

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
INQUIRY INTO THE EXCEPTIONS AND EXEMPTIONS TO THE
EQUAL OPPORTUNITY ACT 1995

GOVERNMENT RESPONSE

INTRODUCTION

Background

The Government has a clear vision for a Victoria that is respectful and inclusive: a community in which everyone has the opportunity to participate in both the economy and society without discrimination. The Government believes a healthy, strong and harmonious community is vital for continued economic growth. To further this aim, the Victorian Government made a commitment in 2006 to improve the efficiency and effectiveness of Victorian equal opportunity law and find better ways to address systemic discrimination. In 2007, the Attorney-General appointed Julian Gardner to conduct a review of the *Equal Opportunity Act 1995* (the 1995 Act). After extensive consultation, Mr Gardner tabled his final report, *An Equality Act for a Fairer Victoria* (the Gardner Report) in June 2008. The recommendations from the Gardner Report have formed the basis of the Equal Opportunity Bill 2010 (the Bill). The Gardner Report focused on the overall equal opportunity framework and did not include a review of the exceptions in the 1995 Act.

A separate review of the exceptions and exemptions in the 1995 Act was commenced by the Government in 2008. Exceptions and exemptions permit discrimination in certain circumstances. Due to the high level of community interest in the exceptions and exemptions, in December 2008, the Government requested the Scrutiny of Acts and Regulations Committee (SARC) of Parliament to undertake a review of the exceptions and exemptions in the 1995 Act. SARC released an Options Paper in May 2009 and held public hearings in August 2009. SARC tabled its Final Report (the SARC Report) on 24 November 2009. While the Government continued to work on the review during this period, the principles contained in the SARC Options Paper and recommendations in the Final Report provided a valuable contribution to the Government's work. The Government supports either fully, in part or in principle, 56 out of SARC's 59 recommendations.

Outlined below is the Government's Response to SARC's recommendations. The reforms to the exceptions and exemptions contained in the Government Response are reflected in the Bill.

Principles underlying the reforms to the exceptions

The Government's aim in reforming the exceptions is to ensure they are reasonable and appropriate and in line with other Government policies and laws. The Government agrees with SARC that consistency with other jurisdictions is desirable and this approach has been adopted where appropriate. In addition, exceptions in the 1995 Act that allow

discrimination that is already allowed by another law have been repealed, as they are unnecessary.

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) provides a framework for assessing the reasonableness of the exceptions. The Charter sets out a test for assessing when conduct will be a reasonable limitation on a human right contained in the Charter (the 'reasonable limitations' test). The SARC Report recommended that this test be incorporated into individual exceptions to provide guidance about how to apply the exceptions when they involve balancing competing rights (see recommendations 3, 12, 20, 23, 50 and 53). As the Charter provides the overarching framework for the Bill, and all of the exceptions have been assessed as compatible with the Charter as explained in the Statement of Compatibility for the Bill, the Government does not consider this approach is necessary.

Recommendations that further review be undertaken

The SARC Report recommended that further review be undertaken in relation to a number of exceptions (see recommendations 16, 36, 40, 44 and 58) The SARC Report noted that the areas identified for review are complex and in some instances raise issues that have a broader scope than equal opportunity law. The Government supports in principle the recommendations that further review be undertaken and will consider these recommendations in the future.

Recommendation	Government Response
Objectives of the Act	
<p>Recommendation 1</p> <p>The Committee recommends that the Act be amended to provide that an objective of the Act is to ensure protection from discrimination to the greatest extent possible consistent with the rights in the <i>Charter of Human Rights and Responsibilities Act 2006</i>.</p>	<p>Support.</p> <p>The Bill includes an objective to further promote the right to equality set out in the Charter. This is also consistent with a recommendation made in the Gardner Report.</p>
Regular review of exceptions	
<p>Recommendation 2</p> <p>The Committee recommends that the Act should require that the exceptions and exemptions in the Act be reviewed at least every 10 years to determine whether they should be retained, amended or repealed.</p>	<p>Support in principle.</p> <p>The Government supports review of the exceptions in the Act from time to time. However, it is not considered necessary to specify a timeframe for review in the Equal Opportunity Act.</p>
Competing rights - direction for interpreting exceptions provisions	
<p>Recommendation 3</p> <p>The Committee recommends that section 12 be amended to provide:</p> <ul style="list-style-type: none"> • the circumstances in which exceptions within one Division of Part 3 may be applied to conduct outside that Division; • that the onus of proof in establishing that an exception is justified rests with the person seeking to rely on the exception; and • that where there is doubt as to the construction of a provision the reasonable limitations test in Charter s. 7(2) is to be used as a guide to resolve the doubt. 	<p>Support in part.</p> <p>The Bill clarifies:</p> <ul style="list-style-type: none"> • the circumstances in which exceptions within one Division may be applied to conduct outside that Division; and • that the onus of proof in establishing that an exception is justified rests with the person seeking to rely on the exception. <p>For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.</p>

Domestic or personal services in the home

Recommendation 4

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

Support.

The Bill includes an amendment to restrict the scope of the exception to only apply to employment to provide domestic or personal service in the employer's own home. The exception will apply if the employee is engaged by the employer personally or through an agent.

The exception will also be amended to clarify that it applies to the care, instruction or supervision of children in a person's home.

Genuine occupational requirements

Recommendation 5

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

Support in part.

The Government has decided to retain the current exception based on 'genuine occupational requirements' in the Bill without amendment.

SARC expressed the view that the term 'genuine occupational requirements' should be replaced by the term 'inherent requirements' to more appropriately focus attention on what is a justifiable limitation to discrimination and to align with the language used in federal law.

It is noted, however, that the term 'genuine occupational requirements' has been interpreted by courts and tribunals as being akin to 'inherent requirements', so this is not considered necessary.

SARC also expressed the view that a reformulated 'inherent requirements' exception be expanded to incorporate the exceptions allowing discrimination against a person with an impairment who cannot perform the genuine and reasonable requirements of the job or partnership. SARC recommended that such an exception only apply after reasonable adjustments have been made.

The Government agrees that employers should be required to consider reasonable adjustments for people with impairments prior to assessing whether they can perform the genuine and reasonable requirements of

	<p>the job. The Bill includes exceptions allowing discrimination where a person cannot perform the genuine and reasonable requirements of the job (see response to recommendation 10).</p> <p>SARC also expressed the view that there should be an ‘inherent requirements’ exception for religious bodies in relation to the attribute of religious belief incorporated either into the inherent requirements exception or the religious exceptions.</p> <p>The Government has incorporated an inherent requirements exception into the religious exceptions. This is addressed in the response to recommendations 48.</p> <p>Finally, in relation to this exception, SARC expressed the view that the exception allowing discrimination on the grounds of age, sex or race where it is necessary for authenticity or credibility be narrowed so that it does not cover employment other than artistic performance, entertainment, photographic or modelling work.</p> <p>This aspect of SARC’s recommendation is not supported as it is considered that discrimination for authenticity or credibility may be required in other types of work. For example, it would allow the employment of an Aboriginal person to provide information and education on Aboriginal heritage in an Aboriginal cultural centre.</p>
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Political employment

<p>Recommendation 6</p> <p>The Committee recommends that section 18 be retained without amendment.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>
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Welfare services

<p>Recommendation 7</p> <p>The Committee recommends that section 19 be amended to allow employment preference a person of the same attribute in delivery of welfare services for people with that attribute when:</p>	<p>Support in principle.</p> <p>The first part of SARC’s recommendation relates to the nature of the service to be provided by a person employed under the exception. While the Government agrees with SARC’s recommendation, it is</p>
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<ul style="list-style-type: none"> • the service provision is intended to and objectively capable of advancing the interest of that group, and • either employment of persons possessing the same attribute is reasonably regarded as central to the employment involved, or the services can be provided much more effectively and appropriately by members of that group. 	<p>implemented in this exception by referencing the services to be provided in accordance with the special measures and special needs provisions in the Bill. These provisions set out the requirements necessary to qualify as a special measure or a special needs service.</p> <p>The second part of SARC’s recommendation aims to provide better guidance about when a service ‘can be provided most effectively’ by someone with the same attribute. The Bill retains the language ‘can be provided most effectively’ but includes two examples to clarify the type of situations the exception is intended to apply to.</p>
<p>Family employment</p>	
<p>Recommendation 8</p> <p>The Committee recommends that section 20 be repealed.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation. The Government notes that being a person’s relative is not an attribute under the Act, so no exception is required to allow employers to employ family members.</p>

Small business

Recommendation 9

The Committee recommends that section 21 be repealed.

Support.

The Bill implements SARC's recommendation. As SARC noted, there is no exception for small businesses under Commonwealth anti-discrimination laws. The Government considers that the exception is misleading, because in most cases, individuals in Victoria could bring a claim under Commonwealth legislation, which covers race, sex, disability and age discrimination. Therefore, the Government supports the recommendation to repeal the exception.

Special services or facilities

Recommendation 10

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

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

The Committee recommends that for consistency the duty to make reasonable adjustments should also extend to the attributes of

Support in part.

The Bill in effect implements SARC's recommendation by reframing the existing exceptions for special services or facilities as positive duties to make reasonable adjustments for a person with an impairment. The duties apply in the areas of employment, education, and the provision of services. They provide that:

- an employer or firm must make reasonable adjustments unless the person with the impairment cannot or could not adequately perform the genuine and reasonable requirements of a job or a partnership even after the adjustments are made
- an educational authority must make reasonable adjustments unless the person with the impairment cannot or could not participate or derive any substantial benefit from the educational program even after the adjustments are made
- a service provider must make reasonable adjustments unless the person with the impairment cannot or could not participate in or access the service, or derive substantial benefit from the service even after the adjustments are made

<p>pregnancy and carer's responsibilities.</p>	<p>The new provisions include a list of factors relevant to determining whether an adjustment is reasonable.</p> <p>The Bill also contains exceptions allowing discrimination in each of these areas if it is not reasonable for the duty holder to make the adjustments or if the adjustments will not enable the person to perform the genuine and reasonable requirements of the job, or participate in or derive substantial benefits from the education or service.</p> <p>The Government does not support SARC's recommendation to extend the duties to the attributes of physical features or pregnancy, as these are adequately protected by the prohibition on indirect discrimination. Additionally, the Bill retains existing provisions that require employers not to unreasonably refuse to accommodate a worker's parental and carer responsibilities.</p>
<p>Reasonable terms of employment and reasonable terms of partnership</p>	
<p>Recommendation 11</p> <p>The Committee recommends that sections 23 and 33 be repealed.</p>	<p>Support.</p> <p>The Bill implements SARC's recommendation. As detailed above, consistent with SARC's recommendation 10, the Bill includes a positive duty to make reasonable adjustments to accommodate a person with an impairment in relation to employment and partnerships. As a result, sections 23 and 33 can be repealed.</p>

Standards of dress and behaviour set by employer

Recommendation 12

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

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

Support in part.

The Government has decided to repeal the exception for standards of dress and behaviour at work, because, as SARC noted, employers' rights in this area are covered by industrial relations law. It is considered that retention of this exception in equal opportunity law may confuse employers by suggesting that an additional defence to unlawful discrimination exists. As SARC noted, no equivalent exception is provided in other Australian jurisdictions.

As such, in repealing the exception, the Government partly supports SARC's recommendation.

For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.

Care of children

Recommendation 13

The Committee recommends that section 25 be retained without amendment.

Support in part.

The Bill re-enacts the exception for the care of children with amendments, to require an objective basis for the discrimination. The exception requires the discrimination by an employer against an employee or prospective employee involving the care, instruction or supervision of children to be reasonably necessary to protect the physical, psychological or emotional well-being of the children.

As noted by the SARC majority report, there has been significant legislative reform recently to provide two protective systems to safeguard children in educational and other settings. They are teacher registration through the Victorian Institute of Teaching and Working with Children Checks under the *Working with Children Act 2005*. In addition to the exception for the care of children included in the Bill, these systems ensure that people employed to work with children are suitable to do so.

As noted in relation to recommendation 4, the Government recognises the importance of allowing parents to determine who should provide child care services in the privacy of the parents' home. Therefore, the exception for employment in relation to childcare has been strengthened by clarifying that it also applies to employment to deliver childcare services in a person's home.

Compulsory retirement of judicial officers

Recommendation 14

The Committee recommends that section 26 should be repealed.

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

Support.

The Bill implements SARC's recommendation. This exception is considered redundant as the compulsory retirement of judicial officers is allowed by section 87AAI of the *Constitution Act 1975*. As the Bill retains the exception for things done under statutory authority this exception is not required.

Youth wages

Recommendation 15

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

Support in principle.

The Government has decided to repeal the exception for youth wages.

Most young workers in Victoria have their wages regulated by the Commonwealth *Fair Work Act 2009*. The Fair Work Act allows for the setting of junior wage rates in instruments made under that Act (modern awards, enterprise agreements, minimum wage orders). The repeal of the exception will not affect the ability of employers to pay junior wage rates to workers under these instruments.

This position is not inconsistent with SARC's recommendation that trainee wages should be introduced. The introduction of trainee wages would not be discrimination based on an attribute and therefore no exception would be required.

Early retirement schemes

Recommendation 16

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

Support in principle.

This recommendation raises issues that are broader than the exceptions in the Bill. The Bill maintains the status quo pending review.

Gender Identity	
<p>Recommendation 17</p> <p>The Committee recommends that the exception in respect to ‘gender identity’ in section 27B should be repealed.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>
Single sex accommodation	
<p>Recommendation 18</p> <p>The Committee recommends that section 28 be retained unamended.</p>	<p>Support in principle.</p> <p>The Government has decided to repeal this exception as it is considered redundant. The exception simply allows an employer to apply to the Victorian Civil and Administrative Tribunal for an exemption in the circumstances covered by the exception. Employers can do this under the exemption process, regardless of whether there is an exception or not. Therefore, the effect of repealing the exception is the same as retaining it. On this basis, the Government supports SARC’s recommendation in principle.</p>
Establishing firms and partnerships	
<p>Recommendation 19</p> <p>The Committee recommends that sections 30 and 31 be retained unamended.</p>	<p>Support in part.</p> <p>As sections 30 and 31 apply to firms with 5 or more partners, firms with 4 or less partners are effectively excluded from the Act. SARC recommends retaining the exclusion on the basis that the relationships between partners in small firms require high levels of mutual confidence and trust. The Government agrees with SARC that these elements are important. However, the Government does not consider that small firms should be completely excluded from the Act. Consequently, the Bill creates explicit exceptions to the provisions allowing discrimination by firms with 4 or less partners and requires the discrimination to be reasonable.</p>

Reasonable terms of qualification

Recommendation 20

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

Support in principle.

The Bill retains this exception with minor amendments that clarify the intended application of the exception. The amendments do not change the scope of the exception.

For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.

Educational institutions for particular groups

Recommendation 21

The Committee recommends that section 38 be retained unamended.

Support.

The Bill implements SARC's recommendation.

Special services or facilities

Recommendation 22

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

The Committee recommends that the exception should incorporate reference to the educational authority's obligation to comply with the Disability Standards for Education 2005 made under the Commonwealth *Disability Discrimination Act 1992*.

Support.

The Bill implements SARC's recommendation (see the response to recommendation 10).

Standards of dress and behaviour in schools

Recommendation 23

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

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

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

Support in part.

The Bill re-enacts the exception to include both standards of dress and behaviour. Consistent with SARC's recommendation, the Bill provides that the views of the school community are a relevant but not determinative factor in assessing the reasonableness of the standard of dress and behaviour.

The Government does not support including whether the standards are subject to any review as a factor in assessing reasonableness, as it does not consider that making the standards subject to a review enhances reasonableness.

For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.

Age based admission schemes and age quotas

Recommendation 24

The Committee recommends that section 41 be retained unamended.

Support.

The Bill implements SARC's recommendation.

Insurance	
<p>Recommendation 25</p> <p>The Committee recommends that section 43 should be amended to apply only to the attributes of sex, impairment and age, and permit discrimination in relation to each of these attributes, only in circumstances where it is permitted by the applicable Commonwealth law.</p> <p>The Committee further recommends that when requested to do so, insurance providers should be required to give reasons for their unfavourable underwriting decisions.</p>	<p>Support in part.</p> <p>While the Bill does not restrict the attributes as recommended by SARC, the scope of the exception for insurance in the Bill is consistent with equivalent exceptions in the Commonwealth <i>Age Discrimination Act 2004</i> and the Commonwealth <i>Disability Discrimination Act 1992</i>. The Bill will require decisions by insurance providers relying on the exception to be reasonable based on the available actuarial or statistical data and only allow decisions to be based on factors other than data where data can not reasonably be obtained.</p> <p>It is not considered necessary to require insurance providers to give reasons for their unfavourable underwriting decisions when requested, as they will have to do this if challenged to show the exception applies.</p>
Credit providers	
<p>Recommendation 26</p> <p>The Committee recommends that section 44 should be amended to apply the same test for allowing discrimination applicable in relation to credit providers under the <i>Age Discrimination Act 2004</i> (Cth).</p> <p>The Committee further recommends that when requested to do so, credit providers should be required to give reasons for their decisions to deny credit.</p>	<p>Support in part.</p> <p>The Government agrees with SARC that the exception for credit providers should be amended in line with the Commonwealth Age Discrimination Act. The Bill implements this part of the recommendation.</p> <p>However, it is not considered necessary to require credit providers to give reasons for their decisions when requested, as they will have to do this if challenged to show that the exception applies.</p>
Supervision of children	
<p>Recommendation 27</p> <p>The Committee recommends that section 45 be retained unamended.</p>	<p>Support.</p> <p>The Bill implements SARC's recommendation.</p>

Special manner of providing a service

Recommendation 28

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

Support.

The Bill implements SARC's recommendation (see the response to recommendation 10).

Disposal by will or by gift

Recommendation 29

The Committee recommends that section 48 be retained unamended.

Support.

The Bill implements SARC's recommendation.

Discrimination by refusing to allow reasonable alterations

Recommendation 30

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

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

Do not support.

The Government has decided to retain section 51 in the Bill without amendment at this time. It is noted that the Disability (Access to Premises) Standards under the Commonwealth Disability Discrimination Act are currently being developed which are relevant in this area.

Discrimination by refusing to allow guide dogs

Recommendation 31

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

Support.

The Bill includes an amended definition of ‘guide dog’ which refers to dogs that are trained to perform tasks or functions to assist a person with an impairment to alleviate the effects of the impairment. This implements SARC’s recommendation by expanding the ambit of the exception beyond vision, hearing or mobility impairments.

The definition is not intended to encompass companion animals. The dogs must be trained to perform specific tasks or functions to alleviate the effects of the impairment, not simply to provide comfort.

Accommodation unsuitable for children

Recommendation 32

The Committee recommends that section 53 be repealed.

Support.

The Bill implements SARC’s recommendation. As the SARC Report notes, the *Residential Tenancies Act 1997* prohibits denial of tenancies to people with children aged under 16, except in certain circumstances, which include that ‘the premises by reason of their design or location are unsuitable or inappropriate for occupation by a child’. Repealing this exception brings Victoria into line with all other Australian jurisdictions.

Shared accommodation

Recommendation 33

The Committee recommends that section 54 be retained.

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

Support in part.

The Bill amends the exception to allow discrimination in shared accommodation where a person or their near relative lives and intends to continue to live that is to accommodate no more than three other people aside from the person, their near relative or the near relatives of either the person or their near relative. This position aligns with the approach adopted in the Commonwealth *Sex Discrimination Act 1984* and the Commonwealth *Disability Discrimination Act 1992*.

As recommended by SARC, the Bill defines a person’s “near relative” in the same terms as the Commonwealth Sex Discrimination Act 1984 and the Age Discrimination Act 2004 but uses the term ‘domestic partner’ instead of ‘de facto spouse’.

Welfare measures in accommodation

Recommendation 34

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

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

Do not support.

The Government has decided to retain the exception without amendment.

In relation to the first part of SARC’s recommendation while the Government appreciates that the recommendation is aimed at limiting the exception only to the extent required, it is considered that narrowing it in this way may have unintended consequences.

It is considered that narrowing the exception as proposed by the SARC majority report could preclude an accommodation provider from relying on the exception if it had accepted a person without the target attribute into the accommodation at any point in time. For example, an accommodation provider providing crisis accommodation for women with children under 18 decides to accept a woman with a 19 year old child, as there is no other accommodation available for the family. The Government considers that an accommodation provider who does this

	<p>should not be prevented from relying on the exception in the future on the grounds that its action on that one occasion now places it outside the scope of the exception.</p> <p>The Government does not accept the recommendation that the exception should apply to non-profit organisations only. For profit and government agencies may also provide welfare-related accommodation pursuant to a funding or contracting out arrangement. There is no reason why such organisations should not be covered by the exception.</p>
<p>Accommodation for students</p>	
<p>Recommendation 35</p> <p>The Committee recommends that section 56 should be amended to provide that an educational institution may not discriminate against groups of students within the institution in providing accommodation.</p>	<p>Support in principle.</p> <p>The Government has decided to retain this exception without amendment. It is not considered necessary to amend the exception to provide that an educational institution may not discriminate against groups of students within the institution, as it is not considered that the current exception allows this. Therefore, in practical terms, the unamended exception achieves the same policy objectives as recommended by SARC.</p>
<p>Accommodation for commercial sexual services</p>	
<p>Recommendation 36</p> <p>The Committee recommends retention of section 57 pending a further review as to the appropriateness of retaining such an exception in the Act.</p>	<p>Support in principle.</p> <p>The Bill implements SARC's recommendation and retains the exception pending review.</p>

Clubs for disadvantaged people or minority cultures

Recommendation 37

The Committee recommends that section 61 be retained unamended.

Support.

The Government agrees with SARC that clubs for disadvantaged people or minority cultures should be allowed. This is reflected in the Bill by the retention of the exception allowing clubs for minority cultures. The exception allowing clubs established to prevent or reduce disadvantage has been repealed, as these clubs are special measures under the reformulated special measures provision. The Bill provides that special measures do not constitute discrimination (see the response to recommendation 55).

Clubs and benefits for particular age groups

Recommendation 38

The Committee recommends that section 62 be retained unamended.

Support.

The Bill implements SARC's recommendation.

Separate access to benefits for men and women

Recommendation 39

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

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

Support in principle.

The Government has decided to retain this exception without amendment. It is considered that the unamended exception contains sufficient safeguards to ensure men and women are able to equitably access club benefits.

Competitive sporting activities	
<p>Recommendation 40</p> <p>The Committee recommends that a more detailed review be undertaken in respect to the appropriate provisions that should be made in equal opportunity law governing exclusion from participation in competitive sports.</p>	<p>Support in principle.</p> <p>This recommendation raises issues that are broader than equal opportunity. The Government has decided to retain the exception for competitive sporting activities without amendment in the Bill.</p>
Political belief or activity in local government	
<p>Recommendation 41</p> <p>The Committee recommends that section 68 be retained unamended.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>
Things done with statutory authority	
<p>Recommendation 42</p> <p>The Committee recommends that:</p> <ol style="list-style-type: none"> 1. Section 69 should be repealed within a reasonable time following Royal Assent. 2. A provision in an enactment which is intended to override the Act be prescribed in the Act (perhaps in a schedule). 3. A provision prescribed in the Act which is intended to override the Act should be subject to a sunset or review provision. 4. Existing enactments that are not intended to override the Act should be identified and amended where necessary. 5. The Victorian Equal Opportunity and Human Rights Commission be given a function requiring it to report to Parliament where it considers that a provision in an enactment is incompatible with the Act. 	<p>Do not support.</p> <p>The Government has decided to retain the exception for things done with statutory authority on the basis that it may still play a role in limited circumstances, namely where a limitation is a reasonable limitation under the Charter, but does not fall within an exception in the Equal Opportunity Act. Since the commencement of the Charter, there is now a front-end review mechanism to ensure that human rights, including the right to equality in section 8, are taken into consideration in the development of new policy and legislation. This mechanism ensures that new Acts or enactments are either Charter compatible, or that a decision to enact an Act or enactment that is not Charter compatible is intended. The Government will continue to monitor legislation that predates the Charter for compatibility with the Charter.</p> <p>The Bill repeals section 207 of the 1995 Act which required the Minister to cause a review of all Victorian Acts and enactments to be undertaken for the purpose of identifying provisions which</p>

<p>6. On the assumption that the other recommendations of the Committee are adopted, concerning the review of incompatible provisions in legislation, section 207 be considered redundant and be repealed.</p> <p>7. In the interim, prior to repeal of section 69, the section be amended to ensure that enactments passed prospectively do not automatically prevail over the Act unless they are prescribed in the Act.</p>	<p>discriminate or may lead to discrimination against any person. This review was completed by SARC in 2005.</p> <p>The Victorian Equal Opportunity and Human Rights Commission (the Commission) will retain its role in monitoring and reporting on provisions in existing laws that have a discriminatory impact. Pursuant to this role, the Commission must notify the relevant Minister and Attorney-General as soon as practicable of any discriminatory provisions of which it becomes aware.</p> <p>It is considered that the combination of these mechanisms provides sufficient transparency and accountability in monitoring laws that may discriminate.</p>
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Things done to comply with orders of the courts and tribunals

<p>Recommendation 43</p> <p>The Committee recommends that section 70 be retained unamended.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>
<p>Pensions</p>	
<p>Recommendation 44</p> <p>The Committee recommends that an expert review be undertaken concerning the need to retain section 71.</p>	<p>Support in principle.</p> <p>This recommendation raises issues that are broader than equal opportunity. The Government has decided to retain the exception without amendment pending review.</p>
<p>Superannuation</p>	
<p>Recommendation 45</p> <p>The Committee recommends that section 72 should be retained without amendment.</p> <p>The Committee recommends that section 73 should be amended to treat discrimination in superannuation on the basis of age in the same way as discrimination on the basis of sex, marital status, or impairment is treated, by applying the test in the <i>Age Discrimination Act 2004</i> (Cth).</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendations.</p>
<p>Charities</p>	
<p>Recommendation 46</p> <p>The Committee recommends that section 74 be retained unamended.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>

Protection of religious orders and religious observance or practice

Recommendation 47

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

Support.

The Bill implements SARC’s recommendation.

Religious bodies – protection in other activities

Recommendation 48

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

Support.

Consistent with the SARC recommendation, the Bill narrows the exception for religious bodies by prohibiting discrimination on the basis of certain attributes. SARC recommended that the exception should not apply to race, impairment, physical features or age. In addition to these, the exception for religious bodies in the Bill does not cover breastfeeding, employment activity, industrial activity, carer status, political belief or activity, pregnancy or personal association. Religious bodies will only be able to discriminate on the attributes of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

The Bill also raises the threshold for permissible discrimination by requiring the discrimination to be ‘reasonably necessary’ to avoid injury to the religious sensitivities of adherents of the religion.

In relation to the employment of a person by religious bodies, the Bill provides an exception to allow discrimination where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position and the person’s attribute means that the person does not meet the inherent requirement. In determining what an inherent requirement is, the Bill specifies that the nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account.

While not limited to religious belief or activity, providing an ‘inherent requirements’ exception for employment by religious bodies aligns

	<p>with the view expressed by SARC in recommendation 5.</p> <p>The SARC majority further expressed the view in relation to this exception that the definition of ‘religious body’ in the Charter not be adopted in the Bill on the basis that this would extend the exception to organisations that have nothing to do with any recognised or organised religion. While the Government acknowledges the concern raised by SARC in this regard, it notes that the current definition of religious body (that is a body ‘established for religious purposes’) has generally been interpreted broadly by courts and tribunals and that adopting the Charter definition is unlikely to extend the coverage of the exception in practice. Given this, and in light of the desirability of creating consistency with the Charter, the Government has decided to adopt the Charter definition of ‘religious body’.</p>
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Religious schools	
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<p>Recommendation 49</p> <p>The Committee recommends that the exception in section 76 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.</p>	<p>Support.</p> <p>As with the exception for religious bodies, the Bill narrows the exception for religious schools by prohibiting discrimination on the attributes of age, breastfeeding, impairment, employment activity, industrial activity, carer status, physical features, political belief or activity, pregnancy, race and personal association. Religious schools will only be able to discriminate on the attributes of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.</p> <p>The Bill also raises the threshold for permissible discrimination by requiring the discrimination to be ‘reasonably necessary’ to avoid injury to the religious sensitivities of adherents of the religion.</p> <p>In relation to the employment of a person by a religious school, the Bill provides an exception to allow discrimination where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position and the person’s attribute means that the person does not meet the inherent requirement. In determining</p>
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	<p>what an inherent requirement is, the Bill provides that the nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account.</p>
<p>Religious beliefs or principles</p>	
<p>Recommendation 50</p> <p>1. The Committee recommends that the exception in section 77 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.</p> <p>2. The Committee recommends that section 77 should be amended to allow an exception for conduct necessary for the person to comply with genuine religious beliefs or principles provided that any limitation of another person’s rights is justified within the test in Charter s. 7(2).</p>	<p>Support in part.</p> <p>As with the exceptions for religious bodies and religious schools, the Bill narrows the exception for religious beliefs or principles by prohibiting discrimination on the attributes of age, breastfeeding, impairment, employment activity, industrial activity, carer status, physical features, political belief or activity, pregnancy, race and personal association. Discrimination will only be allowed on the attributes of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.</p> <p>In addition, the Bill also requires a more objective test by requiring discrimination by a person to be ‘reasonably necessary’ to comply with the doctrines, beliefs or principles of the person’s religion. It is the Government’s view that providing for this more objective test, better balances the right to religious freedom and the right to freedom from discrimination and is consistent with the Charter.</p> <p>For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.</p>

Private clubs

Recommendation 51

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

1. private clubs should be permitted to discriminate on the basis of attributes necessary for the purposes of the club, so that private clubs can select but not exclude members on the basis of an attribute.
2. private clubs should be permitted to discriminate in relation to selection of members and, if necessary, benefits provided to members, but the exception should not extend to areas such as employment or other areas of activity covered by the Act that are not essential to the provision of benefits to the club's members.

Support in part.

The Government agrees with the SARC majority view that the scope of the current exception for private clubs is too broad. The current exception allows private clubs to discriminate on the basis of any attribute, including race, sex or impairment, and in all aspects of their activities, not only membership.

However, the Government does not support the retention of the current definition of club, which is based on receipt of public funding and occupation of Crown land. This definition is out of step with other jurisdictions. The Bill instead adopts the formulation of 'club' in the Commonwealth Sex Discrimination Act with relevant modifications and drops the distinction made in the 1995 Act between private and other clubs. The Bill defines a 'club' to mean:

- an association of more than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes
- which has a licence to supply liquor under the Victorian *Liquor Control Reform Act 1998* except for a temporary limited licence and a major event licence; and
- runs its facilities wholly or partly from its own funds.

Clubs that do not meet the definition of 'club' will not be regulated in relation to membership under the Bill. Regulated clubs not covered by an exception will require an exemption from VCAT to discriminate.

In addition, an exception for single sex clubs is included in the Bill to reflect the position in the Commonwealth Sex Discrimination Act 1984. In line with the SARC majority view, single sex clubs will only be able to discriminate in relation to membership. To ensure transparency, single sex clubs will be required to make their membership rules publicly available without charge. However, single

	<p>sex clubs covered by the exception will not be required to apply to VCAT to obtain an exemption to discriminate.</p> <p>The existing exceptions for clubs, namely clubs for minority groups and clubs for different age groups are retained in the Bill.</p>
<p>Incapacity and age of majority</p>	
<p>Recommendation 52</p> <p>The Committee recommends that section 79 should be amended so that it authorises discrimination only on the basis of the particular incapacity involved.</p>	<p>Support.</p> <p>The Bill implements SARC’s recommendation.</p>
<p>Protection of health, safety and property</p>	
<p>Recommendation 53</p> <p>The Committee recommends that section 80 be amended to provide that discrimination is permitted only where it is reasonably necessary:</p> <ul style="list-style-type: none"> • in relation to impairment or physical features, after consideration of any obligation to make reasonable adjustments for the person, • where there is no less restrictive alternative reasonably available, and • it is proportionate to the risk being avoided, and • where the action meets the reasonable limitations test in Charter s.7(2). 	<p>Support in principle.</p> <p>While the Government supports the restricted interpretation of this exception as reflected in SARC’s recommendation, it has decided to retain the exception without amendment. It is noted that case law has construed this exception as requiring an examination of the reasonableness, rationality and the proportionality of the conduct. Therefore, it is considered that retaining the exception without amendment will meet the concerns underlying SARC’s recommendation.</p> <p>For the reasons noted in the introduction, the Government does not consider it necessary to include reference to the reasonable limitations test in section 7(2) of the Charter.</p>

Age benefits and concessions

Recommendation 54

The Committee recommends that section 81 be retained unamended.

Support.

The Bill implements SARC's recommendation.

Welfare measures and special needs

Recommendation 55

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

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

3. The Committee recommends that the following conditions should apply to the special measures exception:

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

Support.

The Bill provides that special measures do not constitute discrimination and provides a list of conditions for assessing special measures, consistent with SARC's recommendation.

The Bill also re-enacts a limited exception in relation to special needs to clarify that measures taken to meet the special needs of groups that are not necessarily disadvantaged are not unlawful.

Exemptions by the Victorian Civil and Administrative Tribunal

Recommendation 56

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

Criteria for granting a temporary exemption:

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

Process for granting a temporary exemption:

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

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

In particular, the Committee recommends that:

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

Support in part.

The Bill implements the first aspect of SARC's recommendation by listing of factors to be considered by VCAT in granting, renewing or revoking exemptions. The factors are:

- whether the exemption is unnecessary because
 - an exception or exemption already applies; or
 - the conduct would not amount to prohibited discrimination; and
- whether the proposed conduct is a reasonable limitation on the right to equality; and
- all the relevant circumstances of the particular case.

In relation to the process for granting a temporary exemption, the Bill provides that an affected party, including the Commission may intervene with the leave of VCAT. The Bill amends the exemption process by requiring copies of exemption applications to be given to the Commission. This will allow the Commission to consider whether it wishes to apply to make any submissions in relation to the application.

SARC recommended that exemptions should be valid for three years with an option to extend for up to five years. The Bill amends the maximum duration of an exemption from up to three years to up to five years. This position reflects the view that VCAT should retain the discretion to grant exemptions for periods of less than three years to up to five years where appropriate.

While the Government agrees with the principles underlying the other aspects of SARC's recommendations, it considers these are administrative in nature and do not need to be legislated to bring them

- the Tribunal should call for and receive submissions from people whose interests would be affected by the proposed exemption before it makes a determination
- the Tribunal's procedure should remain generally at its discretion
- with the Tribunal's leave, the Commission, or a person whose interests would be directly affected, should have standing under the Act to appear or make submissions in relation to an application for an exemption
- an application for an exemption should be dealt with by the Tribunal within a reasonable time
- the Tribunal should be required to publish reasons for any decision relating to a temporary exemption
- with the Tribunal's leave, the Commission, or a person whose interests would be directly affected, should have standing to seek a review, variation or revocation of an exemption that has previously been granted by the Tribunal.

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

- valid for three years with a discretion to allow a longer period of up to 5 years in appropriate and justified circumstances
- subject to such terms and conditions as the Tribunal specifies
- subject to an obligation to monitor the operation of and need for the exemption on a regular basis
- applicable only in such circumstances or in relation to such activities as the Tribunal specifies
- if necessary and justified be renewable by the Tribunal (rather than re-application)
- the onus on a renewal application should remain on the

into effect.

<p>applicant to show that the need for the exemption continues and provide an opportunity for submissions from people affected or likely to be affected.</p>	
<p>Exemptions to allow compulsory retirement in the public sector</p>	
<p>Recommendation 57 The Committee recommends that section 84 should be repealed.</p>	<p>Support. The Bill implements SARC’s recommendation.</p>
<p>The treatment of transgender and intersex people in the Equal Opportunity Act</p>	
<p>Recommendation 58 The Committee recommends that a further review be undertaken concerning the legal standing of transgender and intersex people in the context of their protection in anti-discrimination law. Pending the outcome of any review, the Committee recommends that interim measures be taken to clarify the status of transgender and intersex people in relation to sex discrimination under the Act.</p>	<p>Support in principle While SARC’s recommendation is focused on the legal standing of transgender and intersex people in the context of their protection in anti-discrimination law, it raises issues that will have a wider impact than anti-discrimination law. The Government will give further consideration to this recommendation.</p>
<p>The position of volunteers under the Act</p>	
<p>Recommendation 59 The Committee recommends that the question of whether to extend the protection of the Act to `volunteers should be considered.</p>	<p>Support. Volunteers will be covered by the Bill. Commencement of these provisions will be delayed to provide sufficient time for organisations to prepare for the new laws.</p>