Inquiry into the Exceptions and Exemptions in the *Equal Opportunity Act 1995* (Vic)

Scrutiny of Acts and Regulations Committee
State of Victoria

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Background

In August 2007 the Attorney-General announced a review of the Equal Opportunity Act 1995 (Vic) (EOA) conducted by Julian Gardner. The focus of the review was to investigate how best to address systemic discrimination and promote equal opportunity through reforms to modernise the EOA. A final report and recommendations for reform of the EOA, An Equality Act for A Fairer Victoria, was submitted to the Attorney-General at the end of June 2008.

Work is progressing on the development of new legislation to replace the EOA and implement the Government's response to the June 2008 report by Julian Gardner. New legislation is expected to be introduced in late 2009 or early 2010. The Government is considering a range of reforms that will transform the Victorian Equal Opportunity and Human Rights Commission (in this document the Commission) from a complaints handling body to one that acts on systemic discrimination, researches, educates and actively helps people to resolve discrimination disputes and to comply with the law.

Review of exceptions and the granting of temporary exemptions by the Victorian Civil and Administrative Tribunal did not form part of the terms of reference of the broader EOA review but were dealt with in a separate Department of Justice review which began with a Consultation Paper (February 2008). The primary aim of the Departments review of exceptions and exemptions was to ensure that they are necessary and justified pursuant to Victoria's human rights framework established by the Charter of Human Rights and Responsibilities (the Charter). Central to this is the assessment of whether the exceptions are reasonable limitations on the enjoyment of human rights protected and promoted by the Charter. The Commission's submission responding to the Consultation Paper made recommendations in relation to the amendment, repeal or further research and analysis of exceptions to improve the EOA's compatibility with the Charter.

In December 2008 the Parliamentary Committee for the Scrutiny of Acts and Regulations was asked to inquire into, consider and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the EOA. The Committee are to consider whether there should be any amendments made to:

- the 50 plus exception provisions in the EOA;
- the VCAT exemption process and
- the statutory authority exception.

The Committee released an Options Paper in May 2009 and invited submissions in response.

The Commission has developed this submission in response to the Committees Options Paper.
Executive Summary

Exceptions and exemptions are an integral part of the EOA. Exceptions are recognised as providing a balance between the rights and freedoms of individuals by providing limited exceptions where discrimination prohibited by the EOA in specified circumstances will not be unlawful. Exemptions provide a mechanism for individuals and entities to seek permission from the Victorian Civil and Administrative Tribunal (VCAT) to discriminate in specified circumstances.

Following the introduction of the Charter of Human Rights and Responsibilities there is a need to review and amend legislative limits on rights to ensure they are compatible with and justified under this new legal framework. This was the primary aim of the Department of Justice review of the exceptions to, and exemptions from, the EOA - Consultation Paper released on 29 February 2008 (Justice Consultation Paper). The Commission’s submission responding to that Consultation Paper made recommendations in relation to the amendment, repeal or further research and analysis of exceptions to improve the EOA’s compatibility with the Charter.

The Commission is of the view that the vast majority of exceptions in the EOA are on face value compatible with the Charter or capable of being interpreted consistently with the Charter.

Following the Justice Consultation Paper and the final report and recommendations for reform of the EOA by Mr Julian Gardner, An Equality Act for A Fairer Victoria, released in June 2008 (the Gardner Report), it is appropriate to revisit in detail potential changes to exceptions and the exemption process. The Gardner Report made various recommendations to change the substantive protections from discrimination in the EOA including:

- Creating a duty not to discriminate even in the absence of a complaint;
- Specifically requiring people to make reasonable adjustments for those with disabilities;
- Providing protection from discrimination for the homeless, volunteers and people with an irrelevant criminal record.

In addition the report recommended reforms to transform the Commission from a complaints handling body to one that acts on systemic discrimination, does research, educates and actively helps people to resolve discrimination disputes and to comply with the law.

In this submission the Commission briefly responds to the options presented in the Committee’s Options Paper noting:

- where the Commission’s view or position put to the Justice Consultation Paper in relation to the Charter compatibility of an exception remains

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1 Section 32(1) of the Charter establishes a new fundamental rule of statutory interpretation in Victoria. It provides that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the provisions purpose.
unchanged following a consideration of the matters raised by the Options Paper;

- exceptions where options proposed in the Options Paper are broadly consistent with the Commission’s earlier position/recommendations and that the Commission considers would enhance Charter compatibility and accordingly would support; and

- notes particular exceptions where the Commission has refined or changed its earlier view/position following consideration of:
  - the issues raised in the Options Paper where the options posed would improve compatibility with the Charter by reducing or further restricting limitations on rights and/or present opportunities to improve clarity and application of exceptions; and
  - the implications of the recommendations arising from the report An Equality Act for A Fairer Victoria.

In addition the Commission outlines its views on matters raised in the “Approaches and Principles” section of the Options Paper on the structure and format of exceptions, process for obtaining exceptions and the relationship between the Charter, its principles and the EOA, and the inclusion of the reasonable limitations principles or a general limitations clause in the Act.

The Commission considers the following key areas for reform in the context of exceptions and exemptions are central and essential if the objectives of the broader review of the EOA of addressing systemic discrimination is to be achieved:

- Special services and facilities – reframing these exceptions as reasonable adjustments duties in the relevant areas which they arise – making the obligations they give rise to clearer and easier to understand in practice.

- Special measures – amending section 82 to permit programs, funding and restrictions on eligibility to access those programs that are designed to assist a disadvantaged group and include a special measures provision within the meaning of discrimination to promote consistency with the Charter.

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2 s 21- small business, s25 – care of children, s26 – compulsory retirement of judicial officers, s27 – youth wages, s27A – early retirement schemes, s 27B – gender identity in employment, ss30-31 discrimination in establishing firms and by firms, s40 standards of dress and behaviour in education, s66 – competitive sporting activities, s69 – things done with statutory authority, ss72-73 superannuation, s78 – private clubs, s84 - exemptions to allow compulsory retirement in the public sector.

3 s43 – insurance, s44 – credit providers, s53 – accommodation unsuitable for children, s 71 pensions, s75-76 religious bodies and schools.

4 s16 – domestic and personal services in the home, s 17 - genuine occupational requirements, s18 political employment, s19 – welfare services, s 20 - family employment, s54 – shared accommodation, s63 – separate access to benefits for men and women, s80 – health and safety.

5 s22 – special services or facilities in employment, s 23 – reasonable terms of employment, s special services or facilities in partnerships, s 33 – reasonable terms of partnership, s 36 – reasonable terms of qualification, s 39 special services and facilities in education, s 46 – special manner of providing a service, s 82 – welfare measures and special needs.
Section 69 – is necessary to repeal to ensure compatibility and increased consistency between the EOA and the Charter. There will always be Acts or provisions, which cannot be reconciled with equal opportunity legislation. In Victoria, the most appropriate way to manage this is that such Acts and provisions intended to override the EOA be prescribed in a schedule to that Act. This ensures that the EOA and other legislation complies with the Charter and does not contradict the central premise of the Charter.

Structure of this Submission
In part one, the Commission outlines its views on matters raised in the “Approaches and Principles” section of the Options Paper on the structure and format of exceptions, process for obtaining exceptions and the relationship between the Charter, its principles and the EOA.

In part two, the Commission briefly responds to the options posed in the Committees Options Paper stating where its view remains unchanged, options posed by the Committee which are broadly consistent with the Commission’s earlier view and would enhance charter compatibility and areas where the Commission has refined its position particularly in relation to options which would improve compatibility with the Charter by reducing or further restricting limitations on rights and opportunities to improve clarity and application of exceptions.

For completeness the Commission addresses every exception even though in relation to the majority of exceptions its position remains the same as previously submitted to the Department of Justice Consultation Paper.

In part three, the Commission comments upon the options proposed in relation to the criteria and process for granting temporary exemptions.

Part four the Commission reiterates the necessity to repeal section 69 as such an exception is no longer appropriate and justified in Victoria’s current legal framework and comments on a process for prescribing enactments that are intended to operate in a discriminatory manner.

This document follows the general structure of the Options Paper for ease of reference. Options posed in the Options Paper are reproduced in text boxes.
Part One - Reviewing Exceptions: Approaches and Principles

The Options Paper states that the aim of designing and drafting any amended exceptions and exemptions should be to give the clearest guidance possible about the purpose of and criteria for the provision while also minimising transaction costs involved in claiming or challenging them. To this effect the Options Paper asks various questions about how the format of exceptions could be changed to assist the achievement of equality in Victoria. In this part the Commission responds to the various questions posed by the Options Paper.

1.1 Structure of the exceptions in the Act

The Options Paper states that it is challenging having exceptions located in different parts of the Act and that it would be beneficial to simplify the structure of the Act. The Options Paper suggests grouping definitions of discrimination in one part and grouping exceptions and the power to grant exemptions separately in another part.

The Commission agrees that simplification would be beneficial. To ensure that clarity is achieved, however, the Commission considers this is a matter in which deference should be made to Parliamentary Counsel’s expertise in drafting legislative provisions. At the very least when Parliamentary Counsel are requested to draft any amendments to exceptions and the exemption process the concern about clarity of provisions and simplification of structure should be expressed.

The Options Paper in talking about the types of exceptions provisions in the Act also highlights the breadth given to specific exceptions in Part 3 by the operation of section 12 of the Act. Section 12 provides discrimination is not unlawful if an exception in Part 3 or Part 4, or an exemption under Part 4, applies. In relation to exceptions in Part 3 the provision indicates that an exception may be relied upon to permit discrimination whether or not it appears in the same division as the provision prohibiting discrimination. On the face of it this means that area specific exceptions, for example those found in the division dealing with employment, may be applied to discrimination occurring in another area of public life covered in another division.

The Options Paper notes that the intended meaning and application of this provision is not clear. Section 12 was introduced in the 1995 Act - no equivalent existed in the predecessor the Equal Opportunity Act 1984 (the 1984 Act). It is worth noting that the structure of the 1984 Act dealt with the definitions and exceptions differently from the present Act. The 1984 Act contained a number of provisions which in the same section make discrimination unlawful and then set out circumstances in which that earlier provision does not apply. The Victorian Anti-Discrimination Tribunal in Jubber v Revival Centres International [1998] VADT 62 (7 April 1998) noted that it has been held that these non-application provisions merely amount to a description of the criteria for establishing discrimination and do not constitute true exceptions (citing Keefe v McKinnes [1991] 2 VR 235). The effect of this structure was that it was uncertain whether the complainant was obliged to prove for example that their
employer’s conduct was unlawful (see section 21(1) and (2) 1984 Act), and that none of the circumstances set out in the sub-paragraphs of that provision applied (section 21(4)(a-k)).

The explanatory memorandum to the 1995 Act indicates that section 12 makes it clear that if an exception under Part 3 or Part 4, or an exemption under Part 4 applies it is not unlawful discrimination and the onus lies upon the person who claims an exception to prove that exemption applies. From this it is possible to infer that section 12 was a response to the structural uncertainties of the 1984 Act.

Section 12 has had little consideration by the Tribunal and Courts to date and a perusal of other jurisdictions suggests that the drafting of section 12 is unique to Victoria. In Colyer v Victoria [1997] VSC 43, the Supreme Court indicated that the Tribunal was required to have regard to all relevant provisions of the Act when making a decision under the Act, including exceptions because of the operation of section 12. In Robertson v Australian Ice Hockey Federation [1998] VADT 112, the Tribunal looked at whether restricting girls' participation in ice hockey was discrimination in the areas of clubs and sport and made the following comments in relation to section 12:

Section 66 relates to competitive sporting activities. In other words, it does not cover people such as umpires, coaches and sporting administrators (s64). The heading includes the word "exception". By virtue of s12 of the Act, if an exception applies, the conduct covered by the exception is not prohibited by Part 3, 5, or 6 of the Act. This applies whether or not he(sic) exception is contained in the same division of Part 3 that would otherwise prohibit the conduct. If the exception in s66 applies in this case, it would not only take the conduct out of the prohibition in s64, but also out of the prohibition in s60, even though s60 is contained in a different division of Part 3 from s66.

Accordingly the conduct would not be unlawful in either the area of sport or clubs if the exception in the sport division applied to the conduct. This case highlights that where a complainant and respondents’ relationship could be characterised in more than one area – and the discrimination complained of is permitted by a specific exception in one area but no other relevant exceptions in the other area - section 12 may operate to permit discrimination in both areas of public life. This is sometimes irrespective of specific prohibitions and exceptions applying to both those areas.

The Commission’s experience of the section 12 is that it is most likely to be expressly raised in the circumstances referred to above 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, an ordinary reading of section 12 may also permit a 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. It is noted that whilst the Commission has not seen this latter circumstance arise in its complaint handling experience (or in matters
before the Tribunal) there is a possibility that it may occur given the specific drafting of section 12. The potential for section 12 to apply area specific exceptions in other areas in relation to other forms of prohibited conduct needs to be considered in terms of its compatibility with the Charter in addition to its impact upon the structure of the Act.

The Commission is of the view that section 12 should not operate to permit area-specific exceptions to be applied generally if this manipulates the terms or circumstances where discrimination could be permitted. There is a real possibility that the application of specific exceptions generally could do so beyond Parliament’s original intention in enacting exceptions specific to certain areas.

It is uncertain what interpretation would be given to section 12 with regard to relevant statutory interpretation maxims. *Expressio unius est exclusio alterius* provides that an express reference to one matter indicates that other matters are excluded. Pearce and Geddes explain this maxim in the following terms; “it is a reasonable assumption that where legislation includes provisions relating to similar matters in different terms, there is a deliberate intention to deal with them differently.” So it could be assumed that because the EOA prohibits discrimination in various divisions in Part 3 and includes specific tailored exceptions to those specific divisions where discrimination will not be unlawful – it appears the Act intends to deal with unlawful discrimination in those divisions differently. This may suggest that discrimination may only be permissible in certain divisions where a division specific exception is present. This is supported further by the structure of the Act which also includes Part 4 which provides for exceptions of general application to the areas in Part 3 that are arguably the only circumstances where the Act contemplates a group of exceptions applying irrespective of specific divisions. Again Pearce and Geddes notes that the application of this maxim by Courts has been approached with caution and reluctance. Section 12 as drafted currently arguably creates tension and uncertainty within the structure of the Act in terms of the Act’s intention to deal with specific prohibitions against discrimination differently in various areas.

This potential for the general application of defined area-specific exceptions may give rise to incompatibility with the Charter as well as inhibiting a clear and simplified understanding of the scope of protection and obligations under of the Act. In terms of incompatibility section 12 could operate to permit application of exceptions out of context. In some circumstances exceptions that may be reasonable limits on rights in the originating division, may not be justified limitations on rights in the circumstances contemplated by the other division.

The Commission is not certain that section 12 will always promote a Charter consistent interpretation and application of area specific exceptions given its potential broad application of exceptions. For understanding and clarity of section 12 it should

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not be required to resort to complex applications of statutory interpretation maxims and the Charter.

For this reason the Commission recommends that the opportunity should be taken to clarify 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. Additionally in terms of the structure of the Act and scope of exceptions – the issue of area specific exceptions in Part 3 operating to permit discrimination where conduct is captured in more than one divisions/area of prohibition should be explored further. Specifically as to whether that is the intended and desirable outcome of the relationship between various prohibitions. If some specific exceptions are required or intended to have a general application the general application of such exceptions should be assessed in accordance with the Charter and structured in the Act accordingly. Appropriate safeguards should be built into section 12 to ensure that it does not permit unreasonable limits on rights. One possible safeguard is the suggestion raised in the Options Paper to include a general statement of purpose about the aims of Act as a whole and the interpretation of the exception provisions as an interpretative direction to courts and tribunals.

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

As the Options Paper notes, currently the Act includes both defined exceptions in the Act and a process for people to seek from VCAT an exemption from the Act. The Commission considers that both remain relevant and appropriate, but improvements could be made to both to ensure the burden of ensuring compliance is lessened for both duty holders and people seeking protection from discrimination. These potential enhancements are discussed below in relation to relevant exceptions and the criteria for granting temporary exemptions.

In addition it is useful to note that the Gardner report makes various recommendations which aim to re-focus responsibility to ensure increased compliance with the prohibitions on discrimination in the Act rather than reliance on individual complainants to challenge and test a respondent who claims an exception as a basis to discriminate. These recommendations include the positive duty not to discriminate, an express requirement to make reasonable adjustments for people with a disability, and an expansion of the Commission’s powers to enable it to investigate and inquire into discrimination on its own motion without an individual complaint.
1.3 Would a general limitation clause rather than specific exceptions be preferable?

The Options Paper also contemplates that all or some of the exception provisions could be replaced by a general limitation clause relying on the reasonable limitation criteria of section 7(2) of the Charter. The Commission notes that some submissions to the Justice Consultation Paper favoured the repeal of specific exceptions in favour of a general exception modelled on the reasonable limitations provision in section 7 of the Charter. The recent report of the Federal Senate Standing Committee on Legal and Constitutional Affairs, Inquiry in the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality also recommended that further consideration be given to removing existing permanent exemptions in that Act and replacing those with a general limitations clause.

The Commission does not consider it appropriate for this to occur in relation to EOA at this stage. The Commission sees the general and specific exceptions contained in the act as performing an important educative role in defining and clarifying the scope of what is and is not acceptable discrimination by community standards (exercised through the Parliament). They can operate to clarify that some forms of discrimination are indeed necessary and appropriate in pursuit of the objects of the Act (the special measures type exceptions) and others highlight forms of discrimination that were considered as reasonable and acceptable by community standards at the time (those that respect personal privacy, safety, personal choice and association, and permit actions considered of economic and legal necessity).

Given the foreshadowed role of the Commission to promote compliance through education and facilitation the Commission considers the retention of the defined exceptions in the Act at this time is appropriate.

The Commission does however note that the principles that underpin general limitations clauses generally (reasonable, justified, proportionate, rational and balanced) should guide the formulation and interpretation of exceptions to and exemptions from the EOA to ensure compatibility with the Charter and that any limitations an exception imposes are reasonably justifiable in a free and democratic society which respects the dignity, equality and freedom of all persons. To this extent the Commission supports the suggestions in the Options Paper to include a general statement of purpose about the aims of Act as a whole and the interpretation of the exception provisions as an interpretive direction to courts and tribunals and the review of fixed/defined exceptions on a regular basis every five or ten years.

Specifically in relation to the regular review of fixed exceptions this might be seen as analogous to the override mechanism in section 31 of the Charter. Overrides allow Parliament to legislate contrary to human rights when exceptional circumstances exist, but require the matter to be revisited every 5 years. The two scenarios are not identical in that overrides permit limitations on rights that don’t meet a section 7 reasonable limitations test, whereas it is expected that contemporary and rigorously vetted exceptions would meet a section 7 reasonable limitations test and as such not
constitute an unreasonable limitation on rights. The area of commonality, however, is that the social and other factors driving each scenario may change and the implications of those changes need to be monitored and considered. What is considered a reasonable limit now may not seem as reasonable in 5 years time, and so in order to prevent the law embedding unreasonable restrictions on rights exceptions should require periodic review. Accordingly, the EOA should require the periodic review of exceptions and exemptions. Such a requirement would also be similar to section 207 of the Act (a once-off obligation requiring the Minister to review all Acts and enactments which discriminate or may lead to discrimination that has already been complied with which the Commission recommended be repealed) but be expressed as an on-going obligation to regularly review. This should ensure fixed exceptions which permit discrimination are regularly assessed in terms of whether they are reasonable limits on human rights.

1.4 What alternative formats could be used?

The Options paper outlines a range of possible ways of expressing exceptions including blanket exceptions, limiting the attributes and areas of an exception, requiring a condition before an exception applies, requiring an assessment of a range of factors or taking of specific steps before an exception applies and expressing exceptions as defences. The current exceptions in the Act reflect a number of these approaches. The Commission offers no view as to which approach should be favoured over the other and believes it would be challenging to expect all exceptions to be drafted with a particular approach in mind. The Commission considers the formulation of exceptions should be based upon a consideration of the policy or intent to which each individual exception relates and the over-riding obligation to ensure that they are framed in the least restrictive way possible to ensure they do not result in unacceptable limitations on human rights.

The Commission discusses in more detail in Part 3 the issues raised in this section of the Options Paper in relation to temporary exemptions:

- guidelines for VCAT for the exercise of its discretion to grant temporary exemptions under section 83 and the requirement that the applicant make out a case within those guidelines; and
- allowing exceptions where notice or a statement of reasons or evidence is provided for the approval of the Commission or registration at VCAT or the Commission.

The Commission agrees with the statement in the Options Paper that in any event reliance upon an exception should be clearly identified as a defence under the Act so that the respondent carries the onus of proof in relation to it.
1.5 A closer look at the reasonable limitations test of the Charter

The Options Paper states that one of the rationales or criteria for reviewing exceptions and exemptions includes the need to ensure that the EOA is not inconsistent with (the rights protected by) the Charter. The Commission has previously outlined the need to review exceptions in line with the Charter framework – specifically section 7(2) in its submission to the Justice Consultation Paper. In this submission the Commission outlines its view on the unique inter-relationship between the EOA and the Charter due to the inclusion of the right to recognition and equality before the law in the Charter and specifically the way that the Charter defines discrimination.

This is in response to issues raised by the Options Paper that there is uncertainty about whether the definition of discrimination in the Charter as ‘discrimination (within the meaning of the Equal Opportunity Act 1995)’ includes merely the definitions of discrimination in sections 7-9 of the EOA, or all the exceptions and exemptions as well. The Options Paper notes that this first view would exclude all exceptions, including special measures as well as exceptions that reduce rights from the concept of discrimination in the Charter, and would produce a concept of equality as identical treatment. The Options Paper states that this view appears contrary to section 12 of the EOA, and its consequences would be unacceptable. The Commission responds to these concerns in this section.

The Charter recognises that every person is equal before the law and is entitled to equal protection of the law without discrimination. It also recognises that every person has the right to equal and effective protection against discrimination. As the Gardner report noted the non-discrimination right under the Charter is different from provisions in the EOA as the Charter allows reasonable limits on the rights contained in it “as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”. In this part the Commission explores the different ways in which the EOA and the Charter protect against discrimination.

The term ‘discrimination’ in the Charter is defined by reference to the EOA. That is the Charter adopts the same definition of discrimination as that in the EOA, including the list of attributes contained in the EOA. Section 3 of the Charter provides that “discrimination” in relation to a person, means discrimination within the meaning of the EOA on the basis of an attribute set out in section 6 of the EOA.

The Commission takes the view that the meaning of discrimination in the Charter is unlikely to be constrained by section 12 and by extension Parts 3 & 4 of the EOA. Part 3 deals with areas where discrimination is prohibited and includes area specific exceptions that make certain types of discrimination lawful and Part 4 deals with general exceptions and temporary exemptions which again permit certain types of discrimination. Whilst this approach is not explicit within the section 3 definition of the Charter, the structure and drafting of the two acts is likely to support this approach.
As a matter of statutory interpretation section 3 of the Charter does not include section 12 of the EOA. Section 3 of the Charter refers to discrimination within the meaning of the EOA on the basis of an attribute listed in section 6 of the EOA - clearly this captures section 7 "Meaning of discrimination" the formulation of which in turn incorporates sections 8 (direct discrimination), 9 (indirect discrimination), and other specific forms of reasonable adjustments obligations (see sections 13A, 14A, 15A, 31A, 51 and 52) but not section 12. Furthermore section 12 refers to the prohibition of discrimination - section 3 of the Charter does not incorporate the prohibition on discrimination, only the definition of discrimination, because it is the Charter itself that prohibits acts and decision making in breach of the rights in s8.

From this it is clear that the scope of the prohibition on discrimination differs between these two Acts. To understand this difference it is important to understand the structure of the EOA and the operation of the prohibition against discrimination in it. The EOA only makes discrimination unlawful (that is, prohibited) in defined areas of public life (Part 3). The EOA limits the scope of the prohibitions by permitting specific and general types of discrimination in public areas of life through the area specific exceptions (Part 3) and general exceptions (Part 4). Section 12 supports this construction by providing that “the Act does not prohibit discrimination if an exception in Part 3…or Part 4 or an exemption in Part 4 applies.” Therefore discrimination within the meaning of section 7 of the EOA outside these areas or that is covered by an exception or exemption is not prohibited by the EOA – but it is still “discrimination” within the meaning of the Act.

Conversely the Charter prohibits discrimination within the right to equality (s8) in relation to a person’s enjoyment of their human rights (s8(2)) and equal protection of the law and equal and effective protection against discrimination (s8(3)). This prohibition against discrimination in the Charter is not confined to the same areas of public life as the EOA. The Charter applies more broadly to the conduct of public authorities through section 38; it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Additionally the Charter requires that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the provision (s32). This interpretive duty is another means or mechanism of ensuring the interpretation and application of laws are non-discriminatory or discriminate within reasonable and justified limits.

Another important distinction is that the Charter rights – including the right to equality – may only be limited in accordance with section 7(2) of the Charter. This ‘reasonable limitations’ clause therefore operates as an all encompassing exception permitting discrimination by a public authority where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 8(4) provides a more specific exception from the prohibition of discrimination in the Charter. It provides that measures taken for the purpose of assisting or advancing the persons or groups of persons disadvantaged
because of discrimination do not constitute discrimination. The effect of 8(4) is important and two fold. First it operates to provide a limited specific exception. Secondly it addresses the concern raised by the Options Paper - that discrimination in the Charter could be reduced to sameness of treatment without a consideration of special measures – by providing that substantive equality is not necessarily achieved by treating everyone equally (identical treatment)\(^7\). Given this dual purpose - section 8(4) should not just be seen as a limited exception to the principles set out within section 8 of the Charter but also as a guide to the interpretation and scope of the principles in the preceding sub-paragraphs\(^8\).

To incorporate the limitations of Parts 3 and 4 of the EOA into the meaning of discrimination in the Charter would be incompatible with the scheme of the Charter in that it would mean rights under s8 would be dealt with differently from all other rights in that the Charter articulates a very specific and finite range of restrictions - those in the Charter's expression of the right (e.g. section 13), limitations permitted as reasonable in accordance with section 7, lawful obligation (section 38(2)), private conduct / decisions (section 38(3)) and religious limitations (section 38(4)).

That is not to say that Parts 3 and 4 are irrelevant – exceptions and exemptions may still be relevant to a consideration of whether an act or decision of a public authority that is discrimination is demonstrably justified as a reasonable limit on rights in accordance with section 7(2) depending on the facts under consideration.

It is useful also to reflect upon the Human Rights Consultation Committee’s recommendations in relation to the Charter and that one of the key reasons for linking the EOA and Charter was to avoid the uncertainty that would have flowed from the international law definition of discrimination which includes "any other status". It was felt public authorities should not have to try and grapple with such an amorphous concept. The Committee made no comment on any need to also include exceptions.

Irrespective of whether the concept of discrimination in the Charter is constrained by exceptions and exemptions in the EOA, amendment to clarify the meaning and operation of section 12 of the EOA is unlikely to impact upon the prohibition of discrimination in the Charter.

### 1.6 Putting the reasonable limitations test into the Act

The Commission has already indicated above that it supports the suggestions in the Options Paper to include a general statement of purpose about the aims of Act as a whole and the interpretation of the exception provisions in accordance with the reasonable limitations principles as an interpretative direction to courts and tribunals and the review of fixed/ defined exceptions on a regular basis every five or ten years.

\(^7\) Explanatory Memorandum to the Charter.
\(^8\) Evans and Pound, An Annotated Guide to the Charter of Human Rights and Responsibilities, p 90.
This would also complement the Gardner recommendations related to improving the links between the Charter and the Act\(^9\).

At the very least the Commission reiterates that the principles derived from section 7(2) of the Charter should inform and underpin the policy and drafting of exceptions so as to ensure they are most consistent with the Charter framework.

In addition the Commission considers that there is the opportunity to codify the reasonable limitations principles in respect of the granting of temporary exemptions following the recent decision by VCAT in *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415 where the Tribunal considered the impact of the Charter – via section 32 – on its discretion to grant exemptions. This is discussed in more detail below in relation to the criteria for granting temporary exemptions.

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\(^9\) Recommendations 1-4 of the Gardner report.
Part Two – General and Specific exceptions

In this Part of the submission the Commission briefly responds to the options posed in the Options Paper in relation to both specific and general exceptions noting:

- where the Commission’s view or position put to the Justice Consultation Paper in relation to the Charter compatibility of an exception remains unchanged following a consideration of the matters raised by the Options Paper;
- exceptions where options proposed in the Options Paper are broadly consistent with the Commission’s earlier position/recommendations and that the Commission considers would enhance Charter compatibility and accordingly would support; and
- notes particular exceptions where the Commission has refined or changed its earlier view/position following consideration of:
  - the issues raised in the Options Paper where the options posed would improve compatibility with the Charter by reducing or further restricting limitations on rights and/or present opportunities to improve clarity and application of exceptions; and
  - the implications of the recommendations arising from the report An Equality Act for A Fairer Victoria

For completeness the Commission addresses every exception even though in relation to the majority of exceptions its position remains the same as previously submitted to the Department of Justice Consultation Paper.

To assist with ease of understanding this response to the Options Paper the Committee’s options are reproduced in boxes at the beginning of each section.

2.1 Exceptions to discrimination in employment and employment related areas

Section 16 – Domestic and personal services in the home

| Option 1: No change to this provision. |
| Option 2: Amend s. 16 to omit the words ‘or in relation to’; and replace the words ‘any person’s home’ with ‘the home of the employer, the person on behalf of whom the act was done, or a relative of either of those persons.’ |

The Options Paper states that the privacy rationale that applies to the selection of workers within the home does not seem as applicable to selection of workers in relation to but outside the home such as a gardener or painter who is working outside only. Option 2 is aimed at enhancing compatibility with the Charter and consistency with the narrower definitions present in other jurisdictions.

Accordingly the Commission supports option 2.
**Section 17 – Genuine Occupational Requirements**

<table>
<thead>
<tr>
<th>Option 1: No change.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 2: Amend the wording of s. 17 by requiring a nexus to be shown in subsections 17(1), (2)(a) and (4) between the work itself and the proposed restriction on eligibility for it, in terms of a reason of sufficient weight to justify the restriction.</td>
</tr>
<tr>
<td>Option 3 (in addition to Option 2 or by itself): Repeal s. 17 and replace it with a provision that allows an exception for discrimination against a person who cannot carry out the inherent (or genuine and reasonable) requirements of the job. The criteria to be considered should be included in the section, as listed above, and should require the employer to discharge the onus of showing the nature of the work, the nature of the proposed restriction and the inherent requirement on which it is based, and a justification for the restriction that is sufficient in terms of the s. 7(2) criteria.</td>
</tr>
<tr>
<td>Option 4: If the attribute of ‘criminal record’ is adopted, then a specific subsection be adopted recognising that in some circumstances conditions as to criminal record may be a genuine or inherent occupational requirement. VEOHRC should be requested to develop guidelines on this for employers.</td>
</tr>
</tbody>
</table>

The Options Paper states that all Australian anti-discrimination laws except the federal *Racial Discrimination Act 1975*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* have provision for genuine occupational requirements, and most (NSW, WA, Qld, ACT, *Sex Discrimination Act (Cth)*) contain examples of the types of activities that fall within the provisions. The Victorian provisions are primarily aimed at sex discrimination, but other jurisdictions have exceptions covering race, sex and age discrimination (NSW, SA), race, sex, age and impairment (SA), race, sex and disability (ACT) and gender, age, race, disability, industrial activity and religion (Tas).

It was further noted that this spread of grounds indicates that broader use could be made of this exception or a corresponding inherent requirements exception in the EOA which could simplify the structure of the EOA significantly and restructure a number of currently isolated exemptions, such as sections 17, 18, 19 and some of the religious exceptions on a principled basis.

The Commission generally supports options 2 and 3 in terms of the capacity to improve compatibility with the Charter and consolidate and clarify a number of exceptions relating to occupational requirements. Specifically the Commission supports a move to the nomenclature of ‘inherent requirements’ which is a better established legal concept and test than ‘genuine occupational requirement’.

However, the Commission would not support an inherent requirements exception that expands beyond the current range of attributes and activities (offering of employment) covered by established occupational requirements exceptions already within the Act. In addition the exception should include the well established
circumstances covered by sections 17 to 19 where possessing a protected attribute may be an inherent requirement.

In relation to impairment and the inherent requirements of employment the Commission considers this is should be addressed separately through the proposed reasonable adjustments provisions as the concept of ability to meet the ‘genuine and reasonable requirements of employment’ is not confined to the offering of employment in relation to the attribute of impairment. Existing policy in the EOA is contained in section 22(1)(b) which provides an employer may discriminate against another person on the basis of impairment in any of the areas in section 13 and 14 if the person cannot or could not perform the genuine and reasonable requirements of employment even after the provision of special services and facilities. This will be discussed in more detail below in relation to section 22 – special services and facilities.

In relation to Option 4 it is noted that the Gardner report recommended that the attribute of irrelevant criminal record be introduced into the Act. Given the proposed attribute includes a consideration of relevancy the Commission considers that an inherent requirements exception in relation to this attribute would be superfluous. Under the proposed definition of the attribute where a person’s criminal record is relevant to the employment the attribute will not be established. Accordingly there is no need for an inherent requirements exception in relation to this attribute and any inclusion of one in relation to this attribute is likely to complicate the application of the attribute.

Section 18 – Political Employment

Option 1: No change.

Option 2: This section should be repealed, and replaced by an equivalent paragraph in a section relating to genuine occupational qualification or inherent requirements of the employment.

See above section.

Section 19 – Welfare Services

Option 1: No change to s. 19.

Option 2: Repeal section 19 and indicate that its function is to be carried out by another provision by including an example or specific paragraph in that exception:

(b) the genuine occupational requirement (or inherent requirement of the particular employment) provision

(c) and / or the special measures provision.

The Commission has no objection to the repeal of this section and its inclusion in a genuine occupational requirements or inherent requirements exception. The Commission considers that a special measures provision should define the meaning
of discrimination and not be characterised as an exception per se – this is discussed in more detail below in relation to section 82 – welfare measures and services.

The explanatory memorandum to the 1995 Act states that section 19 provides an exception for employment in relation to the provision of services for the promotion of the welfare of or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.

The Commission has approached the interpretation and application of this exception consistent with the objects of the Act to ensure that its application is constrained to circumstances involving the delivery of services that have as their purpose the welfare and advancement of disadvantaged groups by permitting employment to be limited to people of the same attribute(s) if a particular service can best be delivered by people with those attributes. This interpretation is arrived at following a purposive interpretation of words ‘welfare’ and ‘advancement’ having regard to the objects of the Act, specifically to eliminate discrimination as far as possible and to promote recognition and acceptance of everyone’s right to equality of opportunity.

The Commission considers there remains a need for a permanent exception of this type and acknowledges that the purpose and application of current section 19 could be more directly related to facilitating the delivery of special measures that are intended to, and objectively capable of, advancing the interests of particular groups disadvantaged in some way.

With this in mind such an exception should have as its purposes and should clearly spell out:

- its operation as a genuine occupational requirement or inherent requirement exception – in that it operates to limit offering of employment to person of a particular attribute; and
- facilitation of special measures by permitting the creation, advertisement and offering of positions that require a person to be of a particular attribute, as a genuine occupational requirement or inherent requirement, to deliver services to particular disadvantaged groups where that service provision is intended and objectively capable of advancing the interest of that group and employment of persons possessing the same attribute(s) is reasonably regarded as central to the work involved or the services can be provided so much more effectively and appropriately by members of that group.

The Commission sees an overwhelming number of temporary exemptions granted by VCAT seeking to permit the conduct contemplated by section 19. In the matter of an exemption application by YMCA Carlton Parkville Youth Service [2004] VCAT 2186 (12 November 2004), the Tribunal noted that the limits or the boundaries of the section are somewhat vague and the words “most effective” are somewhat uncertain in the breadth of their meaning. The Tribunal noted in granting another exemption application (Central Highlands Community Legal Centre Inc [2003] VCAT 1687 (12
May 2003)) that which group can provide the services most effectively is a question of judgment.

The Commission considers the review of exceptions provides the opportunity to create certainty within the Act in terms of facilitating the provision of services that are designed to promote and further the objects of the Act, reduce regulatory burden on duty holders who seek such exemptions, and the administrative burden imposed on the Tribunal in granting temporary exemptions.

The Commission in its submission to the Justice Consultation Paper commented that:

…the Commission’s own anecdotal experience has been that the exemption application process can be challenging for some applicants in terms of understanding whether the conduct they propose to undertake is potentially unlawful discrimination and whether they would require an exemption. This may be partly because there is some uncertainty around the meaning and scope of the general and certain specific special measures exceptions in the Act, which has possibly resulted in some applicants seeking exemptions for reasons of legal certainty. It is the Commission’s view that individuals and entities should not be unduly burdened or discouraged from undertaking affirmative action programs because of legal uncertainty and the need to obtain an exemption.

The Commission went on to recommend that the Department reflect upon the types of exemptions granted by the Tribunal to ensure there are appropriate and relevant exceptions in the Act capable of obviating the need to obtain routine exemptions which are consistent with the spirit and objects of the Act. The Commission considers that section 19 should be amended and clarified to obviate the need for common and unobjectionable exemption applications currently routinely granted by the Tribunal.

**Section 20 – Family employment**

| Option 1: No change to this provision. |
| Option 2: Repeal this provision. |

The Options Paper considers that if this exception was to be assessed under section 7(2) of the Charter, it is difficult to see how it would be a reasonable limitation on the right to equality. The Options Paper also noted that on the other hand, it recognises a very human aspect of managerial prerogative in business, even though situations that it applies to are very unlikely to ever become the subject of a discrimination complaint.

Upon reflection on the issues raised by the Options Paper and the Commission’s limited dealings with this exception the Commission would support repeal of this exception.
**Section 21 – Small Business**

Option 1: No change.

Option 2: Repeal and replace with a provision allowing an exception for situations where compliance would result in unjustifiable hardship for a business or a small business. This could be accompanied by a restriction of the attributes covered by the exception. (See further discussion of the idea of unjustifiable hardship below at s. 22).

Option 3: Retain this provision, with the deletion of the words 'on a full-time basis' in sub-s. (1) and deletion of sub-s. (3). This would alter the employee count from equivalent full-time staff to a head count, as in other states.

The Commission in its submission to the Justice Consultation Paper expressed the view that this exception lacks a legitimate or rational purpose for limiting the right to equality and should be repealed.

The Commission’s position remains that this exception should be repealed. In relation to option 2 which contemplates its repeal and replacement with a limited unjustifiable hardship provision – the Commission does not consider such a general provision appropriate or necessary. There are adequate opportunities to consider capacity of a small business employer to meet their obligations under the Act. See for example in the context of reasonableness in indirect discrimination, factors to be considered in whether a refusal to accommodate parental or carer responsibilities is reasonable and if a similar framework is adopted in relation to the proposed reasonable adjustments provisions factors to be considered in providing adjustments. This will be discussed in more detail below in relation to section 22.

**Section 22 – Special Services or Facilities**

Option 1: No change.

Option 2: Repeal s. 22 and replace it with a provision that expresses similar principles based on the structure and wording used in the DDA (Cth). A subsection should identify the factors that should be considered in assessing the three main conceptual tests. Alternatively the duty to reasonably accommodate could be expressed in the same form as the provision used to create the duty to accommodate parental or carer responsibilities in s. 13A of the EOA.

The Commission in its submission to the Justice Consultation Paper identified that the special services and facilities type exceptions (sections 22, 32, 39 and 46) may no longer be relevant or needed, or may require consequential amendments depending upon whether a more express recognition of the duty to reasonably accommodate was incorporated into the EOA as part of the broader review. Following the Gardner Report recommendation\(^{10}\) to amend the EOA to include an express requirement to make reasonable adjustments for people with impairment in relation to all areas protected by the Act the Commission considers that it is

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\(^{10}\) See recommendation 43 of the Gardner report.
appropriate that these exceptions be reframed as express reasonable adjustments obligations.

The Tribunal has considered\textsuperscript{11} that sections 22 and 23 of the EOA give rise to an important implied obligation directed at requiring an employer to make reasonable adjustments to the requirements of employment to accommodate a person with an impairment. It is the Commission’s view that this implied requirement extends to the other employment related areas, education and the provision of goods and services, based upon the exceptions sections 32, 33, 36, 39 and 46 of the EOA, that contain similar notions of a person with an impairment requiring the provision of ‘special services and facilities’ or ‘service[s]…provided in a special manner’ unless it is not reasonable to do so. In addition sections 22 and 32 are in effect inability to work exceptions where a person is unable to perform the genuine and reasonable requirements of employment\textsuperscript{12}.

It is important to reiterate the central precepts of the notion of reasonable adjustments. These were articulately put in the Gardner report:

Making reasonable adjustments to accommodate a person’s particular attributes (for example, due to their disability) involves balancing the need for the change with the expense or effort involved. If an adjustment requires disproportionately high expenditure or disruption, then it is not reasonable.\textsuperscript{13}

Requiring reasonable adjustments means that policies and practices must be flexible enough to accommodate different needs. The obligation would not, for example, extend to altering the inherent requirements of a job in employment situations. However, it could apply to hours of work or the provision of special equipment where disadvantage could be minimised.\textsuperscript{14}

The Commission considers that the special services and facilities exceptions should be reframed as express reasonable adjustments obligations – thereby the current implied obligations are reframed as an express obligation. The Commission considers that using the underlying policy of those exceptions will be the most efficient way to introduce an express obligation to reasonably accommodate impairment in the relevant areas of the Act. The objective of amendments to these provisions should be to provide certainty and clarity about the scope and application of the obligation to make reasonable adjustments and utilise the existing policy underpinning the implied obligations in the Act.

\textsuperscript{11} Davies v State of Victoria (Victoria Police) VCAT 5 January 2000, see also Vanderhorn v VYMP International Pty Ltd known as Artflo Design (1992) EOC wherein the Victorian Anti-Discrimination Tribunal in considering the predecessor of section 22 in the 1984 Act confirmed that there will be discrimination if special services and facilities are required and can be reasonably provided but are not provided by an employer.


\textsuperscript{13} Paragraph 5.44 of the Gardner Report.

\textsuperscript{14} Paragraph 5.45 of the Gardner Report.
The Commission favours the framing of a duty to reasonably accommodate similar to the format used to create the duty to accommodate parental or carer responsibilities currently in the Act enacted by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008*. The guidance provided by the family responsibilities provisions appears to have been well received within the employment sector with early anecdotal feedback to the Commission being that the provisions provide clearer guidance for employers on their obligations, the factors for consideration provide a useful checklist, and a framework to facilitate resolution of issues in the workplace. These provisions were introduced without the need for definitions of unjustifiable hardship and are seemingly working effectively.

The Commission considers that the reframing of the special services and facilities exceptions in a similar format in relation to the area of employment may provide:

1. If an employee or job applicant has an impairment and requires adjustments or accommodation in order to perform the inherent requirements of employment the employer must make reasonable adjustments (unless the situation arises under 3.)

2. In determining what adjustments are reasonable and whether the employer is reasonably expected to provide them all the relevant facts and circumstances must be considered – these should include:
   - the person’s circumstances, including the nature of his or her impairment;
   - the nature of the role;
   - the nature of the adjustments required to accommodate the impairment;
   - the financial circumstances of the employer;
   - the size and nature of the workplace and the employer’s business;
   - the effect on the workplace and the employer’s business of accommodating the impairment, including:
     - the financial impact of doing so;
     - the number of persons who would benefit from or be disadvantaged by doing so; and
     - the impact on efficiency and productivity and, if applicable, on customer service of doing so;
   - the consequences for the employer of making such adjustments; and
   - the consequences for the job applicant/employee of not making such adjustments.

Considerations of this nature should facilitate an instructive and balanced application of the duty to ensure that adjustments are provided where reasonable to facilitate equality of opportunity for people with disabilities and that those adjustments do not amount to an unjustifiable hardship on employers. Such considerations should also address concerns by small business argued in support of the retention of the small business exception in terms of the potential impact on them of accommodating job applicants with impairments.
3. Where a person or employee is unable to perform the inherent requirements of employment even after the provision of reasonable adjustments an employer may discriminate. This should operate as a limited inherent requirements defence. Currently the equivalent s22(1)(b) can be applied in relation to all areas of employment contemplated in sections 13 and 14. This would permit harassment and denials of training and apprenticeship programs and other employment related benefits. An inherent requirements exception in relation to impairment should be limited in its operation to areas of employment where skills and capacity to perform the role are relevant such as offering employment and dismissal. Section 22(1)(b) is even broader than its equivalent in the DDA (s15(4)) which only applies to offering of employment and dismissal. This limitation should be constrained in the reformulation of this exception as a reasonable adjustments duty. In determining whether or not a person can or could adequately perform the inherent requirements of the employment, all relevant factors and circumstances must be considered, including:

- the person’s training, qualifications and experience;
- the person’s current performance in the employment, if applicable; and
- other relevant factors derived from case law

The Commission favours the above approach as opposed to replicating the provisions to amend the DDA by the recently passed *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (to give effect to the Productivity Commission recommendation to include a duty to make reasonable adjustments in the DDA) by including the duty within the definitions of ‘direct discrimination’ and ‘indirect discrimination.’ Adopting this approach for the EOA is likely to be schematically problematic and may risk dilution of existing obligations in the EOA. The approach taken in respect of the DDA is likely to be problematic in a multi-attribute act where concepts of reasonable adjustments are not limited to disability but may also be applied to other attributes (particularly through the operation of the indirect discrimination definition). Including a reasonable adjustments duty based on the approach adopted in respect of the DDA may have the effect of limiting or narrowing current implied obligations of reasonable adjustments for other attributes. This is due to the approach to statutory interpretation that where legislative provisions deal with similar matters in different terms there is a deliberate intention to deal with them differently.

It is noted that there are nuanced differences between the special services and facilities exceptions currently and these will need to be accommodated appropriately in the reformulation of those exceptions. For example in the area of education section 39 relates to deriving a benefit from education. The reframing of this duty should incorporate a consideration of the need for the educational authority to comply with the *Disability Standards for Education 2005* to avoid operational inconsistencies with the DDA. Further section 46 uses clumsy terminology of ‘more onerous terms’ to
describe where the provision of special services and facilities in goods and services will amount to an unjustifiable hardship on the service provider. The explanatory memorandum states it provides that a service provider may refuse to provide a service or set reasonable terms for the provision of that service to a person if the service would be required to be provided in a special manner because of the other person’s impairment or physical features. In terms of whether it is not reasonable for a service to be provided in that manner the exception provides two options either:

(a) the person cannot reasonably provide that service in that manner;
(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 physical features.

Following the reformulation of this section in the format proposed above sub-paragraph 46(b) will be superfluous as the list of factors will assist a service provider to determine what adjustments may be needed for the provision of the service to accommodate a person’s disability, whether the service provider can reasonably provide the service in that adjusted way, or whether the provision of the service in the manner required by the person with the impairment is not reasonable in the circumstances. This alleviates considerations of ‘more onerous’ which is arguably a lower threshold than reasonableness and is more consistent with the objective of creating a positive duty to facilitate the delivery of services in a manner that accommodates a person’s impairment.

Repealing and re-framing the special services and facilities exceptions will also impact on the scope of protection from discrimination on the basis of physical features. Currently these exceptions also extend to physical features. In so far as a person’s physical features necessitated a service to be provided in a special manner this may occur in relation to tall or short stature or the size of a person’s limbs, bone structure or weight. It is considered that the repeal of special services and facilities exceptions would have little to no impact on the scope of protection from discrimination on the basis of physical features. The Commission notes that it receives very few complaints on the basis of physical features where the application of the special services and facilities exceptions arises. Where it is relevant the attribute of physical features is usually claimed in addition to the attribute of impairment. The Commission made recommendations to the Gardner Review Options Paper to extend the factors relevant to the consideration of reasonableness in indirect discrimination. The Commission in its submission recommended, in addition to reversing the onus of reasonableness in indirect discrimination, extending the factors relevant to the consideration of reasonableness to include whether adjustments could be reasonably made where this is a relevant consideration. These factors would apply to all attributes and all areas where relevant on the facts – so in circumstances where a person’s attribute such as physical features necessitated the provision of reasonable adjustments in order to comply with a requirement condition or practice they would still be protected through the indirect discrimination provisions (amended as suggested by the Commission). Conversely where a respondent imposed a requirement condition or practice that disadvantaged people with the
attribute of physical features they could argue that the requirement condition or practice was reasonable in the circumstances and that reasonable adjustments were not possible or appropriate in the circumstances.

**Section 23 – Reasonable terms of employment**

<table>
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<tr>
<th>Option 1: No change.</th>
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<tbody>
<tr>
<td>Option 2: That the substance of this exception be retained, but that it be amended. Paragraphs (a) and (b) should be combined to provide for an exception where the person could not carry out the inherent requirements of the job based on the model of s. 35(1)(a) of the NT Act or s. 34 of the Qld Act. The language in sub-paragraphs 23(b) and (c) should be modernised similar to s. 22.</td>
</tr>
</tbody>
</table>

In its submission to the Justice Consultation Paper the Commission recommended that the language used by sub-paragraphs 23(b) and (c) be amended similarly to section 22 to use a more progressive term of reasonable adjustments and to clarify whether theses paragraphs are disjunctive. Since then the Commission has considered this exception in more detail specifically in terms of how it would relate to an express reasonable adjustments provision and wishes to highlight some further concerns about the clarity and scope of the exception and the implications this has for it to be applied compatibly with the Charter.

The Commission notes that the natural reading of this exception can cause some uncertainty as to whether the paragraphs (a)-(c) are conjunctive or disjunctive. Specifically whether the provision permits an employer to set reasonable terms of employment or make reasonable variations to them, when all those factors are present in section 23 or just one. Whilst *Davies v State of Victoria VCAT* 5 January 2000 noted that the sub-paragraphs are disjunctive this is not clear on the face of the provision and can cause some uncertainty about the capacity of an employer to set genuine and reasonable requirements generally and whether paragraph (a) may be relied upon in circumstances more broadly than impairment and physical features referred to in paragraphs (b) and (c)

The explanatory memorandum of the 95 Act does not provide any further clarity as to the scope and application of section 23 – states that the exception:

Enables an employer to set reasonable terms of employment, or make reasonable variations to those terms, to take into account the requirements of the employment or any special limitations of an employee or job applicant.

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15 Refer to the following interim applications where the Tribunal was prepared to consider the application of s23 (a) in relation to a requirement to work on Saturday in the context of allegations of indirect discrimination on the basis of religious belief and activity: *Fox v Canberra Television Vic Pty Ltd* [2000] VCAT 423 (29 January 2000) and *Feiglin v B&B Design Australia Pty Ltd* [2007] VCAT 465.
It is useful to reflect on how the setting of reasonable terms and conditions of employment was dealt with in the 1984 Act. That Act contained a similar exception: s21(4)(i) the fixing of reasonable terms or conditions of or the making of reasonable variations in the terms or conditions of employment where the terms are so fixed or as so varied take into account –

(i) any special limitations that a person’s impairment imposes on his capacity to carry on the work involved in employment;
(ii) any special conditions or services which are required to be provided to enable him to undertake the employment or to facilitate the conduct by him or his employment; or
(iii) where applicable the provisions of section 135 of the Labour and Industry Act 1958 and section 39(1) of the Industrial Relations Act 1979;

From this it appears that the setting of and changes to terms and conditions of employment were limited to the attribute of impairment under the 84 Act. Current section 23 appears to be the re-enactment of that section although it is not clear why it has been drafted in a way so as to permit a broader application beyond the attribute of impairment.

The Committee noted that in relation to paragraph 23(a) it would be necessary to consider whether an exception to protect the setting of reasonable terms or requirements of employment in relation to any attributes is either necessary or desirable within the EOA.

Since the Commission’s submission to the Justice Consultation Paper the Commission has considered further the relationship of this exception and a reasonable adjustments provision. Given that it is unclear as to whether interpreting this exception in light of the Charter interpretative duty would lead to it being constrained to impairment or whether it would permit a broader application to other attributes the Commission has revised its opinion in relation to section 23(a). The Commission is of the view that a broad interpretation of section 23(a) that facilitates the setting of reasonable terms or requirements of employment in relation to all attributes is unlikely to be compatible with the Charter.

Sub-paragraph 23(a) permits a limitation on the freedom from discrimination to ensure that the genuine requirements of employment can be met. Notwithstanding that the nature and extent of the limitation is constrained by the requirement of reasonableness and that it be associated with the genuine occupational requirements its broader application to other attributes is uncertain. This exception recognises that employers should be able to set or vary reasonable terms or requirements of employment which is an important purpose in a competitive market economy. Where this provision seeks to balance the reality of employment requirements and the recognition that such requirements may be varied to take into account the requirements of the employment or a person’s circumstances arising from their disability it is likely to be reasonable, rational and proportionate limitation.
However where the exception is relied upon to justify the setting of discriminatory terms or requirements of employment more generally in relation to all protected attributes it is unlikely to be a reasonable limitation on the right to equality. The reasons for this are based upon the framework and structure of the Act. The Act prohibits discrimination in the terms upon which employment should be offered (s13(b)) and by subjecting the employee to any other detriment (s14(d)) it also prohibits the imposition of an unreasonable requirement condition or practice. On the other hand it permits the setting of genuine occupational requirements in specified circumstances: s17-19. Additionally the family responsibilities provisions may facilitate reasonable variations to terms and conditions of employment to take into account the provision of adjustments to accommodate a person’s parental or carer responsibilities. By interpreting section 23 to permit generally the setting of reasonable terms and conditions to have regard to the genuine and reasonable requirements of employment arguably undermines these prohibitions and overrides more specific genuine occupational requirement exceptions in the area of employment.

Given that there are other existing provisions to achieve the purpose of this exception (which are likely to impose fewer restrictions on rights and facilitate a more balanced approach to the setting and variation to terms and conditions of employment) the limitation the exception places on the right to effective protection from discrimination is unlikely to be reasonably justified in a free and democratic society which respects the dignity, equality and freedom of all persons. For this reason it is unnecessary to retain this exception given there are other adequate and more specific constraints to address this purpose in the legislation. Repealing s23(a) therefore will provide greater clarity in relation to discrimination in setting terms and conditions of employment.

The Tribunal in Davies highlighted that paragraphs (b) and (c) are directed at enabling an employer to make positive adjustments to the duties of an employee or terms of employment to accommodate a particular individual’s impairment or physical features, but, is not directed at permitting an employer to exclude such an individual because of their incapacity to perform the duties of employment because of their impairment or physical features.

The Commission considers that section 23 should be repealed. Sub-paragraph 23(a) is unlikely to be justified or necessary for the reasons stated above. The policy rationale behind sub-paragraphs 23(b) and (c) should be retained and addressed by a reasonable adjustments provision in employment. Similarly to the Commission’s view in relation to section 22 the language in sub-paragraphs 23(b) and (c) require modernising. Any drafting of provisions to capture this policy should ensure that they do not permit employers to transfer the costs of reasonable adjustments to an employee by varying their terms and conditions of employment in a detrimental way and thereby significantly negating the notion of reasonable adjustments. Variations
which have such an effect could not be considered reasonable and should not be protected by the exception.

Section 24 – Standards of dress and behaviour

Option 1: No change.
Option 2: Repeal s. 24.
Option 3: If a provision is to be retained, replace s. 24 with a provision to the same effect as s. 29(4) of the EOA (SA) (limited to dress and appearance which are characteristics of sexuality).
Option 4: Add a provision that it is discrimination to require an employee to wear skimpy or revealing clothing unless it is an inherent requirement of the particular employment.

The Commission notes the various views expressed in the Options Paper in relation to this exception, particularly the view that standards of dress and appearance are a legitimate concern for employers but do not raise issues of discrimination and can be adequately handled within the scope of management power to set reasonable terms and conditions of employment. The Options Paper notes further that without more information on what, if any, discrimination concerns have arisen in relation to employee dress and appearance, or behaviours, and why this exception is needed to resolve these issues rather than simply employment law, it is difficult to see the necessity for the retention of this exception.

With this in mind it is useful to note the Commission’s experience with this exception through its enquiry line and complaint handling. The Commission receives various enquiries in relation to standards of dress and appearance from the public on matters including piercings, tattoos and hair length, low cut clothing, stereotyped dress standards directed towards the sexes, body odour and impairments. In this context the exception is referred to as an instructive or education provision to define the scope of what is permissible in terms of dress and appearance standards within the broader framework and objectives of the Act.

The Commission acknowledges that case law from the federal jurisdiction in this area suggests that exploitation of women’s sexuality at work is not discrimination. Following the introduction of the Charter the consideration of the reasonableness of dress and appearance standards would necessitate a more balanced application of the exception requiring the standards to be reasonable, justified, proportionate, rational and balanced to the nature and circumstances of employment. It would be

16 If this exception is repealed it will be important to reflect upon the implications this may have in relation to the scope of protection for physical features particularly given the interpretative expansion of this attribute by the Tribunal. VCAT has interpreted the definition of physical features to include bodily characteristics that may be mutable. In Fratias v Drake International Ltd t/as Drake Jobseek (1998) EOC 93-038 VCAT the Tribunal considered whether hair, posture, facial expressions and dress constituted ‘other bodily characteristics’ for the purposes of establishing discrimination on the basis of physical features. The Tribunal noted that such interpretations are consistent with the exceptions at sections 24 and 40 of the EOA, which permit employers and educational institutions to impose reasonable standards of dress, appearance and behaviour.
anticipated therefore that dress and appearance standards that seek to exploit sexuality should only be permitted where they can be considered reasonable, justified, proportionate, rational and balanced to the nature and circumstances of employment.

It is likely that detailed guidelines would benefit understanding of the law in this area. Guidelines could include guidance on how to develop dress and appearance standards that comply with the Act and how to determine whether standards are reasonable, justified, proportionate, rational and balanced to the nature and circumstances of employment. Accordingly, the Commission’s position remains that no change should occur to this exception.

**Section 25 – Care of Children**

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<th>Option 1: No change.</th>
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<tr>
<td>Option 2: Repeal s. 25.</td>
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<td>Option 3: Amend s. 25 to require that any person relying on it must show that their action was reasonably necessary to protect the child(ren). This would add an objective test.</td>
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<td>Option 4: In addition, this ground could be expressly limited to the attribute of ‘irrelevant criminal record’ as it is in NT and Tasmania, and protection could be extended to the wider group referred to in the NT provision.</td>
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The Commission reiterates its earlier views that if an employer has a rational basis to fear harm to children’s well-being that is not based in prejudice, then that rational basis for a decision or actions will not amount to discrimination. This finding could be reached independently of section 25. Accordingly section 25 is superfluous and should be repealed.

If repeal is not supported at the very least section 25 should be amended to require the decision or action was objectively justified and necessary to protect the children.

**Section 26 – Compulsory retirement of judicial officers**

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<th>Option 1: No change.</th>
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<tr>
<td>Option 2: Repeal of this provision is desirable. If immediate repeal is not acceptable, then the Department of Justice should be encouraged to conduct further research and analysis into whether it is possible to adopt a less restrictive means to manage the competency of the judiciary so as to permit the removal of s. 26.</td>
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The Commission supports Option 2 as reflects the Commission’s earlier position.
Section 27 Youth Wages

| Option 1: No change. |
| Option 2: That consideration be given to amending s. 27 to provide for the operation of genuine trainee wages, without any reference to chronological age. |

The Commission supports Option 2 as it reflects the Commission’s earlier position.

Section 27A – Early retirement schemes

| Option 1: No change |
| Option 2: The Committee recommends the Department undertake more research and analysis on the social and economic considerations relevant to this exception and whether they are sufficient to justify such a limitation. |
| Option 3: This provision could be amended to expire after five years except in relation to those people whose superannuation schemes include specific types of age-related benefits. |

The Commission supports Option 2 as it reflects the Commission’s earlier position.

Section 27B – Gender Identity

| Option 1: No change. |
| Option 2: This exception should be repealed. |

The Commission supports Option 2 as it reflects the Commission’s earlier position.

Section 28 – Single sex accommodation

| Option 1: No change is proposed in relation to s. 28. |

The Commission supports Option 1 as it reflects the Commission’s earlier position.

Section 30 and 31 – Establishing firms and partnerships

No change is proposed to these provisions at this stage - comments sought on whether or not there is support for regarding the ‘small partnerships’ exceptions as reasonable limitations on equality.

The Commission argued for amendment to these sections parallel to the small business exception. The Options Paper notes that partnerships involve a more personal level of responsibility and commitment than an employment relationship and accordingly may bring partnerships of four or fewer people closer to the realm or privacy and choice than the employment contract. Notwithstanding the Committee’s preparedness to explore the extent of this limitation further the Commission’s position remains that these sections should be amended to remove the limited operation of the obligations relating to firms and partnerships with fewer than 5 partners.
Section 32 – Special Services and facilities

Option 1: No change

Option 2: Amend to modernise language to refer to reasonable adjustments as per recommendations in relation to s. 22.

Comments are sought on whether there are any advantages in retaining the reference to ‘genuine and reasonable requirements’ of the partnership rather than adopting ‘inherent requirements’.

Refer to comments related to section 22.

Section 33 – Reasonable terms of partnership

Option 1: No change.

Option 2: Amend to modernise language to refer to reasonable adjustments in similar terms to the changes to sections 23 and 32. A definition of ‘unjustifiable hardship’ in the form of a list of relevant factors should be adopted as well.

Refer to comments related to section 23.

Section 36 – Reasonable terms of qualification

Option 1: No change

Option 2: Amend s. 36 to modernise its language to refer to reasonable adjustments similarly to the recommendations in relation to ss. 23 and 33.

Refer to comments related to sections 23.

2.2 Exceptions to discrimination in education

Section 38 – Educational institutions for particular groups

Option 1: No legislative change is currently proposed in respect of this exception.

Option 2: Amend or redraft the provision.

Submissions are sought on the following questions:
- Whether there is a need for race to be retained in s. 38.
- Whether there may be a need to redraft s. 38 to comply with the special measures provision in s. 8(4) of the Charter, or whether other rights support s. 38 in areas that would fall outside the special measures provision (because they do not deal with disadvantaged groups).

The Commission’s view is that no legislative change is required in relation to this exception. In relation to the reference to race the Commission considers that this should be maintained to protect beyond doubt ongoing educational programs run wholly or mainly for indigenous students, newly arrived migrants and students from culturally and linguistically diverse backgrounds.
The Commission considers that a special measures provision should accompany the meaning of discrimination and should be defined to include a temporal element—something can be defined as a special measure until it has achieved its purpose of addressing disadvantage.

The Commission considers that section 38 is distinguishable from a special measures conduct in that its policy is to permit ongoing delivery of educational institutions and programs for particular groups who for sound social policy reasons are likely to benefit from such targeted programs. Accordingly the section should remain.

Section 39 – Special services and facilities

Option 1: No change.
Option 2: Section 39 should be amended to modernise its language consistently with that of other impairment related exceptions.

Refer to comments related to section 22.

Section 40 – Standards of dress and behaviour

Option 1: No change.
Option 2: Amend s. 40(2) to ensure a more balanced consideration of the factors relevant to determining whether an educational authority’s setting of a standard of dress and appearance is objectively reasonable.

The Commission supports Option 2 as it reflects the Commission’s earlier position.

Section 41 – Age based admission schemes and age quotas

The Options Paper proposed no legislative change in respect of this exception.

The Commission remains of the view that no legislative change is required in relation to this exception.

2.3 Exceptions to discrimination in the provision of goods and services and disposal of land

Section 43 – Insurance

Option 1: No change
Option 2: Add the Age Discrimination Act 2004 (Cth) to the list of Acts in subsection (1)(a).
Option 3: Delete subsections (1)(b) and (1)(c).
Option 4: Add a requirement to notify people whose claims are refused on the basis of s. 43 of their right to seek an explanation of the basis for the decision.
The Commission supports amendment to this exception by the combination of options 2,3 and 4 as these would reflect the Commission’s earlier position that the exception should be limited to certain attributes similar to federal legislation and require an insurer who proposes to rely upon the exception to state their reasons for refusing insurance and the information upon which that is based.

**Section 44 – Credit Providers**

<table>
<thead>
<tr>
<th>Option 1: No change.</th>
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<tr>
<td>Option 2: Amend s. 44 to permit reliance only on statistical or actuarial data on which it is reasonable to rely for the purpose involved and where the discrimination is reasonable having regard to that data.</td>
</tr>
<tr>
<td>Option 3: Amend s. 44 to require that a credit provider who relies on this exception must advise the person whose application is refused of that fact, and of the data relied on in doing so, or alternatively amend s. 44 to allow credit providers to seek authorisation from the Commission to use credit assessment instruments that include age where the relevance of age is established on the basis of statistical or actuarial data.</td>
</tr>
<tr>
<td>Option 4: Repeal this provision on the basis that it is incompatible with the Charter or that the Age Discrimination Act provision adequately covers age discrimination in credit provision.</td>
</tr>
</tbody>
</table>

The Commission supports the first part of Option 3 which is consistent with the Commission’s original position. In relation to the alternative, to allow credit providers to seek authorisation from the Commission to use credit assessment instruments that include age where the relevance of age is established on the basis of statistical or actuarial data, the Commission advises that it has neither the resources nor requisite expertise required to perform the function proposed by that alternative.

**Section 45 – Supervision of Children**

The Options Paper does not propose any legislative change in relation to this exception.

The Commission remains of the view that this exception requires no legislative change.

**Section 46 – Special manner of providing a service**

<table>
<thead>
<tr>
<th>Option 1: No change.</th>
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<tbody>
<tr>
<td>Option 2: Amend s. 46 to modernise its language consistently with that of other impairment related exceptions including ss. 39, 22, 23, 32, 33 and 36.</td>
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</table>

Refer to comments in relation to section 22.
Section 48 – Disposal by will or by gift

The Options Paper does not propose any legislative change in relation to this exception.

The Commission remains also of the view that this exception requires no legislative change.

2.4 Exceptions to discrimination in accommodation

Section 53 – Accommodation unsuitable for children

Option 1: No change.

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

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

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

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

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

The Commission supports option 2 as it appears most consistent with the Commission’s earlier position and is likely to be the easiest to understand and apply in practice without imposing undue burden on the accommodation provider.

Section 54 – Shared accommodation

Option 1: No change.

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

Option 3: Amend s. 54(b) to change the number from 6 to 3.
The Options Paper noted that section 54 is the most generous in terms of restrictions on shared accommodation and to render the EOA more consistent with the remainder of Australian anti-discrimination laws and the federal laws as well, section 54 could be changed to reduce the number of people in the accommodation to the person letting the space, their near relative(s) and three other people. The Commission supports this approach.

**Section 55 – Welfare measures in accommodation**

<table>
<thead>
<tr>
<th>Option 1: No change.</th>
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<tbody>
<tr>
<td>Option 2: This section should be reformed to provide that the educational institution cannot discriminate against groups of students within the institution in providing accommodation.</td>
</tr>
<tr>
<td>Option 3: This section be amended to restrict the available grounds to sex, religion and impairment.</td>
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The Options Paper noted that one aspect of section 55 that needs clarification, and affects the whole of the EOA, is the status of a transgender person, either pre or post operatively, under the EOA. The Options Paper asks - are they to be treated as a member of their affirmed sex, or their birth sex for the purposes of sex discrimination law? The Options Paper indicates that this is unclear following the granting of an exemption to Hanover Welfare Services Ltd (Anti Discrimination Exemption) [2007] VCAT 640, allowing it to refuse to employ or accommodate a pre-surgical male to female transgender person in its women’s services or young women’s support services.

This exemption was subject to an application for revocation by an individual in 2008. The Commission intervened in the application to act as amicus to the Tribunal and to encourage the development of jurisprudence in this area consistently with the objects of the Act.

The Commission argued that references to “women” in the exemption order should be interpreted as inclusive of transgender and transsexual women. The exclusion of transsexual and/or transgender women from women-only services presented a fundamental challenge to the operation of the EOA. The amendments to the EOA to prohibit discrimination on the basis of gender identity were not about creating a “third gender”, they were about respecting the right of transsexual and transgender people, and those of indeterminate sex to determine the gender with which they identify and have the community acknowledge that determination. The Commission argued that the type of exemption granted to Hanover in 2007 wound back quite considerably the EOA’s protection against discrimination on the basis of gender identity. Equality, and indeed the intention of the EOA as reflected in the formulation of gender identity that it enshrines, will be more accurately measured by the extent to which a person’s gender identification is recognised in all spaces, including single sex spaces. The Commission submitted that its view on this is supported by the fact that a specific
exemption for single sex spaces was not included in the amending legislation the Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000.

This application was resolved by consent between the parties to remove the term in the original exemption which permitted the exclusion of pre-operative transgender women.

Accordingly the Commission considers that the status of a transgender person for the purposes of sex discrimination under the EOA is that the protection would apply according to their affirmed sex. The Commission acknowledges however that this interpretation may not be clear and recommends that a legislative note be inserted in the definition section to clarify the relationship between the attributes of ‘sex’ and ‘gender identity’ for the avoidance of doubt.

**Section 56 – Accommodation for students**

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<td>Option 2: This section should be reformed to provide that the educational institution cannot discriminate against groups of students within the institution in providing accommodation.</td>
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The Commission’s view is that no legislative change is required in relation to this exception. The Commission acknowledges the Options Paper comment that section 56 is the widest provision of this type in Australia and that it potentially has a very wide operation in relation to the grounds available and the ability to discriminate against some groups of students. However the Commission considers that the purpose of this provision, to provide an exception for accommodation for students in educational institutions operating wholly or mainly for students with a particular attribute, is linked in purpose with section 38 – educational institutions for particular groups, and it should be retained in its current state.

**Section 57 – Accommodation for commercial sexual services**

The Options Paper noted that comments are welcome on this exception however no change is suggested.

The Commission remains of the view that no change is required to this exception.

**2.5 Exceptions to discrimination by clubs and club members**

**Section 61 – Clubs for disadvantaged people or minority cultures**

The Options Paper proposed no legislative change in respect of this exception.

The Commission remains of the view that no change is required to this exception.
Section 62 – Clubs and benefits for particular age groups

The Options Paper proposed no legislative change in respect of this exception.

The Commission remains of the view that no change is required to this exception.

Section 63 – Separate access to benefits for men and women

Option 1: No change.

Option 2: Section 63 should be amended to follow the model of the SDA (Cth) s. 25(4) and (5). The Committee recommends that a review be undertaken of the appropriate structure for reform of s. 63 along with s. 66 in relation to single and mixed sex sports.

The Options Paper noted that the test of ‘practicability’ in paragraph (a) of section 63 is not very informative and concerns about the potential for section 63 to affect equity in the division of club resources.

Accordingly, the Commission supports option 2 with particular reference to the desirability of reviewing section 63 and 66 in relation to single and mixed sex sports.

2.6 Exceptions to discrimination in sport and local government

Section 66 – Competitive sporting activities

Option: The Committee recommends that a review involving broad consultation with affected organisations be undertaken of the appropriate structure for reform of s. 66 along with s. 63 in relation to equality in single and mixed sex sports.

The Commission supports this approach to section 68 as the Commission in its submission to the Justice Consultation Paper also recommended that further consultation and analysis should occur in relation to the impact of this exception on prohibition of discrimination on the basis of gender identity.

The Commission noted that insofar as the exception permits discrimination on the basis of gender identity it gives rise to a tension in the EOA as gender identity in the EOA is defined as bona fide identification by a person of one sex with another sex, or an indeterminate sex (whether or not the person is recognised as such). In this way the exception may operate to limit not only a person’s equality rights, it also potentially interferes with the right to privacy and reputation and freedom of expression of a person who affirms a sex different from the sex they were brought up in.

Presumably the fact that the exception extends to gender identity is based upon assumptions about the strength, stamina and physique of persons whose affirmed
sex is different from their sex of upbringing. Accordingly, the Commission emphasises the need to undertake further consultation with the public and analysis in relation to the impact of this exception on the prohibition of discrimination on the basis of gender identity and whether or not it is a justified limitation.

**Section 68 – Political belief or activity**

The Committee does not propose any legislative change to this provision.

The Commission remains of the view that no change is required to this exception.

### 2.7 General Exceptions

**Section 70 – Things done to comply with orders of the courts and tribunals**

The Committee does not propose any legislative change to this provision.

The Commission remains of the view that no change is required to this exception.

**Section 71 – Pensions**

Option 1: No legislative change is proposed in respect of this exception.  
Option 2: Section 71 should be repealed.  
It is recommended that the Department of Justice undertake further research and analysis into the limitations that this provision may give rise to with a view to clarifying its role or repealing it.

The Commission supports the repeal of section 71 as this reflects the Commission’s earlier view that it is no longer relevant given that it was intended only as a temporary exception when equal opportunity legislation was first enacted in Victoria. As an alternative to immediate repeal the exception should sunset within 2 years – this would enable any further research and analysis to be conducted.

**Sections 72 and 73 – Superannuation**

No legislative change is currently proposed in respect of this exception.  
The Committee invites submissions on the compliance of sections 72 and 73 with the Charter and the impact of changing them.

The Options Paper notes that since this is a specialist area, there may be a need for review of section 73 to see whether it is still needed, or whether there are ways it could be varied to improve compliance with the Charter. The Commission also recommended that further research and analysis be undertaken into the limitation that this exception may give rise to and would support specialist review.
Section 74 - Charities

The Committee does not propose any legislative change to this provision.

The Commission remains of the view that no change is required to this exception.

Section 75 – Religious bodies

Re section 75(1)
Option 1: No change.

Option 2: Add a provision to s. 75(2) that VCAT may grant an exemption to allow discrimination on the ground of religious belief or activity in relation to the selection or appointment of people to perform senior management functions of a religious body where religious belief or activity is a genuine and reasonable requirement of the position.

Re section 75(2)
Option 1: No change.

Option 2: Amend s. 75(2)(a) to ensure that only actions ‘reasonably necessary’ to conform with religious doctrines are excepted’.

Option 3: Amend s. 75(2)(b) to require that in deciding whether the exception applies in an employment context, attention should be paid to ‘the nature of the employment and the context in which it is carried out’.

Option 4: Amend s. 75(2)(b) by changing the words ‘religious sensitivities’ to ‘religious convictions’.

Option 5: Adopt a further subsection of s. 75 that requires the consideration of factors similar to those in s. 7(2) of the Charter in deciding whether or not the exception applies.

The Commission considers that exceptions dealing with religious freedom should be drafted clearly to facilitate rights balancing considerations to address the tension between religious freedom and freedom from discrimination.

The Commission in its submission to the Justice Consultation Paper acknowledged that whilst actions taken to conform to religious doctrines are important and protected by the freedom of religion a Charter consistent interpretation requires that these must be balanced against competing rights in the circumstances. The Commission called for amendments to sections 75 and 76 to ensure that actions taken to conform with religious doctrines (s75(2)) or in accordance with relevant religious beliefs or principles (s76(2)) are ‘reasonably necessary’ in the circumstances to facilitate a rights balancing consideration of the application of the exception.

The Commission therefore advocates for options that will ensure a more balanced consideration and application of the religious bodies exception and promote compatibility with the Charter to the greatest possible extent.
Section 76 – Religious schools

Re section 75(3) and 76
Option 1: No change.

Option 2: Amend s. 76 to introduce conditions similar to those in s. 75(2) to ensure that discriminatory actions are allowed under s. 76 only on limited attributes and where they are reasonably necessary to conform with religious doctrines or necessary to avoid injury to the religious sensitivities or convictions of the adherents of a religion.

OR

Option 3: Redraft s. 76 on the same basis as s. 51(2) of the ADA (Tas) to permit discrimination where it is to ‘enable or better enable the educational institution to be conducted in accordance with’ the doctrines, etc of the religion.

Option 4: Limit the attributes to which the exception applies to religious belief or activity alone, or together with sexual orientation and gender identity. Allow the possibility of further attributes being excepted on the basis of an inherent requirements analysis.

Option 5: Add provision for an inherent requirements analysis that can be used to extend protection where it is shown that the inherent requirements of a particular position justify this in respect of a particular position.

Option 6: Amend to provide that the religious exception is only available as of right to institutions that are subject to the oversight of a religious body or order.

Option 7: Include a provision listing the Charter s. 7(2) factors as relevant to assessing the acceptability of any particular religious exception.

Option 8: Expressly provide that the onus of proof of all matters relevant to the exception lies on the institution claiming it.

The same considerations stated above in respect of religious freedom and the exception for religious bodies also apply to the exception for religious schools.

The Commission therefore advocates for options that will ensure a more balanced consideration and application of the religious schools exception and promote compatibility with the Charter to the greatest possible extent.

Section 77- Religious beliefs or principles

Option 1: No change.

Option 2: Section 77 be repealed.

Option 3: Section 77 be amended to allow an application for an exemption to be granted where:
- The religious claim is objectively validated.
It is reasonable and proportionate (within s. 7(2) of the Charter) in light of the restriction of other people’s rights that would result.

In relation to section 77 the Commission remains of the view that this exception gives rise to a significant limitation in that it may be relied upon by any person in relation to anything prohibited by the Act and is only constrained by reference to actions being necessary to comply with subjectively held genuine religious beliefs or principles. This exception is neither reasonable, rational nor necessary as there are adequate exceptions in the Act which can maintain an appropriate balance between freedom of religion and freedom from discrimination. For this reason also Option 3 is likely to be superfluous and unnecessary.

Section 78 – Private Clubs

Option 1: No change.
Option 2: Repeal section 78, and the current definition of club in s. 4(1). Adopt the definition of club in s. 4(1) of the SDA (Cth), and possibly the exemption in s. 25(3).
Option 3: Amend s. 78 to provide that the exception applies only in relation to membership of the club, and that the exception does not apply where the club controls access to any benefit that is necessary for an occupation, sport or other area of activity, or alternatively, applies only to clubs that can demonstrate their exclusiveness is justified by a specific purpose and/or interests.

The Options Paper notes that there are two possible paths for reform. One is to retain but vary the private clubs exception, possibly varying the definition of club and the scope of activities and attributes exempted. The latter is to abandon the EOA’s model of a private club altogether and adopt the model of a ‘club’ set up by the SDA, which is the most common model in other Australian anti-discrimination legislation. This would still allow the existence of single sex clubs. A third option is to remove the exception for single sex clubs altogether.

The Commission supports option 3 which is consistent with the Commission’s preferred approach to ensure a more balanced and Charter compatible exception. It is noted also that Option 2 may be desirable and could be considered in terms of harmonizing the scope of the EOA in relation to clubs with other jurisdictions.

Section 79 – Incapacity and age of majority

Option 1: No change.
Option 2: Amend the provision to authorise only discrimination on the basis of the particular incapacity involved.

17 The Commission is of the view that such a limitation is far too broad and unnecessary given the existence of sections 75 and 76 and various other exceptions across other areas of the EOA which could be relied upon to legitimately discriminate where religious freedom is concerned. For example a person may be permitted to discriminate on religious grounds when employing someone to provide personal or domestic services in their own home (s16); educational institutions may exclude people who are not of a particular religion from that institution if the institution caters wholly or mainly for students of a particular religion (s38); a person may discriminate on the basis of religious belief and activity in deciding who is to occupy shared accommodation in which that person or their relative lives (s54).
The Commission noted in its submission to the Justice Consultation Paper that there is the potential for this exception to be applied broadly which may unduly restrict the types of activities and transactions of people with certain attributes such as age and impairment and thereby limit their right to equality. However, because such actions must be interpreted in light of the Charter this should act to constrain the limitation. Accordingly the Commission remains of the view that no change is required to this exception.

Section 80 – Protection of health, safety and property

Option 1: No change.

Option 2: Recommend further review along with other provisions relevant to employment discrimination and the making of reasonable adjustments.

Option 3: In the interim, amend s. 80 to delete the references to property, and to add a subsection (3) that requires an assessment of the reasonableness of the proposed discrimination, including the efforts that have been undertaken to avoid the health and safety risk other than discriminating; any less restrictive alternative; the impact on the person affected and any other relevant factors. The onus of showing that any such discrimination is necessary should be explicitly on the person asserting it.

The Commission originally saw no need to amend this provision in terms of its compatibility with the Charter given the interpretation of this provision by VCAT (see *Hall v VAFA* (1999) and *Kilburn v State of Victoria (Victoria Police)* (2007)). The Commission acknowledges however that there is value in amending this section to include an inclusive list of factors to assist considerations of whether the discrimination is reasonably necessary in the circumstances. The Commission considers that the list of factors should be drawn from the VCAT case law mentioned above which include:

- What is the class whose health and safety are to be protected? What is the size of that class?

- What is the risk from which that class is being protected? What is the magnitude of that risk? What are the consequences to the class to be protected if the risk becomes reality?

- To what degree will the discriminatory action protect the health and safety of the class? Will it eliminate or reduce the risk to the health and safety of that class?

- Does the discriminatory action itself present any risk to the health and safety of the class?

- Are there measures currently in place to protect the health and safety of the class from that risk? Are they effective to protect the health and safety of that
class from that risk? Will the discriminatory action give that class a protection from that risk of a kind or degree that those current measures do not give?

- Are there non-discriminatory alternatives that will give the class protection from the risk that is equal to or better than the discriminatory action? If there are, is there any reason why it may be impracticable for the duty holder to adopt these alternatives?

- Did the duty holder, at the time of the discriminatory action, believe that that action was reasonably necessary to protect the health and safety of the class? On what information or enquiries was this belief based? What information on the matter was reasonably available to the respondent?

These factors must be balanced against each other to arrive at a decision of whether or not, in all the circumstances, the discriminatory action is reasonably necessary to protect the health and safety of the class.

Including a list of factors derived from the above will provide a comprehensive framework designed to assist duty holders to reconcile equal opportunity and health and safety concerns. Dealing with this issue in this tailored way is preferable and will provide more rigour and protection than leaving it to be reconciled in the context of a reasonable adjustments duty. The Commission’s view is that reliance upon exceptions should not be sought before a consideration of a duty holders obligations in relation to reasonable adjustments. It is for this purpose that the Commission prefers the reframing of existing implied reasonable adjustments obligations to establish the primacy of these obligations before exceptions in the Act.

The Commission does not consider it necessary or appropriate to delete the reference to property in this exception. It is noted that the Charter acknowledges property rights – a person must not be deprived of their property other than in accordance with law. The scope of this right is uncertain – some commentators have suggested that it may give rise to positive obligations on public authorities to prevent a deprivation of a person’s property. If the right to property in the Charter is to be construed in this way section 80 may be relied upon to facilitate this protection from deprivation. In any event the Commission considers that the interpretation of section 80 consistently with a reasonable limitations framework and with the addition of factors discussed above is likely to preclude concern raised by the Options Paper that section 80 may be said to set too low a threshold where equality rights can be overridden by a threat of unspecified danger to someone’s property. The addition of factors to assist determinations of ‘reasonably necessary’ should ensure a balanced and appropriately proportionate application of the exception in relation to necessary discriminatory actions taken to protect property.

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Section 81 – Age benefits and concessions

Option 1: This provision needs no amendment, and no submission commented on it.

The Commission remains of the view that no change is required to this exception.

Section 82 – Welfare measures and special needs

Option 1: No change.

Option 2: Amend s. 82 to make clear that it covers programs other than service provision, to clarify that it protects only the nature of the program, its funding, and selection for it, and that a valid program must not only be designed to assist the disadvantaged group but must be objectively capable of doing so, and must be a reasonable response to the disadvantage being addressed.

Option 3: In addition to option 2, introduce a provision that excepts special measures from discrimination, to reflect s. 8(4) of the Charter.

The Commission in its submission to the Justice Consultation Paper noted that section 82 should either be repealed or amended to clarify its application and ensure that only a limited exception operates which permits reasonable restrictions on eligibility to services, benefits and facilities where such services, benefits and facilities are designed to meet the special needs of particular groups19. The Commission noted at the time that any amendments to section 82 would need to take into account any other relevant recommendations made by the broader review in relation to special measures and consistency with the Charter given that the purpose of that section is twofold:

- To provide an exception for anything done that may be described as special measures to prevent or reduce disadvantage; and
- To enable restrictions on eligibility for such services.

Following the Gardner Report recommendation to incorporate into the EOA “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”20, the role of section 82 needs to be reconsidered.

The Commission considers that merely replicating the Charter special measures provision will not provide the requisite guidance on the meaning and application of special measures to ensure that measures taken to address disadvantage are both intended to and objectively capable of advancing the interests of that group. The other limitation of the Charter ‘special measures’ provision is that it only applies to measures taken in relation to people who are disadvantaged because of discrimination. There is not always a causal link between discrimination and disadvantage. Traditionally special measures provisions do not require this link to be demonstrated; it is sufficient that the group is disadvantaged (regardless of the cause of the disadvantage).

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19 Refer to pages 49-51 of the Commission’s submission to the Justice Consultation Paper.

Similarly replicating a special measures provision from other anti-discrimination jurisdictions is unlikely to be the most appropriate approach to giving effect to the Gardner recommendation. The Commission favours a more principled approach that can be adapted by Parliamentary Counsel to best reflect the structure of the proposed Equality Bill and consistency with the Charter.

The Commission considers that the most effective way to give effect to this recommendation is to include a specific special measures provision within the meaning of discrimination in the EOA formulated in accordance with the following principles.

A special measures provision should:

1. Express that a person may take special measures for the purpose of promoting and realising equality – and that such measures do not constitute discrimination.
2. Apply to all attributes and areas of the act.
3. Measures should be undertaken in good faith in pursuit of the purpose of the measure – that is the subjective intention of the person undertaking the measures should be assessed to ensure a measure is taken without the intention of causing harm to others on the basis of an unrelated or irrelevant attribute and must be done with the intention of assisting or advancing particular persons or particular groups of people. The person undertaking the special measure should bear the burden of proof in relation to the purpose of the measure and their good faith conduct.
4. Measures taken are justified by reference to the needs for such advancement or protection of a particular group (in terms or whether they require such assistance and the group affected has consented to it) and whether the measure in question is reasonably capable of achieving its intended purpose. By requiring a consideration of the basis for the need of a special measure this will also assist in clarifying whether that need has been met and a measure should no longer be framed as a special measure (see below at 7).
5. Facilitate both subjective and objective tests of whether a measure is taken for a purpose is a special measure (as outlined above) and the person undertaking the special measure should bear the burden of establishing the purpose of the measure and their good faith conduct in taking that measure.
6. Permit measures that are taken either solely for that purpose or for that purpose as well as other purposes.
7. Be temporary in nature – that is once the purpose or object of the special measure has been achieved it ceases to be a special measure and may amount to discriminatory conduct.

Special measures provisions should not:

1. Permit or cause detriment or disadvantage to any other person or class of persons of another attribute.
2. Permit discrimination or detriment in the administration, delivery and performance of the measures – this is necessary to avoid the undesirable situation that arose from the Court of Appeal decision in *Colyer*.

3. Be named or described as ‘positive discrimination’ which is an unhelpful characterisation, nor should they refer to affirmative action as this connotes quotas and special measures are much more than quotas.

4. Include a sole purpose test like the Racial Discrimination Act 1975.

5. Use the term “designed” as this has proved unhelpful in current section 82.

A special measures provision formulated taking into account these principles will address and re-enact the primary purpose of section 82 to permit anything done that may be described as special measures to prevent or reduce disadvantage. In addition a more limited exception will be needed to address the reality noted by the Options Paper that because resources for service and program provision are limited selection on some reasonable basis will be needed along with the right to exclude those not targeted by the service or program. Therefore a more limited exception should be enacted to clarify that reasonable restrictions can be placed on eligibility for services, benefits and facilities described as special measures to address the secondary purpose of current section 82 to enable restrictions on eligibility for welfare services.

The Productivity Commission in its 2004 review of the DDA recommended that the exemption in the DDA for ‘special measures’ be amended to clarify that it exempts the establishment, eligibility criteria and funding of these measures designed to benefit particular groups within the community and clarified to ensure that it does not exempt the general administration of special disability services. A similar approach could be adopted in relation to the relation to the amendment of section 82.

**Section 84 – Exemptions to allow compulsory retirement in the public sector**

<table>
<thead>
<tr>
<th>Option 1: No change.</th>
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</thead>
<tbody>
<tr>
<td>Option 2: That this exemption be repealed.</td>
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<tr>
<td>Option 3: The operation of this clause be limited only to people employed as at a particular date and not to any later new employees, so that its operation eventually ceases.</td>
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</tbody>
</table>

The Commission’s position remains that this exception should be repealed.

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21 See Recommendation 12.4.
Part Three – section 83 – exemptions by the Victorian Civil and Administrative Tribunal

Option 1: No change.

Option 2: Section 83 should be amended to provide guidelines for the exercise of the power in the form of the criteria from s. 7(2) of the Charter as the basis for granting exemptions. An exemption should only be granted if it is compatible with the purposes of the Act and with the protection of human rights.

Option 3: An alternative procedure should be created that allows exemptions that are special measures to come into effect on notifying VEOHRC, subject to subsequent challenge in VCAT. This could be limited to certain areas of operation, such as where exceptions previously generally available have criteria that are difficult to challenge.

Option 4: The procedure for deciding on an exemption application should ensure:

Any application is publicly advertised for some weeks before a decision is made
A contradictor is available to appear, and appears, at any hearing convened to decide on an application; this could be a party who will raise the issues adequately, or if there is no such party, the VEOHRC.

Option 5: Exemptions should be available for a maximum of five years, with a presumption that the normal period would be three years. Renewals of exemptions should be available by review towards the end of this period rather than re-application. Exemptions should be subject to such conditions as VCAT prescribes, including an obligation to monitor the progress of and need for the exemption.

The Commission considers the review of exceptions and exemptions provides the opportunity to create certainty within the Act in terms of facilitating the provision of services that are designed to promote and further the objects of the Act, reduce regulatory burden on duty holders who seek such exemptions, and the administrative burden imposed on the Tribunal in granting temporary exemptions.

The Commission considers that following the inclusion of a special measures provision within the meaning of discrimination (based upon the principles recommended by the Commission) the granting of temporary exemptions to give advance approval to such measures will be unnecessary. In addition clarifying and amending permanent special measures type exceptions such as section 19 will further obviate the need for common and unobjectionable exemption applications currently routinely granted by the Tribunal. This in effect defines the Tribunal’s mandate in granting temporary exemptions as granting dispensation from the Act where a different right or interest is allowed to prevail in a particular situation which may lead to a limitation on rights.
Criteria for granting exemptions

To minimise limits on rights in the granting of temporary exemptions and to ensure that such limits are the least restrictive means available to achieve the purpose for which the exemption is sought the Commission supports Option 2. That section 83 is amended to provide guidelines for the exercise of the power in the form of the criteria from section 7(2) of the Charter as the basis for granting exemptions. An exemption should only be granted if it is compatible with the purposes of the Act and with the protection of human rights.

This would therefore require an applicant for a temporary exemption to make out a case within those criteria. This approach is also consistent with the development of case law in this area. In *Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption)* [2008] VCAT 2415 VCAT considered the impact of the Charter – via section 32 – on its discretion to grant exemptions. While the Commission did not intervene in this application, VCAT adopted a position that the Commission has put forward in a number of previous exemption applications:

As I have said, s83 gives me the power to grant an exemption, but does not provide any guideposts for me as to how that power should be exercised. The Commission’s submission is that in interpreting the word ‘may’ in s83, I must interpret it in a way that is compatible with human rights and therefore I must not use the discretion provided in that section to sanction an exemption if the terms of that exemption are not compatible with human rights.

In other words, the discretion under section 83 of the *Equal Opportunity Act* is not unlimited. Looked at in the light of section 32 of the Charter, section 83 requires me to consider the purpose of the *Equal Opportunity Act* and not make an exemption unless I am sure that the proposed exemption is justified by the purpose of the *Equal Opportunity Act*, and that the granting of the exemption is compatible with human rights. (At paragraphs 46-47)

In light of the approach adopted by the Tribunal the Commission considers that it is appropriate to codify the reasonable limitations principles in respect of the granting of temporary exemptions.

In addition to the section 7(2) principles the fundamental principles adopted in *Fernwood*[^1996] should still factor in the Tribunal’s consideration to grant an exemption. Specifically that an exemption will not be granted unnecessarily - that is, where another statutory exception in the Act clearly applies, or where there is no arguable case of discrimination, and in considering an application for exemption the Tribunal will take into account how the exemption might promote the objectives of the Act, and also whether the exemption is consistent with the spirit of the scheme of the Act.

Process for granting exemptions

Options 3 – 5 above relate to the process for the granting of temporary exemptions. In relation to Option 3 to allow special measures to come into effect on notifying the Commission, subject to subsequent challenge in the Tribunal, the Commission considers this would be unnecessary and inappropriate. As stated above if a special measures provisions is adequately drafted to provide sufficient guidance and the clarity of permanent special measures type exceptions is improved there is no need for the granting of exemptions in respect of these matters. Any notice or registration process will be entirely superfluous and an unnecessary administrative burden on the entity responsible for receipt of notices or registration. In addition the Commission considers it inappropriate for it to operate as if acceding to such notices given its foreshadowed role in monitoring and intervening in exemptions granted by the Tribunal, and providing compliance advice and enforcing a positive duty. Accordingly the Commission does not support a process of allowing exemptions where notice or a statement of reasons or evidence is provided for the approval of the Commission or registration at the Tribunal or the Commission.

The Commission considers that the Tribunal’s procedure for hearing an exemption application should remain at the discretion of the Tribunal. At the very least, however, notice of applications pending and exemptions granted should be listed on the Tribunal’s website.

The Commission reiterates its earlier recommendations made to the Justice Consultation Paper in relation to formalising the Commission’s role in the exemption process set out in section 83 that:

- applicants for an exemption from the Act should be required to provide a copy of their application to the Commission;
- the Commission should have standing under the Act to appear or make submissions in relation to applications for an exemption from the EOA; and
- the Commission should have standing to seek review, variation or revocation of an exemption that has previously been granted by the Tribunal.

The Commission supports Option 5 that proposed to permit the granting of exemptions for a maximum of five years, with a presumption that the normal period would be three years; that renewals of exemptions should be available by review towards the end of this period rather than re-application; and that exemptions should be subject to such conditions as the Tribunal prescribes, including an obligation to monitor the progress of and need for the exemption.
Part Four – section 69 – statutory authority exception

Option 1: No change.
Option 2: Section 69 should be repealed, and:
Any legislative provision which is intended to override the EOA be prescribed in the EOA,
All existing legislation that is not intended to override the EOA be amended,
The VEOHRC be given power to report to parliament if it finds that a particular law is in conflict with the EOA,
Section 207 be repealed,
A minimal lead-time is more appropriate (such as 12 months from the Royal Assent of the repeal of section 69),
During the transition period, further consultation should occur with non government organisations to ensure that legislation that is important for compliance be brought to the government’s attention.

The Commission supports Option 2 which is consistent with its earlier recommendations made to the Justice Consultation Paper in relation to the necessity to repeal section 69 and implement the outstanding recommendations of the SARC Inquiry into Discrimination and the Law in relation to the current subservience of the EOA to all other statutes and enactments. This is now more imperative following the introduction of the Charter enshrining the human right of recognition and equality before the law. The Options Paper details some of the interpretative challenges that may arise as a result of the Charter if section 69 is retained in its present form. The Commission is of the view that section 69 contradicts the central premise of the Charter, that legislation should be developed and interpreted consistently with human rights, and that human rights may only be subjected to reasonable limits that are demonstrably justified in a free and democratic society.

The Commission has previously advised in its 2004 submission to the SARC section 207 review the circumstances in which it sees the application of section 69 arising in the context of limited anecdotal information derived from complaint handling. These observations remain accurate and indicate the exception is not invoked frequently in complaints before the Commission. Where the exception is raised, more often it appears to relate to situations where:

- The complainant is restricted in or prohibited from gaining registration to undertake work in a particular profession or industry because of their age/impairment
- The complainant is restricted in or prohibited from engaging in a specific activity that is regulated by statute for example obtaining or imposing restrictions on a licence to drive
• There is a discriminatory effect of employment related conditions and benefits under an award or under workers compensation or superannuation legislation, for example the imposition of maximum age requirements in connection with the payment of workers' compensation benefits
• A professional representative body seeks to impose uniform fees under a general statutory power to do so, but that do not take account of the employment status of some members (for example part-time employees, or employees on maternity or unpaid sick leave)
• An employer discriminates against an employee on the understanding that the discrimination is necessary to comply with occupational health and safety laws, or requests information about an employee's prior medical history or disabilities
• Recipients of beneficial government services designed specially for disadvantaged groups believe that such services do not meet their specific needs

It would appear that discriminatory actions taken as the result of or in connection with statutory provisions have not been the subject of a significant number of complaints handled by the Commission. Whilst a seemingly obvious conclusion to draw from this would be that the level of discrimination experienced is not significant in relative terms, an alternative, and perhaps more accurate interpretation could be that fewer individuals are prepared to pursue their rights where they are aware that the source of the discrimination is the law itself.

Whilst the Commission acknowledges that in some instances a sound policy basis may exist to exempt the discrimination allowed for under legislation, it believes that the wholesale application of the exception in section 69 is an inappropriate, inflexible and heavy-handed mechanism for exempting discrimination under statutory authority. Hence there will be necessity for a mechanism for prescribing certain acts under the EOA. This is the only possible alternative as the Commission sees it to section 69 that will promote clarity and certainty of the law and provide an accountable and transparent framework for resolving conflict between the EOA and other laws and maintain the integrity of the Charter.

Accordingly the Commission believes that a system whereby future protection for legislative provisions that discriminate on justifiable policy grounds, is made available via a process of prescribing laws, administered by the Attorney-General and requiring his approval, could be an expedient means by which section 69 could be repealed without unnecessarily impeding Government and public sector administration.

The Commission’s view is that where a legislative provision is prescribed in the EOA as intending to override that Act the override protection should expire on the 5th anniversary of day on which the override came into operation. This will ensure that such limitations are subject to review and reconsideration. A similar provisions exists in relation to override declarations made by Parliament in relation to the Charter (section 31).
Since the adoption of the Charter, and the legislative scrutiny mechanisms and obligations it has established, the 3-year transitional period the Committee recommended in the section 207 review to provide Departments time to audit and amend existing legislation is perhaps excessive and no longer justified. A minimal lead-time is more appropriate (such as 12 months from the royal assent of the repeal of section 69) given the implementation of the Charter and the transitional time Departments have had to audit and amend legislation.

In addition to the sun-setting repeal of section 69 the Commission’s role in section 162(3) of the EOA in relation to any provision of an act that discriminates or has the effect of discriminating (requiring the Commission to notify the relevant Minister responsible for the administration of that Act) should be strengthened. This function should be amended to include a power for the Commission to make recommendations to reduce the discriminatory affect of the provision and require the responsible Minister to respond to the notice in Parliament within 6 months of receiving it. Strengthening the Commission’s power under section 162 in this way is also consistent with the various recommendations of the Gardner report aimed at equipping the Commission to address entrenched and systemic forms of discrimination.

Whilst the Commission argues for greater devolution of responsibility to government departments and instrumentalities to achieve compliance with the EOA, the Commission does not believe that an expectation that these bodies understand and appreciate the complexities of discrimination law is realistic, nor reasonable, given the way the EOA presently identifies and defines discrimination. The Commission believes that the next challenge faced by legislators, policy makers and administrators will be in achieving enhanced understanding of what discrimination is and when it occurs. Clearer, simpler definitions, sophisticated and comprehensive consultation processes, and enhanced functions and powers for the Commission to advocate for and facilitate compliance with the Act, will be significant markers along the way to this achievement.