicial officers

26 Exception—compulsory retirement of judicial officers

Nothing in this Division applies to the compulsory retirement on the basis of age of, or the failure to appoint a person on the basis of age as—

(a) a judge of the Supreme Court or the County Court; or

(b) a magistrate or bail justice.

Recommendation 14.

The Committee recommends that section 26 should be repealed.

If it is not immediately feasible to repeal the section the Committee recommends that further consideration be given to an alternative process that may be implemented in respect to the question of compulsory retirement of judicial officers.

The Committee notes that the Chief Justice of Victoria, The Honourable Marilyn Warren forwarded a copy of her submission to the recent Senate Inquiry into Australia’s Judicial System and the Role of Judges. In relation to compulsory retirement of judges, the Chief Justice commented:

The existence of a compulsory retirement age has been accepted for a number of years as the means for determining the outer limit of the judicial career. What that outer limit should be has been the subject of further consideration in recent times. This is in part a result of broader social trends of increased life expectancy and later retirement. In Victoria it has also been prompted by the experience in the Supreme Court which is facing the loss of a number experienced judges in a short period of time, posing challenges at an organisational level. When it became clear a number of judges reaching retirement age would happily continue, the Court was prompted to consider whether reinstatement of

39 Submission (7).
40 Submission (131).
the 72 age of compulsory retirement would be appropriate given the organisational benefits and financial savings.

The Committee considers that if the repeal of this exception is not immediately feasible then the question of dealing with a compulsory retirement age for judicial office holders should be subject to further inquiry and consideration.

Youth wages

27 Exception—youth wages

An employer may pay an employee who is under the age of 21 years according to the employee’s age.

Recommendation 15.

Youth wages

The Committee recommends that section 27 should be amended to allow for trainee wages related to the level of experience or training of a person without reference to their age.

The Committee notes that support for removal of the reference to age of a person was expressed by the Commission, the Youth Affairs Council of Victoria, and the Australian Services Union.

The Committee notes that at the public hearings, the VACC expressed support for the retention of section 27 without amendment, contending that youth wages were an important basis on which its small business members extended opportunities to young people to enter the workforce, and that the automotive industry has many small businesses that are very sensitive to wage costs.

The Committee considered that since the legal age of majority has been 18 years of age for many years in this and other jurisdictions that the reference to 21 years is now anachronistic in seeking to attach legal consequences to an age between 18 and 21 years.

The Committee further observes that repealing section 27 or replacing it with a provision allowing genuine trainee wages would bring Victorian law into line with the position in NSW, WA, SA and the NT, none of these jurisdictions have a provision authorising payment of youth wages according to age. The Committee acknowledges that wage regulation is now largely a federal matter within Victoria and that the Age Discrimination Act 2004 (Cth) does authorise payment of youth wages according to age: s. 25. The Committee considers there is no need for Victorian law to authorise youth wages based on age discrimination.

The Committee further considers that allowing wages to be paid by reference to experience would also mean that the benefit of entry-level wages would be open to employees of any age.

41 Submission (7).
42 Submission (751).
43 Submission (743).
44 Transcript of evidence, Victorian Automotive Chamber of Commerce, 4 August 2009.
Further, the Committee considers that a provision expressed as allowing the payment of genuine trainee wages or wages related to experience would be Charter compatible. Such a provision would be one based on the recognition of skills and experience and not merely based on an arbitrarily prescribed age. The Committee further observes that a youth wage provision based on age that failed to take into account skills and experience may now also be incompatible with the right to equality in section 8 of the Charter.

**Early retirement schemes**

27A Exception—early retirement schemes

(1) 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 any eligibility of the employee to receive a retirement benefit from a superannuation fund.

(2) Subsection (1) applies, and is deemed always to have applied, to anything done by an employer on or after 1 January 1996.

**Recommendation 16.**

*Early retirement schemes*

The Committee recommends that further research and consideration be given to the area of early retirement schemes with a view to assessing the feasibility of repealing the current exception.

The Committee considers that section 27A appears to involve age discrimination, and its justification is unclear. The Committee recommends that further research and consideration be given to the need to retain this exception in its current form.

The Committee considers that age related limits on benefits to employees may be unreasonable limitations on the right to equal protection and non-discrimination. The Committee notes that it received several submissions, including from the Commission, supporting either repeal or further research with a view to test the need to retain this exception.

The Committee observes that other jurisdictions do not provide for a similar provision.

**Gender identity**

27B Exception—gender identity

(1) An employer may discriminate against another person on the basis of gender identity in any of the areas specified in section 13 or 14 if—

(a) the person does not give the employer adequate notice of the person’s gender identity; or

(b) the person gives the employer adequate notice of the person’s gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

45 Submission (7).

46 Including the Age Discrimination Act 2004 (Cth).
(2) In determining whether or not it is unreasonable for the employer not to discriminate against the person, all relevant facts and circumstances must be considered, including—

(a) the cost to the employer of not discriminating;
(b) the feasibility of the employer not discriminating;
(c) the financial impact on the employer of not discriminating;
(d) the financial circumstances of the employer;
(e) the impact of the proposed discrimination on the person;
(f) any other relevant factors.

Recommendation 17.

Gender identity

The Committee recommends that the exception in respect to ‘gender identity’ in section 27B should be repealed.

The Committee notes that section 27B was introduced in 2000 when the gender identity provisions of the Act were adopted.  

The Committee notes that it received no submissions in respect to the retention, amendment or repeal of this exception.

The Committee notes that there are no equivalent provisions in any other jurisdiction, even in those jurisdictions that make specific provisions concerning transgender discrimination.

Further the Committee considers that the provision in its current form may be incompatible with the Charter as the implication of the provision appears to be that there may be circumstances in which it is reasonable for an employer to discriminate against a transgender person on the basis of their gender identity, whether or not they give notice of their gender identity to their employer, and regardless of whether any competing rights are involved.

The Committee considers that given its recommendations concerning ‘inherent requirements’ (eg. section 17) there appears to be no logical basis for retention of this provision.

Single sex accommodation

28 Exemption—single sex accommodation

47 Gender identity is defined in s. 4(1) of the Act to cover transgender and intersex people as follows:

‘gender identity’ means—
(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 that sex, whether by means of medical intervention, style of dressing or otherwise; or
   (ii) by living, or seeking to live, as a member of that sex.
Scrutiny of Acts and Regulations Committee

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

Recommendation 18.

Single sex accommodation

The Committee recommends that section 28 be retained unamended.

The Committee notes that it did not receive any submission seeking the retention of this provision. However, the Committee notes the concern expressed by the Federation of Community Legal Centres that transgender issues needed to be resolved in relation to section 27B and a number of other sections involving sex differentiation. Matters relevant to transgender and intersex issues are referred to later in this report (refer to the chapter “Other Matters”).

Employment-related areas

Establishing firms and partnerships

30 Discrimination in establishing firms

A person who intends to establish a firm comprising 5 or more partners must not discriminate against another person in the terms on which the other person is invited to become a partner.

31 Discrimination by firms

(1) This section applies to firms comprising 5 or more partners.

(2) A firm to which this section applies must not discriminate against a person—

(a) in deciding who should be invited to become a partner;

(b) in the terms on which the person is invited to become a partner.

(3) A firm to which this section applies must not discriminate against a partner of that firm—

(a) by denying or limiting access by the partner to any benefit arising from partnership in the firm;

(b) by expelling the partner from the firm;

(c) by subjecting the partner to any other detriment.

Recommendation 19.

Discrimination in establishing firms and discrimination by firms

The Committee recommends that sections 30 and 31 be retained unamended.

The Committee notes that sections 30 and 31 are provisions that are equivalent in relation to firms and partnerships to the exception for small businesses in section 21

48 Submission (691).
The Committee considers that a partnership arrangement is distinct from an employer/employee relationship. In particular a partnership involves the undertaking of joint legal liability by the partners and each of them, jointly and severally. The Committee observes that such legal relationships in a small firm involve important factors such as mutual confidence, trust and matters of partner compatibility and that these and other personal factors will largely determine entry to a small partnership. The Committee considers that it would be unreasonable to require partners not to give prominence to these factors in selecting a person to be a partner of a small firm of less than 5 partners.

The Committee notes that the current exception has counterparts in other jurisdictions other than in Tasmania, the ACT and the NT.

**Special services and facilities**

32 Exception—special services or facilities

(1) A firm, or a person intending to establish a firm, may discriminate against a person seeking admission to the firm as a partner or against a partner in the firm on the basis of impairment if—

(a) in order to perform the genuine and reasonable requirements of partnership in the firm—

(i) the person or partner requires or would require special services or facilities; and

(ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or

(b) the person or partner cannot or could not adequately perform the genuine and reasonable requirements of partnership in the firm even after the provision of special services or facilities.

(2) In determining whether or not a person can or could adequately perform the requirements of partnership, all relevant factors and circumstances must be considered, including—

(a) the person’s training, qualifications and experience;

(b) the person’s current performance as a partner, if applicable.

The Committee observes that section 32 relating to firms and partnerships is equivalent of the exception in section 22 applying to employment, and reform of this provision is covered by the recommendations made in relation to section 22.

The Committee observes that the current provision creates an implied duty to provide reasonable special services or facilities to take account of the special needs of a person with an impairment. The provision also provides that no duty exists if the person would still be unable to perform the “genuine and reasonable requirements” of the firm or partnership were the special services or facilities to be provided.

The Committee’s recommendation in relation to ss. 22, 32, 39 and 46 proposes to replace the test, with a duty to make reasonable adjustments for a person with an impairment or physical feature, with

---

49 See Recommendation 10.
an additional defence provided to an employer where a person is unable to perform the ‘inherent requirements’ of the employment.\textsuperscript{50}

**Reasonable terms of partnership**

33 Exception—reasonable terms of partnership

A firm, or a person intending to establish a firm, may set reasonable terms or requirements of partnership, or make reasonable variations to those terms or requirements, to take into account—

(a) the reasonable and genuine requirements of partnership in the firm;

(b) any special limitations that a person’s impairment or physical features imposes on his or her capacity to undertake the obligations of partnership in the firm;

(c) any special services or facilities that are required to enable him or her to undertake those obligations or to facilitate the performance of those obligations.

In respect to section 33 refer to recommendation 11.

The Committee observes that section 33 relating to firms and partnerships is the equivalent to section 23 which applies to employment, and should be repealed as the Committee has recommended in the context of s. 23.

The Committee considers that sections 23 and 33 would become redundant if the Committee’s recommendations are adopted to introduce an express duty to make reasonable adjustments (See recommendation 10. in relation to s. 22 and 32) with an exception for inability to perform the inherent requirements of the employment (refer also to recommendation 5. in relation to section 17).

**Reasonable terms of qualification**

36 Exception—reasonable terms of qualification

A qualifying body\textsuperscript{51} may set reasonable terms in relation to an occupational qualification, or 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 practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates.

Recommendation 20.

The Committee recommends that section 36 be amended to require any reasonable terms of occupational qualification or reasonable variations, to be consistent with the reasonable limitations test in Charter s. 7(2).

The Committee observes that section 36 differs from the provisions in sections 23 and 33, which refer directly to setting and varying reasonable terms or requirements of employment by employers (s. 23)

\textsuperscript{50} See Recommendation 5.

\textsuperscript{51} A ‘qualifying body’ is defined in the s. 4(1) of the Act as ‘a person or body that is empowered to confer, renew or extend an occupational qualification.’
or by firms or partnerships (s. 33). However section 36, unlike sections 23 and 33 does not directly affect the employment relationship, but instead refers to the setting of terms for qualifications, and permits the making of reasonable terms and variations for a person with an impairment or physical features by a qualifying authority.

Whilst the Committee considers that section 36 should be retained, it considers that the exception should be expressly conditioned on the setting of reasonable terms and variations that are consistent with the reasonable limitations test in Charter s. 7(2).
Education

Educational institutions for particular groups

38 Exception—educational institutions for particular groups

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

(a) people who are not of the particular sex, race, religious belief, age or age group; or
(b) people who do not have a general, or the particular, impairment —

from that institution or program.

Recommendation 21.

Educational institutions for particular groups

The Committee recommends that section 38 be retained unamended.

The Committee notes that submissions contending that race should be retained in section 38 were made by the Rabbinical Council of Victoria \(^{52}\) and the B’nai B’rith Anti-Defamation Commission. \(^{53}\) The Rabbinical Council contended that as Judaism is transmitted through the maternal line, not being solely a matter of self-identification (unless a conversion process is completed), it may be necessary to rely on descent in some cases. The B’nai B’rith Anti-Defamation Commission noted that “the ability for children to be educated within their own culture religion is necessary for minority groups to have genuine equal opportunity, and that a group should not be required to prove disadvantage nor to define itself as disadvantaged in order to access this exemption”. Further the submission from Deakin University \(^{54}\) contended that retention of race in section 38 may be necessary to protect the Institute for Koorie Education.

The Committee observes that while all State and Territory jurisdictions have a similar exception concerning education for particular groups, they all cover more limited grounds, and none include race as an attribute.

The Committee considers that some situations covered by section 38 would be justified as special measures designed to achieve equality. This may be the case for special educational provisions for disadvantaged communities such as indigenous people. The Committee observes that not all applications of the s. 38 exception are likely to amount to special measures. Nevertheless, the Committee considers that the Victorian community accepts religious and culturally based schools for minority groups, even where those groups are not disadvantaged. The Committee therefore does not recommend the removal of race as a ground in section 38.

\(^{52}\) Submission (553).
\(^{53}\) Submission (398).
\(^{54}\) Submission (746).
The Committee observes that as currently provided section 38 allows a school to be run “for a particular race”, so on that construction does not appear to permit exclusion of a particular race or races from a school. Section 38 authorises only selective inclusion, not selective exclusion, and this limits the possibility that it could be used to target specific groups in a discriminatory way on the basis of race.

Special services or facilities

39 Exception—special services or facilities

An educational authority may discriminate against a person on the basis of impairment if—

(a) in order to participate or continue to participate in, or to derive or continue to derive substantial benefit from, the educational program of the authority—
   (i) the person requires or would require special services or facilities; and
   (ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or

(b) the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational program even after the provision of special services or facilities.

Recommendation 22.

Special services or facilities

The Committee recommends that section 39 should be amended to provide a duty to make reasonable adjustments for a person with an impairment or physical feature. However, the duty would not apply if the person would derive only minor benefit from the education if the reasonable adjustments were to be made.

The Committee recommends that the exception should incorporate reference to the educational authority’s obligation to comply with the Disability Standards for Education 2005 made under the Disability Discrimination Act 1992 (Cth).

The Committee notes that in the context of education, section 39 is the equivalent to sections 22 and 32 which respectively deal with employment and firms and partnerships. All three sections currently provide an implied duty to make adjustments for a person with an impairment by the provision of special services or facilities.

The Committee recommends that section 39 be amended to impose an express duty to make reasonable adjustments for a person with an impairment or physical feature in education. This recommendation is consistent with those recommended by the Committee in respect to sections 22 and 32 (Recommendation 10).

However, the Committee considers that the duty should not apply where the person would derive only minor benefit from the education if the reasonable adjustments were to be made. The Committee considers that the current limitation test in section 39 of inability to derive ‘substantial benefit’ may be an overly stringent test that may unreasonably deny a student access to education where the student may still derive some benefit after reasonable adjustments are made. The Committee proposes that
the test should instead exclude those situations where the benefit to be derived by the student is too small or disproportionate to the expense and disruption involved.

The Committee observes that in the area of education and disability, the Federal Disability Standards for Education 2005 apply in Victoria and the provision should not create a standard for schools at variance or inconsistent with those standards. The Committee further notes that section 22 of the DDA (Cth) relating to disability discrimination in education does not contain a test of an inability to ‘derive substantial benefit’ from education, or any such equivalent.

The Committee notes the concerns expressed by the AISV\(^{55}\) in respect to the position of private schools with modest financial resources. However, the Committee notes that the proposed duty to make reasonable adjustments is limited to steps that are reasonable given the specific resources (financial and human) available to a particular school.

### Standards of dress and behaviour in schools

40 Exception—standards of dress and behaviour

(1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.

(2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard.

Recommendation 23.

Standards of dress and behaviour in schools

The Committee recommends that section 40 should be amended to remove reference to behaviour.

The Committee further recommends that the exception should provide that in assessing the reasonableness of the standards set by an educational authority, the following factors should be considered –

- whether the views of the school community have been taken into account in adopting the standards of dress or appearance and whether the standards are subject to any review, and
- whether the standards are a reasonable limitation on other rights having regard to the test in Charter s. 7(2).

The Committee notes that there is no equivalent of section 40 in any other Australian jurisdiction.

The Committee considers that as in the case of section 24 (dress standards in employment) a provision such as this may play an educative role in clarifying the law. However, the Committee considers that as currently drafted the section is unnecessarily wide and may not be compliant with the reasonable limitations test in Charter s. 7(2).
Further, the Committee considers that the provision should not extend to standards of behaviour. The Committee observes that educational authorities have the power to set reasonable behaviour or standards of conduct for all students. It would appear to the Committee that the only need for a provision such as section 24 to include behaviour would be where the standards of behaviour were based on a protected attribute, or where any standards might have a disproportionate effect on a person with a particular attribute. The Committee observes that no example was suggested in any submission that would require behaviour standards based on an attribute.

The Committee notes that two areas of concern were raised in submissions. First, the Sikh Interfaith Council\textsuperscript{56} and the Islamic Council of Victoria\textsuperscript{57} expressed concern that section 40 could be used to prevent students from adopting dress or appearance required as part of their religious observance. Secondly, concern was expressed in a number of submissions relating to gender-based uniform requirements in schools, especially requirements that female students can only wear dresses or skirts.

The Committee considers that the test in Charter s. 7(2) should apply to assessing what is a reasonable standard for dress and appearance and that clearer guidance could be given in section 40 by including a list of relevant factors based on the Charter s. 7(2) test.

The Committee notes that concerns were expressed by several religious schools contending that the exception provision was important to their ability to create and model the values and beliefs of their community. The Committee considers that the values and beliefs of the particular school would be a relevant factor in assessing the reasonableness of the dress and appearance rules adopted in that school. The Committee notes that schools will also have additional protection under the religious exceptions in sections 75(2) and 76, if the Committee’s recommendations are enacted.

**Age based admission schemes and age quotas**

\textit{41 Exception—age-based admission schemes and age quotas}

An educational authority may select students for an educational program on the basis of an admission scheme—

(a) that has a minimum qualifying age; or

(b) that imposes quotas in relation to students of different ages or age groups.

**Recommendation 24.**

\textit{Age based admission schemes and age quotas}

\textbf{The Committee recommends that section 41 be retained unamended.}

The Committee did not receive any submission in relation to this exception, and for reasons that are self-evident and based on reasonable and defensible public policy, recommends that it be retained as an exception in its current form.

\textsuperscript{56} Transcript of evidence, Sikh Interfaith Council of Victoria, 5 August 2009.

\textsuperscript{57} Op cit, Islamic Council of Victoria, 5 August 2009.
Provision of goods and services and disposal of land

Insurance

43 Exception—Insurance

(1) An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if—

(a) the discrimination is permitted under the Sex Discrimination Act 1984 or the Disability Discrimination Act 1992 of the Commonwealth; or

(b) the discrimination is based on—

(i) actuarial or statistical data on which it is reasonable for the insurer to rely; or

(ii) if there is no such data, on other data on which it is reasonable to rely—

and is reasonable having regard to that data and any other relevant factors; or

(c) if neither of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors.

(2) In this section—

insurance policy includes an annuity, a life assurance policy, an accident insurance policy and an illness insurance policy;

insurer means a person who is in the business of providing insurance policies.

Recommendation 25.

Insurance

The Committee recommends that section 43 should be amended to apply only to the attributes of sex, impairment and age, and permit discrimination in relation to each of these attributes, only in circumstances where it is permitted by the applicable Commonwealth law.

The Committee further recommends that when requested to do so, insurance providers should be required to give reasons for their unfavourable underwriting decisions.

The Committee notes that the insurance exception in section 43 is also relevant to the superannuation exception in section 73 as life insurance is a component of many superannuation schemes. Insurance and superannuation, as well as credit provision (section 44) are regulated by Commonwealth anti-discrimination laws, and the Committee’s recommendations in relation to these three areas are designed to ensure that the exceptions under the Act are consistent with Commonwealth laws.

The Committee notes that in all other jurisdictions in Australia, the insurance exception is limited to sex, age and impairment or disability (with marital status added in EOA (WA) and ADA (Tas)). The Committee considers that the recommended change would align Victorian law with the Commonwealth and other Australia jurisdictions, reducing the number of different regimes that would apply to insurance providers operating in Australia.

The Committee notes that the insurance exemption in the DDA (Cth), s. 46, was reviewed by the Productivity Commission in its Review of the Disability Discrimination Act 1992 Inquiry. The
Productivity Commission concluded that the exception was appropriate, but that it should not be allowed to protect a decision based on—

- stereotypical assumptions about disability that are not supported by reasonable evidence
- unfounded assumptions about risks related to disability.\(^{58}\)

The Productivity Commission recommended that insurers that rely on the exception should be required to explain the data relied on to the person whose application is refused.\(^{59}\)

The Committee considers that a requirement to disclose reliance on the exemption is a basic protection for members of groups affected by the exception in section 43, and further notes that the ICA (Cth) requires insurers to state reasons for their decision. However, the Committee observes that the obligation under section 75 of the ICA (Cth) arises only when the applicant for insurance requests reasons in writing, and that Act does not contain a provision requiring the insurer to notify the applicant of the right to request reasons to be given. The Committee recommends that the Act should contain a provision requiring disclosure of the supporting data used by an insurer where section 43 is engaged\(^{60}\) and the insurer should be required to advise an applicant or insured of their entitlement to request reasons for the decision to deny insurance.

### Credit providers

#### 44 Exception – credit providers

(1) A credit provider may discriminate against an applicant for credit on the basis of age by refusing to provide credit, or on the terms on which credit is provided, if the criteria for refusal or the terms imposed—

(a) are based on—

(i) actuarial or statistical data on which it is reasonable for the credit provider to rely; or

(ii) if there is no such data, on other data on which it is reasonable to rely; and

(b) are reasonable having regard to that data and any other relevant factors.

(2) In this section credit provider means a person who provides credit in the course of a business carried on by that person.

#### Recommendation 26.

Credit providers

The Committee recommends that section 44 should be amended to apply the same test for allowing discrimination applicable in relation to credit providers under the Age Discrimination Act 2004 (Cth).

The Committee further recommends that when requested to do so, credit providers should be required to give reasons for their decisions to deny credit.

---


\(^{59}\) Op cit., p. 341 and recommendation 12.2.

\(^{60}\) Provisions in other legislation requiring disclosure of actuarial or other data include the Commonwealth SDA s. 87, DDA s. 107 and ADA s. 52, as well as the ADA (NSW) ss. 37(3) [sex], 49Q [disability] and 49ZYT [age] and the EOA (SA) where s. 89 provides a model for requiring disclosure to the applicant or insured.
The Committee notes that sections 37(4) and 37(5) of the ADA (Cth) allow discrimination only where there is actuarial or statistical information on which it is reasonable to rely on and where the discrimination involved is reasonable. The Committee observes that this standard is more stringent than that in the Act, and by virtue of any inconsistency with State law, the Commonwealth law applies to all credit providers in Victoria. The Committee considers that it would be clearer for credit providers, if Victorian law reflected this single standard, which prevails in all States other than NSW and Tasmania.\textsuperscript{61}

The Committee notes that credit providers in States other than Victoria, NSW and Tasmania do not have the benefit of an exception in state law for the use of age in credit risk assessment and decision-making, and that both NSW and Tasmania require that the credit exception can only be relied on if the relevant sources and information are disclosed to the tribunal on request.\textsuperscript{62}

The Committee considers that in the interests of transparency, a credit provider should be required to disclose the basis upon which a person is refused credit at the time the application is determined and further, the credit provider should be obliged to advise the applicant that they have a right to request reasons for the refusal.

### Supervision of children

45 Exception—supervision of children

A person may require, as a term of providing goods or services to a child, that the child be accompanied or supervised by an adult if there is a reasonable risk that, if unaccompanied or unsupervised, the child may—

(a) cause a disruption;

(b) endanger himself or herself or any other person.

<table>
<thead>
<tr>
<th>Recommendation 27.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervision of children</td>
</tr>
<tr>
<td>The Committee recommends that section 45 be retained unamended.</td>
</tr>
</tbody>
</table>

The Committee notes that the Commission\textsuperscript{63} contended that no amendment should be made to this provision and the submission made by the Federation of Community Legal Centres\textsuperscript{64} maintained that the section should be subject to a Charter s. 7(2) test.

The Committee considers that the provision as drafted requires that there is a reasonable apprehension of risk of harm to justify the obligation of adult supervision and is therefore persuaded that the current provision appropriately balances the competing rights involved.

### Special manner of providing a service

46 Exception—special manner of providing a service

---

\textsuperscript{61} Anti-Discrimination Act 1977 (NSW), s. 49ZYU; Anti-Discrimination Act 1998 (Tas), s. 34.

\textsuperscript{62} ADA (NSW), s. 49ZYU(b) and ADA (Tas), s. 34(2).

\textsuperscript{63} Submission (7).

\textsuperscript{64} Submission (691).
A person may refuse to provide a service, or set reasonable terms for the provision of a service, to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features and —

(a) the person cannot reasonably provide the service in that manner; or

(b) the person can only reasonably provide the service in that manner on more onerous terms than the person could reasonably provide the service to a person without that impairment or those physical features.

**Recommendation 28.**

**Special manner of providing a service**

The Committee recommends that section 46 should be amended to provide a duty to make reasonable adjustments for a person with an impairment or physical feature. The duty should be to make only those adjustments that are reasonable, and would not apply where the person would not benefit from the services if the adjustments were to be made.

The Committee considers that on its current construction 'more onerous terms' provides no clear guide as to the level of adjustments that may be required. On one view, any adjustment above that needed for a non-impaired person could be regarded as 'more onerous'.

The Committee considers that for consistency with other provisions relating to the duty to make reasonable adjustments for a person with an impairment (see recommendation 10.) the requirements in relation to provision of services should be expressed in terms of reasonable adjustments.

**Disposal by will or by gift**

48 Exception—disposal by will or gift

A person may discriminate against another person in the disposal of land by will or as a gift.

**Recommendation 29.**

**Disposal by will or by gift**

The Committee recommends that section 48 be retained unamended.

The Committee notes that it did not receive any submissions with respect to this exception and considers that given the clearly private nature of disposition by a person of property by will or as a gift that the current provision is clearly understandable and justified.
Accommodation

Discrimination by refusing to allow alterations

51 Discrimination by refusing to allow alterations

(1) A person who has provided accommodation to another person with an impairment must allow the other person to make reasonable alterations to that accommodation to meet his or her special needs if—

(a) the alterations are at the expense of the other person; and
(b) the alterations do not require any alterations to the premises of another occupier; and
(c) the action required to restore the accommodation to the condition it was in before the alterations is reasonably practicable in the circumstances; and
(d) the other person agrees to restore the accommodation to its previous condition before leaving it and it is reasonably likely that he or she will do so.

(2) This section is in addition to, and does not affect or take away from, any requirements imposed by or under the Building Act 1993.

Recommendation 30.

Discrimination by refusing to allow alterations

The Committee recommends that section 51 be amended to include a provision that there is an obligation to make reasonable adjustments for a person with an impairment or a physical feature.

The duty should only apply to those adjustments that are reasonable, and the duty should not apply where the person could not benefit even if the adjustments were to be made.

The Committee observes that the Act contains no provision imposing a duty to make reasonable adjustments in relation to accommodation, even where the adjustments are relatively modest. The Committee notes that accommodation is the only significant area of activity covered by the Act in which there is no duty to make reasonable adjustments for a person with an impairment or physical feature. The Committee recommends that section 51 should be amended to provide that there is an obligation for the provider of the accommodation to make reasonable adjustments to accommodation for a person with an impairment or a physical feature.

The Committee notes that on its current construction section 51 allows a tenant to make alterations to a property at their own expense provided that they reinstate the property at the end of the tenancy.

The requirement to make reasonable adjustments should be in addition to any alterations made under the current provisions in section 51, permitting alterations that are made at the expense of the tenant.

---

65 Submission (752), Mr Bernd Bartl.
66 An example of a provision that imposes a similar obligation is s. 54 of the Discrimination Act 1991 (ACT): "Discrimination relating to accommodation: Section 21 does not make unlawful discrimination on the ground of disability in relation to the provision of accommodation to a person who has a disability if special services or facilities are, or would be, required by the person and their provision would impose unjustifiable hardship on the person providing or proposing to provide the accommodation."
The current provision allowing tenants to make reasonable adjustments is an important right for tenants with an impairment or physical feature and the Committee recommends that that aspect of the current provision should be retained.

Discrimination by refusing to allow guide dogs

52 Discrimination by refusing to allow guide dogs

(1) A person must not refuse to provide accommodation to a person with a visual, hearing or mobility impairment because that person has a guide dog.

(2) A person must not require, as a term of providing accommodation to a person with a visual, hearing or mobility impairment who has a guide dog—
   (a) that the dog be kept elsewhere;
   (b) that the person pay an extra charge because of the dog.

(3) This section does not affect the liability of the person with the guide dog for any damage caused by the dog.

Recommendation 31.

Discrimination by refusing to allow guide dogs

The Committee recommends that the definition of ‘guide dog’ be amended so as to expand the ambit of the exception beyond the current prescribed impairments of vision, hearing or mobility.

The Committee notes the recommendations of the Gardner Review to expand the ambit of the section beyond the current prescribed impairments (vision, hearing and mobility). The Committee considers that this recommendation has merit.

The Committee was assisted by the submission made by the Federation of Community Legal Centres that drew attention to the fact that some people living with a mental impairment may benefit from the companionship of a pet in order to alleviate phobic symptoms.

Accommodation unsuitable for children

53 Exception—Accommodation unsuitable for children

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

Recommendation 32.

Accommodation unsuitable for children

The Committee recommends that section 53 be repealed.

---

67 An Equality Act for A Fairer Victoria, recommendations 52 and 53.
68 Submission (691).
69 Recent examples of amendments in relation to assistance animals are in DDA (Cth) s. 8, and SA Equal Opportunity (Miscellaneous) Amendment Act 2009 ss. 88 and 88A.
The Committee observes this exception may sanction discrimination against families with children, and against young persons aged 16 and 17 seeking accommodation. The Committee notes that this could occur due to the absence of adequate objective criteria in the current provision, which may make it problematic to challenge any assessment made or asserted by landlords or estate agents as to the unsuitability of the premises.

The Committee notes that there is no equivalent to section 53 in any other Australian jurisdiction.

The Committee notes that the Tenants Union of Victoria (“TUV”) contended that in its experience families with children did suffer discrimination in relation to accommodation and that section 53 as currently expressed does not require real estate agents to make out a ground as to why it is not suitable, and as a result, real estate agents acting for landlords could just refuse accommodation, for no other reason but that that tenant has a family. The TUV noted that s. 30 of the Residential Tenancies Act 1997 (Vic) prohibits denial of tenancies to people with children aged under 16, except in certain circumstances which include, in s. 30(2)(c), that ‘the premises by reason of their design or location are unsuitable or inappropriate for occupation by a child’. The TUV stated that there is a need for better protection of people with children who are seeking accommodation.

The Committee further notes the submission by the TUV contending that if the provision is to be retained it should be subject to a Charter s. 7(2) reasonable limitations style test. Further the submission maintained that suitability of premises for occupancy by families with children or by children is an area best governed by specific residential tenancy laws with the distinct advantage that specialist residential tenancy tribunals (VCAT) have resources and expertise to deal with tenancy disputes more quickly and efficiently than a complaint resolution under the Act.

Shared accommodation

54 Exception—shared accommodation

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

(a) in which the person or a relative of the person lives and intends to continue to live; and

(b) that is for no more than 6 people in addition to the people referred to in paragraph (a).

Recommendation 33.

Shared accommodation

The Committee recommends that section 54 be retained.

The Committee recommends that a definition of ‘near relative’ should be included for the purposes of this section.

The Committee notes that there is a tension in relation to section 54 between allowing privacy rights to prevail in genuine shared houses, and ensuring that residents in small rooming houses are protected by the Act. The Residential Tenancies Act 1997 (Vic), which regulates rooming houses, defines a rooming house as “a building in which there is one or more rooms available for occupancy on payment of rent (a) in which the total number of people who may occupy those rooms is not less

---

70 Submission (550).
71 Transcript of evidence, Tenants Union of Victoria, 4 August 2009, p. 3.
than 4". The Committee also accepts the desirability of retaining section 54 in its current form to permit legitimate shared accommodation situations without subjecting them to the prohibitions in the Act.

The Committee observes that all three Federal laws and the WA and Queensland Acts that have an exception similar to section 54 apply the exception where the accommodation will be occupied by the person, one or more of their near relatives, and not more than 3 other people. The Committee considers that adopting this approach would promote national consistency concerning anti-discrimination law, and would result in a single standard applicable under Federal and State anti-discrimination laws.

The Committee notes that the only submission received concerning this exception, from the TUV, contended that section 54 had the potential to allow discrimination against people in the context of small rooming houses.

The Committee notes that at present section 54 does not distinguish between legitimate shared housing and commercially operated small rooming houses, and the absence of a distinction between them makes it difficult to protect both the privacy rights of people in shared accommodation and the non-discrimination rights of residents of small rooming houses.

In the current housing climate the Committee has decided it would be preferable to retain the limit of six additional people to protect the privacy of large shared houses, such as student houses.

The Committee recommends including a definition of ‘near relative’ to replace the term ‘relative’ to improve consistency with other Australian anti-discrimination laws.

**Welfare measures in accommodation**

55 Exception—welfare measures

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

---

**Recommendation 34.**

Welfare measures

The Committee recommends that section 55 be amended to delete the words ‘or mainly’ so that the exception would be confined to the provision of accommodation established wholly for the welfare of people of a particular sex, age, race or religious belief.

The Committee further recommends that the provision should apply only to non-profit organisations.

The Committee observes that this exception allows accommodation to be provided for the welfare of the particular groups for whom accommodation is provided. The Committee notes that as currently

---

72 Residential Tenancies Act 1997 (Vic), s. 3.
73 SDA, DDA and ADA (Cth); EO Act (WA) and the ADA (Qld).
74 Submission (550).
expressed the provision is not expressly limited to circumstances intended to benefit the principal group for whom accommodation is provided and would allow a person (whether for profit or not) providing accommodation to identify a group for whom it is mainly but not exclusively intended to provide accommodation and then to allow the person to discriminate against people in other groups.

The Committee notes that in many other Australian jurisdictions the provision of special welfare accommodation is protected by the general special measures provision rather than a specific exception such as section 55. In jurisdictions where there is a specific provision for special welfare accommodation (SA and WA), the provision is expressed as applying only to accommodation that is designed solely for people of the particular group, and only where that accommodation is managed by a voluntary or non-profit organisation.

The Committee considers that section 55 currently applies to accommodation wholly or mainly for a particular group and leaves open the prospect of selective discrimination against people not in the principal group. For example where accommodation is primarily provided for people of a particular age or religious belief, but where the accommodation cannot be filled entirely from that group, and the accommodation provider fills vacancies from outside that group there may be scope for discrimination on the basis of any of the other protected attributes. Therefore the Committee considers that a narrowing of the exception and limiting its scope to non-profit organisations is desirable.

The Committee notes the submission made by the Tenants’ Union of Victoria concerning the issue of discrimination against transgender people in the provision of accommodation and expressed concern that the provision may permit discrimination. The Commission also contended that transgender people should be treated by the Act according to their affirmed gender. The Committee notes that the question of how transgender persons are to be treated in discrimination matters arises in connection with several exceptions in the Act that refer to sex. The Committee notes that this subject is discussed in the chapter “Other Matters”.

### Accommodation for students

#### 56 Exception—Accommodation for students

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

(a) students of that sex, race, religious belief, age or age group; or

(b) students with a general, or the particular, impairment.

#### Recommendation 35.

**Accommodation for students**

The Committee recommends that section 56 should be amended to provide that an educational institution may not discriminate against groups of students within the institution in providing accommodation.

---


76 Submission (550).

77 Submission (7).
The Committee notes that section 56 closely parallels section 38 (educational institutions for particular groups) which provides an exception for schools for students of a particular race, sex, religion or age.

The Committee observes that the submissions made by the Catholic and Anglican Churches noted the importance of the provision and of retaining religion as an attribute in the exception. However the submission acknowledged that the exception could be narrowed in relation to discrimination against groups of students within the institution.

The Committee notes that the grounds available for this exception are narrower in other jurisdictions and in several jurisdictions the only exception relating to the provision of accommodation for students of an educational institution is to authorise institutions of any type to provide single sex accommodation. Only Queensland and the Northern Territory have exceptions similar in effect to section 56, and the exceptions in those jurisdictions are restricted to the attributes of sex, religion and impairment.

The Committee considers that an institution operated mainly for students with a particular attribute that chooses to admit students with a different attribute should not be permitted, without appropriate justification, to discriminate against those students in the allocation of accommodation provided by that institution for its students.

The Committee also notes that it did not receive any evidence concerning the need for age or race to be retained as attributes in this exception, and notes that these attributes are not found in counterpart provisions in other Australian jurisdictions.

**Accommodation for commercial sexual services**

57 Exception — accommodation for commercial sexual services

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

**Recommendation 36.**

Accommodation for commercial sexual services

The Committee recommends retention of section 57 pending a further review as to the appropriateness of retaining such an exception in the Act.

The Committee noted a number of submissions concerning the appropriateness of retaining this provision in the Act. The Federation of Community Legal Centres contended that the Act is “not the appropriate place to locate the regulation of a lawful commercial activity.” The Tenants' Union of Victoria also commented:

---

78 EOA (WA), s. 32(2); SDA (Cth), s. 34(2) and DA (ACT), s. 39(2).
79 ADA (Qld), s. 89 and ADA (NT), s. 40(2)-(2B).
80 Federation of Community Legal Centres, Submission (691).
81 Tenants’ Union of Victoria, Submission (550).
As lawful sexual activity is permitted under the EOA, it could be a breach of [Charter] rights for this exception to remain. We also submit that commercial sexual activity is regulated so this exception is anomalous with other laws that exist.

The Committee notes that there is no reported case of a complaint engaging section 57.

The Committee observes that no other Australian jurisdiction has a similar provision.

The Committee further notes that section 58(1)(a) provides that the Act’s provisions relating to accommodation “apply despite anything to the contrary in any other Act.” The Committee considers that were section 57 to be repealed, the ‘lawful sexual activity’ ground may apply and could render it unclear whether providing accommodation for commercial sexual activity would be covered by current planning or commercial tenancy laws.

The Committee considers that this exception should be reviewed to determine whether the exception has a valid or useful role located within an enactment dealing with discrimination law or whether it is currently sufficiently regulated under other specific purpose legislation, or if it is not so covered by tenancy laws, whether the intent of the exception would be better provided for in other specific purpose legislation.
Clubs and club members

Clubs for disadvantaged people or minority cultures

61 Exception—clubs for disadvantaged people or minority cultures

A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally—

(a) to prevent or reduce disadvantage suffered by people of that group; or

(b) to preserve a minority culture.

Recommendation 37.

Clubs for disadvantaged people or minority cultures

The Committee recommends that section 61 be retained unamended.

The Committee notes that several submissions supported the retention of this exception. The Committee received no submissions recommending repeal or amendment.

The Committee accepts that for reasons that are self-evident an exception seeking to address disadvantage or preserving a minority culture should be retained.

Clubs and benefits for particular age groups

62 Exception—clubs and benefits for particular age groups

(1) A club, or a member of the committee of management or other governing body of a club, may exclude a person from membership if—

(a) the club exists principally to provide benefits for people of a particular age group; and

(b) the person is not in that age group.

(2) A club, or a member of the committee of management or other governing body of a club, may restrict a benefit to members who are members of a particular age group, if it is reasonable to do so in the circumstances.

Recommendation 38.

Clubs and benefits for particular age groups

The Committee recommends that section 62 be retained unamended.

The Committee observes that it received no submissions in respect to this exception and considers that for reasons that are self-evident the exception should be retained.

The Committee accepts that for reasons that are self-evident an exception seeking to provide benefits to persons of a particular age should be retained.
Seperate access to benefits for men and women

63 Exception—separate access to benefits for men and women

A club, or a member of the committee of management or other governing body of a club, may limit a member’s access to a benefit on the basis of the member’s sex if —

(a) it is not practicable for men and women to enjoy the benefit at the same time; and

(b) either—

(i) access to the same or an equivalent benefit is provided for men and women separately; or

(ii) men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.

The Committee recommends that section 63 should be amended to include a list of factors that should be considered by a club’s governing body in respect to decisions concerning separate access.

The Committee recommends that one of the factors to be considered should be whether the club has taken steps to improve gender equality in access to benefits.

The Committee notes the submission made by the Law Institute of Victoria which commented:

that section 63 be amended, so that clubs are required to make reasonable adjustments to accommodate for both sexes, except where they can show unjustifiable hardship or protection by another exception. We consider that this test will be more informative than the current test of “practicability”. The test could be accompanied by factors such as those listed in section 25 (5) of the Sex Discrimination Act 1984 (Cth).

The Committee notes that section 25(4) of the SDA (Cth) is a provision equivalent to section 63 of the Act and that section provides a list of factors to be used in determining the application of the exception in s. 25(4). The Committee considers that there is merit in the approach of listing factors to be considered in making the relevant assessments required by section 63.

The Committee further considers that clubs that do not already provide equal benefits to men and women should only be able to rely on this exception if they can show they have taken steps to improve gender equality in access to benefits, unless it would be unreasonable to do so having regard to any hardship involved in providing equal access. Therefore, the Committee recommends that one of the factors to be considered in making any assessment under section 63 should be whether the club has taken reasonable steps to improve gender equality in access to benefits.

---

82 Law Institute of Victoria, Submission (750), p. 8.
83 SDA s. 25(5) provides:

(5) In determining any matter relating to the application of subsection (4), regard shall be had to:

(a) the purposes for which the club is established;
(b) the membership of the club, including any class or type of membership;
(c) the nature of the benefits provided by the club;
(d) the opportunities for the use and enjoyment of those benefits by men and women; and
(e) any other relevant circumstances.
The Committee considers that its recommendations would give effect to the reasonable adjustments approach proposed by the Law Institute of Victoria and would be consistent with the reasonable limitations test in Charter s. 7(2).
Sport

Competitive sporting activities

66 Exception—competitive sporting activities

(1) 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.

(2) A person may restrict participation in a competitive sporting activity—

(a) to people who can effectively compete;
(b) to people of a specified age or age group;
(c) to people with a general or particular impairment.

(3) Subsection (1) does not apply to a sporting activity for children under the age of 12 years.

Recommendation 40.

Competitive sporting activities

The Committee recommends that a more detailed review be undertaken in respect to the appropriate provisions that should be made in equal opportunity law governing exclusion from participation in competitive sports.

The Committee considers that there are two areas arising from this exception that may require further specific review. The first is the determination of the circumstances in which a person of a particular sex or age should be excluded from playing sport with persons of another sex or age. The Committee considers that reform of this provision cannot be undertaken in the absence of a clearer understanding of the needs of and limitations on the organisations and individuals that are likely to be affected.

The second area of concern relates to gender identity and the circumstances in which a transgender or intersex person may be excluded from participation in competitive sports.

The Committee does not consider that it has sufficient time or is adequately resourced to undertake an authoritative inquiry into the complex issues and factors involved in assessing the appropriate provision that should be made in discrimination law governing exceptions in competitive sports.

The Committee notes the requests for broader consultation expressed by sporting organisations in their submissions to the Committee, and that any changes to s. 66 may have implications for other provisions, such as section 63.

The Committee therefore makes no specific recommendation concerning this section.
Local government

Political belief or activity in local government

68 Exception—political belief or activity

Section 67 does not apply to discrimination on the basis of political belief or activity.

Note: Section 67 provides:

67 Discrimination by councillors

A councillor of a municipal council must not discriminate against—

(a) another councillor of that council;

(b) a member of a committee of that council who is not a councillor of that council—
in the performance of his or her public functions.

Recommendation 41.

Political belief or activity in local government

The Committee recommends that section 68 be retained unamended.

The Committee did not receive any submission concerning this exception and recommends that it should be retained without any amendment.
General Exceptions and Exemptions

Things done with statutory authority

69 Things done with statutory authority

(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of—

(a) an Act, other than this Act;

(b) an enactment, other than an enactment under this Act.

(2) For the purpose of subsection (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

(3) Section 47(3) and 58(1) prevail over this section to the extent of any inconsistency between them.

Recommendation 42.

Things done with statutory authority

The Committee recommends that –

1. Section 69 should be repealed within a reasonable time following Royal Assent.

2. A provision in an enactment which is intended to override the Act be prescribed in the Act (perhaps in a schedule).

3. A provision prescribed in the Act which is intended to override the Act should be subject to a sunset or review provision.

4. Existing enactments that are not intended to override the Act should be identified and amended where necessary.

5. The Victorian Equal Opportunity and Human Rights Commission be given a function requiring it to report to Parliament where it considers that a provision in an enactment is incompatible with the Act.

5. On the assumption that the other recommendations of the Committee are adopted, concerning the review of incompatible provisions in legislation, section 207 be considered redundant and be repealed.

6. In the interim, prior to repeal of section 69, the section be amended to ensure that enactments passed prospectively do not automatically prevail over the Act unless they are prescribed in the Act.

The Committee notes that on its current construction section 69 permits anything that is authorised by another enactment84 to prevail over the Act, whether or not that other enactment expressly provides

---

84 Enactment is defined in s. 4(1) to mean "a rule, regulation, by-law, local law, order, Order in Council, proclamation or other instrument of a legislative character."
that it is intended to prevail over the Act. The Committee notes that the effect of section 69 is to put the Act in a subservient position to any other Act.

The Committee observes that section 69 has the broadest ambit as a legislative exception than any other anti-discrimination law prevailing in any Australian jurisdiction, exempting not only actions that are “necessary to comply with” other enactments, but also things that are “authorised by” other enactments.\textsuperscript{85}

The Committee observes that in its 2005 final report on Discrimination in the Law (Inquiry under section 207 of the Equal Opportunity Act 1995), the Committee recommended that section 69 be repealed\textsuperscript{86}. In that report the Committee’s preferred approach for dealing with potential conflict between the Equal Opportunity Act 1995 and other laws was to provide ‘front end review’ so that inconsistent laws were identified and amended to resolve any conflict or prescribed in the Act as a provision identified as necessary to prevail over the Act. The Committee maintains the view that this is the preferable approach in dealing with inconsistent laws. The Committee further observes that government agencies and non-government organisations have now had four years since the Committee’s recommendations were made to consider this proposed alternative regime for dealing with enactments that are intended to override the Act.

The Committee notes that it did not receive any submissions that contended that the provision should be retained in its current form, and received a number of submissions that recommended repeal as a matter of priority.

The Committee considers that if a provision is included in the Act requiring inconsistent enactments that are intended to prevail over the Act to be prescribed in the Act, the enactments so prescribed should be subject to a sunset clause or other form of periodic review, and where continued necessity dictates, the provision(s) be renewable. The Committee observes that the introduction of such a process was supported by the submission made by the LIV.\textsuperscript{87}

The Committee recommends that a reasonable period of time should be allowed before the repeal of section 69 takes effect. In the intervening period, the Committee recommends that section 69 should be amended to except only actions that are ‘necessary to comply with’ other Acts that were in force as at the date of the amendment, and to delete subsection (2). This would ensure that the rights protected by the Act would cease to be automatically overridden by all later legislation.\textsuperscript{88}

\textsuperscript{85} There is no similar exception in the RDA (Cth), for example, and in the SDA (Cth) s. 40(2)-(6) except “anything done in direct compliance with” specific listed laws, while in the DDA (Cth) s. 47(2)-(3) except “anything done in direct compliance with” a prescribed law.


\textsuperscript{87} Law Institute of Victoria, Submission (750), p. 16.

\textsuperscript{88} A change to this effect has been adopted in EOA (WA) s. 69(1)(a) and exists in ADA (Qld) s. 106(1)(a). To be most effective, any such change should be accompanied by a provision that gives the Act priority over all legislation passed after the provision. The Act already contains two provisions that give it priority over other legislation: s. 47(3) in relation to disposal of land, and s. 58(1) in relation to accommodation.
Things done to comply with orders of the courts and tribunals

70 Things done to comply with orders of courts and tribunals
A person may discriminate if the discrimination is necessary to comply with—
(a) an order of the Tribunal;
(b) an order of any other tribunal or any court.

Recommendation 43.

Things done to comply with orders of courts and tribunals
The Committee recommends that section 70 be retained unamended.

The Committee considers that there are self-evident sound policy reasons justifying the retention of such a provision.

Pensions

71 Pensions
Nothing in Part 3 affects discriminatory provisions relating to pensions.

Recommendation 44.
Pensions
The Committee recommends that an expert review be undertaken concerning the need to retain section 71.

The Committee observes that section 71 was most likely intended as a transitional temporary measure when it was enacted in 1977.89

The Committee notes the submission from the Commission recommending the repeal of this exception.

The Committee further observes that no other Australian jurisdiction includes a similar provision related to pensions in its anti-discrimination laws.

The Committee therefore considers that an exception for pensions as currently provided in the Act may be incompatible with the Charter and should now be repealed.

In the alternative the Committee considers that an expert review of the necessity or desirability of retaining this provision should be undertaken.

---

89 Section 71 appeared in the EO Act 1984 (Vic), as s. 36.
Superannuation

72 Superannuation—existing fund conditions

(1) A person may discriminate by retaining an existing superannuation fund condition in relation to a person who—

(a) is a member of that fund at the commencement of this section; or

(b) becomes a member of that fund within a period of 12 months after the commencement of this section.

(2) In this section existing superannuation fund condition means, in relation to a superannuation fund, a condition of the fund, or of membership of the fund, that is in operation at the commencement of this section.

73 Superannuation—new fund conditions

(1) A person may discriminate against another person on the basis of age by imposing conditions in relation to a superannuation fund if—

(a) the discrimination occurs in the application of prescribed standards under the Superannuation Entities (Taxation) Act 1987 or Superannuation Industry (Supervision) Act 1993 of the Commonwealth; or

(b) the discrimination is required to comply with, obtain benefits, or avoid penalties under any other Commonwealth Act; or

(c) the discrimination is based on—

(i) actuarial or statistical data on which it is reasonable to rely; or

(ii) if there is no such data, on other data on which it is reasonable to rely—

and is reasonable having regard to that data and any other relevant factors; or

(d) if none of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors.

(2) A person may discriminate against another person—

(a) on the basis of sex or marital status, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Sex Discrimination Act 1984 of the Commonwealth;

(b) on the basis of impairment, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Disability Discrimination Act 1992 of the Commonwealth.

Recommendation 45.
Superannuation – existing and new fund conditions

The Committee recommends that section 72 should be retained without amendment.

The Committee recommends that section 73 should be amended to treat discrimination in superannuation on the basis of age in the same way as discrimination on the basis of sex, marital status, or impairment is treated, by applying the test in the Age Discrimination Act 2004 (Cth).
The Committee received no substantive comments on these exceptions and it is not clear to the Committee whether these provisions require amendment or whether retaining them in their current form is justified.

The Committee notes that superannuation is a highly technical area and it would not be appropriate to make significant changes to these exception provisions without a separate expert review. The Committee notes that an expert review was also recommended by the Commission in its submission to the Committee.

However, the recommendation that the Committee makes in this report is directed solely to the harmonisation of the Act with the relevant provisions of the ADA (Cth). The Committee observes that the area of superannuation is largely governed by Federal law and the provisions of the ADA (Cth) apply in Victoria in matters of superannuation. The Committee notes that an amendment to the Act to bring it into conformity with Federal law is highly desirable. The Committee's recommended amendment would achieve a single standard in Federal and State law and would ensure that section 73 treats discrimination in superannuation on the attribute of age in the same way as discrimination on the basis of sex, marital status and impairment.

The Committee notes that in its submission the Investment and Financial Services Association contended that a move towards consistency with Commonwealth law in this area was desirable.

---

90 The Age Discrimination Act 2004 (Cth) provides:

37 Superannuation, insurance and credit—actuarial data etc.

Superannuation and insurance

(1) Subsections (2) and (3) apply to the following:

(a) an annuity;
(b) a life insurance policy;
(c) a policy of insurance against accident or any other policy of insurance;
(d) membership of a superannuation or provident fund;
(e) membership of a superannuation or provident scheme.

(2) This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person’s age:

(a) in respect of the terms or conditions on which the annuity, policy or membership is offered to, or may be obtained by, the other person; or
(b) by refusing to offer the annuity, policy or membership to the other person; if the condition in subsection (3) is satisfied.

(3) The condition is satisfied if:

(a) the discrimination:

(i) is based upon actuarial or statistical data on which it is reasonable for the first mentioned person to rely; and
(ii) is reasonable having regard to the matter of the data and other relevant factors; or

Note: The Commission and the President can require the disclosure of the source of the actuarial or statistical data (see section 54).

(b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors. ...

38 Superannuation legislation

(1) This Part does not make unlawful anything done by a person in direct compliance with:

(a) a Commonwealth Act (or a provision of a Commonwealth Act) relating to superannuation; or
(b) a regulation or any other instrument (or a provision of a regulation or instrument) that:

(i) relates to superannuation; and
(ii) is made under a Commonwealth Act.

(2) This Part does not make unlawful anything done by an exempt public sector superannuation scheme (within the meaning of the Superannuation Industry (Supervision) Act 1993) in accordance with an Act of the Commonwealth, a State or a Territory, or a trust deed, by or under which the scheme is established.

91 Investment and Financial Services Association, Submission (756).
Charities

74 Charities

(1) Nothing in Part 3 (including sections 47 and 58)—
   (a) affects a provision of a deed, will or other instrument that confers charitable benefits, or enables charitable benefits to be conferred;
   (b) prohibits anything that is done in order to give effect to such a provision.

(2) This section applies to an instrument made before, on or after the commencement of this section.

(3) In this section charitable benefits means benefits exclusively charitable according to Victorian law.

Recommendation 46.

Charities

The Committee recommends that section 74 be retained unamended.

The Committee considers that, as in the case of the exception for personal disposition of property by will (section 48), the reasons for the retention of this exception are self-evident and based on practical and understandable public policy.
The religious exceptions

The Committee notes that the Act provides important protection against discrimination on the basis of a person’s religious beliefs. Through the ‘religious exceptions’ in sections 75 to 77, the Act also provides exceptions for certain activities of religious organisations to protect religious freedom.

The Committee received many submissions expressing their support for the existing religious exceptions and asking that they not be repealed. Some submissions sought extension of the religious exceptions. Other submissions contended that they should be restricted or repealed.

The Committee observes that most religious organisations that made submissions rejected the distinction between core and other activities, arguing that their religion extends not only to private activities such as worship but also guides the daily activities of adherents, which affects activities such as education in a religious school and the provision of welfare services.

The Committee prefers to consider the relevant issues by distinguishing between activities that affect only members of the religion, and activities that may affect others. Section 75(1) covers activities where only the rights of followers of the religion are affected, and the Committee recommends no change to this exception. However where people outside the religion are affected by the activities of religious individuals or groups, their human rights may be affected by the religious exceptions and different considerations may apply.

The Committee observes that as currently drafted sections 75 to 77 are broad exceptions, which protect the right to religious freedom without providing any means to consider whether any other rights may be infringed. In essence these exceptions allow freedom of religion to automatically prevail over any other rights involved. As it would appear the dominance of one right over all others may be inconsistent with the reasonable limitations test in Charter s 7(2) that require a balancing of equality rights and freedom of religion.

The Committee notes that concerns about the restriction of the human rights of others by the religious exceptions were expressed by organisations including the Victorian Independent Education Union, the Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender & Intersex Health & Wellbeing, and the ALSO Foundation. These matters related to discrimination and insecurity of employment for employees of religious organisations and institutions, and students in religious schools.

Further, in their submissions the Commission and Liberty Victoria contended that human rights are not adequately respected where religious bodies are allowed wide scope to effect traditional forms of discrimination against homosexuals and women, based on sexual orientation, sex and marital status. Some submissions expressed the concern that no clear criterion existed by which to distinguish

---

92 See respectively submission (763) and submissions from the Ministerial Advisory Committee and the ALSO Foundation to the Exceptions Review.
93 Victorian Equal Opportunity and Human Rights Commission, submission (7).
94 Submission (755).
discrimination justified by religious doctrine from that which resulted from prejudice. Gay and Lesbian Health Victoria referred to the –

"powerful judgmental messages given to young people by religious organisations" as adding "an extra layer of struggle, especially for young people who seek to retain some religious affiliation" and argued that "upholding the right of organised religion to discriminate against same sex attracted young people privileges religious sensibilities over young lives and is not within the spirit of the just and inclusive society the Victorian Charter of Human Rights and Responsibilities enshrines."

Religious organisations stated that the exceptions merely allow them to maintain practices that were based in doctrine and were important for their adherents. In most cases, they argued, there are many alternative employers and service providers, so that allowing the religious exceptions would not, in practice, substantially narrow opportunities for people in the affected groups. They argued that the essence of protecting their freedom of religion was to allow them to follow their beliefs even where they did not accord with the majority view.

The Committee considers that religious organisations should generally be allowed to act according to their own beliefs, especially where there are alternatives to the activities that they undertake. Therefore the Committee does not recommend that the test in Charter section 7(2) should be explicitly adopted in sections 75 and 76. The Committee observes that whilst such a test would allow the balancing of the non-discrimination right against right to freedom of the religion in each specific case, there is a more compelling need for clarity in the law in an area where many charitable and volunteer based organisations operate.

However the Committee recommends that the religious exceptions should be amended to limit the attributes on which discrimination is permitted, and to refine the scope of the exceptions to ensure that any discrimination is clearly justified by religious doctrine.

The Committee notes that there was some discussion in the submissions about the status of freedom of religion in international human rights law, and the Committee has included a brief note on this together with the provisions of the International Covenant on Civil and Political Rights relevant to both non-discrimination rights and religious freedom at Appendix B. In brief, the Committee notes that the provisions indicate that international law allows a State to legislate to balance religious freedom against other rights, including equality rights.

**Protection for religious orders and religious observance or practice**

*75 Religious bodies*

(1) *Nothing in Part 3 applies to—*

(a) the ordination or appointment of priests, ministers of religion or members of a religious order;

(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;

(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.*

---

55 Submission (98). The organisation is based in the Australian Research Centre in Sex, Health and Society at La Trobe University.
Scrutiny of Acts and Regulations Committee

Recommendation 47.
**Protection for religious orders and religious observance or practice**

The Committee recommends that section 75(1) be retained unamended.

The Committee considers that it is self-evident that section 75(1) which covers the most fundamental aspects of religious observance and practice should be retained without amendment.

**Religious bodies – protection in other activities**

75 Religious bodies

...  

(2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—

(a) conforms with the doctrines of the religion; or

(b) is necessary to avoid injury to the religious sensitivities of people of the religion.

Recommendation 48.

**Religious bodies – protection in other activities**

The Committee recommends that the exception in section 75(2) should be retained but should be narrowed so that it does not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.

The Committee acknowledges that on its current construction section 75(2) has a broad ambit. The provision excepts anything done by a religious body that either conforms with the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion, and provides an exception from all the prohibitions of the Act except sexual harassment. Section 75(2) covers the activities of religious bodies and related organisations without any restriction on the nature of the activity involved, and can apply to social welfare, education, service provision, commerce and all other areas. The Committee observes that section 75(2) is expressed as a blanket exception and does not allow consideration of any other rights that may be affected, and that as such is unlikely to comply with the reasonable limitations test in Charter s. 7(2).

However, the Committee has concluded that to require balancing of competing rights in every individual case would be unduly onerous if not unworkable for religious bodies. The Committee further observes that religious bodies perform work of a charitable and welfare nature and are dependant upon significant voluntary contributions. Therefore the Committee considers that the preferred option for reform is refinement of the exception by limiting the attributes on which it should be available.

**Attributes**

The Committee observes that since sections 75(2) and (3) and sections 76 and 77 affect the rights of people who are not followers of the religion, and should therefore be no wider than is necessary in the circumstances.
The Committee notes that the Catholic, Anglican, and Presbyterian Churches made submissions to the Committee that they did not seek the right to discriminate on the grounds of race, age or impairment, and noted that such discrimination would be against church teachings.

**Areas in which the Committee recommends no change**

**Exempting senior management or generis title positions**

The Committee does not recommend extending the religious exception to allow an exception in relation to appointments to senior management positions in religious organisations. The Committee acknowledges that having a religious qualification for a position may not be a matter of religious doctrine or religious sensitivities, thus section 75(2) may not apply. In relation to senior management positions, the Committee has recommended elsewhere that the Act should be amended to include an exception that allows a person to be excluded from employment where they cannot perform the inherent requirements of the position (See Recommendation 5. concerning s. 17). The Committee has recommended that the inherent requirements exception should be available in relation to the attribute of religious belief or activity. This would enable religious organisations, including schools, to identify specific positions for which membership of a religion is an inherent requirement. The Committee considers that it is more appropriate for this assessment to occur on the basis of a specific position than to be automatically available on a blanket or generic basis. The Committee notes that if legal certainty is considered desirable the Tribunal could be empowered to grant an exemption in relation to a specific position where the relevant criteria are met.

**Definition of ‘religious body’**

The Committee does not recommend the adoption in the Act of the definition of ‘religious body’ used in the Charter. Section 75 applies to “a body established for religious purposes.” By contrast, the Charter includes a definition of ‘religious body’ as:

38(5) In this section “religious body” means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

The Committee notes that the Charter definition of ‘religious body’ is significantly wider than the relevant definition in the Act and extends to organisations that may have nothing to do with any recognised or organised religion. The Committee considers that the religious exception should not extend to any organisation that decides to operate in accordance with religious principles. The Committee observes that the protection of equality rights would be undermined if any organisation could exempt itself from the Act simply by self-declaring that it conducts its activities in accordance with religious doctrines beliefs or principles. The Committee observes that organisations that fall outside the scope of ‘religious body’ in the Act could rely on the recommended exception for the
inherent requirements of the employment where religious belief is an inherent requirement of a particular position.

The Committee also acknowledges there has been a vast expansion in recent years of provision of public services by religiously based organisations as a result of government policies of contracting out service provision. It considers that such contracting out does not provide a justification for extending the religious exception, especially where the activity is undertaken with public money and to provide services to the whole community, not just a section of the community. The Committee is aware that for many such activities, the funding contracts for the services may provide that discrimination should not occur, but it notes that this may be inadequate to ensure that a person affected could seek a legal remedy for discrimination. The Committee considers that any expansion of the scope of the Act would have to be undertaken cautiously after a thorough review of the types of organisations involved and the potential need for and impact of such an expanded definition.

**Religious Schools**

75 Religious bodies

...  

(3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

76 Religious schools

(1) This section applies to a person or body (other than a body established for religious purposes) that—

(a) establishes an educational institution to be conducted in accordance with religious beliefs or principles; or

(b) directs, controls or administers an educational institution conducted in accordance with religious beliefs or principles.

(2) Nothing in Part 3 applies to anything done by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution (including the employment of people in the institution) that is in accordance with the relevant religious beliefs or principles.

---

**Recommendation 49.**

Religious bodies and schools

*The Committee recommends that the exception in section 76 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.*

The Committee notes that, similar to section 75(2), these provisions are broad exceptions that do not consider or balance any competing human rights. The Committee also notes that religious schools are an example of one activity of religious organisations covered by section 75(2), and that for consistency with section 75, section 76 should be amended by limiting the attributes to which it applies similar to the limitations recommended for s. 75(2).
The Committee notes that other Australian jurisdictions, including NSW, QLD, and the RDA, DDA and ADA (Cth) have no specific provision for religious schools equivalent to section 76, rather they rely on a general exception for religious bodies equivalent to section 75(2). The Committee observes that in the jurisdictions that have specific provisions relating to religious schools, the exception applies either to all attributes but only in limited areas of activity under the Act, or otherwise it applies to all areas of activity under the Act but only to limited attributes.

The Committee observes that section 76 of the Act is the only religious schools exception amongst Australian jurisdictions that applies to all areas of activity and all attributes, and which does not include a test of necessity to comply with the relevant religious beliefs. The Committee considers that refining the scope of section 76 as recommended will increase the consistency of the Act with other Federal and State anti-discrimination laws.

**Treatment of existing employees**

The Committee observes that many submissions relating to religious schools dealt only with the need to exclude people from selection for employment on various attributes. However the Committee acknowledges that concerns about the rights of existing employees of religious educational institutions and service providers were raised by the VIEU and the Australian Services Union as well as the Victorian Gay and Lesbian Rights Lobby and Liberty Victoria. The VIEU contended that it is unacceptable for teachers in religious schools to have less employment and equality rights than other employees or teachers in non-religious schools. The VIEU is concerned that the Act currently fails to protect female teachers in religious schools from the possibility of dismissal if they become pregnant outside marriage, and may not protect all teachers from religious, sex or sexuality discrimination in relation to promotion opportunities or in respect to dismissal. It noted that many religious schools choose to employ teachers who are not members of the religion, and their rights should be considered. Liberty Victoria contended that to allow the exclusion of homosexuals from the entire workforce of religious schools fails to respect the human rights of people with a minority sexuality.

Having considered all submissions the Committee has decided to recommend that the religious exceptions, concerning sections 75(2) and (3) and section 76, should be retained but should apply for fewer attributes.

**Religious beliefs or principles**

> Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.

---

100 See eg. EOA (WA), DA (ACT), SDA (Cth) which only allow discrimination against employees or contract workers and in education.

101 See eg. ADA (NT) which allows discrimination only religious belief or activity and sexuality; ADA (Tas) which allows discrimination only on gender.

102 Victorian Independent Education Union, submission (763).

103 Australian Services Union, submission (743).

104 Victorian Gay and Lesbian Rights Lobby, submission (678).

105 Liberty Victoria, submission (755).
Recommendation 50.

Religious beliefs or principles

1. The Committee recommends that the exception in section 77 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.

2. The Committee recommends that section 77 should be amended to allow an exception for conduct necessary for the person to comply with genuine religious beliefs or principles provided that any limitation of another person’s rights is justified within the test in Charter s. 7(2).

The Committee observes that section 77 is expressed as a broad exception and was first introduced in the Victorian Equal Opportunity Act in 1995. The Committee notes that parliamentary and other documents from that time do not help to clarify its purpose.

The Committee notes that other Australian jurisdictions have no equivalent to section 77, and further observes that no submission asserted that religious freedom was therefore inadequately protected in other States and Territories.

The Committee notes that section 77 allows religious adherents to follow their religious beliefs even if it involves discrimination against others on any attribute in any area of activity. As currently drafted, section 77 requires that the discrimination must be necessary, but excludes consideration of either the weight or seriousness of either the religious belief involved or the other rights that may be overridden by it. The Committee considers that section 77 is unlikely to be compatible with the reasonable limitation test in Charter s. 7(2).

The Committee recommends that if the exception is to be retained, it should include a reasonable limitations test as in Charter s. 7(2).
Inquiry into the Exceptions and Exemptions to the

Private clubs

78 Private clubs

(1) Nothing in Part 3 applies to the exclusion of people from a private club or from any part of the activities or premises of a private club.

(2) In this section, private club means a social, recreational, sporting or community service club or a community service organisation, other than one that—
(a) occupies any Crown land; or
(b) directly or indirectly receives any financial assistance from the State or a municipal council.

Recommendation 51.

The Committee recommends that section 78 should be amended to provide that –

1. private clubs should be permitted to discriminate on the basis of attributes necessary for the purposes of the club, so that private clubs can select but not exclude members on the basis of an attribute.

2. private clubs should be permitted to discriminate in relation to selection of members and, if necessary, benefits provided to members, but the exception should not extend to areas such as employment or other areas of activity covered by the Act that are not essential to the provision of benefits to the club’s members.

The Committee does not recommend a change that would prevent single-sex clubs from continuing their operations or require them to seek an exemption in order to continue their operations. The Committee accepts that freedom of association is a fundamental human right that is protected by the Charter, and should be balanced against non-discrimination rights. The Committee considers that associations of private individuals should not be required to show they serve an approved purpose (such as redressing disadvantage) in order to operate, nor should they be required to apply for an exemption to pursue their activities.

However the Committee notes that section 78 is currently expressed as a blanket exception that automatically allows freedom of association to prevail over non-discrimination rights and in its present form is unlikely to be compatible with the reasonable limitations test in Charter s. 7(2). The Committee has concluded that section 78 should be amended to allow for a more nuanced or appropriate balancing of the rights to non-discrimination and freedom of association.

The Committee notes that other Australian anti-discrimination laws use two thresholds to identify clubs to which they apply. The first is that clubs below 30 members are not subject to the laws at all, and the second is that the prohibitions of anti-discrimination law generally apply to a club that provides and maintains its facilities in whole or in part from the funds of the organisation, and sells or supplies liquor for consumption on its premises, unless a specific exception applies. The Committee notes that the definition of ‘club’ in the SDA (Cth) applies only to organisations of 30 or more members.
Committee considered whether to introduce either of these criteria into the Act, but concluded that it was not necessary to do so. The Committee preferred not to differentiate between private clubs on the basis of size or types of activities, because it regards all clubs that do not receive public financial assistance or occupy public land as private in nature.

The Committee therefore recommends that the private clubs exception should continue to be available to all clubs that do not occupy public land or receive public financial assistance. However, the scope of protection that it provides should be amended as outlined below.

The Committee considers that the attributes on which discrimination is permitted should be only those actually necessary for the private club’s stated purposes. The Committee considers that this could be achieved by permitting discrimination on the basis of an attribute or attributes that is or are necessary for the purpose of the club by allowing selection for membership or allocation of benefits on the basis of that attribute. Clubs should not be allowed to use attributes as a basis for exclusion from membership or benefits. The Committee considers that adopting these two conditions would provide a clear and appropriate scope for the exception. For example, a male only club would not be permitted to discriminate on the attributes of race, impairment, or religion, unless these were necessary for the purposes of the club.

The Committee considers that the areas of activity in which a club should be permitted to discriminate should be those of selection for membership and if necessary, allocation or provision of benefits to members. The Committee notes that this would be similar to the scope of the equivalent exception in the SDA (Cth). The Committee considers that the exception should not extend to employment within the club, unless they are essential to providing benefits to members. The clubs that gave evidence to the Committee did not seek to discriminate in relation to employment or other activities that affected non-members. The Committee observes that clubs will be able to use the exception recommended by the Committee in relation to inherent requirements of the position in appropriate cases (see Recommendation 5 in relation to section 17).

The Committee recommends that unless an activity of a private club falls within the private clubs exception or another exception, it should be subject to the Act in relation to its employment and other activities.

Incapacity and age of majority

79 Legal incapacity and age of majority

(1) Nothing in this Act is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority.

(2) 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.

Recommendation 52.

Incapacity and age of majority

The Committee recommends that section 79 should be amended so that it authorises discrimination only on the basis of the particular incapacity involved.

See SDA (Cth) ss. 39 (a) and (b).
The Committee considers that the purpose of section 79 is to preserve the rules of law relating to legal capacity. The Committee notes that a legal incapacity could arise by virtue of age or mental impairment, both of which are attributes covered by the Act. The Committee considers that the purpose of subsection (2) is to make clear that a person can be treated differently on the basis of their incapacity, even if it appears that such treatment is based on their attribute and may therefore fall within the definition of prohibited discrimination. However, the Committee is concerned that on its current construction section 79(2) may not effectively confine permitted discrimination only to the attribute on which the incapacity is based.

The Committee recommends amending section 79(2) to ensure that it permits only discrimination based on the attribute that is the basis for the incapacity. The Committee notes that a useful model for a construction that allows discrimination only on the attribute that is the basis for the incapacity is found in section 57G of the DA (ACT).

The Committee observes there is no exception similar to section 79 found in either the ADA (Cth), DDA (Cth) or in the EO Act (WA). However the Committee notes that all other state and territory laws have an equivalent provision.

The Committee notes that the Commission did not see a need to amend section 79 because it would be read subject to the Charter. However, the Committee is concerned that the clearest possible guidance should be given by the Act and that an amended provision would be in accordance with the intention of the provision. Submissions from the Youth Affairs Council of Victoria, and Vision Australia supported an amendment of this nature.

**Protection of health, safety and property**

80 Protection of health, safety and property

(1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary—

(a) to protect the health or safety of any person (including the person discriminated against) or of the public generally;

(b) to protect the property of any person (including the person discriminated against) or any public property.

(2) A person may discriminate against another person 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).

---

109 A specific example of the type of situation contemplated is provided in s.112 of the ADA (Qld): “It is not unlawful for a person to refuse to enter into a contract with a minor, or a person who has impaired capacity for the contract within the meaning of the Guardianship and Administration Act 2000, if the contract cannot be legally enforced.”

110 Discrimination Act 1991 (ACT) s. 57G: Legal incapacity; Part 3 does not make it unlawful to discriminate against a person on the ground of age in relation to a transaction if the person is subject to a legal incapacity because of his or her age and the incapacity is relevant to the transaction.

111 Submission (7).

112 Youth Affairs Council of Victoria, submission (751), pp. 8-9

113 Vision Australia, Submission to the Exceptions Review.
Recommendation 53.

Protection of health, safety and property

The Committee recommends that section 80 be amended to provide that discrimination is permitted only where it is reasonably necessary –

- in relation to impairment or physical features, after consideration of any obligation to make reasonable adjustments for the person,
- where there is no less restrictive alternative reasonably available, and
- it is proportionate to the risk being avoided, and
- where the action meets the reasonable limitations test in Charter s. 7(2).

The Committee observes that section 80 is the interface between anti-discrimination law and occupational health and safety laws. The Committee notes that section 80 is the broadest such provision in any Australian jurisdiction and that typically equivalent laws confine the exception to matters relating to public health.114 The Committee notes that in relation to employment, occupational health and safety, specific laws prevail over the Act by virtue of section 69.115

The Committee notes that a number of submissions from disability organisations expressed concern that section 80 sets a low threshold for permitting discrimination.116 The Commission117 and the Federation of Community Legal Centres118 submitted that section 80 should be made subject to the reasonable limitations test in Charter s. 7(2).

The Committee notes that the Tribunal in applying section 80 has construed the section as requiring an examination of the reasonableness, rationality and proportionality of the conduct.119

The Committee has concluded that clearer guidance should be given in section 80 by requiring a relevant assessment to be made by reference to a range of factors including the factors in Charter s. 7(2).

Age benefits and concessions

81 Age benefits and concessions

A person may provide benefits, including concessions, to another person based on age.

---

114 See eg. ADA (NSW), s. 49P; DDA (Cth), s. 48; ADA (NT), s. 55 and ADA (Tas), s. 47.
115 It is expected that the operation of occupational health and safety laws would be preserved as prevailing over the Act even if s. 69 was repealed.
116 See submissions to the Exceptions review from Vision Australia and Blind Citizens Australia, discussed in the Options paper at pp. 139-140.
118 Federation of Community Legal Centres, submission (691).
Recommendation 54.

*Age benefits and concessions*

The Committee recommends that section 81 be retained unamended.

The Committee observes that no submission was received in relation to this exception and for reasons that are self-evident and based on public policy no amendment is recommended.
# Special Measures

## Welfare measures and special needs

### 82 Welfare measures and special needs

1. Nothing in Part 3 applies to anything done in relation to the provision to people with a particular attribute of special services, benefits or facilities that are designed—
   - (a) to meet the special needs of those people; or
   - (b) to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.

2. Without limiting the generality of subsection (1)—
   - (a) a person may grant a woman any right, privilege or benefit in relation to pregnancy or childbirth;
   - (b) a person may provide, or restrict the offering of, holiday tours to people of a particular age or age group.

### Recommendation 55.

Welfare measures and special needs

1. The Committee recommends that section 82 be amended to declare that special measures do not constitute discrimination.

2. The Committee recommends that criteria for a program of special measures should include that the program addresses an identified disadvantage, such as a need for protection or advancement of a group of people identified by one or more attributes.

3. The Committee recommends that the following conditions should apply to the special measures exception:
   - the special measure should be temporary, so that it does not continue after the identified disadvantage has been eliminated,
   - progress of the measure towards equality should be regularly evaluated and monitored,
   - be undertaken in good faith to give effect to its purpose,
   - is objectively capable of moving towards the purpose,
   - is a reasonable response to the disadvantage being addressed,
   - the onus of proof to establish the necessity for a special measure should be on the person proposing to provide the special measure, and
   - be solely for the purpose or substantially for that purpose.

The Committee considers that special measures intended to promote equality for people who suffer disadvantage as a result of past discrimination or systemic disadvantage should not be regarded as
Inquiry into the Exceptions and Exemptions to the 

discrimination under the Act. The Committee endorses the recommendation\textsuperscript{120} of the Gardner Review that:

\begin{quote}
\textit{The existing provision in the Charter that provides that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination,\textsuperscript{121} should be incorporated in the Act.}
\end{quote}

The Committee observes that on its current construction section 82 is very narrow and for example, does not authorise any special measures in relation to employment. Organisations that seek to adopt and implement an equal opportunity plan for women or indigenous employees are not covered by any exception in the Act. The Committee notes that many organisations routinely apply for an exemption under section 83 to ensure their action will be lawful.

The Committee recommends that the definition of a special measure in the Act should not depend on proving specific past discrimination as this test is likely to be too legalistic and divert resources into legal proof rather than addressing disadvantage. The Committee observes that definitions of special measures in other Australian jurisdictions are linked to the existence of disadvantage rather than to proof of past discrimination. The Committee recommends that special measures should be defined as measures intended to promote equality by assisting a particular group who are disadvantaged on the basis of one or more attributes. Special measures may involve providing special services or facilities to reduce disadvantage, or promoting equality or equality of opportunity at work or in other areas. Special measures could be taken in relation to any of the attributes or areas covered by the Act provided the group being assisted is disadvantaged in the context in which the special measures operate.

The Committee recommends that the scope of protection for special measures in the Act should exempt their funding, establishment and conduct. However the special measures exception should not except everything that occurs in the course of carrying them out. Decisions about employment, specific service provision or the general administration of disability or other services should not be excepted.\textsuperscript{122} However, the Committee considers that where a special service or facility is provided and limited resources mean that selection of participants is necessary, the exemption from the Act should cover selection of participants on an objective basis.

\textbf{Exemptions by the Victorian Civil and Administrative Tribunal}

\textsuperscript{83} Exemptions by the Tribunal

(1) The Tribunal, by notice published in the Government Gazette, may grant an exemption—

\begin{itemize}
\item [(a)] from any of the provisions of this Act in relation to—
\item [(i)] a person or class of people; or
\item [(ii)] an activity or class of activities; or
\end{itemize}

\begin{itemize}
\item Charter, s. 8(4).
\item In its review of the Disability Discrimination Act 1992 (Cth), the Productivity Commission concluded that the exemption in the DDA for ‘special measures’ should be amended to clarify that it exempts the establishment, eligibility criteria and funding of these measures designed to benefit particular groups within the community but not the normal administration of special disability services. Review of the Disability Discrimination Act 1992, Productivity Commission Inquiry Report No. 30, April 2004, Recommendation 12.4, see generally Ch. 12.
\end{itemize}
(b) in the circumstances referred to in section 28; or
(c) from any of the provisions of this Act in any other circumstances specified by the Tribunal.

(2) An exemption remains in force for the period, not exceeding 3 years, that is specified in the notice.

(3) The Tribunal, by notice published in the Government Gazette—
   (a) may renew an exemption from time to time for the period, not exceeding 3 years, specified in the notice;
   (b) may revoke an exemption with effect from the date specified in the notice, which must be a date not less than 3 months after the date the notice is published.

(4) An exemption may be granted or renewed subject to any conditions the Tribunal thinks fit.

(5) An exemption may be granted, renewed or revoked—
   (a) on the application of a person whose interests, in the opinion of the Tribunal, are or may be affected by the exemption; or
   (b) on the Tribunal’s own initiative.

Recommendation 56.

Exceptions by the Victorian Civil and Administrative Tribunal (the ‘Tribunal’)

The Committee recommends that section 83 be amended in relation to the criteria for granting temporary exemptions and the process involved in considering applications.

Criteria for granting a temporary exemption:

The Committee recommends that a temporary exemption should be granted on the basis of an individual application where there is an arguable case of discrimination, where the exemption is consistent with the objectives of the Act and where the exemption is a reasonable limitation within the meaning of the test in Charter s. 7(2).

Process for granting a temporary exemption:

The Committee recommends that the process for granting temporary exemptions should:

- be transparent and accountable, and
- provide an opportunity for a person affected or an independent contradictor to put the case against granting the temporary exemption.

In particular, the Committee recommends that:

☐ the Tribunal should keep a public record of all exemptions granted, with sufficient information to allow a person to understand the scope and reasons permitting the temporary exemption.

☐ the Tribunal should be required to publish notice of any application received for at least two weeks before any determination is made, and the applicant for an exemption (or the Tribunal) should be obliged to provide a copy of any such application to the Commission.

☐ the Tribunal should call for and receive submissions from people whose interests would be affected by the proposed exemption before it makes a determination.

☐ the Tribunal’s procedure should remain generally at its discretion.
with the Tribunal’s leave, the Commission, or a person whose interests would be directly affected, should have standing under the Act to appear or make submissions in relation to an application for an exemption.

an application for an exemption should be dealt with by the Tribunal within a reasonable time.

the Tribunal should be required to publish reasons for any decision relating to a temporary exemption.

with the Tribunal’s leave, the Commission, or a person whose interests would be directly affected, should have standing to seek a review, variation or revocation of an exemption that has previously been granted by the Tribunal.

The Committee recommends that when an exemption is granted it should be –

valid for three years with a discretion to allow a longer period of up to 5 years in appropriate and justified circumstances,

subject to such terms and conditions as the Tribunal specifies,

subject to an obligation to monitor the operation of and need for the exemption on a regular basis;

applicable only in such circumstances or in relation to such activities as the Tribunal specifies;

if necessary and justified be renewable by the Tribunal (rather than re-application);

the onus on a renewal application should remain on the applicant to show that the need for the exemption continues and provide an opportunity for submissions from people affected or likely to be affected.

The Committee considers that section 83 allows unexpected situations to be dealt with under the Act. In general the question that is likely to arise in relation to section 83 is whether some other right should prevail over the prohibitions in the Act. The Committee considers that this question should be resolved in accordance with the reasonable limitations test in Charter s. 7(2).

In respect to temporary exemptions two major issues arise concerning the criteria for granting an exemption and the procedure or process for considering applications.

Criteria

The current criteria for granting an exemption under section 83 are those identified by the Anti-Discrimination Tribunal (the Tribunal's predecessor) in the case of Fernwood Fitness Centres,

which concerned an exemption granted for a gym to allowing only women as members. The Tribunal in that case considered that the appropriate test was –

is the exemption appropriate in the light of the objectives and scheme of the Act? In considering that question, the Board will, in addition to the particular circumstances of each case, take into account such matters as the reasonableness of the exemption sought and also whether, although not clearly falling within any of the statutory exceptions, the circumstances bear a close resemblance to any of

the specific exceptions ... Conversely, if exemption is sought for reasons wholly unrelated to the objectives or scheme of the Act (such as to obtain a commercial advantage), an exemption would be inappropriate (emphasis added)

The Committee considers that adoption of the approach in Charter s. 7(2) is consistent with these criteria. The Charter s. 7(2) approach would permit assessment of a range of factors that may be relevant such as the public interest in observing the law, the public interest in granting the exemption, and any unreasonable burden on either the applicant or a person affected by the exemption.

The Committee observes that the Fernwood test was reinterpreted by Morris P in the recent case of Boeing, where the Tribunal held that the proper test was “whether the proposed exemption is necessary or desirable to avoid an unreasonable outcome.” However, the Committee regards that test as inconsistent with the Charter s. 7(2) approach. The Committee here relevantly observes that the Charter came into operation after the Boeing decision.

The Committee observes that the relevance of the enactment of the Charter has more recently been considered by Bell J in Lifestyle Communities Ltd (No 3) [2009] VCAT 1869. There the Tribunal held that the Charter s. 7(2) test applied to the exercise by the Tribunal of its administrative discretion under section 83. The Committee considers that the Committee’s recommended amendments would give effect to this decision and appropriately reflect the test to be applied under the Act following the enactment of the Charter.

Procedure

In relation to the procedure for granting a temporary exemption, the Committee observes that all submissions that commented on procedure emphasised the need for greater transparency and to provide an opportunity for opposing considerations to be put to the Tribunal.

The main factors that were considered were that:

- a person likely to be affected should have a reasonable opportunity to be made aware of an application for a temporary exemption before the application is determined, and
- an application should not be considered in the absence of a contradictor (whether that be the person(s) likely to be affected or an independent public interest advocate).

The Committee’s considers that its recommendations in relation to process are intended to address these concerns, whilst allowing the Tribunal sufficient discretion over its own procedure in dealing with temporary exemption applications.

The Committee notes that consideration should be given to providing legal aid to a person who may be affected by a temporary exemption.

---

124 Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption) [2007] VCAT 532.
Exemptions to allow compulsory retirement in the public sector

84 Exemptions to allow compulsory retirement in the public sector

On the application of any Minister, the Minister, in writing, may grant an exemption from Part 3 to allow the compulsory retirement on the basis of age of any class of people employed—

(a) under the Public Administration Act 2004;
(b) under Part 2.4 of the Education and Training Reform Act 2006;
(c) under the Police Regulation Act 1958;
(d) by a public hospital within the meaning of the Health Services Act 1988.

Recommendation 57.

Exemptions to allow compulsory retirement in the public sector

The Committee recommends that section 84 should be repealed.

The Committee notes that section 84 allows any Minister to grant an exemption in relation to compulsory retirement in the public sector. The Committee observes that it has no information on the use that has been made of this provision, the number of exemptions (if any) granted by any Minister under it, or the reasons for any exemption(s). The Committee observes that it appears that section 84 does not require exemptions to be justified, publicised or be limited to any particular term that requires them to be reconsidered.

The Committee notes that there are no equivalent provisions in any other Australian jurisdiction. The Committee considers that to the extent that section 84 has been adopted as a transitional provision dealing with the introduction of age as an attribute, the time for transitional adjustment has now almost certainly expired.

The Committee is not aware of any ongoing justification for the retention of section 84 and consequently recommends its repeal.
Other Matters

The treatment of transgender and intersex people in the Equal Opportunity Act

The Committee observes that the legal position of transgender and intersex people under the Act is unclear and may be denied a full measure of protection under the Act as a result. The Committee notes that the Act essentially rests on the assumption that every person belongs to one of two sexes, and that many exceptions relate only or principally to the attribute of sex, and the Act does not make adequately address the question of transgender and intersex persons and their non-discrimination rights under the Act in relation to their sex.

Recommendation 58.

The Committee recommends that a further review be undertaken concerning the legal standing of transgender and intersex people in the context of their protection in anti-discrimination law. Pending the outcome of any review, the Committee recommends that interim measures be taken to clarify the status of transgender and intersex people in relation to sex discrimination under the Act.

The Committee notes that transgender and intersex people are protected from discrimination based on their gender identity under the definition of ‘gender identity’ in section 4(1) of the Act whether or not they have had gender re-assignment surgery. However, the Act is unclear about when such a person is to be treated as being of the sex that they have chosen to affirm rather than their birth sex. The Committee notes that a transgender or intersex person could be treated as not being of their affirmed sex, or as being of no sex, and as a consequence of this gap in the law may be deprived of an opportunity to challenge discrimination on the basis of sex. This could arise in the context of restrictions on accommodation for employees and restrictions on clubs and sporting activities or in other contexts.

The Committee notes that several organisations expressed concern about the impact on transgender and intersex people of their inability to be recognised in their affirmed gender under the Act. The Federation of Community Legal Centres noted that:

---

125 See for example provision exceptions relating to the provision of single sex accommodation in employment (s. 28), welfare accommodation (s. 55) and student accommodation (s. 56).

126 See for example the exception for clubs that provide different benefits to men and women (s. 63), the private clubs exception (s. 78) and the competitive sports exception (s. 66).

127 See submissions from Victorian Equal Opportunity and Human Rights Commission (7), Federation of Community Legal Centres (691), and evidence given by Transgender Victoria on 4 August 2009.
transgender and intersex people are not even always accommodated in the wording of the Act; for example, section 28 counterposes ‘one sex’ to ‘both sexes’ and so leaves it unclear as to the place of intersex individuals. … Section 55 also facilitates potential discrimination on the basis of gender identity if the person’s own identification is not read as determining the question of the person’s sex.\textsuperscript{128}

The Committee notes the example of the temporary exemption granted by the Tribunal to Hanover Welfare Services\textsuperscript{129} allowing it to exclude transgender women who were not born female from a women’s transitional and crisis accommodation service that it ran. The Committee notes the advice of the Commission\textsuperscript{130} that it conducted negotiation and education processes involving the parties to this exemption application, as a result of which the exemption was removed by agreement. Nevertheless, the reported decision granting the exemption still stands.

The Committee notes that in many jurisdictions it is necessary for transgender people to obtain a certificate based on prescribed evidence before their change of gender is officially accepted. For example, the Births, Deaths and Marriages Registration Act 1996 (Vic)\textsuperscript{131} requires verification by two doctors that gender re-assignment surgery has occurred before the register of births can be amended to recognise the chosen sex, and a birth certificate recognising the changed sex can be issued. This appears to be a very restrictive criterion and would not necessarily be appropriate as a requirement for recognising a transgender person for other purposes.

The Australian Human Rights Commission has recently completed a report on Sex Files: the legal recognition of sex in documents and government records,\textsuperscript{132} which concluded that simply requiring recognition of the person’s affirmed sex is not an adequate solution to the problem of determining when a transgender person should be recognised under their affirmed gender. That Report recommended that the Federal government should take a leadership role in ensuring that there is a nationally consistent approach to the legal recognition of sex in accordance with its recommendations and with the co-operation of State governments.

The Committee considers that different approaches may be able to be identified for people at different stages along the path to adopting a gender, or that a test that allows for consideration of the interests of the transsexual or intersex person could be developed. For example, the UK Equality Bill 2009 contains a number of exceptions relating to gender reassignment, which are tested by whether the restriction is a proportionate means of achieving a legitimate aim. For example, Schedule 23 — General exceptions provides –

\begin{quote}
\textit{Communal accommodation}

3(1) A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—

(a) the admission of persons to communal accommodation;

(b) the provision of a benefit, facility or service linked to the accommodation.
\end{quote}

\textsuperscript{128} Federation of Community Legal Centres, submission (691.
\textsuperscript{129} Hanover Welfare Services Ltd (Anti Discrimination Exemption) [2007] VCAT 640
\textsuperscript{131} See Part 4A—Recognition of Sex (Transsexualism).
\textsuperscript{132} At http://www.hreoc.gov.au/genderdiversity/index.html
(4) In applying sub-paragraph (1)(a) in relation to gender reassignment, account must also be taken of whether and how far the conduct in question is a proportionate means of achieving a legitimate aim.

This approach would allow the circumstances to be assessed in the context of each individual case, and appears to be consistent with the Charter s. 7(2) test for reasonable limitations on rights. The Equality Bill 2009 (UK) contains a similar exception in relation to separate services and single sex services. 133

Sport

The Committee considers that sport involves particular difficulties in dealing with transgender and intersex people as sporting ability often depends on physique and this is related to birth sex. In addition, sport is played at many levels, and what may be suitable to regulate competition at an elite level may not be appropriate for competitions or sporting organisations where the emphasis is on social participation. The Committee does not consider that simply recognising affirmed sex would lead to an appropriate solution in the context of ensuring fair competition.

The Committee notes that there are different legislative approaches to this issue. The ADA (NSW) allows the exclusion of a transgender person from sporting activities for members of their affirmed sex:

38P Sport

(1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.

(2) Subsection (1) does not apply: [to certain roles such as coaching …]

By contrast, a more nuanced provision exists in the Gender Recognition Act 2004 (UK), which directs attention to the nature of the sporting activity:

19. Sport

(1) A body responsible for regulating the participation of persons as competitors in an event or events involving a gender-affected sport may, if subsection (2) is satisfied, prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act.

(2) This subsection is satisfied if the prohibition or restriction is necessary to secure—

(a) fair competition, or

(b) the safety of competitors,

at the event or events.

(3) “Sport” means a sport, game or other activity of a competitive nature.

(4) A sport is a gender-affected sport if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport.

133 Equality Bill 2009 (UK) Schedule 3 — Services and Public Functions: Exceptions, Part 6 — Separate and single services s. 25.
A similar provision involving the definition of ‘gender-affected activity’ appears in the Equality Bill 2009 (UK): see Part 14 — General exceptions, s. 190 Sport.

The Committee notes, however, that none of these provisions deals with how transgender people are to be treated in terms of their sex.

**General exceptions for transgender and intersex people**

Resolving these issues requires a level of research beyond that possible for the Committee in undertaking this current broad review. However, the Committee believes it may be desirable to adopt interim provisions pending a final full review of this difficult area of discrimination law. The Committee considers that it is in the public interest that the legal status of transgender or intersex persons in relation to accommodation and sporting activities should ultimately be fully addressed. The Committee considers that the approach in s. 3 of Schedule 23 of the Equality Bill 2009 (UK), and in the context of sport, the *Gender Recognition Act 2004* (UK) would provide a basis for an interim approach to sex discrimination against transgender people that should be adopted pending the outcome of a fuller review.

**The position of volunteers under the Act**

**Recommendation 59.**

*The Committee recommends that the question of whether to extend the protection of the Act to volunteers should be considered.*

The Committee notes that the Federation of Community Legal Centres134 contended that some provisions in the Act, while not expressed as exceptions, operate as de facto exceptions by restricting the meaning or scope of prohibited discrimination under the Act. For example, the employment provisions in section 14 of the Act, when read with the definition of ‘employment’ in section 4(1) explicitly exclude protection from discrimination for volunteers. The Federation’s submission contended that volunteers should be given protection under the Act.

The Committee considers that there may be sound policy reasons to consider extending the prohibition against discrimination on the basis of defined attributes to volunteers.

The Committee observes that organisations that routinely rely on volunteers should have an obligation to act in a manner that is in conformity or compatible with the non-discrimination principles in the Act. In making this recommendation the Committee is aware that the form and content of any protection may need careful consideration concerning any reasonable limitations that may need to apply.

The Committee recommends that this question should be the subject of further review.

---

134 Federation of Community Legal Centres, submission (691).
The Minutes of the Committee show that the following Divisions took place during consideration of *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995, Final Report* on Tuesday 20 October 2009.

**Small Business**

Motion—That the Committee adopt recommendation 9, concerning section 21 – Exception—small business, as follows:

  Recommendation 9
  The Committee recommends that section 21 be repealed.

Moved Ms Jaala Pulford MLA
Seconded Mr Colin Brooks MLA

The Committee divided.

Ayes, 5  Noes, 4
Mr Colin Brooks MLA  Mr Ken Jasper MLA
Mr Carlo Carli MLA  Mr Edward O’Donohue MLC
Mr Khalil Eideh MLC  Mrs Inga Peulich MLC
Mr Telmo Languiller MLA  Mr Ryan Smith MLA
Ms Jaala Pulford MLC

And so it passed in the positive.

**Reasonable terms of partnership**

Motion—That the Committee adopt recommendation 11, concerning section 23 – Exception—reasonable terms of employment and section 33 – Exception—reasonable terms of partnership, as follows:

  Recommendation 11
  The Committee recommends that sections 23 and 33 be repealed.

Moved Ms Jaala Pulford MLC
Seconded Mr Khalil Eideh MLC
The Committee divided.

Ayes, 6  
Mr Colin Brooks MLA  
Mr Carlo Carli MLA  
Mr Khalil Eideh MLC  
Mr Ken Jasper MLA  
Mr Telmo Languiller MLA  
Ms Jaala Pulford MLC  
Noes, 3  
Mr Edward O'Donohue MLC  
Mrs Inga Peulich MLC  
Mr Ryan Smith MLA

And so it passed in the positive.

**Standards of dress and behaviour set by employer**

Motion—That the Committee adopt recommendation 12, concerning section 24 – Exception—standards of dress and behaviour (set by employer), as follows:

Recommendation 12

The Committee recommends that sections 24 should be amended to remove the reference to behaviour.

The Committee further recommends that a dress or appearance requirement should be subject to the reasonable limitations test in Charter s. 7(2).

Moved  Ms Jaala Pulford MLC  
Seconded  Mr Khalil Eideh MLC

The Committee divided.

Ayes, 5  
Mr Colin Brooks MLA  
Mr Carlo Carli MLA  
Mr Khalil Eideh MLC  
Mr Telmo Languiller MLA  
Ms Jaala Pulford MLC  
Noes, 4  
Mr Ken Jasper MLA  
Mr Edward O'Donohue MLC  
Mrs Inga Peulich MLC  
Mr Ryan Smith MLA

And so it passed in the positive.

**Care of Children**

Motion—That the Committee adopt recommendation 13, concerning section 25 – Exception—care of children, as follows:

Recommendation 13

On the proviso that protection is provided in specific purpose legislation concerning the safety and welfare of children the Committee recommends that section 25 be repealed.
Moved Ms Jaala Pulford MLC
Seconded Mr Khalil Eideh MLC

The Committee divided.

Ayes, 3  
Mr Carlo Carli MLA  Mr Colin Brooks MLA
Mr Khalil Eideh MLC  Mr Ken Jasper MLA
Ms Jaala Pulford MLC  Mr Telmo Languiller MLA
Mr Edward O’Donohue MLC LC
Mrs Inga Peulich M
Mr Ryan Smith MLA

Noes, 6

And so it passed in the negative.

Motion—That recommendation 13, concerning section 25 – Exception—care of children, be amended and included in the report, as follows:

Recommendation 13
The Committee recommends that section 25 be retained without amendment.

Moved Mrs Inga Peulich MLC
Seconded Mr Ryan Smith MLA

The Committee divided.

Ayes, 6  
Mr Colin Brooks MLA  Mr Carlo Carli MLA
Mr Ken Jasper MLA  Mr Khalil Eideh MLC
Mr Telmo Languiller MLA  Ms Jaala Pulford MLC
Mr Edward O’Donohue MLC
Mrs Inga Peulich MLC
Mr Ryan Smith MLA

Noes, 3

And so it passed in the positive.

Youth wages

Motion—That the Committee adopt recommendation 15, concerning section 27 – Exception—youth wages, as follows:

Recommendation 15
The Committee recommends that section 27 should be amended to allow for trainee wages related to the level of experience or training of a person without reference to their age.
Moved Mr Telmo Languiller MLA  
Seconded Mr Colin Brooks MLA

The Committee divided.

Ayes, 5  
Noes, 4

Mr Colin Brooks MLA  Mr Ken Jasper MLA  
Mr Carlo Carli MLA  Mr Edward O'Donohue MLC  
Mr Khalil Eideh MLC  Mrs Inga Peulich MLC  
Mr Telmo Languiller MLA  Mr Ryan Smith MLA  
Ms Jaala Pulford MLC

And so it passed in the positive.

**Standards of dress and behaviour in schools**

Motion—That the Committee adopt recommendation 23, concerning section 40 – Exception—standards of dress and behaviour (in schools), as follows:

Recommendation 23

The Committee recommends that section 40 should be amended to remove reference to behaviour.

The Committee further recommends that the exception should provide that in assessing the reasonableness of the standards set by an educational authority, the following factors should be considered –

- whether the views of the school community have been taken into account in adopting the standards of dress or appearance and whether the standards are subject to any review, and
- whether the standards are a reasonable limitation on other rights having regard to the test in Charter s.7(2)

Moved  Ms Jaala Pulford MLC  
Seconded  Mr Telmo Languiller MLA

The Committee divided.

Ayes, 5  
Noes, 4

Mr Colin Brooks MLA  Mr Ken Jasper MLA  
Mr Carlo Carli MLA  Mr Edward O'Donohue MLC  
Mr Khalil Eideh MLC  Mrs Inga Peulich MLC  
Mr Telmo Languiller MLA  Mr Ryan Smith MLA  
Ms Jaala Pulford MLC

And so it passed in the positive.
Welfare measures in accommodation

Motion—That the Committee adopt recommendation 34, concerning section 55 – Exception—welfare measures, as follows:

Recommendation 34

The Committee recommends that section 55 be amended to delete the words ‘or mainly’ so that the exception would be confined to the provision of accommodation established wholly for the welfare of people of a particular sex, age, race or religious belief.

The Committee further recommends that the provision should apply only to non-profit organisations.

Moved Ms Jaala Pulford MLA
Seconded Mr Telmo Languiller MLA

The Committee divided.

Ayes, 6
Mr Colin Brooks MLA
Mr Carlo Carli MLA
Mr Khalil Eideh MLC
Mr Ken Jasper MLA
Mr Telmo Languiller MLA
Ms Jaala Pulford MLC

Noes, 3
Mr Edward O'Donohue MLC
Mrs Inga Peulich MLC
Mr Ryan Smith MLA

And so it passed in the positive.

Source: reproduced from Appendix A of the Department of Justice's Background Paper for SARC.

### Division 1 – Discrimination in employment

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>Exception – domestic or personal services</td>
<td>All</td>
</tr>
<tr>
<td>17</td>
<td>Exception – genuine occupational requirements</td>
<td>Sex (all employment) Age, sex, race (dramatic / artistic performance, photographic or modelling work etc) Physical Features (dramatic / artistic performance, photographic or modelling work etc)</td>
</tr>
<tr>
<td>18</td>
<td>Exception – political employment</td>
<td>Political belief or activity</td>
</tr>
<tr>
<td>19</td>
<td>Exception – welfare services</td>
<td>All</td>
</tr>
<tr>
<td>20</td>
<td>Exception – family employment</td>
<td>May limit to relatives</td>
</tr>
<tr>
<td>21</td>
<td>Exception – small business</td>
<td>All</td>
</tr>
<tr>
<td>22</td>
<td>Exception – special services or facilities</td>
<td>Impairment</td>
</tr>
<tr>
<td>23</td>
<td>Exception – reasonable terms of employment</td>
<td>May set reasonable terms</td>
</tr>
<tr>
<td>24</td>
<td>Exception – standards of dress and behaviour</td>
<td>May set standards</td>
</tr>
<tr>
<td>25</td>
<td>Exception – care of children</td>
<td>All</td>
</tr>
<tr>
<td>26</td>
<td>Exception – compulsory retirement of judicial officers</td>
<td>Age</td>
</tr>
<tr>
<td>27</td>
<td>Exception – youth wages</td>
<td>Age</td>
</tr>
<tr>
<td>27A</td>
<td>Exception – early retirement schemes</td>
<td>Age</td>
</tr>
<tr>
<td>27B</td>
<td>Exception – gender identity</td>
<td>Gender identity</td>
</tr>
<tr>
<td>28</td>
<td>Exemption – single sex accommodation</td>
<td>Sex</td>
</tr>
</tbody>
</table>
### Division 2 – Discrimination in employment-related areas

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>32</td>
<td>Exception – special services and facilities</td>
<td>Impairment</td>
</tr>
<tr>
<td>33</td>
<td>Exception – reasonable terms of partnership</td>
<td><em>May set reasonable terms</em></td>
</tr>
<tr>
<td>36</td>
<td>Exception – reasonable terms of qualification</td>
<td>Impairment, physical features</td>
</tr>
</tbody>
</table>

### Division 3 – Discrimination in education

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>38</td>
<td>Exception – educational institutions for particular groups</td>
<td>Sex, race, religious belief, age or age group, impairment</td>
</tr>
<tr>
<td>39</td>
<td>Exception – special services or facilities</td>
<td>Impairment</td>
</tr>
<tr>
<td>40</td>
<td>Exception – standards of dress and behaviour</td>
<td>All</td>
</tr>
<tr>
<td>41</td>
<td>Exception – age based admission schemes and age quotas</td>
<td>Age</td>
</tr>
</tbody>
</table>

### Division 4 – Discrimination in the provision of goods and services

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>43</td>
<td>Exception – insurance</td>
<td>All</td>
</tr>
<tr>
<td>44</td>
<td>Exception – credit providers</td>
<td>Age</td>
</tr>
<tr>
<td>45</td>
<td>Exception – supervision of children</td>
<td>Age, parental status, personal association</td>
</tr>
<tr>
<td>46</td>
<td>Exception – special manner of providing a service</td>
<td>Impairment, physical features</td>
</tr>
<tr>
<td>48</td>
<td>Exception – disposal by will or by gift</td>
<td>All</td>
</tr>
</tbody>
</table>

### Division 5 – Discrimination in accommodation

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>53</td>
<td>Exception – accommodation unsuitable for children</td>
<td>Age, parental status, personal association</td>
</tr>
<tr>
<td>54</td>
<td>Exception – shared accommodation</td>
<td>All</td>
</tr>
<tr>
<td>55</td>
<td>Exception – welfare measures</td>
<td>Sex, age, race or religious belief</td>
</tr>
<tr>
<td>56</td>
<td>Exception – accommodation for students</td>
<td>Sex, race, religious belief, age, impairment</td>
</tr>
<tr>
<td>57</td>
<td>Exception – accommodation for commercial sexual services</td>
<td>Lawful sexual activity</td>
</tr>
</tbody>
</table>
### Division 6 – Discrimination by clubs and club members

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>61</td>
<td>Exception – clubs for disadvantaged people or minority cultures</td>
<td>All</td>
</tr>
<tr>
<td>62</td>
<td>Exception – clubs and benefits for particular age groups</td>
<td>Age</td>
</tr>
<tr>
<td>63</td>
<td>Exception – separate access to benefits for men and women</td>
<td>Sex</td>
</tr>
</tbody>
</table>

### Division 7 – Discrimination in sport

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>66</td>
<td>Exception – competitive sporting activities</td>
<td>Sex, gender identity, age, impairment</td>
</tr>
</tbody>
</table>

### Division 8 – Discrimination in Local Government

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>68</td>
<td>Exception – political belief or activity</td>
<td>Political belief or activity</td>
</tr>
</tbody>
</table>

### General Exceptions to and Exemptions from the prohibition of Discrimination in the Equal Opportunity Act 1995

<table>
<thead>
<tr>
<th>Section</th>
<th>Exception</th>
<th>Attribute/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>69</td>
<td>Things done with statutory authority;</td>
<td>All</td>
</tr>
<tr>
<td>70</td>
<td>Things done to comply with orders of the courts and tribunals</td>
<td>All</td>
</tr>
<tr>
<td>71</td>
<td>Pensions</td>
<td>All</td>
</tr>
<tr>
<td>72</td>
<td>Superannuation – existing fund conditions</td>
<td>All</td>
</tr>
<tr>
<td>73</td>
<td>Superannuation – new fund conditions</td>
<td>Age, sex, marital status, impairment</td>
</tr>
<tr>
<td>74</td>
<td>Charities</td>
<td>All</td>
</tr>
<tr>
<td>75</td>
<td>Religious bodies</td>
<td>All</td>
</tr>
<tr>
<td>76</td>
<td>Religious schools</td>
<td>All</td>
</tr>
<tr>
<td>77</td>
<td>Religious beliefs or principles</td>
<td>All</td>
</tr>
<tr>
<td>78</td>
<td>Private clubs</td>
<td>All</td>
</tr>
<tr>
<td>79</td>
<td>Incapacity and age of majority</td>
<td>Age, impairment</td>
</tr>
<tr>
<td>80</td>
<td>Protection of health, safety and property</td>
<td>Impairment, physical features, pregnancy</td>
</tr>
<tr>
<td>81</td>
<td>Age benefits and concessions</td>
<td>Age</td>
</tr>
<tr>
<td></td>
<td>Welfare measures and special needs</td>
<td>All</td>
</tr>
<tr>
<td>---</td>
<td>-----------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>82</td>
<td>Exemptions by the tribunal</td>
<td>All</td>
</tr>
<tr>
<td>83</td>
<td>Exemptions to allow compulsory retirement in the public sector</td>
<td>Age</td>
</tr>
</tbody>
</table>
Appendix B
A Note on Non-Discrimination and Religious Freedom in International Law

The provisions of the International Covenant on Civil and Political Rights (the ‘ICCPR’) relevant to both non-discrimination rights and religious freedom are extracted below. The non-discrimination right in Article 2.1 is a fundamental right underpinning all other rights in the ICCPR, and equality rights are further specifically protected by Articles 3 and 26. States parties are obliged by Article 1.2 to ensure legal protection for equality rights as much as for other rights.

Paragraph 18.3 acknowledges that the right to freedom of religion can be restricted only by “limitations … prescribed by law [that] are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” Paragraph 18.4 requires that the State respect the rights of parents or guardians “to ensure the religious and moral education of their children in conformity with their own convictions.” However, this is not a full scale guarantee of state support for a religious school system, which remains a policy choice to be made by the state concerned. From the above it appears that international law does not provide a basis to argue that the State cannot regulate the religious school sector in the interests of equality. Whether or not it chooses to do so is a separate question.

International Covenant on Civil and Political Rights

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

(emphasis added)
Appendix C
List of Submissions

Submissions received to the committee’s inquiry

Written submissions

1. Dr John Moody
2. Miss Joan Duggan
3. Ms Shirley Thomson
4. FamilyVoice Australia
5. Dr Mark Zirnsak, Director, Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia
6. Mrs Dorothy Soffe
7. Ms Emma Turner
8. Miss Heather Brown
9. Mr Stuart Brown
10. Mr & Mrs Bruce Mitchell
11. Mrs Maureen Jongebloed
12. Mrs Fiona Walker
13. Mr Trevor Walmsley
14. Mr Ken Lyngcoln
15. Mr Kevin Beadle
16. Sydney Evans
17. Mr & Mrs Victor and Crystal Soo
18. Ms Jennifer Parfenovics
19. Mr Bryan Hobbs
20. Mrs Jaana Puronpaa
21. Ms Lili Robinson
22. Ms Michelle Shaw
23. Mr Michael Wager
24. Mr Bryan de Pree
25. Miss Melanie Camp
26. Ms Marj Lucas
27. Mr Dale Hendrick
28. Mr & Mrs Robert and Elizabeth Alabaster
29. Mr Davis Mutabwa
30. Mutabwa Family
31. Mr Matthew Street
32. Mr & Mrs Jeremy and Kate Crotty
33. Pastor Victor Soo
Reach Community Church
34. Mr Matthew Soo
35. Ms Tanya van Praag
36. Ms Cate McKeown
37. Ms Sharon Smith
38. Mrs Judith Bond
39. Mr Chris Mulherin
40. Pastor Malcolm Doswell
41. Mr Paul Furlong
42. Mr Don Cameron
43. Mrs Julie Ohlson
44. Mr Ted Woods, Old Testament Lecturer
   Bible College of Victoria
45. Ms Maggie Miller
46. Mr David Owen
47. Mr Paul Smithers
48. Ms Patricia Welsh
49. Mr Scott J. Neill
50. Ms Raylene Schriever
51. Mr Patrick Pekin
52. Ms Melissa Rumble
53. Mr George Parker
54. Mr Daren Rumble
55. Mr David Devenie
56. Mr James Connor, Minister
   Langwarrin-Pearcedale Anglican Church
57. Mr Jim Hanrahan
58. Mr Alex Christian
59. Mr Brian Bowtell
60. Mr Emidio Restall
61. Ms Leesa Fletcher
62. Ms Olivia Sharpe
63. Mr & Mrs Robert and Kellie van der Zaag
64. Mrs Gwenda Allan
65. Mr Bruce Allan
66. Mr Mervyn R. Vose
67. Mr Steve Cioccolanti
68. Mr Johaan Ernest
69. Mr David Bird
   Highwood Health Lifestyle Centre
70. Mr Ian Webb
71. Mr & Mrs E.S. Neaves
72. Dr Philip Ayres
73. Mr Graham Jamieson
74. Mr Michael Clarke

184 Mrs Enid Mayfield
185 J.B. Morley
186 Mr & Mrs Leo and Moya Morrissey
187 Ms Nola A. Richter
188 Mrs Thérèse Sellick
189 Mrs Pauline M. Bourke
190 Rev. Dr. Peter Barclay
191 Mr Clayton Jones, Headmaster Girton Grammar School
192 Mr & Mrs Tavis and Kate Beer
193 Mrs Laurel Smith
194 Ms Mary Sexton
195 Ms Libusa Battici
196 Mr David May
197 Mr Louis Wong
198 Mr Caleb Lim
199 Mr Wilson Hon
200 Ms Florence Ong
201 Mr Benjamin J. Caruana
202 Chris Strahan
203 Ms Sylvia Choa
204 Ay Ming Khor
205 Ms Alyson Bailey

Operation Mobilisation Australia Melbourne

206 Mr Sandy Citro
207 Jo Laing
208 Ms Jenny Anderson
209 Mr & Mrs Victor and Maria Bionic
210 Mr Shuman Shen
211 Ms Sonia Menzel
212 Mr James Crockett
213 Dr James Lailah
214 Ms Ellen Carr
215 Mr Anthony Grieve
216 Mrs Swee Cheng Chew

Auburn Hospital

217 Mr David Lam
218 Mr John Hoh
219 Ms Sonia Parker
220 Ms Julie Patrick
221 Ms Melinda Tang
222 Jac Tang
223 Dr Desmond Gaffney
224 Mr Melville Miranda
225 Tze Wei Yeo
226 Wan Jin Yeo
227 Assoc. Prof. K T Yeo
228 Mr Peter Salmon
229 Mrs Madge Fahy

Social Questions Committee, Country Women’s League of Victoria & Wagga Wagga Inc.

230 Sandy Mortimer
231 Mr Chris Yong
232 Mr Peter Robb
233 Ms Julia Manickam
234 Mr & Mrs Charles and Anne Rodrigues
235 Dr Bee May
236 Ms Katrina Mathai and Family
237 Mr Tom Mathai
238 Mr Wayne Gurney
239 Mr & Mrs Michael and Josephine Renehan
240 Mr William Francis Savage
241 Mr Jim Morissy
242 Ms Julie Waters
243 Ms Dawn Fernandez
244 Mr Nathan Venema
245 Mr Tom Fahy
246 Mr Ferdinand Susilo
247 Ms Ana Del Rosario
248 Ms Daphne Yeo
249 Mr Andrew Soetiono
250 Angelin Susilo
251 Mr Nikkho Shanditta
252 South West Christian Church
253 Mr Alain Binette
254 Rev. János Dabasy
255 Mr & Mrs R and D Goulding
256 Miss Pat Hoare
257 K.P. Kelly
258 Ms Doreen Ryan
259 Mr E.R. Tudor
260 Ms Margie Toole
261 Mrs Margaret van de Camp
262 Mr Giuseppe Battici
263 Mrs J. Evans
264 Mr Stephen Hescott
265 Mr & Mrs Evert and Mia Jansen
266 Dr & Mrs Clemens Pratt
267 Ms Wendy Sherwell
268 Mr Tom Wise
269 Wodonga Lutheran Parish
270 Ms Helen Toohey, President and Chair Catholic Religious Victoria
271 Ms Kim H Chong
272 Nita Indriani
273 Upul De Silva
274 Chang Yang Ho
275 Mr Derek McKenzie
276 Ms Anita Toner
277 Mr Ian D. Cathie
278 Mr Marc Schellekens
279 Mr & Mrs Richard and Fiona Loo
280 Ms Mary Edmonds
281 Mr & Mrs David and Ruth Clark
282 Mr & Mrs Rick and Marie Thomas
283 Lei Shong Lau
284 Mr Paul Fitzgerald
285 Drs Rosemary Wong and Mathis Grossman
286 Ms Lay Hong Gwee
287 Mr Edward Gwee
288 Mrs Temi Ajayi
289 Ms Dina Fernandez
290 Ms Emily Izzard
291 Mr Aaron Izzard
292 Mr David Klobe
293 Mr Yohan Wijaya
Scrutiny of Acts and Regulations Committee

294 Mr & Mrs Stephen and Pam Beel
295 Ms Michelle Shave
296 Mr Tom Angenent
297 Ms Betty Dwyer
298 Mrs Ruth Allison
299 Mrs Allison Stanley
300 Mrs Mary Cudmore
301 Mr & Mrs Earle T. and Jessie G. Greaves
302 Mr Hubert Bowman
303 Mr Rob Nyhuis
304 Mr & Mrs Alain and Pauline Cer dor
305 Ms Rachel Lim
306 Ms Anne Van Tilburg
307 Dr Pohan Lukito
308 Mr & Mrs Leslie and Carmen Sammut
309 Ms Mary Macgill
310 Mr Bernie Macgill
311 Ms Kate Macgill
312 Mr & Mrs Steven and Helen Flanagan
313 Mrs Ida Day
314 Ms Sophia Hunter
315 Mr Hui-Shyang Lee
316 Ms Christine Lau
317 Mr Dario Ferlin
318 Ms Janine Gipin
319 Ms Mary Lee
320 Mr & Mrs Jack and Bing Venema
321 Rev Dr Bill Berends
322 Mr Mark Beadle
323 Mr Kenny Cheong
324 Mr Brian Magree
325 Ms Beatrice Tong
326 Mr Daniel Hunt
327 Mr & Mrs William and Lay See Lok
328 Ms Delphine Tan
329 Dr Perla Protacio
330 Ms Irene Ho
331 Mr Mark Berry
332 Mrs D. Jones
333 Mr Bruce Wilkinson
334 Mr David Looke
335 Mr Vincent Malory
336 Ms Kyra Chua
337 Ms Orysia T. Ellis
338 Mrs Maria Citro, ISM Ministry Staff CrossCulture Church
339 Mr Robert Agius
340 Rev. Fr. Paul Rankin OP, Parish Priest St Dominic’s Catholic Church
341 Mr Phillip Stuckey
342 Ms Gayle Moss
343 Dr Carol Tong
344 Mr & Mrs Daniel and Lisa Wells
345 Mrs Marie Pragt
346 Dr Ian Pugsley
347 Ms Anabelisa Mateo
348 Mr Ricardo Mateo
349 Dr Tein Chong
350 Mr George Kokonis
351 Mr & Mrs Rudolph and Debra Treiguts
352 Ms Lisi Wei
353 Mr & Mrs Carolyn and Barry Hamond
354 Mr Geoff Grace
355 Ming The
356 Ms Su Ling Leck
357 Mr Jeffrey Lau
358 Ms Liez! Dungca
359 Mrs Noellyn Ngo
360 Dr Christopher Ngo
361 Jony Beck
362 Mr Desmond Kenneally
363 Mr John Morrissey
364 Mr Graeme Watters
365 Mr & Mrs Antonino and Pamela Pisasale
366 Mr & Mrs John and Joan Burger
367 Ms Darina Cheong
368 Mr David Westaway
369 Mr David Perrin
370 Mr Ron Hardaker, Executive Director Australian Finance Conference
371 Ms May Ee Vivien Wan
372 Ms Valda B. Mathers
373 Mr Clarence Chun-Chi Su
374 Jiong Ho
375 Mr Steven Tong
376 Margaret Maher
377 Mr Thomas Shallyey
378 Mr & Mrs K and H Hawood
379 Mr Stanley Fisher
380 Mr Jim Hennessey
381 Mr Peter Bilston
382 Mrs Aileen Bullen
383 Mr Frank Kenna
384 Mrs Dorothy Tong
385 Ms Carole Hart
386 Mr William Cleary
387 M White
388 Mr Ted Borst
389 Ms Leanne Bell
390 Mr Gavin Tobin
391 Ms Mary Price
392 Mr Paul Dickson
393 Mr George Simpson
394 Rev. Wayne Muschamp Pastors of the Lutheran Church, Victoria District
395 Mr Peter Renchan
396 Mr & Mrs Steven, Myrna and Tania Hengeveld
397 Mr Kendall Lovett and Ms Mannie De Saxe Lesbian and Gay Solidarity Melbourne
398 Mr Tony Levy, Chairman B’nai B’rith Anti-Defamation Commission Inc
399 Drs Lesley and Hugh Chisholm
400 Mr Jack Betts
401 Ms Pam Lazzaro
402 Mrs M Geehman
403 Mr Keith Barton

404  Mr Brian Gleeson
405  AA & B Janssen
406  Mr & Mrs Peter and Brenda Murphy
407  Mr & Mrs Colin and Bernice Werner
408  Mr Kerry Hutton, Principal
Ballarat Christian College
409  Ms Martina Moore
410  Ms Lorraine Janetzki
411  Ms Patricia Wald
412  Mrs K McNeill
413  Ms Thelma Reaburn
414  L N Robinson
415  Ms Rosie Riva Wood
416  Mr John Cooney
417  Mrs John Capaldi
418  Mrs Carol Colman
419  H J Murphy
420  A J Mahoney
421  Mr Bruce Lindsay
422  Pastor Rob Keller
CrossCulture Church of Christ Inc
423  Mr Edward Rock
424  Rev Wayne Muschamp
425  G J Stekelenburg
426  Mrs Lily Gunthorp
427  Robyn Lines
428  E A Bazeley
429  Pastor Greg and Keirien Hooke
Benalla Baptist Church
430  Mariusz and Barbara Tragarz
431  Mr Andrew Menzel
432  Mr Ian Menzel
433  Ms Sandra Menzel
434  R an G Nihill
435  Mr Bob Hogarth
436  Ms Janice Hales
437  Mrs Audrey Ogden
438  Ms Naomi Zanker
439  Mr Robert Mathews
Franciscans
440  Mr Ernest M
441  Mr Roger Smith
442  Ms Sue Litchfield
443  Mr Martin Hanscamp, Principal
Mount Evelyn Christian School
444  Mr Owen Charles
445  Mrs June Tilley
446  Ms Jill Malcolm
447  Ms Susan Wyatt
448  Mr Daniel McGlone
449  Ms Helen J. Williams
450  Ms Jennifer Howell
451  Mr Sean Sandilands
452  Ms Lynette Brown
453  Mr & Mrs Neville and Annette Large
454  Mr Michael Smith
455  Ms Jane Ting
456  Mr Koe Benny Saputra
457  Mr Anthony Liew
458  Holy Trinity Lutheran Church, Dandenong
459  Ms Anna Mathai
460  Ms Jane Southey, President
Alexandra Club
461  Mrs Isabelle Ashton
462  Ms Louisa Ashton
463  Mr Peter Baldry
464  Mr Roger Bergen
465  Mr Roman Bielecki
466  Mr Ian Brearley
467  Mrs Dorothy Brown
468  Miss Heather Brown
469  Ms Jane Byrne
470  Mr Tim Cannon
471  Mr Denis Fitzgerald, Executive Director
Catholic Social Services Victoria
472  Bishop Timothy Costelloe SDB DD, Chairman
Catholic Education Commission of Victoria Ltd.
473  Mr Phil Cogger, Church Relations Coordinator
CNEC Partners International
474  Dr Lindsay McMillan, CEO & Principal Chaplain
Converge international
475  Mr Patrick Coyne
476  Mr & Mrs Russell and Kirsty Creek
477  J. Cully
478  Mr Jim Dargan
479  Mr James Joseph Dargan
480  Mr Joe Dargan
481  Ms Margot Dargan
482  Mr & Mrs Ray and Angela Debevec
483  Mr Andrew Denny
484  Ms Kaitlyn Dodd
485  Mr Michael Doyle
486  Mr Mark Ryan,
Echuca Club
487  Dr Peter Rogers, Chairman
Monash University Engineering Foundation
488  Ms Christina Freese
489  A G Gannon
490  Ms Gabrielle Gannon
491  Ms Izzy Gannon
492  Ms Georgina Gannon
493  Mr John Gannon
494  Sir James Gobbo
495  Mr William S. Glasson
496  Mr Brendan Griffin
497  Dr Janet Gross
498  Jessie Gurney
499  Ms Margaret Hill
500  Mr Kelvin J. Hughes
501  Yi Huang
502  Mr Neville Hunter
503  Mr & Mrs John and Sandra Issell
504  Ms Kirsten Jack
505  Rev. Graeme Jackel
506  Mr & Mrs D & J Kearns
507  Mr & Mrs RC & W Klaassen
508  Mr Weston Langford
Scrutiny of Acts and Regulations Committee

Mr John Moore
Ms Monica Naughton
H. Kay Plunkett
Mr William O'Connor
Ms Fiona Ogilvie
Mr Nigel Onamade
Mr & Mrs Matthew and Jean O'Toole
Rev. Chris Raatz
Grampians Parish
Mr Harold Ramsey
Ms Phyllis Restall
Mr David Roberts
Mr Ian Trevyaud
The Sandhurst Club
Ms Carolyn Sandilands
Mr Alan Shaw, Church Council Secretary
Highfield Road Uniting Church
Miss Natasha Sim
Mr & Mrs Jim and Ursula Soulsby
Rev. Rob Isaachsen, Coordinator
Transforming Melbourne
Ms Amanda Varley
Ms Maryleen Venema
Mr Peter R. Sheahan, Principal
Waverley Christian College
Ms Jenny Lloyd
Mr & Mrs Malcolm and Rosemary Pryor
Rev. Mark Wilkinson, Coordinator
Werribee Baptist Church
Ms Margaret Battams
Mr James Francis Hayes
Ms Jenny Johnson
Mr Peter Cumming
Mrs Dorothy M. Jones
Mr Gerald Flood
Ms Jenny Lloyd
Mr David Isaachson
Mrs Babette Francis, National & Overseas Co-ordinator
Endeavour Forum Inc.
Fr. Anthony F. Denton, Director of Vocations
Archdiocese of Melbourne
Mr Dave Annison
Mr Spero Katos
Ms Patricia Tusjak
Mr Brian Tideman
Mr Peter Murray
Ms Yvonne Le Maistre
Ms Samantha Godwin
Mr Ewan McDonald
Ms Louisa Warnock, Executive Director
Victorian Ecumenical System of Schools Ltd.
Mr Peter Bolling
Mr Leopold Hamulczyk
Ms Lesa Meese
Chris Sargeant
Mr & Mrs John and Lorraine Louden
Mr Andrew Weston
Ms Debra Watts
Ms Sue Kelly
Ms Shirley Seskis
Mr Uwadoka Chidiebere Prevailer
Rev. Mark Wilkinson Senior Pastor
Mr Gerald Leicester
Mr Chad Waller
Ms Anne Wright
Mr David Mangelsdorf
Ms Helen Mewburn
Rev. David Palmer
Ad Hoc Interfaith Committee
W.M.R. Kelly
Melbourne Savage Club
Mr Vernon Clark, Principal
Maranatha Christian School
J Cumming
Mr Raymond C Pietsch
Ms Jennifer M Pietsch
Dr Tein Chong
Mr Geoffrey Fuller, President
West Brighton Club Inc.
Mr Gerald Leicester
Ms Joan Johnson
Mr Stephen Bell
Mrs Dorothy Duncan
Lei Shong Lau
Ms Elizabeth Fitzgerald
Bosnia Hercegovina Children's Fund Inc.
Mr Mathew Zanker
Scrutiny of Acts and Regulations Committee

696  Ms Rhonda Huber
697  Mr Peter Longmire
698  Dr Ray Cleary AM Chairman
Social Responsibilities Committee
Anglican Diocese of Melbourne
699  Mr Ian Nott
700  Miss Rebecca and Ms Dianne Mangelsdorf
701  Mr Michael Pountney, Communications Officer
Association of Independent Schools of Victoria
702  Mark Clarebrough
703  Mr Damian Reeves
704  Ms Fiona Reeves
705  Miss Nancy Yoo
706  Mrs Barbara J. Little
707  Mr & Mrs Robert and June Mears
708  Ms Jane Fagan
709  Ms Elaine Fiddelaers
710  Ms Rosalie McLaren
711  Ms Heather Ridout, Chief Executive
Australian Industry Group
712  Ms Alyson Prescott
713  Rev. John Haig, Senior Pastor
Beaumaris Baptist Church
714  Mr Titilayo Adetunji
715  P. J. O’Brien
716  Ms Elizabeth A. Kloeden Director
South Eastern Region, Lutheran Education
717  Ms Anneliese Proctor
718  Mr Simon Proctor
719  Mr Peter McKill
720  Mr John Anning
General Manager Policy, Regulation Directorate
Insurance Council of Australia
721  Mr Michael Kirkpatrick
722  D W McCallum
723  A J Macken, Principal
A. J. Macken & Co
724  T W Brady
725  Ms Marie Sheahan
726  M Wilson, President
Camperdown Branch, Catholic Women’s League
727  Mrs Annie James, President
Lyceum Club (Melbourne)
728  R & S Gerrick
729  Mr & Mrs Michael and Julie Krins
730  Mr & Mrs Richard and Nicole Nyhouse
731  P Gringel
732  Ms Marjorie Weber
733  Mr Brian Roberts
734  Dr Robert Pollnitz
Chair, Commission on Social & Bioethical Questions
Lutheran Church of Australia
735  Mr Robert Johnston, Executive Officer
Australian Association of Christian Schools
736  Pastor Nigel Phillips Senior Pastor
Maroondah City Church
737  Mr Adrian Wiles, Principal
Luther College
738  Mr Cain McDonald Principal
Victory Lutheran College
739  Mr Bob Speck Principal
St. Andrew Christian College
740  Mr John C. Lloyd
741  Mr Darryl Allen
742  Mr Rocco Mimmo Founder and Chairman
Ambrose Centre for Religious Liberty
743  Mr Richard Duffy Research and Policy Officer
Victorian Authorities and Services Branch, Australian Services Union
744  Ms Marianne Bagguley
745  Mr & Mrs Chas and Marianne Bagguley
746  Professor Sally Walker, Vice-Chancellor
Deakin University
747  Ms Mary E. Smith
748  Rev. DJ Palmer
Convenor of the Church & Nation Committee
Presbyterian Church of Victoria
749  Mr Luke McCormack President Victorian Branch
National Civic Council
750  Mr Danny Barlow, President
Law Institute of Victoria
751  Ms Jennifer Rose Manager, Policy and Projects
Youth Affairs Council of Victoria Inc.
752  Mr Bernd Barti
753  Mr Bob Pannekoek
754  Mr Allan H. Gandy, Public Officer
Sandringham Club Inc.
755  Liberty Victoria
756  Investment & Financial Services Association
757  Recruitment and Consulting Services Association
758  Mr & Mrs Gordon and Phyllis Heller
759  Mrs Zara Fram
760  Ms Monica and Denise Wickerson
761  P.A.J. Le Roux
762  Melbourne Catholic Lawyers Association
763  Victorian Independent Education Union

Pro Forma Submissions
764. Ms Suzanne McDonald
765. Mrs Gloria Bennett
766. Mr William Jackson
767. P S Newell
768. Ms Lynette Clark
769. Luan Le
770. Ms Amanda Mullett
771. Ms Nicole Harris
772. Mr Aaron Lillicrapp
773. Ms Lisa Lillicrapp
774. Mr Gillian Begg
775. Zorica Bradonjic
776. Mr Ron Widdison
777. Mr Stephen Munyard
778. Frene Rozalics
779. Delrine Ranasinghe
780. Ms Sheree Trommler
781. Ms Joy Donnellan
782. Ms Christine Pitama
Scrutiny of Acts and Regulations Committee

900. Ms Renee Ilett
901. Ms Robyn Weitering
902. Mr John Weitering
903. Ms Rebecca Ibi Ternanov
904. Ms Cheryl Middlemast
905. Mr Frank Jetmar
906. Ms Ilora Jetmar
907. Ms Charmian Mitchell
908. Mr Alan Crowden
909. Ms Alison Decarlo
910. Ms Immanuel Daely
911. Ms E Delicia Buddhipala
912. Mr Victor Rento
913. Ms Gina Rento
914. Ms Suzanne Goode
915. Mr Roger Perera
916. Ms Judy Perera
917. Dr Botros Botroschief
918. Ms Amanda Cimino
919. Mr Stephen Sulyok
920. Ms Anna Shekel
921. Mr David Cuma
922. Ms Magogota Cuma
923. Ms Tracie Cornejo
924. Ms Wendy Stear
925. Ms Paula Tangiwai Kelly
926. Ms Carol Lim
927. Ms Joanne Prins
928. Mr Andrew Snook
929. Ms Kylie Snook
930. Ms Bridget Grant
931. Mr W James Grant
932. Ms Margaret Turley
933. Ms Tammy Bennett
934. Ms Fenny Shantika
935. Ms Christine Burton
936. Ms Sue Wylie
937. Ms Tanya Leek
938. Ms Adriana Dumitru
939. Ms Lisa Tucker
940. Mr Steven Tucker
941. Ms Jacqueline Morgan
942. Ms Channy Hemmings
943. Mr Louise Sutton
944. Ms Magaly Linares
945. Kirthi Disanayake
946. Ms Heather Dudley
947. Ms Jacqueline Isaaccs
948. Ms Karen Kelaart
949. Mr Don Raymond
950. S Wheatley-Price
951. N Wha
952. Ms Kelly Lock
953. Ms Janet De Jong
954. Mr Kevin De Jong
955. Ms Julie De Jong
956. Mrs Deborah Meegama
957. Anonymous
958. Ms Agnes Millar
959. Ms Ruth Ollington
960. Ms Victoria Bakerov
961. Ms Rebekah Adelmann
962. Mr Rodney Semple
963. Mrs J Kariywasam
964. Mrs Grace Cook
965. Ms Edith Kovac
966. Mrs Juanita R Vala
967. Mr Peter Noorbergen
968. J Noorbergen
969. Ms Pamela Dudley
970. Mrs Kylie Buck
971. Mr Suresh J David
972. Ms Rachel Rojales
973. Ms Lydia Adams
974. Ms Anne M Benc
975. D Armstrong
976. Ms Sharon Koh
977. Mr Alwyn Van Breen
978. Ms Candice Van Breen
979. W J Van Breen
980. T Brough
981. Ms Lynne Schmidt
982. Ms Valentina Gainaru
983. Lesley Sureshkumar
984. Ms Narelle Jenkins
985. Ms Kathy Poppenbeck
986. Ms Majella Bailou
987. Ms Annette Schout
988. Meserach Aliso
989. Ms Tracy Medlin
990. Mr Dirk Francke
991. Lee Seok Ching
992. Ms Sharlene Phillips
993. Mr Lee Tilley
994. Ms Robyn Tilley
995. Mr Terry Melhuish
996. Ms Michelle Melhuish
997. Ms Melody Williams
998. Ms Tanya Williams
999. Mr Alan Williams
1000. Ms Belinda Major
1001. Mr Daniel Major
1002. Ms Lynda Boutros
1003. Mr Andrew Boutros
1004. Ms Debra Lee
1005. Ms Julia Capon
1006. Mr Ben Vander Veen
1007. Ms Karen Vander Veen
1008. Ms Shirley Cantwell
1009. Mr Tim Sherwell
1010. Ms Stacey Sherwell
1011. Ms Tina Hines
1012. Mr Andrew James Day
1013. Mr Ian Spencer
1014. Ms Wendy Spencer
1015. Ms Elvera Stow

105
Submissions supplied to the Committee from the Department of Justice, directed to the Victorian Premier, Hon. John Brumby MP and Attorney-General, Hon. Rob Hulls MP, relating to the Committee’s inquiry on 12 August 2009.

1132. Ms Alison Davis
1133. B Jenkins
1134. Ms Brigitte Boland
1135. Anonymous
1136. Ms Sonia Nieto
1137. A Migliorelli
1138. Ms Pina Migliorelli
1139. Mr Victor Arnost
1140. Mr Michael Ivone
1141. Mr giuseppime Bon
1142. Lino Bon
1143. Ms Margaret Ellison
1144. Ms Sampernew
1145. W Ellison
1146. Ms Sheila Carroll
1147. Ms Marie Coradini
1148. Ms Christine Gios
1149. B Rogers
1150. Palinvia Merlo
1151. Ms Beverley
1152. Ms Martina Torcaso
1153. L Parmesan
1154. Ms Marly Ro Taluim
1155. Ms Anna Sacco
1156. Ms Julie Brandellero
1157. Mr Peter Howard
1158. Ms Helena Martin-Lejevre
1159. P Ivone
1160. L Hampton
1161. C Byrne
1162. J W Williamson
1163. Ms Iola Martin
1164. Ms Una Harrington
1165. Ms Helen Morgan
1166. Ms Kathleen Harrington
1167. R J Rigoni
1168. Ms Carmel O’Connor
1169. Ms Lindy Howard
1170. C Rigoni
1171. P Rinaudo
1172. M Joren
1173. Ms Patricia Thompson
1174. M Dale
1175. Mrs Danita Marr
1176. P Ford
1177. Y Rouche
1178. V Matassam
1179. Jong Ho
1180. Kim H Chong
1181. Mr Lawrence Sim
1182. Mr Marshall Lee
1183. Mr Patrick Yau
1184. Mr Daryl & Mrs Janet Kearns
1185. Ms Eva Faltas
1186. Mr Robert and Mrs Kellie van der Zaag
1187. Mr Chris & Mrs Lindy Mulherin
1188. Mr Javier M & Mrs Stella M Mercado
1189. Mr Mark & Mrs Fiona Krelle
1190. Mr Anthony Clements
1191. Ms Jill Malcolm
1192. Ms Shirley Barnes
1193. Ms Heathar Jordan
1194. Mr Darren & Mrs Fiona Haymes
1195. Mr Robert Soutar
1196. Pastor Kevin Beadle, New Life Christian Church Ouyen
1197. Mr Justin & Mrs Kristel Clerke
1198. Ms Gaye Gones
1199. Mrs Katherine Callinan-Moore
1200. Ms Kaylene Gardner
1201. Mr David Everett
1202. Mrs Lindy Yeates
1203. Mr John Green
1204. Ms Jeanette Baldwin
1205. Ms Rachel Varcoe
1206. Mr Neil & Mrs Coral Moulton
1207. Mr John & Mrs Wendy Major
1208. Mr Warren & Mrs Joanna Strybosch
1209. Mr George & Mrs Dina Papaikonomou
1210. Mr Bill & Mrs Gayle Papageorgiou
1211. Mr Geoff & Mrs Michelle Cutting
1212. Mr Nigel & Mrs Megan Mason
1213. Dr Michael J Geluk
1214. Mr David & Mrs Trish Woodward
1215. Mr Mark Jennings
1216. Ms Tiffany Smith
1217. Mr Robert & Mrs Grace Gallo
1218. Ms Jenny Wake
1219. Rev. David Devine Rowville Baptist Church
1220. Rev. Mark Smith Drouin Presbyterian Church
1221. Mr Travis & Mrs Kate Beer
1222. Mr Vernon Clark
1223. Ms Elisabeth van Dreven
1224. Ms Delrae Lanigan
1225. Mr Tony & Mrs Christine Koh
1226. Mr Clark McKenzie
1227. Mr Darryl Martin
1228. Mr Stewart Downs
1229. Mr Paul Arnott
1230. Mr Peter T Jones

135 Submissions supplied by the Department of Justice.


Submissions received in response to Discussion paper

1. Council on the Ageing
2. National Council of Women Victoria
3. Hall, David
4. Community and Public Sector Union - Victorian Branch
5. Stewart, Chris
6. Heath
7. Tregale, Tony and Heather
8. Gurney, Karen
9. Australian Woman Network
10. Action for Community Living Inc
11. Alzheimer’s Association of Victoria
12. Gaze, Beth
13. Paradies, Yin; and Berman Gabrielle
14. Chapman, Anna
15. Naylor, Bronwyn; Patterson, Moira; and Pittard, Marilyn
16. B’nai B’rith Anti-Defamation Commission Inc
17. Better Hearing Australia
18. Smith, Belinda
19. Thornton, Margaret
20. Australian Industry Group
21. Youth Affairs Council of Victoria
22. Jackson, Ross
23. Over 50s Association
24. Elwaeis, Andrew
25. Hepatitis C Council of Victoria
26. Ethnic Communities Council of Victoria
27. Victorian Aboriginal Legal Service Cooperative
28. Union Research Centre Organisation Technology
29. Disability Employment Action Centre
30. Vout, Paul
31. Victorian Trades Hall Council
32. Tenants’ Union of Victoria
33. Youthlaw
34. Victoria Legal Aid
35. Blind Citizens Australia
36. Council to Homeless Persons
37. Hindell, Ingrid
38. Victorian Gay and Lesbian Rights Lobby
39. PILCH Homeless Persons’ Legal Clinic
40. Job Watch Inc
41. Human Rights Law Resource Centre
42. Rainbow Network
43. VIVAIDS Victorian Drug Users Organisation
44. Parents Victoria
45. Borenstein, H
46. Vision Australia
47. Fitzroy Legal Service
48. Uniting Church in Australia
49. St Kilda Legal Service
50. Eastern Centre Against Sexual Assault
51. Homelessness Advocacy Service
52. TransGender Victoria Inc
53. Springvale Monash Legal Service
54. Charlesworth, Sara
55. Mental Health Legal Centre
56. Recruitment and Consulting Services Australia
57. PILCH Public Interest Law Clearing House
58. Westernport Speaking Out
59. Federation of Community Legal Centres
60. Victorian Alcohol and Drug Association
61. Victorian Automobile Chamber of Commerce
62. Australian Services Union
63. Law Institute of Victoria
64. Catholic Archdiocese of Melbourne
65. Tranznation
66. Anonymous
67. Curran, Liz
68. Victorian Equal Opportunity and Human Rights Commission
69. Victorian Council of Social Service
70. Western Suburbs Legal Service
71. Richards, Melinda
72. Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing
73. VicHealth
74. Office of the Public Advocate
75. Municipal Association of Victoria
76. Disability Services Commissioner
77. Victorian Disability Advisory Council
78. Victorian Women with Disabilities Network
79. Ministerial Advisory Council of Senior Victorians
80–89 Confidential
Submissions received in response to Options Paper

1  Kenos, Ange
2  B’nai B’rith Anti-Defamation Commission
3  Yooralla
4  Clarke, Lowen
5  Change-Ability Advisory Services
6  Festival of Light Australia
7  Hepburn Shire Council
8  Victorian Aboriginal Legal Service Cooperative Ltd
9  Westaway, David
10 Adams, Carol and Grosser, Kate
11 Victorian Gay and Lesbian Rights Lobby
12 Ministerial Advisory Council of Senior Victorians
13 Johnstone, Valerie
14 Catholic Archdiocese of Melbourne
15 Australian Human Resources Institute
16 Disability Services Commissioner
17 Confidential
18 Over 50s Association
19 ACTU
20 Warmambool City Council
21 Tenants Union of Victoria Ltd
22 Catholic Women’s League in Victoria
23 Chapman, Anna
24 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia
25 Patmore, Glenn
26 Youthlaw
27 Salt Shakers
28 Naylor, Bronwyn
29 PILCH Homeless Persons’ Legal Clinic
30 Victorian Independent Education Union
31 Federation of Community Legal Centres (Vic) Inc
32 Association of Participating Service Users (APSU)
33 Andrades, Carol
34 Disability Discrimination Legal Service
35 Victorian Multicultural Commission
36 Human Rights Law Resource Centre
37 Blind Citizens Australia
38 Gaze, Beth
39 Victorian Council of Social Service
40 Law Institute of Victoria
41 Victorian Equal Opportunity and Human Rights Commission
42 Australian Industry Group
43 EO Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing
44 Islamic Women’s Welfare Council of Victoria Inc
45 Vision Australia
46 Victorian Employers’ Chamber of Commerce and Industry
47-59 Confidential
60 Victorian Bar Association

Submissions to the Department of Justice’s Exception Review

- Mr Patrick John Meadth
- Mr Tony & Mrs Elizabeth Pearse
- Mr Jaime Khoo
- Mr Clinton & Mrs Kirsti Le Page
- Mr Kelvin Hicks
- Mr Edward & Mrs Karen Seymour
- Ms Maria Barreno
- Ms Karen Moran
- Mr Hume Jephcott
- Mr Bill Watson
- Ms Janet Sim
- Traralgon & District Baptist Church
- Pastor George Hansford
- E J Low
- Mr Michael Sim
- WayOut, Rural Victorian Youth & Sexual Diversity Project
- Mr Marcelo Avelino
- Mr John Vis
- Mr Steven Westendorp
- Edward
- Mr Raymond Mitchell
- Mr Ken L Koh
- Mr John and Mrs Fay Nolan
- Mr William Kenny
- Ms Daniella Koh
- Mr Dale Stephenson
- Pastor Victor Soo
- Mr James Veryzer
- Festival of Light Australia
- Drs Stephen & Nicola Wheatley Price
- Mr Danny & Mrs Susan Krivan
- Ms Fiona Sanders
- Ms Joanne Parker
- Mrs Kate Murphy
- Dr Bill Berends
- Mrs Jane Majkut
- Ms Valeria Campbell
- Professor Margaret Thornton, Australian National University College of Law
- Mr Shaun O’Keefe
- Mr & Mrs D Hawthorn
- Mr Henry Poulsen
- Mr John Poulsen
- Mr Jason Chong
- Mr Charles & Mrs Mavis Schwab
- Ms Robynne McDonnell
- Mr John R Guscott
- Mr Ted Curnow
- Mr Francis & Mrs Diane Morgan
- Mr Graham Mouser
- Mr & Mrs Antony C Prentis
- Mr & Mrs Stephen Illott
- Ms Juliana Wong
- Ms Anneliese Kopp
- Mr Bryan & Mrs Marjorie Hobbs
- Mr Mac & Mrs Diianne Hawkins
- A J Beer
- Mr Ken & Mrs Kate Murphy
- Mr Tony Gallagher

• Ms Patricia R Wilson
• Mrs Rose Dickinson
• A Polderman
• Mr Alan N Henderson
• Mr Graham Haylock
• Mr Cornelis Van Rossum
• Mrs Janine Mann
• Mr Rob & Mrs Val Pym
• Pastor Noel Uebergang
• Mr Kevin McCormack
• Mr & Mrs R McCracken
• Mr Philip Hammond
• Ms Dina Fernandez
• Ms Eva Klein
• Mr Alan Barnard
• Mr & Mrs Barry Ward
• R Kollmorgen
• Mr Robert Carter
• Dr H C Chua
• Mr William G Forbes
• Mr John Cribbes
• Mr Andrew Dexter
• Mr Chen Zhenyi & Mr Arthur Andrew
• Mr Dean & Mrs Vinna Baptist
• Ms Jessica Sim
• Mr Martin Pakula
• Mr Phillip Cogger
• Shir Lin Koh
• Ms Kirsty Manning
• Mr Jason Ha
• Ms Munlee Tai
• Kim H Chong
• Ms Michele Tirman
• Mr Kwet Kooy Yong
• Mr John Joyner
• Mr Nicholas & Mrs Rita Lock
• Mr Joshua Lee
• Mr Frank Pearce
• Mr Steven Mak
• Ms Bebe Susanto
• Mr Charles Hui
• Mr Bradley Asken
• Wallace Family
• Ms Belinda Giannone
• Mr James Wei
• Mr Antony Chandra Tsjin
• Dr Yvonne Tan
• Mr Paul Pello
• Mr Scott William Cumberland
• Mr William S Glasson
• Mr David & Mrs Rebecca Field
• Mr Scott William Cumberland
• Mrs Eve Mills
• Reverend Graham Holman
• Mr Matthew Mulvaney
• Dr Tein Chong
• Ms Meryll Christen
• Pastor Joseph Rodrigues
• Mr Louis Cheung
• Reverand Dr Peter Barnes
• Mr Charles Noller
• Ms Catherine Muraguri
• Mr Peter Cummings
• Mr Erik & Mrs Elizabeth Werps
• Mr Peter Hall
• Ms Stefanie Tan
• Dr Rouel J M Protacio
• Mr Colin Leayr
• Ms Paul Smithers
• Ms Kialyn Kerr
• Ms Debra Watts
• Mr Michael & Mrs Leanne Casanova
• Dr Christopher & Mrs Jeanette McHardy
• Nicholls Family
• Mrs Kerrie Ternes
• Mr C R Thompson
• Mr Bruce & Mrs Jenny McWilliam
• Mr Mark Miran
• Ms Jiong Ho
• Mr Rod & Mrs Katie Meadows
Inquiry into the Exceptions and Exemptions to the

• Mr Gerard Abdoo
• Mr Chris Duyker & Mr & Mrs Perera
• Ms Lai Chong
• Mr Carl & Mrs Sarah Michael
• Ms Liz Spicer
• Mr Brad Greenwood
• Mr Brendan Griffin
• Mr Matthew Griffin
• Mrs Bridget Griffen
• Dr D Clarnette
• Mr Tom & Mrs Yvonne Stout
• Mrs Maureen Seiler
• Mr Sam Leong
• Mr Spero Katos
• Mr John Yeoh
• Mr Rob Bailey
• Mr Ian & Mrs Pat Ruddick
• Mr Simon T Foo
• Christian Apostolic Association
• Mr David J Westaway
• Mr Larry Wilson
• Ms Donna Cook
• T C Chew
• Mr Trevor N Wells
• Mr Michael & Mrs Cheryl Jandesu
• Mr Ralph Prestage
• Mr Wayne Walters
• Mr Jeremy Wong
• Mr Geoff & Mrs Jenny Rowe
• Ms Fernanda Dahlstrom
• Ms Dorothy Phua
• Mrs Noellin Ngo
• Mr David Vernon
• Dr Christopher Ngo
• Mr Christian Borleis
• Ms Carolyn Ullyatt
• Ms Ruth Gibson
• Mr Robert & Mrs Jayne Withall
• Mr Graeme Lowe
• Tut Yoa
• Ms Hanni Kutschker
• Mr Andrew A McNabb
• Mr Terry Dold
• ACCESS Ministries
• Catholic Womens League of Victorian & Wagga Wagga Inc
• Ms Weilin Fah
• Ms Lorelle Turnbull
• Mr Malcolm & Mrs Rosemary Pryor
• Mr Raoul Court
• Sir/Madam
• Mr Brett Turnbull
• Ms Jacinta Le Page
• Ms Belinda Rogerson
• Mr Nathan Keen
• Louden Family
• Victorian Farmers Association
• Australian Evangelical Alliance Religious Liberty Commission
• Sikh Interfaith Council of Victoria Inc
• Ms Stewart Louden
• Ms Christina Engel
• Ms Jocelyn Hall
• Insurance Council of Australia Ltd
• Ms Ruth Wilson
• Ms Merryn Patterson
• Victorian Independent Education Union
• Mrs Pauline Cole
• Mr John Ryan
• Victorian Gay & Lesbian Rights Lobby
• JobWatch Inc
• Ms Eva Bevan
• Mrs Beth Lang
• Ms Suraya Hani
• Live Performance Australiä
• Mr David Young
• Mr Bill & Mrs Averil Muehlenberg
• Ms Lennryce Westaway
• Mr David G Westaway
• Ms Nurwahyun Rosli
• Association of Independent Schools of Victoria Inc
• Anglican Diocese of Wangaratta
• Royal Victorian Bowls Association Inc & Victorian Ladies’ Bowling Association
• Mr Alan A Hoysted
• Mr Howard McCallum
• Recruitment and Consulting Services Association Ltd
• Presbyterian Church of Victoria
• Mr Steven Tong
Scrutiny of Acts and Regulations Committee

- Ms Carol Wilkinson
- Catholic Archdiocese of Melbourne
- Victorian Institute of Forensic Mental Health
- Ms Margaret Prior
- Mr Fred & Mrs Eunice Clay
- The Anglican Diocese of Ballarat
- Mr Peter & Mrs Romaine Barnett
- Equity & Student Services, La Trobe University
- Mr Steve Landers
- Human Rights Law Resource Centre Ltd
- Public Interest Law Clearing House
- Melbourne Law School
- Australian Industry Group
- Ms Amanda Lim
- Mrs Judith Bond
- Northern Mallee Christian Fellowship Inc
- Mr David Jackson
- Mr John & Mrs Honour Moore
- L Teh
- Mr Alan & Mrs Glenys Watter
- Mr Alex & Mrs Ruth Cavicchi
- Ms Leoni Gardner
- Ms Sheryl Bartlett
- Mr Edwin Bartlett
- Ms Elizabeth Neil
- Vision Australia
- Dr Davinia Seah
- Mr Tom Vassallo
- Mr David Hooke
- Mr James Crockett
- Victorian Automobile Chamber of Commerce
- Salt Shakers
- AFL Victoria
- Ms Jennifer M Douglas
- Mr Ron & Mrs Joan Clough
- Disability Discrimination Legal Service
- Ms Elly Bromberg
- State Trustees
- TransGender Victoria
- Clubs Victoria Inc
- Federation of Community Legal Centres (Vic) Inc
- Uniting Church in Australia
- PILCH Homeless Persons’ Legal Clinic
- Mental Health Legal Centre Inc
- Netball Australia
- Ms Lydia Adams
- Ms Rosemary Reilly
- Victorian Equal Opportunity & Human Rights Commission
- Ms Anita Toner
- Blind Citizens Australia
- Law Institute of Victoria
- Victoria University
- Equal Opportunity Commission of Western Australia
- Ms E L Russell
- Victorian Council of Social Service
- Open Door Christian Church
- Victorian Bar Council
- Ms Anita Toner
- Basketball Victoria
- B’nai B’rith Anti-Defamation Commission
Appendix D
List of Witnesses at Public Hearings

The Committee held public hearings concerning the inquiry to obtain further evidence from individuals and organisations that made submissions to the Committee.

Tuesday, 4 August

- Victorian Equal Opportunity and Human Rights Commission
- Human Rights Law Resource Centre & Public Interest Law Clearing House
- Law Institute of Victoria
- Jobwatch
- Victorian Automobile Chamber of Commerce
- Victorian Employers’ Chamber of Commerce and Industry
- Tenants Union of Victoria
- Insurance Council of Australia
- Australian Finance Conference
- Victorian Gay and Lesbian Rights Lobby
- ALSO Foundation
- Transgender Victoria

Wednesday, 5 August

- Lyceum Club
- Melbourne Savage Club
- Catholic Bishops of Victoria
- Catholic Social Services
- Anglican Church of Australia
- Presbyterian Church of Victoria
- Islamic Council of Victoria
- Christian Schools Australia
- Sikh Interfaith Council of Victoria
- B’nai B’rith Anti-Defamation Commission
- Mt Evelyn Christian School
- Australian Christian Lobby
- Catholic Education Office
- Association of Independent Schools of Victoria
- Victorian Independent Education Union
SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

EXCEPTIONS AND EXCEPTIONS TO THE
EQUAL OPPORTUNITY ACT 1995

MINORITY REPORT

16 NOVEMBER 2009
Introduction

The Governor on the advice of the Executive Council, pursuant to section 33 of the Parliamentary Committees Act 2003, requested on 18 December 2008 that the Scrutiny of Acts and Regulations Committee (“the Committee”) inquire into, consider and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995* (“the Inquiry”).

The Committee was requested to provide its final report to Parliament by 30 April, 2009, a completely unrealistic timeline.

The Committee tabled an Options Paper, including a Minority Report, in May, 2009.

The comments made in this Minority Report should be read in conjunction with the Minority Report tabled with the Options Paper and the Final Report by the Committee (“the Report”) tabled contemporaneously with this Minority Report.

The response to the Inquiry has been overwhelming, with approximately 1800 submissions considered and a significant level of public interest. The majority of the submissions made were in response to proposed changes to sections 75 and 76, the sections dealing with religious freedom. The overwhelming majority of those submissions sought the retention of those sections as they currently stand.

Process

The limited time provided by the government for the Committee to complete the Inquiry has meant that the Committee has not had the opportunity to explore all relevant issues in as much depth as would be desirable.

The various recommendations throughout the Report which call for additional work or research are reflective of both the limited time available and the complexity of many of the issues considered.

We note with disappointment that the Attorney-General has pre-empted the Committee’s report by his press release dated 27 September 2009 (the day after the Grand Final) announcing a decision of the Government regarding various changes that the Government intends to make to the *Equal Opportunity Act 1995* (“the Act”).

The decision of the Attorney-General to act without reference to the Committee’s Report calls into question the significant time and cost of conducting the Inquiry, including the time and effort of those who made written submissions and/or presented evidence to the Committee.

The Committee engaged an external consultant at significant expense, used the services of hansard for two full days and incurred addition costs to conduct the inquiry.

It is usual for inquiries commissioned by either the Parliament or the Executive to be finalised and presented to Parliament so that their deliberations and
recommendations can be considered before changes to legislation or regulation are made. In failing to wait for the final report on this inquiry, the Government, and the Attorney-General specifically, have demonstrated a contempt for proper process and the Parliamentary system.

**Structure and interpretation of the Act**

The Report by the Committee recommends that:

- the objectives of the Act be amended to ensure protection from discrimination to the greatest extent possible consistently with the Charter (recommendation 1);
- exceptions and exemptions retained in the Act should be reviewed at least every ten years (recommendation 2);
- where there is doubt as to the meaning of a provision, the balancing test detailed in s. 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”) should be used as a guide to resolve the doubt
- the onus of proof that an exemption is “justified” should be on the person seeking to rely on it (recommendation 3);
- the exemption in section 69 for things done in accordance with statutory authority be repealed (recommendation 42);
- where a temporary exemption is sought from VCAT, the exemption must be a reasonable limitation within s. 7(2) of the Charter (recommendation 56).

The focus on consistency with the Charter, including a competing rights analysis based on s.7(2), is likely create substantial uncertainty and have unforeseen consequences. S.7(2) of the Charter purports to create a legal test for resolving conflicting claims about rights, but in fact it requires courts to make decisions about policy issues that should be made by the community through public debate and through Parliament. A clear example of this is the issue of “reasonable adjustments” which we discuss below.

There is also a contradiction between the recommendation that discrimination be eliminated to the greatest extent possible consistent with the Charter and the numerous recommendations contained within the Report where the Committee has concluded that there are good public policy reasons for not eliminating discrimination to the greatest extent possible consistent with the Charter.

For example, the Report recommends that Section 18 be retained without amendment. This section states:

“An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a

1 Section 7(2) of the Charter states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
political party, member of the electorate staff or any person or any similar employment”.

It is highly likely that this instance of discrimination could be prohibited consistently with the Charter, yet the Committee has formed the policy view, for obvious and sound reasons, that the exemption should be retained. The fact that allowing this instance of discrimination may be capable of justification under s.7(2) of the Charter does not alter the fact the Charter does not require this discrimination to be allowed, thus demonstrating that the retention of this exemption is inconsistent with recommendation 1.

There are numerous other recommendations in the report that also show that recommendation 1 is not appropriate as an objective of the Act. For example:

- Recommendation 21 (section 38) – allowing educational institutions to limit admissions to particular groups;
- Recommendation 24 (section 41) – allowing age based admission schemes and age quotas
- Recommendation 54 (section 81) – allowing age based concessions.

If recommendation 1 were to be fully put into effect, all of these exemptions and exceptions would have to be scrapped.

We are also concerned that recommendation 3 proposes that on all occasions the respondent should bear the onus of proof of establishing than an exception is “justified”\(^2\). We consider that whilst such an onus may be appropriate on many occasions, there may be occasions when the onus would better lie with the applicant; particularly where the applicant is in possession of relevant facts and knowledge relating to an allegation of discrimination.

An example might be where a tenant claims the need to have a companion animal for mental health reasons (see recommendation 31). It would be reasonable to expect the tenant to demonstrate the existence of those mental health reasons, rather than require a landlord to prove that a tenant did not have mental health reasons for requiring a companion animal.

Recommendation 56 proposes a vague and open-ended test for making what is in reality a policy decision about whether a temporary exemption should be granted. The same recommendation proposes that highly prescriptive and complex procedural requirements should be imposed on both applicants and on VCAT. It would be far better for the legislation to give more guidance as to the policy criteria that should be applied, and be less prescriptive as to administrative detail. That would be much more in accord with both common sense and the government’s own red tape reduction policy.

In relation to acts done in accordance with statutory authority, citizens are entitled to be protected from being required to do two inconsistent things by two different laws. If in such cases a citizen does what one law requires, he or she should not be

\(^2\) In referring to “establishing that an exception is justified” it seems the Report intends to refer to the respondent justifying the availability of the exception, rather than having to justify the policy merits of the exemption.
penalised for not complying with the other law. We support a front end review of legislation and a decision by Parliament as to which laws should prevail in which circumstances. However, if an inconsistency escapes that review, or if future legislation creates a new inconsistency, that should not be the citizen’s problem.

We note that when it comes to inconsistency between a court or tribunal order and the Act, the Report considers “there are self-evident sound policy reasons” why the citizen should not be in breach of the Act for obeying the order of the court or tribunal (recommendation 43). We consider the same “self-evidence sound policy reasons” mean a citizen should not be in breach of the Act for obeying the requirements of another Act of Parliament.

Furthermore, we do not agree with the Report’s implicit assumption that the Act should generally prevail over other inconsistent legislation. The Report itself concedes that occupational health and safety legislation should prevail over the Act in an employment context, and by logical extension many other safety laws should also prevail. We believe that priorities between the Act and other legislation in instances of inconsistency should be decided by Parliament on the merits of each instance.

Finally, we observe that if the current review of exemptions and exceptions by the Committee and the government is done properly, the changes made should be expected to last a lot longer than a mere 10 years. It is appropriate to review regulations and other subordinate legislation every 10 years, but the community is entitled to expect far greater stability when it comes to broad policy issues such as the subject of this review.

If a need for a particular change arises, that should be debated on its merits at the time, but the Committee and the Government will not have done their work properly if the entirety of the changes arising from the current review is pre-programmed to have a shelf life of only 10 years.

**Genuine occupational requirements – section 17**

The Report recommends that the current authorisation of “genuine occupational requirements” be replaced with an authorisation of “inherent requirements of the position”.

On one view, this change may seem minimal, but we would be concerned if it operated so that an employer’s genuine and bona fide assessment of the requirements of a job could be second-guessed by a tribunal or court.

For example, to pick up the current exemption in s.17(2)(d) of the Act, if a shopping centre manager concluded that it was necessary in the circumstances of his or her shopping centre that the cleaner of female lavatories should be a female employee, would that employer be at risk of being held to have discriminated because the manager of another similar shopping centre did not impose such a requirement, and therefore the requirement could not be considered to be an “inherent requirement” of the position?
We are also concerned at the Report’s suggestion that the employers should not be entitled to refuse to employ people with various criminal records. We support encouraging the reintegration into the community of people who have served their sentence and genuinely seek a crime-free future life. However, ultimately, an employer is responsible for the safety of his or her employees, customers and suppliers and the security of the assets of the business. Employers should be entitled to seek information from job applicants about past criminal convictions if they see fit to do so, and an employer’s decision not to employ an applicant after taking into account that applicant’s criminal convictions should not be subject to second-guessing by the VEOHRC or VCAT.

**Employment**

**Family businesses (s. 20), small businesses (s.21) and youth wages (s.27)**

The Report recommends that the family business and small business exemptions be repealed (ss. 20 and 21 – recommendations 8 and 9) and that the youth wages exemption be removed and replaced with an exemption allowing trainee wages based on the level of experience or training of a person without reference to their age (s27 – recommendation 15). We disagree.

The Victorian Automobile Chamber of Commerce (VACC) gave evidence to the Committee relating to small businesses and the concerns they have about the impact of additional regulation, such as removing the small business exception, on the decisions of their members to employ additional staff.³

The VACC also gave evidence about the benefits of youth wages:

“So from that perspective the view of our members is that these young people are coming in, they just want to get a bit of a feel for the industry, they are not productive, they do not really have skills, but the fact that it is a junior rate is the incentive to give them the opportunity to come in and actually do some work and learn about the type of opportunities in that business because, like I said earlier, it is a highly regulated industry, it is a very technical industry, it is potentially a dangerous industry, so there is a fair bit of supervision required and that means taking what we deem to be productive people off the tools to supervise these young people, and all of this is down time.”⁴

We note that unemployment for 15-24 year olds in Victoria who are actively looking for work has increased from 8% in December 2008 to 11.9% in September 2009, or by over 20,000 young people.⁵

We further note the findings from The Victorian Skills Commission Annual Report which states that the overall number of apprentices and trainees in 2008-09 was 120,004, compared to 122,243 the year prior – a decrease of 2,239.

---

³ Yilmaz, L. General Manager, Industrial Relations, OHS and Training, VACC and Ms G Marton, Workplace Lawyer, VACC in evidence to the Committee on 4 August, 2009
⁴ Ibid
Furthermore, recommendation 15 is contrary to Federal Labor’s workplace relations policy, which supports the retention of youth wages. As Deputy Prime Minister, Julia Gillard, has said:

*People of course do support youth wages regimes and we’ve kept the youth wages regime.*

From the evidence presented, it would appear that the recommendations relating to family employment, small business and youth wages may have a detrimental impact on employment, particularly youth employment, at a time of economic uncertainty and labour force insecurity. Our focus, unlike the Labor members of the Committee, is on job protection and job creation, particularly for our young people.

We recommend no change be made to these sections.

**Standards of dress, appearance and behaviour**

*In employment (s. 24) and schools (s. 40)*

The Committee have recommended that the reference to “behaviour” in both s.24 (recommendation 12) and s.40 (recommendation 23) be removed, but that references to standards of dress and appearance be retained, subject to a Charter s.7(2) analysis.

In relation to schools, the Committee has also recommended that in assessing the reasonableness of a school’s dress or appearance policy, it must be considered whether the views of the school community have been taken into account in adopting the standards of dress or appearance and whether the standards are subject to any review.

We note the argument made in the Report that the issue of behaviour in employment is better dealt with under industrial relations law, now a matter for the Commonwealth. However, if it is intended that Commonwealth workplace relations law should regulate the setting of behaviour standards by employers, Victorian law should make clear that an employer cannot be subjected to a claim of discrimination for acting in accordance with Commonwealth law.

Schools today are facing increasing problems of anti-social and other inappropriate behaviour by students, such as bullying and school ground violence. At the same time, the authority of school principals and school communities to impose standards and disciplinary sanctions is being challenged and undermined.

The purpose of the section 40 exemption is to ensure that a reasonable standard of behaviour set by a school cannot be subject to challenge on the grounds that it discriminatory. There was no evidence put before the committee that this exemption has caused any difficulties in its present form, and to remove standards of behaviour from this exemption would send completely the wrong message about restoring standards and respect amongst young people.

---

The Report correctly points out that if the behaviour exemption is removed, schools would be liable to claims not only of direct discrimination, but also potentially to claims that in some way a behaviour standard amounted to indirect discrimination on the grounds of “disproportionate effect” on persons with a protected attribute. This simply magnifies the uncertainty that removal of the exemption would create for schools trying to set appropriate standards of behaviour for their students.

The existing exemption is subject to the clear and straightforward protection that any standard must be “reasonable”. Any standard that unfairly imposes an unreasonable burden on students having a protected attribute will almost always be able to be dealt with under this existing provision.

In relation to schools' standards of dress and appearance, the existing exemption already encourages consultation with the school community over those standards by deeming them to be reasonable if the views of the school community have been taken into account. Recommendation 23 seeks to micro-manage the school by taking into account whether they have “review” arrangements in place, even if their dress code is well established and accepted.

Even worse, the majority’s recommendation allows the wishes of the school community to be overridden if the person sitting in judgement forms the view that the standard is “unreasonable” having regard to the vague and open-ended terms of section 7(2) of the Charter.

Violence, truancy and bullying have become serious problems in many schools. Instead of restoring authority to school principals and school communities to set and uphold standards, as the government should be doing, if the government accepts this recommendation it will be placing yet another complication and obstacle in the way of school principals and school communities restoring and maintaining the discipline and respect in schools which parents, students and the community are entitled to expect.

We support the right of both schools and employers to set not only reasonable standards of dress and appearance, but also of behaviour in their school or workplace, without being exposed to an allegation of discrimination.

The current sections 24 and section 40 have worked well and we do not support the changes recommended in the majority Report.

**Care of Children – section 25**

We acknowledge the importance of protecting children from harm. We are pleased that some Government members also recognise this and the importance of respecting the rights of parents when caring for their children. We are pleased that it is recommended that s25, care of children, be retained unamended in the Act.
Adjustments to accommodate impairment or a physical feature

- section 22 – special services or facilities in employment (recommendation 10)
- section 32 – special services and facilities in firms and partnership (recommendation 10)
- section 39 – special services or facilities in education (recommendations 10, 22)
- section 46 – special manner in providing a service (recommendations 10, 28)
- section 51 – accommodation (recommendation 30)
- section 80 – safety requirements (recommendation 53)

We support the general principle that people should be prepared to make reasonable adjustments to meet the needs of others with impairments or disabilities. However, the concept of “reasonable” on its own is open to many different interpretations. It is neither appropriate nor fair to require or empower a court or tribunal to make decisions applying such a broad term in such an open-ended context.

This is particularly important where one party may, depending on the interpretation of the term, be required to incur considerable expense for the benefit of the other party.

The Report gives little elaboration of what should be considered in assessing what is “reasonable”.

The clearest example of the problem is the proposed requirement to make of “reasonable adjustments” in the case of rental accommodation.

What is reasonable could, on some interpretations, extend to requiring any rental accommodation to be made compliant with disability access standards, such as fitting ramps, widening passageways and installing wheelchair accessible toilets. Many private sector rental property owners have invested their life savings into buying a rental property to provide for their retirement, and would have the returns on their investment slashed by such a requirement.

Conversely, some tenants may have disabilities which could be readily accommodated by making relatively minor alterations, such as fitting a handrail to a set of steps.

Whether, and to what extent, it would be appropriate to require private landlords to incur potentially very large expenditures to make some or all such alterations is primarily a question of public policy which should be decided by the community through Parliament.

Similarly, the term “reasonable adjustments” if interpreted in a particular way may lead to significant cost implications for employers, schools or service providers, whilst a contrary interpretation may result in unsatisfactory outcomes for people with an impairment.

Imposing vague and open-ended requirements is of particular concern in the context of the protection of health, safety and property. Section 80 of the Act currently
permits discrimination on the basis of impairment or physical features if reasonably necessary to protect health, safety or property, and discrimination on the basis of pregnancy if reasonably necessary to protect health or safety.

The Report recommends that such discrimination only be permitted if, amongst other things, it is subject to a reasonable adjustments requirement and meets the reasonable limitations test in s.7(2). Imposing a s.7(2) test means that people seeking to protect health, safety and property will be forced to make judgements as to whether any exclusions or limitations they believe should be imposed are “demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors”.

If an employer or business person wrongly fails to exclude someone, loss of life or serious injury may result and they could face heavy fines or gaol. If they do exclude someone, and a tribunal judges that human dignity means a person with a disability has the right to participate despite the risk, the employer or business person could be liable to pay substantial compensation.

We also note that the Report seeks to avoid this dilemma in the case of employment by arguing that section 69 of the Act (acts done in accordance with statutory authority) would prevail over section 80 in its recommended form. This, of course, does nothing to help service providers who would still be forced to decide between safety and the uncertain demands of s.7(2). Furthermore, a separate recommendation of the Report is that s.69 be repealed (recommendation 42). However, the Report claims that even if s.69 were repealed, “It is expected that the operation of occupational health and safety laws would be preserved as prevailing over the Act…” (footnote 115). This shows that the Report recognises the difficulties that recommendations 42 and 53 would create if implemented, but does not have a satisfactory solution to those difficulties.

Our view is that policy decisions on these issues should be made by Parliament, and that where the application of those policy decisions to particular facts requires the involvement of concepts such as “reasonableness”, the legislation must give as much guidance as possible as to how that concept is to be interpreted and applied.

**Reasonable terms of employment and reasonable terms of partnership – sections 23 and 33.**

For similar reasons, we are concerned that without clarity the duty to make reasonable adjustments leaves employers and those in a partnership with considerable uncertainty.

We note the submission of the Association of Independent Schools Victoria “(AISV)” and believe these issues were not sufficiently explored by the Committee.

Without clarity and in line with our conclusions on recommendation 10, we consider that sections 23 and 33 should be retained.
Insurance – section 43

The Report recommends that the insurance exemption should apply only to the attributes of sex, impairment and age and only where permitted by Commonwealth law, and that the insurer should be required to give reasons for their decision if asked to do so (recommendation 25).

We consider it is reasonable to require an insurer to provide an explanation as to why the particular attribute concerned has led them to refuse insurance or to offer it only on less favourable terms. Insurers should be required to provide sufficient detail to demonstrate that their decision is supported by reasonable evidence. We do not consider it reasonable to require insurers to provide detailed actuarial calculations or modelling simply in response to a request for the reasons for their decision.

In relation to the attributes on the basis of which discrimination is permitted, the principle should be that insurers should be able to set terms and conditions based on a bona fide and reasonable business practice having regard to the risks and any other relevant factors involved. This is, in effect, what the existing section provides. If insurers are not permitted reasonably to take into account actuarial and statistical data and other relevant factors, the result will be that one group of insurance consumers (ie,, the lower risk group) is forced to cross-subsidise another group of consumers (ie, the higher risk group that the insurers are not permitted to charge a higher premium).

It may well be that the principal attributes taken into account by insurers for the most common forms of policy are those of sex, impairment and age. However, insurance policies can be issued to cover a wide variety of risks, and there is no reason in principle to limit the attributes that may be taken into account. There was no evidence put before the Committee that the existing section has been misused so that those seeking insurance have been treated unfairly because of a protected attribute.

Clearly, if a relevant Commonwealth law imposes a more restrictive obligation on an insurer, the insurer will be required to comply with the Commonwealth obligation. However, that is no justification for imposing an unreasonable restriction under Victorian law. If it is considered that Commonwealth law “covers the field” in relation to discrimination in insurance, the logical course would be for the Victorian Act not to have any application at all to insurance matters.

Accommodation for children – section 53

The Report recommends that section 53 be repealed (recommendation 32). Section 53 permits a person to refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

As the Report acknowledges, this provision is in similar terms to s.30(2)(c) of the Residential Tenancies Act 1997. If section 53 were repealed, s.30(2)(c) would also need to be repealed, because otherwise a person relying on that provision could nonetheless find themselves in breach of the Act (and it would be debatable whether s.69 would apply, even if s.69 is retained in its current form).
This recommendation is an instance of what is in fact a wide-ranging policy issue purportedly being made on the grounds of equal opportunity.

It is well established that Victoria currently has a crisis of accommodation, and that crisis is resulting in both children and adults having little choice but to live in unsuitable accommodation. A central policy issue is whether the circumstances in which children may be forced to live in unsuitable accommodation should be broadened by removing the right of a landlord to refuse to allow a child to live in unsuitable accommodation. This is a multi-faceted issue involving important considerations of consumer protection, housing and child welfare policy. Any such decision should be made following consideration and input by all disciplines and perspectives involved. A change of policy should not be slipped into force as a purported issue of equal opportunity alone.

There is a further and largely separate aspect to this recommendation, namely, where the presence of children in accommodation could impose unreasonable risk of loss or damage to the landlord’s property, or unreasonably intrude on other users of the accommodation or adjoining premises. For example, bed and breakfast establishments are a key part of Victoria’s tourism industry. Many of those establishments advertise as being “unsuitable for children”. If a decision is to be made that Victoria should ban bed and breakfast premises that offer child-free accommodation, that decision also should be subject to a wide-ranging policy debate.

**Welfare measures in accommodation – section 55**

The Report recommends (recommendation 34) that the current exemption for welfare measures in accommodation be narrowed to apply only where the hostel or similar institution is established wholly for the welfare of people of a particular sex, age, race or religious belief.

We are concerned that this is unduly prescriptive and may adversely affect some organisations which currently provide welfare accommodation mainly but not exclusively for people of a particular sex, age, race or religious belief.

In particular, the recommendation will prevent an institution established to assist one group from ever taking in anyone from outside that group in special circumstances. If the institution were to do so, they would be forced to abandon their primary purpose.

We recommend that the current provision be retained without amendment.

**Section 78 – Private Clubs**

The right to freedom of association is enshrined in the Charter.\(^7\)

Notwithstanding this, the Attorney-General has repeatedly stated that he believes that private clubs, (those that do not either occupy Crown land or receive a subsidy

\(^7\) Section 16.
from the State, and which do not operate for profit), should have to justify their right to exist before the Victorian Civil and Administrative Committee ("VCAT"). He is reported as saying:

"if they want to live in the past, they should have to go to VCAT and make out a case for an exemption".  

The Lyceum Club stated their opposition to having to follow this course of action:

"I think it would be an abrogation of our human rights and freedom of association… I do not believe, as private citizens, we should have to do it".  

The Victorian Employers Chamber of Commerce and Industry ("VECCI") concurred, stating:

"We would like to affirm the fundamental right of freedom of association… we also feel that such changes (such as removing the exemption) could have unintended consequences, such as consequences for single sex clubs that cater for women… in our view, market forces will really determine the future of single sex clubs…"

Much of the debate about private clubs would appear to revolve around the perception that they are bastions of power, influence and decision making. The Committee, however, did not receive any evidence to substantiate this perception. We again note the evidence of the Lyceum Club:

"…the purpose of the (Lyceum) club, as with the purpose of the men’s clubs, is not for power and influence… no business can be discussed, no business cards exchanged, no deals done in any of these clubs. It is against the charter of all the clubs."  

We note the reported comments of a spokesperson for the Governor General, Her Excellency, Quentin Bryce AC, that "The Governor General has no issue with men or women only clubs or organisations".

We are pleased that Government members of the Committee have isolated the Attorney-General on this issue and have recognised the important human right of freedom of association in their recommendations relating to private clubs.

**Religious bodies and schools – sections 75 and 76**

The Human Rights Law Resource Centre ("HRLRC") and the Public Law Interest Clearing House ("PILCH") submitted that "all exemptions and exceptions should be repealed and that they should be placed with regulatory guidelines on permissible

---

9 James, A., President, Lyceum Club, evidence to the Committee, 5 August, 2009.
10 Marriott, A., VECCI, evidence to the Committee, 4 August, 2009.
limitations to the rights of non-discrimination and equity.\textsuperscript{13} This general position is one also subscribed to by some of the other human rights organisations.

The logical extension of this proposition is that religious bodies and schools should no longer be afforded the protection they currently enjoy pursuant to sections 75 and 76. In its Options Paper, the Government members of the Committee put forward a number of proposals to limit and reduce the scope of the s.75 and s.76.

Much of the debate surrounding these issues has focused on the distinction between “core” and “non-core” activities of faith based schools and faith based organisations. Some contend that the current exemptions should be narrowed so that only those activities specifically related to religious practice should retain the exemption pursuant to the Act.

The religious organisations and independent schools peak bodies have rejected this artificial distinction and contend that such a narrowing would diminish their ability to foster the environment that they see as appropriate for their school or organisation. The AISV stated:

\begin{quote}
\textit{“we are of the firm belief that the people at schools are in the best position to employ those people they feel are the best people to educate students attending those schools, based on the values and tenets of those schools, whether they be faith or not.”}\textsuperscript{14}
\end{quote}

We are pleased that the Government members of the Committee have abandoned their previous options canvassed in the Options Paper and have joined with us in rejecting this distinction.

In particular, the Government members of the Committee have not sought to require religious schools or other organisations to demonstrate that any employment decision is justified as “necessary” or due to an “inherent requirement” of the job. We fully agree with the Government members in this respect. We believe faith based schools and other organisations should be free to employ staff whom they believe will uphold the values and beliefs of the faith-based school or other organisation concerned, without being required to justify the need for this requirement to an external organisation or tribunal.

We urge the Attorney-General to reconsider his reported intention to impose an “inherent requirements” or similar test on faith based schools and other organisations in light of the unanimous recommendation of the Committee on this matter.

**Religious belief – section 77**

We are concerned that the recommendation to apply a s.7(2) test to section 77 will undermine this exemption and create uncertainty.

As previously discussed, section 7(2) is highly subjective and open to individual interpretation. For example, how would s.7(2) apply if a devotedly Christian printer

\textsuperscript{13} Cusask, S., public interest lawyer, PILCH, evidence to the Committee, 4 August, 2009.

\textsuperscript{14} Pountney, M., communications officer, AISV, evidence to the Committee, 5 August, 2009.
were to refuse to print anti-Christian literature, or a devoutly Muslim carpenter were
to refuse to carry out repairs to a church or synagogue, because of their religious
beliefs? Such services are almost always readily obtainable from other sources, so
no real difficulty is caused to the other party involved. To coerce people to associate
themselves with issues and activities to which they have sincere and deeply held
religious objections undermines not only the right to freedom of association, but also
the open and tolerant multicultural environment of which Australians are rightly
proud.

Experience shows that sooner or later some group intent on making a point will
mount a complaint and bring legal proceedings based on provisions such as those in
recommendation 50, even though the services the group claims it is seeking to obtain
can readily be obtained from other sources.

Impact on VCAT

It is likely that the existence of the Charter and its impact on judicial interpretation,
coupled with some of the recommendations contained in the Report, will cause the
number of matters at VCAT to increase.

We already have a stretched legal system. Timelines between the issuing of
proceedings and a hearing at VCAT or before the courts are constantly under
pressure from the combined impacts of increased case loads and inadequate
resourcing.

The President of VCAT, his Honour Justice Kevin Ball, is currently completing a
review of VCAT. His Honour has identified a number of areas for improvement. The
Age made the following observation:

“The Victorian Civil and Administrative Tribunal is to be overhauled as waiting times
for hearings blow out and its president confronts serious issues with its operation”.  

As part of any changes made to the Act, the Government must provide the resources
required to handle all aspects of the additional work load and case load generated in
a timely and efficient manner. We subscribe to the maxim that justice delayed in
justice denied.

Conclusion

The Report recommends several changes to the Act that are reasonable and
sensible, such as some of the recommendations providing for better harmonisation
with existing Commonwealth legislation or to make changes that reflect the changed
legislative and jurisdictional context that exists now compared to 1995.

Unfortunately, a number of recommendations of the majority Report would have a
seriously adverse effect in creating injustice and uncertainty, and in imposing
unnecessary and reasonable burdens on members of the community, as we have

15 Dobbin, M., The Age, VCAT chief admits faults, calls for overhaul, 12 August, 2009
highlighted in this minority report. We also have reservations and concerns about various other recommendations as well.

We are pleased, however, that the Government members of the Committee have agreed with us in recommending only minor changes to some of the most contentious and important exemptions.

It is a credit to the former Attorney-General, the Hon. Jan Wade, and those associated with the drafting of the Act, that despite the effluxion of time, it continues to be a contemporary document that largely strikes the appropriate balance between eliminating discrimination and protecting freedom.

As was stated by Victorian Human Rights and Equal Opportunity Commission (“VEOHRC”):

“The Act itself has worked very well. It has certainly enabled Victoria to have a very good environment in which discrimination issues can be raised and addressed.”

---

16 Gorton, M., AM, Chairperson, VEOHRC, in evidence to the Committee, 4 August, 2009.
Mr Ken Jasper
Deputy Chair

Ms Inga Peulich
Committee Member

Mr Ryan Smith
Committee Member

Mr Edward O’Donohue
Committee Member