



Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing

Ms Rowena Allen
Chair, GLBTI MAC
c/o Jan Watson
20/50 Lonsdale St
MELBOURNE 3000

Mr Julian Gardner
Reviewer, Equal Opportunity Review
Department of Justice
Level 24 121 Exhibition Street
MELBOURNE 3000

Re: Submission to the *Equal Opportunity Exceptions Review*

GENERAL QUESTIONS

Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?

Balancing rights and limitations on rights is a constant struggle in anti-discrimination law. Even within protected rights there are issues to be considered, e.g. a gay male-only space protects homosexual men but excludes lesbians who are also protected under the Equal Opportunity Act (EOA). It is hard to get it 'right' but automatic exceptions are detrimental to the balancing of rights as they take away any chance to challenge, debate, discuss and review which right should be protected or not. Whereas the EOA has wide ranging protection – in the form of 'attributes' of the person - the exceptions in many cases need to be amended or struck out entirely.

A suggestion would be to write into each section the possible defence/argument for the service provider/respondent as is the case in Federal anti-discrimination law. Further to this defences should be proved by the respondent, not unlike 'unjustifiable hardship' or 'reasonable accommodation/adjustments' rather than an automatic defence which limits a right to equal opportunity.

Most of the exceptions are unnecessary, unfair and prevent any chance at balancing competing rights. Writing a defence into a section with the onus on the respondent to prove their defence is the best way to try and level the playing field.

The role of the Human Rights Charter is crucial to the reform of the exception and exemption provisions. It provides, in section 7 (s.7), the criteria for assessing when a limitation on a human right, which is what the exceptions and exemptions are, can be justified "in a free and democratic society". Provisions that do not satisfy s.7 should be repealed, or amended to comply.

Many of the exceptions are in effect to enable "special measures" to be taken for the redress of discrimination and its effects. This is permitted by s.8(4) of the Charter, and if this section were written into the Act it might make many of these exceptions redundant.

Some exceptions are roundabout ways of providing for an implied obligation to make reasonable adjustments to terms or practices. It would be better for the Act to make this obligation express and clear, rather than indirect and implied.

What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?

Repealing or amending exceptions to the Equal Opportunity Act will help further the elimination of discrimination to the greatest possible extent. In this way all GLBTI Victorians can participate in and contribute to all aspects of civic and social life and have the opportunity to fulfil their potential.

Participation of GLBTI people, unconstrained by discrimination, will enable their talents and contributions to the social and business economy to be fully harnessed, and benefit themselves and community.

Savings would be generated in the health system as there is clear evidence that discrimination leads to ill health, particularly in relation to mental health problems and alcohol and drug use and associated morbidities.

Public education arising out of an improved legislative response to discrimination for GLBTI people is likely to reduce the overt discrimination faced. It could improve families' responses to a family member revealing they are gay and so potentially lead to less homelessness for same sex attracted and transgender young people (SSATYP).

Research by Gay and Lesbian Health Victoria (GLHV) and others (see Attachment Two Bibliography) shows that pervasive discrimination leads to poorer health in those subject to it. This has direct costs for both the individual and the community through the resulting use of the health system.

The indirect costs are no less real. Reduced health can mean a loss of educational opportunity or achievement resulting in lower lifetime productivity which is a direct cost to the individual and the economy. Reduced health also means reduced workplace productivity which is again a loss to the individual and the economy.

Research in North America shows gay men there have, on average, at least ten per cent (up to 32 per cent in some studies) lower lifetime earnings than their non-gay peers. This statistic probably sums up the overall effect of all the ways that breaches of the human right to equality through individual and systemic discrimination directly and indirectly harm this one population group.

If discrimination in Victoria has a similar effect on incomes as in North America then the detrimental economic impact is significant.

EXCEPTIONS AND EXEMPTIONS

An overriding principle for the exceptions and exemptions that remain is that they should be worded such that the exceptions are based on objective evidence and not on subjective individual, community or society perceptions.

Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?

See response to first General Questions page 1.

Should any exceptions be repealed? If so, which exceptions and why?

Exceptions to Discrimination in Employment and Employment Related Areas

Section 21 Exception –small business

This exception has no legitimate purpose that cannot be met in less restrictive ways and so should be repealed. Federal anti-discrimination laws do not exempt small business recruitment in this way, and this section may even encourage proprietors to break federal laws; it may itself be in breach of them and hence invalid under the constitution.

Section 22 Exception – special service or facilities

This Section should be repealed as it could be used to not employ someone with a disability.

Applicants with a disability/impairment who are able to fulfil the inherent requirements of the position must be given the job. If they cannot fulfil these requirements – even after the employer makes ‘reasonable adjustments’ – only then can the employer discriminate on the basis of impairment.

Removing this exception allows a person with a disability the chance to apply for a position. The employer and related service providers then have to prove why they can not make the necessary accommodations in the particular case rather than get a blanket exception.

This section is really about the obligation to make reasonable adjustments to enable a person to do the job in spite of their impairment. This was established in, for example, *Davies v State of Victoria* VCAT 5 January 2000. It should be replaced by a provision which expressly declares this obligation. The exception then applies only when reasonable efforts have been made to do so.

There are several sections which have the same issue. In all such cases the duty to make reasonable adjustments is part of the positive equality duty referred to in the EO Review Options Paper, and should be made clear in the EO Act.

Section 24 Exception – standards of dress and behaviour

It should be the policy and practice of organisations to establish their own standards after a process of consultation with staff and clients/customers. Employers and staff should negotiate these standards within the context of appropriate occupational health and safety requirements and in the context of accepting the diversity of their workforce. As it stands currently an employer can impose his/her own standards and values.

Section 25 Exception – care of children

This exception should most definitely be repealed as its ramifications are too far reaching. For example an applicant for a job may have distinctive physical features such as moles or scars or skin pigmentation which the employer may believe would have a negative effect on ‘the physical, psychological or emotional wellbeing of children’. This exception encourages discrimination on grounds of impairment or physical features on the basis of belief.

What about a transgender applicant for child care work or a gay man or lesbian teacher? Should they be discriminated against because the employer believes they are protecting ‘the physical, psychological or emotional wellbeing of the children’? There is no evidence that gay, lesbian, bisexual, transgender or intersex people working to care for children have caused them ‘psychological or emotional’ harm. This Section is discriminatory and is used again and again to justify homophobia, heterosexism, intolerance and prejudice

There is no evidence that children are adversely affected by having gay, lesbian or bisexual childcare workers, teachers, or parents. Charlotte Patterson’s recent study of adolescents with gay and lesbian parents showed that their adjustment and relationships and school outcomes were the same as heterosexually parented children (see Attachment Two Bibliography: Wainright). While this work focusses on the experiences of adolescents with lesbian and gay parents parallels can be made with children having gay and lesbian teachers.

Childcare workers have had little education and/or professional development about the impact of sexual orientation on young children, and so it is likely that they are not well informed about the current research findings as above (see Attachment Two Bibliography: Casper)

There is evidence that lesbian teachers have been discriminated against and lost their jobs. In 2005 one lesbian was dismissed from a Victorian school when it became aware she had a same sex partner. This was on the basis of a complaint from a parent, and assumed adverse consequences on the students in her care (see Attachment Two Bibliography: Green). Even if gay and/or lesbian teachers don't actually lose their jobs they still experience harassment from colleagues and students related to their sexual orientation. Ferfolia's paper discusses the difficult experience of 6 lesbian teachers in Sydney, and the lack of support from their school environments (see Attachment Two Bibliography: Ferfolia).

The *Working with Children Check* is the current and most appropriate mechanism to satisfy community concerns about those who work (in a paid or voluntary capacity) with children under the age of 18.

Section 27B Exception – gender identity

The significant concern about this exception and the reason for the GLBTI MAC's request for its repeal is that the phrase 'adequate notice' is too broad and subjective. Who determines what is 'adequate' and even what is the form of the notice: a phone call, an email or a formal letter? What would the circumstance be that they are unreasonable?

Section 28 Exception – single sex accommodation

The GLBTI MAC concern with this exception is the issue of language or terminology. Does the definition of 'sex' mean "with-or-without a penis"? The ambiguity or lack of clarity creates problems for pre, or non--operative transsexuals. Transgender people's gender identity is different to their biological sex.

Section 32 Exception – special services and facilities

Refer to comments made under Section 22.

Exceptions to Discrimination in Education

Section 40 Exception – standards of dress and behaviour

One of the GLBTI MAC's concerns regarding this exception is its potential to force young people out of school. For example if gender variant students need to present themselves at school in clothing appropriate to their perceived gender they may not have the support of their school community. It is very likely that the school community will not be supportive or understanding of gender variant students unless they have had opportunities to participate in professional development (for principals, teaching and non-teaching staff) and community education programs for parents and families. If a school community didn't want transgender students at its school what are the implications for this student: are they forced out of school?

Allowing this exception to remain undermines the significant work of the Department of Education and Early Childhood Development (DEECD) in acknowledging and addressing the real problem of homophobic bullying in schools.

Victorian government schools are expected to develop and maintain an environment where "All students in Victorian government schools have a right to feel safe at school and be free from bullying, including gay, lesbian, bisexual, transgender and intersex students." (*Safe Schools are Effective Schools*). A DEECD website <http://www.sofweb.vic.edu.au/wellbeing/safeschools/bullying/> supports school communities with strategies for responding to homophobic bullying.

This policy development and implementation was based on evidence indicating the extent of homophobic bullying in schools. This evidence was documented in ['Writing Themselves in](#)

[Again](#) the Australian Research Centre in Sex, Health and Society's report on the sexual health and wellbeing of same sex attracted young people in Australia. This report found that the most common place of homophobic was at school. 74% of young people who had suffered homophobic abuse reported at least one incident of verbal or physical abuse at school.

DEECD's strategy encourages schools to take a whole-school approach to developing and maintaining safe school environments where everybody has the right to feel physically and psychologically safe.

Exceptions to Discrimination in the Provisions of Goods and Services and the Disposal of land

Section 45 Exception – special manner of providing a service

Refer to comments made under Section 22.

Exceptions to Discrimination in Accommodation

Section 55 Exception – welfare measures

This is a concern as the definition of sex is not as clear – or as fair – as members of the transgender community would like e.g. VCAT Decision; Hanover Welfare Services 2007

Exceptions to Discrimination in Sport and Local government

Section 66 Exception – competitive sporting activities

The reference to gender identity should be removed in recognition that the participation of transsexuals in elite competitive sporting activities is now at the highest level. The International Olympics Committee in 2004 approved the Stockholm Consensus (See Attachment One) which allowed 'a person who has changed sex to compete in sports competitions'.

General Exceptions

Section 71 - Pensions; Section 72 - Superannuation—existing fund conditions; Section 73 - Superannuation—new fund conditions,

These sections were introduced thirty years ago as a temporary measure and can now be removed. As their intent is inconsistent with *The Charter of Human Rights and Responsibilities* they should definitely be removed.

Section 75 Religious bodies, Section 76 Religious schools and Section 77 Religious beliefs or principles

The GLBTI MAC supports the Rainbow Network Victoria submission.

Blanket religious exceptions under the Equal Opportunity Act should be removed. These exceptions are not appropriate, particularly given that religious schools are involved in delivering a public service using public funds. It is unacceptable for bodies receiving public funding to be able to discriminate.

Section 77 should be repealed. Sections 75 and 76 should be amended so that they only cover 'internal matters' (i.e. matters that only concern their own members, and do not involve public services or public funds). In any case, the applicability of exceptions should be based on objective evidence, to conform with the Charter's reasonable limitations test, and be the least restrictive measure.

Acknowledging that religious freedom is also a human right, it could be a legitimate exception to permit actions that are necessary to conform to the religion's precepts, but not for those that are merely convenient or desired.

These provisions effectively allow religious organisations to discriminate against GLBTI members of the community, and their families, in a variety of areas, and especially in education (for example, against the employment of teachers who may identify as gay or lesbian).

These provisions also have the potential to be used to ban non-heterosexual students participating equally in a range of school experiences e.g. taking a same sex partner to school functions particularly formals. In response to the Anglican all boys' school in Brisbane banning same sex partners at its school formal the principal of Marcellin College (a Melbourne Catholic boys' school) said the school would also not allow male formal partners. Mark Merry said the position was in line with school community expectations. "At this stage we would not be offering boys the opportunity to take same-sex partners to the mid-year formal," Mr Merry said. "It is a Catholic school and the expectation of the school community is that we reflect Catholic teaching."

In contrast the Victorian Department of Education and Early Childhood Development said state schools should allow gay couples to attend events together. "All Victorian government schools are expected to adhere to equal opportunity legislation, which stipulates that discrimination on these grounds is unlawful," department spokeswoman Maria Ligerakis said.

IS THE VCAT EXEMPTION PROCESS APPROPRIATE? HOW COULD IT BE IMPROVED?

The VCAT exemption process should be made more transparent and accessible. The model of the Human Rights and Equal Opportunity Commission (HREOC) could be adopted. HREOC makes public any application for exemption on its website and invites direct comment from anyone in the community and stakeholders. Members of the public and stakeholders are able to comment on the proposed exemption as part of the HREOC process and before it has made a decision to grant or reject the application. HREOC also sends out notice of exemptions in its email newsletters. In this way more people can comment as they are made aware of the applications early in the whole process.

It would appear that tribunal members could benefit from participation in relevant professional development to improve their understanding of issues facing some of the groups often discriminated against. Concerns have been raised about some matters involving transgender applicants. Community feedback is that they have been poorly and/or inappropriately conducted (e.g. incorrect references to gender identity and questions asked and comments made that show very limited understanding of the issues of discrimination on the health and wellbeing of transgender people).

Victoria is fortunate in that evidence-based and well-regarded professional development and/or training is readily accessible through Gay and Lesbian Health Victoria (GLHV) based at the Australian Research centre in Sex, Health and Society at La Trobe University. (<http://www.glhv.org.au/training>)

Attachment One: Statement of the Stockholm consensus on sex reassignment in sports

On 28 October 2003, an ad-hoc committee convened by the IOC Medical Commission met in Stockholm to discuss and issue recommendations on the participation of individuals who have undergone sex reassignment (male to female and converse) in sport.

This group was composed of:

- Prof. Arne Ljungqvist (SWE)
- Prof. Odile Cohen-Haguenauer (FRA)
- Prof. Myron Genel (USA)
- Prof. Joe Leigh Simpson (USA)
- Prof. Martin Ritzen (SWE)
- Prof. Marc Fellous (FRA)
- Dr Patrick Schamasch (FRA)

The group confirms the previous recommendation that any "individuals undergoing sex reassignment of male to female before puberty should be regarded as girls and women" (female). This applies as well for female to male reassignment, who should be regarded as boys and men (male).

The group recommends that individuals undergoing sex reassignment from male to female after puberty (and the converse) be eligible for participation in female or male competitions, respectively, under the following conditions:

- Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy
- Legal recognition of their assigned sex has been conferred by the appropriate official authorities
- Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimise gender-related advantages in sport competitions.
-

In the opinion of the group, eligibility should begin no sooner than two years after gonadectomy.

It is understood that a confidential case-by-case evaluation will occur.

In the event that the gender of a competing athlete is questioned, the medical delegate (or equivalent) of the relevant sporting body shall have the authority to take all appropriate measures for the determination of the gender of a competitor.

Sch 12.11.03

Attachment Two: Bibliography

National and State

Couch, M, Pitts M, Mulcare, H, Croy S, Mitchell A and Patel S, 2007, *Tranznation a report on the health and wellbeing of transgender people in Australia and New Zealand*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

Ferfolja, T. Australian lesbian teachers--a reflection of homophobic harassment of high school teachers in New South Wales government schools. *Gender and Education*, 10(4), 401.

Green, S. (2005, Monday 7 March 2005). Don't ask, don't tell. The Education Department is deserting gay students and teachers. *The Age*, pp. 4-5.

Hillier, L, Warr, D, & Haste, B (1996). *The rural mural: Sexuality and diversity in rural youth*. National Centre in HIV Social Research: Program in Youth/General Population, Centre for the Study of Sexually Transmissible Diseases, La Trobe University, Melbourne

Hillier, L, Harrison, L, Dempsey, D, Matthews, L, Beale, L, Rosenthal, D. & Walsh, J, 1998, *Writing Themselves In A National Report on the Sexuality, Health and Well-Being of Same-Sex Attracted Young People* (Monograph series No.7), National Centre in HIV Social Research, Australian Research Centre in Sex, Health and Society, La Trobe University Melbourne.

Hillier L, Turner, A, Mitchell A 2005, *Writing themselves in again-six years on :the second national report on the sexuality, health and wellbeing of same sex attracted young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

Pitts, M, Smith A, Mitchell, A and Patel S 2006, *Private Lives - A Report on the Health and wellbeing of GLBTI Australians*, Gay and Lesbian Health Victoria, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

Swimming upstream: making places welcoming a report on the needs of gay, lesbian and bisexual in 'hard to reach' groups 2006 Gay and Lesbian Health Victoria, ARCSHS, La Trobe University Melbourne.

International

Banks, C 2003n *The Co\$t of Homophobia – literature review of the economic impact of homophobia on Canada*, Gay and Lesbian Health Services of Saskatoon Canada, Saskatoon CA.

Banks, C 2001n *The Co\$t of Homophobia – literature review of the human impact of homophobia on Canada*, Gay and Lesbian Health Services of Saskatoon Canada, Saskatoon CA.

Casper, V., Cuffaro, H. K., Schultz, S., Silin, J. G., & Wickens, E. (1996). Toward a most thorough understanding of the world: Sexual orientation and early childhood education. *Harvard Educational Review*, 66(2), 271-293.

Wainright, Russell & Patterson (2004). Psychosocial adjustment, school outcomes and romantic relationships of adolescents with same-sex parents. *Child Development*, 75, 1886-98.