

# Chapter 5

## > Reasonable adjustments for somebody with a disability

### Overview

368. The Equal Opportunity Act now imposes express obligations to make 'reasonable adjustments' for a person with a disability in certain areas. While these obligations were implicitly required by the Equal Opportunity Act's predecessors, the duty is now explicit.
369. Each of the 'reasonable adjustment' obligations are 'stand alone' provisions, and a contravention of any of them constitutes unlawful discrimination and can be an additional head of claim for a person bringing a complaint to the Tribunal or Commission.

### When reasonable adjustments are required

370. The obligations to make reasonable adjustments are set out in various sections of the Equal Opportunity Act and apply in relation to:
- employment (including adjustments for employees, people offered employment and partners/people offered partnership)<sup>370</sup>
  - education<sup>371</sup>
  - the provision of services.<sup>372</sup>
371. The Equal Opportunity Act contains a number of examples of practical steps that may constitute 'reasonable adjustments', including installing access ramps for wheelchairs, allowing a person or employee to be absent from work for rehabilitation or medical treatment, allowing a person to take more frequent rest breaks during work, providing a teacher's aide to a student, and including subtitles in audio-visual presentations.

### Are the adjustments reasonable?

372. In determining whether it is reasonable to require a person to make adjustment for somebody with a disability, the Tribunal must look at all relevant facts and circumstances. The Equal Opportunity Act prescribes the factors which may be relevant.<sup>373</sup> Broadly speaking, these include:
- the nature of the complainant's disability
  - the nature of the work offered or performed
  - the type of adjustment needed to accommodate the disability
  - the respondent's circumstances, including its size and financial circumstances
  - the effect on the respondent of making the adjustment (including the number of other people who would be benefited or disadvantaged by making the adjustment, financial impacts and impacts on efficiency and productivity)
  - the consequences for the respondent if adjustments are made
  - the consequences, for the complainant, of not making the adjustment
  - any relevant 'disability action plan' made under the *Disability Discrimination Act 1992 (Cth)* or the *Disability Act 2006 (Vic)*.

### When adjustments are not required

373. The requirements to make reasonable adjustments apply unless it can be shown that the adjustment would be ineffective because:

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370 *Equal Opportunity Act 2010 (Vic)* ss 20, 33.

371 *Ibid* s 40.

372 *Ibid* s 45.

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373 *Ibid* ss 20(3), 33(3), 40(3), 45(3).

- a. in a work-related context, the person or employee could not 'adequately perform the genuine and reasonable requirements' of the employment or partnership even after the adjustments are made<sup>374</sup>
- b. in an education context, the person 'could not participate in or continue to participate in or derive or continue to derive any substantial benefit from the educational program' even after the adjustments are made<sup>375</sup>
- c. in relation to the provision of services, 'the person could not participate in or access the service or derive any substantial benefit from the service' even after the adjustments are made.<sup>376</sup>

374. There are also specific defences available to respondents where the adjustments are not reasonable and/or the adjustment would be ineffective for the reasons summarised above.<sup>377</sup>

### What are genuine and reasonable requirements of employment?

375. In order to understand what are the 'genuine and reasonable requirements' of the employment, the Tribunal must look at all the circumstances surrounding the employment, including any contract of employment, statutory functions, and organisational or operational requirements.<sup>378</sup>

376. The Tribunal considered the phrase 'genuine and reasonable requirements of the employment' in the case of *Davies v State of Victoria (Victoria Police)*<sup>379</sup> in the context of the exception under section 22 of the former 1995 Act. In that case, the Tribunal said:

What are the genuine and reasonable requirements of the employment?  
In our view, these are wider than the inherent or essential requirements of the employment... The requirements of the employment and the requirements of the employer are not necessarily the same thing, although they will often be the same.

The requirements of the employment refers to what the job or position requires to be done, as well as what is necessary to do those duties. The term covers the whole range of these requirements, and not just the 'essential' ones. The requirements must be requirements 'of the employment'. In other words, they must relate to and derive from the employment. They must be genuine requirements. An employer cannot invent requirements which are not truly requirements of the employment. They must be reasonable requirements. As was pointed out in the context of indirect discrimination, 'reasonable' is a more demanding test than one of convenience but a less demanding test than one of necessity (*Secretary, Department of Foreign Affairs and Trade v Styles* [1989] FCA 342; [1989] 23 FCR 251 at 263 per Bowen CJ). So, a requirement for abilities or qualifications that are grossly disproportionate to the degree of difficulty of the duties, might not constitute a reasonable requirement of the employment.<sup>380</sup>

377. The Tribunal went on to say that the genuine and reasonable requirements of employment may also include certain abilities and skills provided that they are relevant to the particular duties of the employment. For example, a certain degree of physical or mental fitness.<sup>381</sup>

378. The Tribunal also commented that the circumstances in which the employment is carried out, including dangers to which the employee may be exposed or may expose others, may also be relevant in determining the genuine and reasonable requirements.<sup>382</sup> On that point, the Tribunal cited the reasons of Gummow and Hayne JJ in *X v Commonwealth of Australia & Another*,<sup>383</sup> which concerned the question of whether a soldier with HIV/AIDS could perform the 'inherent requirements' of combat duties and, in particular, whether the risk of others being infected in the course of the employment was relevant.

374 [Ibid ss 20\(2\), 33\(2\)](#).

375 [Ibid s 40\(2\)](#).

376 [Ibid s 45\(2\), 46](#).

377 [Ibid ss 23, 34, 41, 46](#).

378 [\[2000\] VCAT 819](#).

379 [Ibid](#).

380 [Ibid](#).

381 [Ibid](#).

382 [Ibid](#), citing *X v Commonwealth of Australia & Another* [1999] HCA 63.

383 [\[1999\] HCA 63](#).

# Chapter 6

## > Accommodating a person's responsibilities as a parent or carer in employment and related areas

379. In work-related contexts, employers have specific obligations under the Equal Opportunity Act to provide flexible working arrangements for parents and carers, provided that it is reasonable to do so. These obligations are separate to, but broadly consistent with, the right to request flexible working arrangements under the *Fair Work Act 2009 (Cth)*.<sup>384</sup> But note that the Equal Opportunity Act applies to all employers in Victoria.
380. More specifically, the Equal Opportunity Act provides that an employer, principal or firm must not 'unreasonably refuse' to accommodate a person's responsibilities as a parent or carer in relation to their 'work arrangements'.<sup>385</sup> These obligations are set out in various different sections of the Equal Opportunity Act and apply in relation to:
- people who are offered employment<sup>386</sup>
  - employees (including casual employees)<sup>387</sup>
  - contract workers<sup>388</sup>
  - partners (including people who are invited to become partners) of firms – such as legal and accounting firms – comprising more than five partners.<sup>389</sup>

381. The Equal Opportunity Act includes several examples of the types of flexible working arrangements that may assist in accommodating a person's responsibilities. These may include, for example, changing a person's hours of work, rescheduling meetings so that people with parent/carer's responsibilities can attend, or permitting work from home.

### Responsibilities as a 'parent' or 'carer'

382. A person has responsibilities as a 'carer' if 'another person is wholly or substantially dependent [on them] for ongoing care and attention'. This may include, for example, a person's responsibilities to care for an elderly person or somebody with an illness or disability.<sup>390</sup> The definition of carer excludes circumstances where the caring arrangements are wholly or substantially commercial (for example, paid nurses or carers).
383. For the purposes of the Equal Opportunity Act a 'parent' includes step-parent, adoptive parent, foster parent or guardian.<sup>391</sup>

### Complainant must make a request

384. In order to engage these provisions of the Equal Opportunity Act, the complainant must actually make a request for accommodation of their responsibilities as a parent or carer. This was found by the Tribunal to be an implicit requirement, although the Equal Opportunity Act does not specifically refer to such a request.<sup>392</sup>

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384 Note that [section 65](#) of the *Fair Work Act 2009 (Cth)* contains similar obligations, although the scope of these obligations is narrower under the FW Act as they only apply in respect of parents of children who are under school age, or children under 18 years old who have a disability. Note that at the time of publication the *Fair Work Amendment Bill 2013* had been introduced which would amend [section 65](#) of the *Fair Work Act 2009 (Cth)* to expand the categories of employees who may make such a request.

385 [Section 4](#) of the *Equal Opportunity Act 2010 (Vic)* defines 'work arrangements'. Broadly, it encompasses arrangements that apply or would apply to the individual as well as the workplace.

386 [Equal Opportunity Act 2010 \(Vic\) s 17](#).

387 [Ibid s 19](#).

388 [Ibid s 22](#).

389 [Ibid s 32](#).

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390 [Ibid s 4](#).

391 [Ibid s 4](#).

392 [Richold v State of Victoria, Department of Justice \[2010\] VCAT 433, \[38\]](#).

## When is a refusal unreasonable?

385. The Equal Opportunity Act sets out a number of factors to be taken into account in determining whether it was reasonable for the employer, principal or partnership to refuse the employee's request. Broadly, these factors include:
- a. the complainant's personal circumstances including the nature of his or her responsibilities as a parent or carer
  - b. the nature of the complainant's role or the work performed by them
  - c. the respondent's circumstances (including its finances, size, and operations)
  - d. the effect that accommodating the complainant's responsibilities would have on the respondent (including efficiency, productivity, customer service and the impacts on other people in the workplace)
  - e. the consequences, for the complainant, of the refusal to accommodate his or her parental or carer responsibilities.
386. In determining whether the respondent's conduct was reasonable, the Tribunal must weigh-up and balance the competing interests of the complainant and respondent by reference to these 'commonsense considerations'.<sup>393</sup> In *Richold v State of Victoria, Department of Justice*<sup>394</sup> (*Richold*), the Tribunal clarified that the obligation 'does not require an employer to entirely subjugate its own interests to the interests of the employee as a parent or carer. Rather it requires a reasonable accommodation to be reached between the two'.<sup>395</sup>
387. In *Richold*, the complainant was employed as a casual prison guard. Her complaint related to a policy introduced by the employer which changed the way shifts were allocated to casual staff. The reason for the change was to ensure that work which attracted higher penalty rates (such as weekend work) was distributed fairly. The effect of the change was that if Ms Richold refused more than two shifts per week – which she often had to do due to her parental responsibilities – she received fewer shifts in total. This was different from the previous policy, whereby casual staff had been rostered for days that they were available and the number of hours were distributed as evenly as possible. Ms Richold argued that the new policy constituted an unreasonable failure to accommodate her parental responsibilities.
388. In that case, the Tribunal said that although the previous policy was more accommodating of Ms Richold's family responsibilities, the new policy was 'not unreasonable', especially because it was designed to address concerns raised by other employees about the fair allocation of work.<sup>396</sup> The Tribunal looked at a number of factors in reaching this conclusion. Ms Richold's status as a casual employee was found to be especially relevant because, according to the Tribunal, 'the very nature of casual employment... grants the fullest possible flexibility'.<sup>397</sup>
389. A different result may have been reached in this case if the changes had impacted the working arrangements of permanent full-time or part-time employees.<sup>398</sup>

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393 Victoria, *Parliamentary Debates*, Legislative Assembly, 11 October 2007, 3468 (Bob Cameron, Minister for Police and Emergency Services).

394 [2010] VCAT 433.

395 Ibid [43].

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396 Ibid [44].

397 Ibid [42].

398 Ibid [34].

# Chapter 7

## > Refusing accommodation to a person because they have an assistance dog

### What is an 'assistance dog'?

390. An 'assistance dog' is defined to mean a dog that is trained to perform tasks or functions that assist a person with a disability to alleviate the effects of his or her disability.<sup>399</sup> This is a shift away from (and arguably a broadening of) the term 'guide dog' used in the 1995 Act, which was limited to a dog that is trained to assist a person who has a visual, hearing or mobility impairment.
391. According to the Explanatory Memorandum, the definition of 'Assistance Dog' may include, for example, a dog trained to assist people who suffer from seizures or psychiatric disorders.<sup>400</sup> However, the Explanatory Memorandum also confirms that the definition is not intended to be so broad to encompass companion or comfort dogs, but may extend to animals trained to assist with 'navigating social interactions where the nature of the impairment is such that this helps to alleviate the impairment'.<sup>401</sup>

392. In *State of Queensland (Queensland Health) v Che Forest*<sup>402</sup> (*Che Forest*), Spender and Emmett JJ considered the meaning of 'assistance animal' under the *Disability Discrimination Act 1992 (Cth)*. They said the question is not whether a dog does, in fact, assist an applicant to alleviate the effects of a disability. What is relevant is whether the animal was trained with that purpose or object in mind. In that case, Queensland Health reported that the applicant's dogs were ill-behaved and ill-controlled and therefore requested evidence of the dogs' training. In their reasons, Spender and Emmett JJ suggest that an applicant may need to provide evidence of proper assistance dog training, where the existence or quality of training is in question.<sup>403</sup>

### Protection for people with assistance dogs in accommodation

393. Discrimination against someone because of their assistance dog, can be discrimination on the basis of the disability if it occurs in any area of public life.
394. [Section 54](#) of the Equal Opportunity Act specifically provides that a person must not refuse to provide accommodation to a person with a disability because he or she has an assistance dog. In particular, it is unlawful to require a person with a disability to keep the dog elsewhere (other than in the accommodation) or to require the person to pay an extra charge because of the dog. [Section 54](#) is a stand alone provision and does not require proof of direct or indirect discrimination.<sup>404</sup>

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399 [Equal Opportunity Act 2010 \(Vic\) s 4](#).

400 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 5.

401 *Ibid.*

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402 [\[2008\] FCAFC 96](#), [106].

403 *Ibid* [118].

404 [Equal Opportunity Act 2010 \(Vic\) s 7\(1\)\(b\)](#).

# Chapter 8

## > Permanent exceptions

### Overview of exceptions

395. The Equal Opportunity Act contains a number of exceptions to discrimination which operate on an automatic, permanent basis (as opposed to temporary exemptions which may be granted by the Tribunal in certain circumstances). The effect of the permanent exceptions is to deem certain activities, which would otherwise constitute unlawful discrimination, to be lawful conduct under the Equal Opportunity Act. Some of these exceptions apply in specific areas of public life, like employment, education and good and services. Other exceptions apply generally across all areas of the public life. Each of those permanent exceptions is discussed below.
396. In addition, a person may apply to the Tribunal for an order granting it a temporary, specific exemption to allow it to discriminate in certain circumstances. Temporary exemptions are dealt with in [Chapter Nine](#) of this resource.
397. There is often overlap in decisions of the Tribunal with respect to permanent exceptions and temporary exemptions. When a person or entity applies for a temporary exemption from the Equal Opportunity Act, the Tribunal must consider whether such an exemption is necessary or, rather, whether the proposed discriminatory conduct is already lawful in accordance with one of the permanent exceptions to discrimination.

### Exception for things done with statutory authority

398. [Section 75](#) of the Equal Opportunity Act replicates section 69 of the 1995 Act. This provision allows a person to discriminate, if that discrimination is necessary to comply with, or authorised by, a provision of a Victorian Act or enactment.<sup>405</sup> Such discrimination will therefore only be permitted in very specific circumstances, but the nature of the exception should allow for minimal ambiguity.
399. The case of [H.J. Heinz Company Australia Ltd v Turner](#),<sup>406</sup> heard in the Supreme Court of Victoria, illustrated how this provision can operate in practice. Towards the end of his employment, Heinz had placed Mr Turner on 'limited duties', which restricted him to the operation of only two machines. This was to accommodate Mr Turner's work related injury. As a result of this, Mr Turner was prevented from working overtime, because Heinz had a policy that did not allow workers who were on modified duties to work overtime because, Heinz said, it could not guarantee that the duties performed on overtime would fit within the employee's modified duties.
400. The Equal Opportunity Board of Victoria found that the exclusion of Mr Turner from overtime was discriminatory because a 'blanket policy' had been applied, and consideration had not been given to how Mr Turner may be permitted to undertake overtime.

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405 Enactment includes rules, regulations, by-laws, local laws, orders, Order in Council, proclamation or other instrument of legislative character: [Equal Opportunity Act 2010 \(Vic\)](#), s 4; [Interpretation of Legislation Act 1984 \(Vic\)](#), s38; [Dulhunty v Guild Insurance Limited \(Anti-Discrimination\)](#) [2012] VCAT 1651, [16]-[33].

406 [1997] VicSC 282; (1990) EOC 92-964.

401. Heinz appealed this decision, and argued that its obligations under the *Occupational Health and Safety Act 1985* (Vic) (as in force at the relevant time) meant that the overtime policy was a reasonable and practicable one, and, most significantly for this exception, that the policy was one that Heinz was authorised to implement by law. The Supreme Court found in favour of Heinz.
402. In providing reasons for the decision, the Court favoured the approach that, if the policy was formulated by Heinz in fulfilment of its legal obligations to provide safe working conditions, the only question then for determination was whether the discrimination occurred because of a bona fide application of the policy. As this was the case, the discrimination was lawful.
403. The findings of the court in *Heinz* have been echoed in other cases in Australia. For example, in *Cercone v Bull's Transport Pty Ltd*<sup>407</sup> and *Hills v The State of South Australia*.<sup>408</sup>
404. In *Garden v Victorian Institute of Forensic Mental Health t/as Thomas Embling Hospital*<sup>409</sup> the complainant, Mr Garden, was an inpatient at Thomas Embling Hospital, a forensic psychiatric facility. Mr Garden claimed that the confiscation and opening of his mail constituted discrimination. Deputy President McKenzie however found that the conduct was authorised by law:
- There is no doubt that, if the opening and confiscation of the letter were in the course of implementing a necessary security condition, that conduct would be authorised by s 47 of the Mental Health Act and would in turn be exempt from the prohibitions on discrimination in the Equal Opportunity Act by virtue of s 69 of that Act. It is my view that it is the scheme of the Mental Health Act and of s 47 in particular that an authorised psychiatrist or his or her delegate may impose necessary security conditions on a patient without having to be concerned whether those conditions may be discriminatory.
405. Mr Garden's discrimination claim was struck out.

## Exception for things done for the protection of health, safety and property

406. [Section 86\(1\)](#) of the Equal Opportunity Act allows for discrimination on the basis of disability and physical features where the discrimination is reasonably necessary to protect the health, safety or property of any person. This includes the person discriminated against, or the public generally.
407. [Section 86\(2\)](#) of the Equal Opportunity Act allows discrimination on the basis of pregnancy where it is reasonably necessary to protect the health and safety of any person (including the person discriminated against).
408. In *Hall v Victorian Amateur Football Association*<sup>410</sup>, Mr Hall was excluded by the Victorian Amateur Football Association (VAFA) from participating in amateur football because he was HIV positive. VAFA said that the exclusion of Mr Hall was 'reasonably necessary' in the circumstances and was permitted under section 80(1) of the 1995 Act (the predecessor to [section 86\(1\)](#) Equal Opportunity Act).
409. In considering the arguments put forward by VAFA, the Tribunal noted that players and officials that Mr Hall may come into contact with during the game were at risk of infection. While this risk was thought to be low, the Tribunal held that the banning of Mr Hall was not unlawful in light of that risk.
410. However, the Tribunal went on to consider VAFA's Infectious Diseases Policy, which was very detailed in its methods of dealing with people and property contaminated by blood and containing hygiene in team areas. The Tribunal said that VAFA had not rigorously and consistently applied this Policy, but if it had done so, the risk of infections such as HIV would be reduced. Most notably, the Tribunal further found that because application of the Policy would give increased protection to the class of players and officials at risk, rather than simply banning the applicant (which still left open the risk of infection from other HIV sufferers), banning Mr Hall was not 'reasonably necessary'. Proper application of the Policy was a non-discriminatory means by which VAFA could reduce the identified risk to health and safety without banning Mr Hall. Mr Hall's claim of discrimination was therefore upheld.

407 [\[2002\] SADC 123](#); (2002) EOC 93-246.

408 [\[2002\] SASC 171](#); (2001) EOC 93-145.

409 [\[2008\] VCAT 582](#).

410 [\[1999\] VICCAT 333](#); (1999) EOC 92-997.

411. By way of further example, in *NC, AG, JC, SM, Matthews & Matthews as personal representatives of the Estate of Matthews v Queensland Corrective Services Commission*,<sup>411</sup> the Queensland Anti-Discrimination Tribunal considered complaints on behalf of five prisoners that the respondent had discriminated against them on the basis of their HIV positive status. The allegations of discrimination included being housed in a medical segregation unit, not being given the option to work in the kitchen at the prison, and for a time not being permitted to attend the oval at the same time as the mainstream protection prisoners.
412. In this case, the Tribunal found that the treatment of the complainants in the correctional centres was less favourable than that of other prisoners who were not HIV positive, and accordingly the respondent had been in breach of the *Anti Discrimination Act 1991* (Qld). The Respondent, in its defence, sought to evoke a number of exceptions in the Act. One of the exceptions that it tried to rely on was section 107, which is similar to [section 86](#) of the Equal Opportunity Act. The Tribunal was not satisfied that the exception applied in this matter because there was a 'paucity of evidence' to show that segregation of prisoners who were HIV positive was necessary for health reasons.
415. The special needs exception also specifically covers:
- rights or benefits granted to women in relation to pregnancy or childbirth<sup>413</sup>
  - the provision or restriction of holiday tours to people of a particular age or age group.<sup>414</sup>
416. [Section 88](#) of the Equal Opportunity Act, replaces section 82(1)(a) of the 1995 Act. Section 82(1)(b) of the 1995 Act was reframed as the special measures provision in [section 12](#) of the Equal Opportunity Act. The interaction between 'special needs' and 'special measures' under the Equal Opportunity Act is discussed below.
417. The Explanatory Memorandum indicates that a person wanting to rely on this exception must demonstrate, on an objective basis, that there is a need for the services, benefits or facilities and that the measures put in place are objectively capable of meeting those needs.<sup>415</sup>
418. However, previous case law suggests that the person's state of mind will be centrally relevant to determining whether the services, benefits or facilities were 'designed' for a lawful reason, namely to meet a group's special needs. The Tribunal reviewed this authority in *Lifestyle Communities Ltd (No 3)*, in relation to section 82(1) of the 1995 Act:

## Exception for special needs

### Scope of the exception

413. The special needs exception, under [section 88](#) of the Equal Opportunity Act, allows a person to establish services, benefits or facilities, to meet the 'special needs' of people with a particular attribute. Further, eligibility for such services may be limited to people with the particular attribute.
414. The Equal Opportunity Act includes the following example of conduct which would fall within the special needs exception: '[a] community organisation establishes a support group for single fathers in response to research that shows that single fathers have a need for targeted counselling and support.'<sup>412</sup> This example would fit within the special needs exception because there is a demonstrated need for the service, whether or not single fathers are a disadvantaged group within the community.

413 [Ibid s 88\(3\)\(a\)](#).

414 [Ibid s 88\(3\)\(b\)](#). For example, see *Morris (Anti Discrimination Exemption)* [2007] VCAT 380, in which the Tribunal expressed doubt that the special needs exception under the 1995 Act would enable a tour organiser to offer women-only tours. In doing so, the Tribunal noted that the exception applied to holiday tours provided for particular age groups, not to holiday tours provided for people with other attributes.

415 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), 45.

411 [\[1997\] QADT 22](#); (1998) EOC 92-940.

412 [Equal Opportunity Act 2010 \(Vic\)](#), s 88.

Whether the purpose of a special measure under [section 82\(1\)](#) of the Equal Opportunity Act was to be ascertained subjectively or objectively was considered in *Colyer v State of Victoria (Colyer)*. Kenny JA (Brooking and Callaway JJA agreeing) held the exception applied where the service-provider genuinely believed the services would meet those purposes. Her Honour held [s 82\(1\)](#) 'requires the relevant decision-maker to be satisfied that the genuine and not-colourable intention of the service-provider' was to achieve the beneficial purpose. According to her Honour, this belief is ascertained as a fact from the evidence, including inferences to be drawn from 'the nature of the services to be provided and the identity of the recipients of the service'. In summary:

If upon consideration of all relevant matters, the decision-maker is satisfied that the genuine and not colourable intention of the service-provider is to provide the special services for the ends identified in paragraphs (a) or (b) of [s. 82\(1\)](#), then it follows that the services are 'designed' to meet those needs. If the decision-maker is not so satisfied, then it follows that the services are not so designed. That is, if it were to appear that the relevant intention was not held or not genuinely held by the service-provider, then [s. 82\(1\)](#) would not apply.<sup>416</sup>

*Colyer* was followed by the Full Court of the Federal Court of Australia in *Richardson v ACT Health and Community Care Service*. Finkelstein J (Miles and Heerey JJ agreeing) held the 'purpose' (not 'design') element of the exception in [s 27](#) of the *Discrimination Act 1991* (ACT) refers to 'the actual intention of the decision-maker or actor.' But that intention must still be established:

To determine whether the decision-maker holds the requisite state of mind, it will be permissible to enquire whether the conduct in question was capable of achieving equal opportunity ([s 27\(a\)](#)) or meeting special needs ([s 27\(b\)](#)). That enquiry may be necessary for the purpose of establishing that the claimed intention is one that is likely to have been held by the decision-maker. It is not, however, to substitute for an enquiry into the subjective state of mind of the decision-maker an objective criterion. It is merely one of the means by which a claimed subjective intention can be established, in cases where there may be doubt.

### Interaction between 'special needs' and 'special measures'

419. The special needs exception complements the promotion of 'special measures' under [section 12](#) of the Equal Opportunity Act. Section 12 of the Equal Opportunity Act provides that taking measures for the purpose of promoting or realising substantive equality for members of a group with a particular attribute is not discrimination. However, unlike the special measures provision, the 'special needs' provision operates as an exception to discrimination and may apply regardless of whether the beneficiaries of the services, benefits or facilities experience a particular disadvantage.<sup>417</sup>

420. In *Georgina Martina Inc*,<sup>418</sup> in relation to the special measures provision, Member Dea explained that:

In order to consider whether conduct is taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, it is necessary to identify the inequality which is being sought to be remedied and its cause and then consider how the proposed measure promotes or realises substantive equality.

417 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#), [45].

418 [\[2012\] VCAT 1384](#), [41].

416 [\[2009\] VCAT 1869](#), [246]-[247].

421. In contrast, the special needs exception enables the establishment of special services, benefits or facilities that meet the special needs of people with a particular attribute, regardless of whether or not they are disadvantaged. Section 88 only requires 'the special services, benefits or facilities to be identified and for them to be shown to meet the special needs of the relevant group identified by the attribute.'<sup>419</sup>

422. In, *Georgina Martina Inc*,<sup>420</sup> the Tribunal found that the special needs exception applied in relation to services provided by a high-security women's refuge to women fleeing family violence (including emergency accommodation and case management). However, the Tribunal was not satisfied that the services could be properly characterised as a special measure, noting that:

On the evidence before me, the current application is not concerned with the creation of a service to meet the needs of women, which are not met by services currently available to men and women, in order to achieve equality between men and women. It is a response to the needs of some women, not for reasons based on inequality in the existing options available to all, but because they have a particular need arising from the violence of some men.

Unlike the counselling example (set out in section 12 of the Equal Opportunity Act), this is not a case where there are family violence services available to men and women which better serve the needs of men. Rather than adjusting or improving on an existing service for the purpose of promoting or realising equality for women, on the evidence this and other refuge services were created as a new initiative because there were no other services available.<sup>421</sup>

423. For further discussion of this decision (in relation to the Tribunal's decision to grant a temporary exemption permitting the refuge to employ women-only), see [paragraphs 485, 489–493](#) and [518](#) of this resource.

424. Current case law does not provide definitive guidance on the application of the 'special needs' exception. Further case law is needed to provide clarity about the scope of, and interaction between, the 'special needs' and the 'special measures' provisions.

### Exception for age benefits and concessions

425. Under [section 87](#) of the Equal Opportunity Act, it is permissible to discriminate in the provision of providing benefits to a person based on age. This includes, for example, providing concessionary tickets to an event.

### Exceptions relating to superannuation and pensions

#### Discrimination by retaining an existing discriminatory superannuation fund condition

426. [Section 78](#) of the Equal Opportunity Act allows a person to discriminate by retaining an existing discriminatory superannuation fund condition in relation to a person who is a member of the fund and was a member of the fund at 1 January 1996.

427. The provisions of the Equal Opportunity Act relating to the superannuation exceptions have not yet been tested by the courts. However, the approach the courts may take in relation to the issues of discrimination and superannuation was demonstrated by the decision of the Queensland Anti-Discrimination Tribunal in *Lundsbergs v Q Super*.<sup>422</sup> In that case, Lundsbergs, a former police officer who suffered from a major depressive disorder, as well as other drug-induced disorders, alleged that the Queensland Government Superannuation Office (Q Super) discriminated against him on the basis of his impairment by paying his superannuation payment as a lump sum to the Public Trustee, instead of to him, after he was dismissed from the police force. Q Super argued that Lundsbergs was not capable of accepting responsibility for handling a large financial payment.

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419 [\[2012\] VCAT 1384, \[57\]](#).

420 *Ibid.*

421 *Ibid* [47].

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422 [\[2004\] QADT 12](#).

Q Super acknowledged that it had discriminated against Lundsbergs by requiring that the payment be made to the trustee, but said that it was exempted by the [Anti-Discrimination Act 1991 \(Qld\)](#), which provided that it was not unlawful to discriminate on the basis of an impairment by imposing a condition which is reasonable having regard to any other factors.<sup>423</sup> The superannuation fund's trust deed, in this case, gave the trustees discretion to determine how benefits would be paid in cases of mental ill-health or incapacity of the fund member. The Tribunal held that the wording of these provisions did not impose a specific condition within the meaning of that Act, and Super Q could therefore not rely on the Act to exempt its actions. It was not 'reasonable' for Q Super to have relied on the exemption because the provisions of the trust deed were too broad and did not define types of ill health or incapacity, nor did they distinguish between degrees of it, nor set out clear circumstances for its use.<sup>424</sup>

428. Accordingly, it was held that unlawful discrimination had occurred in this case. Clearly, findings in respect of such exceptions will depend heavily on the facts of each specific case, but this case demonstrates that this exception does not constitute a blanket exception; the courts are likely to give detailed consideration to the particular terms of the superannuation scheme.

### Discrimination on the basis of age in superannuation

429. Under [section 79](#) of the Equal Opportunity Act, a person is permitted to discriminate against another on the basis of age by imposing conditions in relation to a superannuation fund in a number of circumstances. This clause closely resembles section 73 of the 1995 Act, with the exception of paragraphs (c) and (d), which have been amended to bring the circumstances in which discrimination is allowed into line with those in the *Age Discrimination Act 2004 (Cth)*.

430. The Equal Opportunity Act now permits discrimination in relation to superannuation if:
- it is based upon actuarial or statistical data on which it is reasonable for the person to rely
  - it is reasonable having regard to that data and any other factors
  - in a case where no actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.
431. The person relying on the exception would have the burden of demonstrating this.

### Exception for pensions

432. [Section 77](#) of the Equal Opportunity Act provides that the provisions relating to discrimination, in Part 4 of the Equal Opportunity Act, do not affect discriminatory provisions relating to pensions. This provision re-enacts section 71 of the 1995 Act.

### Exceptions for competitive sporting activities

#### Exclusion on the basis of sex and gender identity

433. The Equal Opportunity Act contains a number of exceptions which permit sporting competitions to operate on a single-sex or single-gender basis for competitors over 12 years of age, provided that certain criteria are met.
434. The first exception only applies to competitive sporting activities for which 'strength, stamina or physique of the competitors' is relevant.<sup>425</sup> The Tribunal has found, for example, that strength, stamina and physique are relevant to participation in competitive calisthenics. Thus, in *McQueen v Callisthenics Victoria Inc*,<sup>426</sup> the Tribunal held that it was lawful to exclude Mr McQueen, a 33 year-old man, from callisthenics competitions which were open to women over 14 years of age. In that case, the Tribunal member said:

423 [Anti-Discrimination Act 1991 \(Qld\) s 63](#).  
424 [Lunsbergs v Q Super \[2004\] QADT 12 \[66\]](#).

425 [Equal Opportunity Act 2010 \(Vic\) s 72\(1\)](#).  
426 [\[2010\] VCAT 1736](#).

I am satisfied the respondent has proved to the appropriate standard there are differences between the sexes in strength, stamina and physique which can affect participation of females in the sport of callisthenics which has developed as a sport participated in by women only above the age of 14 years. In its execution, competitive callisthenics requires skill, endurance, strength and coordination. It requires a high degree of physical dexterity. It is designed entirely around the female form. The introduction of males into the sport would be such as to materially change the way the sport is conducted and thus have a significant effect upon the roles of those who participate in it.<sup>427</sup>

435. In considering the question of the relevance of strength, stamina or physique, the Tribunal has held that the question of relevance is determined by considering whether 'if both sexes were to compete against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors'.<sup>428</sup> Lawn bowls has been found to be a sport in which strength, stamina or physique is not relevant in this sense.<sup>429</sup>
436. A second exception applies to permit the exclusion of persons of a particular sex from a competitive sporting activity where the exclusion is necessary for progression to an elite, national or international competition or level of competition.<sup>430</sup>
437. Thirdly, a permanent exception applies where the exclusion or restriction of persons of a particular sex is for the purposes of facilitating participation by people of the non-excluded sex, provided that the exclusion is reasonable, having regard to:

- a. the nature and purpose of the activity
- b. the consequences of the exclusion or restriction for people of the excluded or restricted sex
- c. whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.<sup>431</sup>

438. The second and third exceptions referred to above were introduced into the Equal Opportunity Act by an amendment in 2011. According to the Explanatory Memorandum to the 2011 amending Bill,<sup>432</sup> the new exceptions are intended to apply beneficially. For example, the participation exception is only intended to be available where the exclusion or restriction is designed to encourage stronger participation in sport by a particular sex in circumstances where participation has been a problem.
439. The Second Reading Speech highlighted, as a reason for the new exception, concerns about dwindling numbers in some competitive sports like lawn bowls where single-sex competitions were not automatic.<sup>433</sup> According to the Second Reading Speech, 'the needs of those who want to play with members of their own sex' were not being adequately addressed, which had led to participants leaving the sport.<sup>434</sup>

### Age and ability

440. The Equal Opportunity Act also allows competitive sporting activities to be restricted to people who can effectively compete, people of a specified age or age group or people with a general or particular impairment.<sup>435</sup>

## Exceptions on the basis of religion

### Scope of the exceptions

441. The Equal Opportunity Act contains a broad range of exceptions which apply in relation to the activities of religious bodies, including who may become members of a religious order, the activities of religious schools and other conduct which is reasonably necessary to comply with a person's religious doctrines, beliefs or principles.

427 [2010] VCAT 1736, [58].

428 *South v Royal Victorian Bowls Association* [2001] VCAT 207, [35].

429 See, for example, *Royal Victorian Bowls Association Inc* [2008] VCAT 2415. In later cases involving lawn bowling, exemptions were granted under the 1995 Act's equivalent to section 89 of the *Equal Opportunity Act 2010* (Vic), on the basis that certain events were part of what was described as the elite pathway leading to national and international championships.

430 *Equal Opportunity Act 2010* (Vic) s 72(1A).

431 *Equal Opportunity Act 2010* (Vic) s 72(1B).

432 *Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011* (Vic), 7.

433 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2011, 1363-1367 (Robert Clark, Attorney-General).

434 *Ibid.*

435 *Equal Opportunity Act 2010* (Vic) s 72(2).

## What is a religious body?

442. [Section 81](#) defines 'religious body', for the purposes of these exceptions, to mean:
- a body established for a religious purpose
  - an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

## Religious officials

443. [Section 82](#) of the Equal Opportunity Act provides that religious bodies may discriminate on the basis of any protected attribute in relation to the:
- ordination or appointment of priests, ministers of religion or members of a religious order
  - training or education of people seeking ordination or appointment of priests, ministers of religion or members of a religious order
  - the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

## Religious schools

444. [Section 83](#) of the Equal Opportunity Act authorises some types of discrimination in relation to religious schools. This exception is slightly different from the religious schools exception which applied under section 76 of the 1995 Act.
445. The religious schools exception applies to 'a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles'.
446. It covers conduct 'in the course of establishing, directing, controlling or administering the educational institution' provided the conduct:
- conforms with the doctrines, beliefs or principles of the religion
  - is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

447. This exception does not apply in relation to all attributes. It is limited to discrimination on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

## Religious beliefs or principles

448. The Equal Opportunity Act also contains a broad exception which permits discrimination by religious bodies on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity provided that the conduct:
- conforms with the doctrines, beliefs or principles of the religion
  - is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.<sup>436</sup>
449. This broad exception, contained in [section 82\(2\)](#) of the Equal Opportunity Act, applies only to religious bodies. It does not extend to discrimination on the basis of all attributes. It does not permit discrimination on the basis of age, employment activity, disability, industrial activity, breastfeeding, pregnancy, physical features, political belief/activity or race.
450. There is also a broad exception for discrimination by any person (including but not limited to a religious body) where the conduct is 'reasonably necessary' for the discriminator 'to comply with the doctrines, beliefs, or principles of their religion'. This exception also only applies to discrimination on the basis of certain attributes, namely religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.
451. It is intended that the term 'reasonably necessary' requires an objective assessment of whether the discrimination is necessary to conform with the doctrines, beliefs or principles of the person's religion.

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436 [Equal Opportunity Act 2010 \(Vic\) s 82\(2\)](#).

452. Although decided under the 1995 Act, *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor*<sup>437</sup> provides some guidance on the way in which some of these concepts are likely to be applied. Note that this case has been appealed by Christian Youth Camps (CYC). A judgement has not been delivered in this appeal at the time of publication of this document.
453. This case concerned a refusal by the Phillip Island Adventure Resort (Resort) to accept a booking from the Cobaw Health Service (Cobaw). The WayOut project is a youth suicide prevention initiative operated by Cobaw that targets same-sex attracted young people in rural Victoria.
454. In June 2007, Cobaw contacted Phillip Island Adventure Resort to make a booking for a two day youth forum. Cobaw claimed that its booking was rejected because of the sexual orientation of the proposed attendees. Cobaw lodged a complaint on the basis that this refusal contravened the 1995 Act.
455. The resort's operator, CYC, denied it had discriminated against Cobaw, or that if it had, this was permitted by religious exemptions under the 1995 Act. The resort and CYC is owned by the Christian Brethren Trust.
456. CYC sought to rely on the exemptions in section 75 of the 1995 Act, namely, that CYC was a 'body established for religious purposes' and that its refusal of Cobaw's booking was:
- a. in conformity with the doctrines of its religion
  - b. necessary to avoid injury to the religious sensitivities of people of its religion.
457. CYC also sought to rely on the exemption under section 77 of the 1995 Act, namely that the refusal of Cobaw's booking was necessary to comply with genuine religious beliefs or principles.
458. Justice Hampel found that CYC discriminated against Cobaw in refusing to accept its booking for accommodation on the basis of the sexual orientation of the proposed guests.
459. Justice Hampel found that CYC was not a body established for religious purposes and was therefore unable to rely on the exemptions in section 75 of the 1995 Act. In determining this, she considered it relevant that CYC provided camping facilities to both secular and religious groups and that its marketing materials made no mention of the Christian Brethren religion or Christian Brethren Trust.<sup>438</sup>
460. Although it was unnecessary for Justice Hampel to consider whether the refusal to take the booking was conduct which conformed with the doctrines of the religion or was necessary to avoid injury to the religious sensitivities of people of the religion, having regard to the extent to which these matters were argued before her at hearing, her Honour set out her findings on those matters.

#### What are doctrines of the religion?

461. In determining that the 'relevant religion' was the Christian Brethren denomination of Christianity, Justice Hampel followed the case of *OV and OW v Members of the Board of the Wesley Mission Council*.<sup>439</sup>
462. In establishing what were doctrines of the Christian Brethren's religion, Justice Hampel relied on the creeds, declarations of faith in addition to a statement of fundamental beliefs and doctrines set out in the Christian Brethren's 1921 Trust Deed.
463. Justice Hampel found that beliefs about marriage, sexual relationships or homosexuality, did not constitute a doctrine of the religion of the Christian Brethren. In making this finding, her Honour found compelling:

[T]he absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith.<sup>440</sup>

438 Ibid [254].

439 (2010) NSWCA 155.

440 *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* [2010] VCAT 1613, [305].

437 [2010] VCAT 1613.

### What does 'conforms with the doctrines of the religion' mean?

464. Justice Hampel was not satisfied that the refusal of the booking conformed with the doctrines of the religion, even if (1) CYC was a body established for religious purposes, and (2) beliefs about marriage, sexual relationships and homosexuality amounted to a doctrine of the Christian Brethren religion.<sup>441</sup>
465. Her Honour noted that while for the Christian Brethren, conformity with their beliefs about sex and marriage required them to restrict their own sexual activity to sex within marriage, there was no evidence to suggest that conformity with their beliefs about marriage and sexuality required them to avoid contact with people who were not of their faith and who did not subscribe to their beliefs about God's will in respect of sex and marriage.
466. In finding that CYC failed to establish that the refusal to take the booking conformed with the doctrines of the religion, Justice Hampel referred to the decision of *McFarlane v Relate Avon Limited*<sup>442</sup> where Laws LJ held that the right to freedom of religious belief does not confer a right on members of a religion to impose their beliefs on a secular society.<sup>443</sup>

### Was the refusal to take the booking necessary to avoid injury to the religious sensitivities of people of the religion?

467. Justice Hampel found that the relevant sensitivities which must be considered are not the subjective sensitivities of one person, rather the sensitivities common to adherents of the religion. Her Honour said that the sensitivities are the common religious sensitivities which are to be contrasted with, for example, the social or cultural sensitivities of adherents of the religion.<sup>444</sup>

468. Her Honour found it compelling that CYC had not taken any steps to prevent people other than married couples who engaged in sexual activity from staying at the adventure resort, or engaging in sexual activity at the adventure resort. Justice Hampel found that the logical conclusion of CYC's failure to take such steps was that 'it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage, to refuse bookings to same sex attracted people, or people who engaged in sexual activity outside marriage'.<sup>445</sup>
469. Therefore, if it was not necessary to exclude other same sex attracted people, or people who had, or might, while at the adventure resort, engage in sex outside marriage to avoid injury to the religious sensitivities of the Christian Brethren, then it was not necessary to exclude the WayOut group on that ground.

### Genuine religious beliefs or principles

470. In determining the applicability of the exemption under section 77 of the 1995 Act, her Honour found that the relevant question was 'whether the refusal was necessary to comply with the genuine religious beliefs or principles' of CYC.
471. Justice Hampel found that CYC's personnel genuinely held beliefs about marriage, sexual activity and sexual orientation which were based on their beliefs as members of the Christian Brethren and that these beliefs, were, for the purposes of section 77 of the 1995 Act, religious beliefs, genuinely held. However, CYC had not made out a claim for an exception under this section because of the reasons identified above, including, the manner in which the adventure resort is operated such as marketed to secular and religious groups.<sup>446</sup>

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441 Ibid [308].

442 [2010] EWCA Civ B1.

443 [Cobaw Community Health Services v Christian Youth Camps Ltd & Anor \[2010\] VCAT 1613, \[309\]](#).

444 Ibid [329].

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445 Ibid [344].

446 Her Honour made a declaration that CYC had committed discrimination in breach of the 1995 Act and ordered that CYC pay compensation of \$5,000 for the hurt and distress caused.

## Exceptions relating to employment

### Employment: domestic or personal services

472. A person may discriminate in relation to employment for positions involving domestic and personal services, including child-care services, in their own home.
473. The permanent exception extends beyond an individual who employs somebody to work in their own home. It also covers employers, such as employment agencies, who provide staff to perform home-based domestic or personal care services where the person receiving the services makes a particular request. [Section 24](#) of the Equal Opportunity Act sets out the following illustrative example:

An agency employs people to provide personal care services. A woman contacts the agency and requests that it provide a carer to assist her with personal care in her home. The woman tells the agency that the carer must be female. The agency may discriminate in determining who should be employed to provide personal care to the woman as the services will be provided in the woman's home, and she has specifically asked for a female carer.

### Employment: care of children

474. [Section 25](#) of the Equal Opportunity Act provides a permanent exception for employment that involves the care, instruction or supervision of children provided that the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.
475. The exception extends to the prohibitions on discriminating against both employees and job applicants ([section 16](#) and [18](#) of the Equal Opportunity Act). However, the exception does not extend to post-secondary education providers.

476. The exception, as it appeared in the 1995 Act, was considered by the Tribunal in an application for a temporary exemption brought by the American Institute for Foreign Study (AIFS).<sup>447</sup> In that case, the AIFS sought a temporary exemption from the 1995 Act to enable it to discriminate against Australian candidates for positions as 'au pairs', or nannies, in the USA. Due to the USA's visa requirements, candidates had to be of a certain age and physical fitness and also had to disclose other personal characteristics, such as their nationality and place of birth, as these factors were relevant to the visa fees payable.
477. The Tribunal referred to the permanent exceptions relating to domestic or personal services and the care of children. The Tribunal said that, while neither of those permanent exceptions entirely covered the proposal by AIFS, that proposal was nonetheless 'within the spirit' of the existing exceptions. On that basis, the Tribunal decided to grant AIFS a temporary exemption permitting it to discriminate in the terms sought.

### Employment: genuine occupational requirements

478. [Section 26](#) of the Equal Opportunity Act allows employers to limit the offering of employment to people of one sex where it is a genuine occupational requirement that employees be people of that sex, or necessary for authenticity or credibility in art/performance. It is important to note that this permanent exception only applies in relation to certain protected characteristics, in certain circumstances. It does not apply generally, or in relation to all characteristics that are protected by law.

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447 [American Institute for Foreign Study \[2000\] VCAT 432.](#)

479. [Section 26\(2\)](#), provides a number of examples of circumstances where it may be a 'genuine occupational requirement' for a person to be of a particular sex, including where the employment:
- can only be performed by a person having particular physical characteristics other than strength or stamina
  - needs to be performed by a person of a particular sex to preserve decency or privacy
  - includes the conduct of searches of the clothing or bodies of people of that sex (for example, security staff required to conduct physical searches)
  - the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex (as may be the case for some cleaners)
  - the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress (for example, a sales assistant working in a women's lingerie department).
480. The threshold test for genuine occupational requirements under section 26 differs to the test for 'inherent requirements of the job' under the *Disability Discrimination Act* (Cth), which is not defined. Accordingly, federal case law on the 'inherent requirements' has limited relevance to section 26, and should be used cautiously.
481. Further, [section 26\(3\)](#) allows employers to limit the offering of employment to people of a particular age, sex or race, or to people with or without a particular disability in relation to a dramatic or artistic performance, entertainment, photographic or modelling work, or any other employment provided that the discrimination is necessary for 'authenticity or credibility'.
482. An example of employment other than dramatic or artistic related work that may require discrimination 'for authenticity' is the employment of an Indigenous person to provide educational information about Indigenous culture at a cultural centre.<sup>448</sup>

483. [Section 26\(4\)](#) allows employers to discriminate on the basis of physical features in the offering of employment in relation to a dramatic or artistic performance, photographic or modelling work or any similar employment. The term 'similar employment' in this subsection limits the exception to dramatic or artistic related work for which a person's physical features are relevant.<sup>449</sup>
484. Cases such as *Georgina Martina Inc*<sup>450</sup> do not provide definitive guidance on how much of a job needs to fall within the relevant exception for it to apply. For example, even situations envisaged by the Act, such as fitting of clothes as a genuine occupation requirement under subsection 26(2)(b), are likely to involve other activities such as stock maintenance, cash register sales etc. Further case law is needed to provide clarity about the scope of these provisions.

#### Employment: political employment

485. [Section 27](#) of the Equal Opportunity Act allows discrimination on the grounds of political belief or activity in the offering of employment to a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment. According to the Explanatory Memorandum, it is intended that this exception apply only to employment where a person's political belief or activity is relevant to the job, and employment with the Australian Electoral Commission.<sup>451</sup>

#### Employment: welfare services

486. [Section 28](#) of the Equal Opportunity Act allows an employer to limit an offer of employment to people with a particular attribute where the employment is to provide services that:
- are special measures under [section 12](#) of the Equal Opportunity Act
  - meet the special needs of people with a particular attribute under [section 88](#) of the Equal Opportunity Act if those services can be provided most effectively by people with that attribute.

449 Ibid.

450 [2012] VCAT 1384.

451 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic), 24.

448 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic), 24.

487. According to the Explanatory Memorandum, the circumstances in which a service ‘can be provided most effectively’ by a person with the same attribute as the target group of the services is not defined in the section, as there are a range of reasons why services may be provided most effectively by a person from the same group as the target group. For example, it may be that only a person from the target group will have insight into the particular issues faced by the target group, or it may not be culturally appropriate to have anyone other than a member from the target group providing the services, or the target group may have a fear or mistrust of anyone who is not from the target group because of their experience.<sup>452</sup> However, this should be based on more than a personal preference or prejudice.
488. In *Georgina Martina Inc*,<sup>453</sup> an application was made for a temporary exemption to enable the applicant – a high security 24-hour women’s refuge – to employ women only, to offer services only to women and their children, to provide accommodation only to women and their children and to advertise these matters. The applicant indicated to the Tribunal that it intended to appoint women only to all roles within the organisation, rather than just counsellors or other front line staff.
489. Before granting the temporary exemption, the Tribunal had to consider whether such a temporary exemption was necessary, or whether the proposed discrimination was already authorised by the Equal Opportunity Act because it was a special measure, or because it fell within one of the permanent exemptions, including [section 28](#).
490. While Member Dea considered that the proposals to discriminate in the provision of accommodation and services were covered by permanent exceptions to discrimination – particularly [section 60](#) (welfare measures) and [88](#) (special needs) of the Equal Opportunity Act, she concluded that the permanent exception under [section 28](#) did not permit the organisation to restrict employment to women across all areas of its operations, because that would go beyond what was necessary to ‘most effectively’ provide services to the organisation’s clients. Member Dea said:
- Arguably, the available material does not sufficiently prove that the services can be provided most effectively by women rather than men. While the arguments put by the applicant and the Commission appear fair and reasonable, they are not supported by objective evidence about the effectiveness of service delivery by women as compared with men. That evidence could take the form of a survey which shows that clients would not wish to have any interactions with any men irrespective of their role. Evidence that men had been employed and had been less effective in their roles than women might be sufficient.<sup>454</sup>
491. In considering whether the proposed conduct was covered by [section 28](#), Member Dea said:
- The front line roles whose focus is assisting women who seek refuge in a state of distress and on accessing supports and services in the aftermath of violence would most likely fall within section 28. However, the material before me does not allow me to conclude that all roles within the applicant organisation can be provided most effectively by women and so I am not persuaded that section 28 would operate with the effect that the employment of women only throughout the organisation could not be found to involve prohibited discrimination. In another case, evidence may be available such that the exception is proven to clearly apply to all roles.<sup>455</sup>
492. Although the Tribunal was not convinced that the proposal to restrict employment to women fell within the exception in section 28, it nonetheless decided to grant the organisation a temporary exemption to allow this to occur, in accordance with its powers under [section 89](#) of the Equal Opportunity Act. In doing so, the Tribunal considered that the granting of the exemption was consistent with the Charter and amounted to a reasonable limitation on the right to equality. [Chapter Nine](#) of this resource deals with the Tribunal’s power to grant temporary exemptions.

452 Ibid [25].  
453 [\[2012\] VCAT 1384](#).

454 Ibid [66].  
455 Ibid [69-70].

493. In *Domestic Violence Victoria (Anti Discrimination Exemption)*,<sup>456</sup> the Tribunal granted an exemption for Domestic Violence Victoria Inc to advertise for and employ women only. In granting the exemption the Tribunal noted, as determinative factors, the fact that any staff member could be the first point of contact for women seeking direct assistance in relation to family violence. In addition, the fact that the applicant was involved in projects requiring its staff to liaise closely with victims of family violence, and believed that users would not avail themselves of its services if male employees were present were also reasons for the application being granted. Further, the Tribunal considered that the limit imposed by this exemption was reasonable and justified under the Charter.

#### Employment: youth wages

494. [Section 28A](#) of the Equal Opportunity Act provides for an exception that enables an employer to discriminate on the basis of age in paying an employee who is under the age of 21 years. The effect of section 28A is to authorise, under the Equal Opportunity Act, the payment of junior rates of pay provided for under certain instruments (for example in a modern award).
495. According to the Explanatory Memorandum, the purpose of the exception is to clarify that the payment of an employee under the age of 21 years according to their age, does not amount to unlawful discrimination.<sup>457</sup>

#### Employment: early retirement schemes

496. Under [section 29](#) of the Equal Opportunity Act, it does not amount to unlawful discrimination if an employer considers the age of an employee, together with that employee's eligibility to receive a superannuation retirement benefit, in deciding the terms on which to offer an employee an incentive to resign or retire.

#### Employment related areas: reasonable terms of qualifications

497. [Section 37](#) of the Equal Opportunity Act provides that where a person cannot meet the terms or requirements of an occupational qualification because of an impairment, it is not unlawful discrimination for a qualifying body to set reasonable terms in relation to the occupational requirement, or to make reasonable variations to those terms, so that the person can practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates.

#### Exceptions relating to education

##### Education: standards of dress and behaviour

498. An educational authority is permitted under [section 42](#) to set and enforce reasonable standards of dress, appearance and behaviour for students.
499. In assessing whether the standard is reasonable, [section 42\(2\)](#) provides that the views of the school community are a relevant but not determinative factor.
500. According to the Explanatory Memorandum, section 42 is not intended to allow schools to apply standards in a way that unreasonably restricts the rights of students and teachers to adhere to religious dress codes, for example by wearing a turban or hijab.<sup>458</sup>
501. International treaties and case law have been significant in the development of this and similar exceptions.
502. In the case of *Begum, R (on the application of) v Denbigh High School*,<sup>459</sup> the House of Lords found that the school did not interfere with a pupil's right to manifest her religion by refusing to let her wear a jilbab (a full length, loose cloak) to school because 'Article 9 [of the European Convention on Human Rights on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.<sup>460</sup> The Lords' majority judgment turned on the fact that the claimant chose to attend a school that did not allow the jilbab to be worn, when in fact three other schools in the area did allow for the jilbab in their dress code.

456 Exemption Application No A48/2012, General Gazette Number G38, 20 September 2012, 2084.

457 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

458 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

459 [\[2006\] UKHL 15](#) (the *Begum* case).

460 *Ibid* [50] (Lord Hoffman).

503. The Lords also held that even if there had been an interference with the claimant's rights, the interference was objectively justified following the reasoning of the European Court of Human Rights (the European Court) in *Sahin v Turkey*.<sup>461</sup> In that case, the European Court held that there is a need for compromise and balance, recognising 'the value of religious harmony and tolerance between competing groups and of pluralism and broadmindedness.'<sup>462</sup> The Lords found that the school uniform policy at Denbigh High was developed following extensive consultation with Muslim students, parents and local mosques and that it served the wider educational purposes of promoting harmony. This aim was deemed important given the complex make-up of the school, with students from 21 different ethnic backgrounds and 79 per cent of students who were practising Muslims.

504. This case was followed in the case of *R (on the application of X) v Head teachers of Y School and Governors of Y School*,<sup>463</sup> in which the High Court of England and Wales upheld a school uniform policy that prohibited the niqab.

#### Education: age-based admission schemes and age quotas

505. Under [section 43](#) of the Equal Opportunity Act, educational authorities are allowed to select students for a program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of different age groups. According to the Explanatory Memorandum, this exception is intended to enable educational authorities to ensure the different developmental and learning needs of students of different ages can be catered for by schools.<sup>464</sup>

## Exceptions relating to the provision of goods and services and the disposal of land

### Goods and services: insurance

506. [Section 47](#) of the Equal Opportunity Act sets out limited circumstances under which insurers may discriminate against a person by refusing to provide an insurance policy.
507. Circumstances in which an insurer will be able to discriminate in the provision of insurance include if the discrimination is:
- permitted under Commonwealth anti-discrimination legislation<sup>465</sup>
  - based upon actuarial or statistical data on which it is reasonable for the insurer to rely
  - reasonable having regard to that data and any other relevant factors
  - in relation to a situation where no actuarial or statistical data is available and can not reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

### Goods and services: credit providers

508. [Section 48](#) of the Equal Opportunity Act allows credit providers to discriminate against people applying for credit on the basis of age. The section has been amended to be consistent with the [Age Discrimination Act 2004 \(Cth\)](#).
509. The exception provides that a credit provider will be able to discriminate on the grounds of age if:
- it is based on actuarial or statistical data on which it is reasonable for the credit provider to rely
  - the discrimination is reasonable having regard to the data
  - in a case where no actuarial or statistical data is available and can not reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

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461 *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported).

462 Ibid.

463 *R (on the application of X (by her father and litigation friend)) v Head teachers of Y School and Governors of Y School* [2007] EWHC 298.

464 Explanatory Memorandum to the Equal Opportunity Bill 2010 (Vic).

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465 Specifically, the [Sex Discrimination Act 1984](#), the [Disability Discrimination Act 1992](#), or the [Age Discrimination Act 2004](#).

### Goods and services: supervision of children

510. The provider of goods and services to a child is allowed to require the child be accompanied or supervised by an adult if there is a reasonable risk that the child may cause a disruption or endanger himself or herself or another person.<sup>466</sup> This exception is intended to protect the health and safety of children and the general public.

### Disposal of land: disposal by will or gift

511. It is not unlawful for a person to discriminate against any person on the basis of any attribute in the disposal of land by will or gift.<sup>467</sup>

### Exceptions relating to the provision of accommodation and access to public premises

#### Accommodation: unsuitable for children

512. A person may refuse to provide accommodation to a child or a person with a child if the premises are unsuitable or inappropriate for occupation by a child because of their design or location.<sup>468</sup>
513. According to the Explanatory Memorandum, the exception does not allow a person to refuse to provide accommodation where the premises are considered unsuitable for other reasons such as the amenity of other guests.<sup>469</sup>

#### Accommodation: shared accommodation

514. A person can discriminate in deciding who is to occupy residential accommodation if the provider of accommodation or a near relative resides in the premises, and it will accommodate no more than three people excluding the provider or near relatives. 'Near relative' includes a parent or grandparent, child or grandchild, spouse or domestic partner.<sup>470</sup>

#### Accommodation: welfare measures

515. [Section 60](#) of the Equal Opportunity Act provides that hostels or similar institutions which are run wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief are permitted to refuse accommodation to people who do not have the particular attribute.

516. By way of illustration, the Explanatory Memorandum provides the example of an aged care facility targeted at the Greek community, that refuses to accept non-Greek people. Such a situation would come under this exception.<sup>471</sup>

517. In *Georgina Martina Inc*,<sup>472</sup> VCAT found that the welfare measures exception applied to a refuge established for the welfare of women (and their children) fleeing domestic violence. As a result, it was lawful to discriminate against males over the age of 18 in relation to the provision of accommodation.

#### Accommodation: for students

518. The exception in [section 61](#) of the Equal Opportunity Act, allows educational authorities that operate an educational institution (including schools, colleges, universities or other education or training institution), wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment (as allowed by the exception in [section 39](#)) to provide accommodation wholly or mainly for students with that particular attribute.
519. The Explanatory Memorandum states that it is not intended that the exception allow discrimination in the allocation of accommodation to people who have been accepted into the accommodation by the educational authority.<sup>473</sup>

#### Accommodation: for commercial sexual services

520. [Section 62](#) of the Equal Opportunity Act provides that a person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis, such as a licensed brothel.

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466 [Equal Opportunity Act 2010 \(Vic\)](#), s 49.

467 [Equal Opportunity Act 2010 \(Vic\)](#), s 51

468 [Equal Opportunity Act 2010 \(Vic\)](#), s 58A.

469 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

470 [Equal Opportunity Act 2010 \(Vic\)](#), s 59.

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471 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

472 [Georgina Martina Inc \[2012\] VCAT 1384](#).

473 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

## Access to or use of public premises not reasonable

521. The Equal Opportunity Act has a specific exception for discrimination in access to public premises. [Section 58](#) allows discrimination in relation to the access or use of public premises where the discrimination cannot reasonably be avoided<sup>474</sup> or the discrimination is permitted because of the operation of a disability standard under the [Disability Discrimination Act 1992 \(Cth\)](#) or by virtue of a determination under the [Building Act 1993 \(Vic\)](#). In determining whether the discrimination can be reasonably avoided, all relevant facts and circumstances must be considered, including:
- a. the circumstances of the person with the disability, including the nature of their disability<sup>475</sup>
  - b. the nature of the measures required to provide or allow access to, or use of, the premises or facilities in the premises<sup>476</sup>
  - c. the person's financial circumstances<sup>477</sup>
  - d. the consequences for the person of avoiding the discrimination<sup>478</sup>
  - e. the consequences for the person with the disability of the person not avoiding the discrimination.<sup>479</sup>
522. More specifically, under [section 58\(3\)\(a\)](#) of the Equal Opportunity Act, discrimination will be permitted where the premises or facilities comply with, or are exempted from compliance with, a disability standard under the [Disability Discrimination Act 1992 \(Cth\)](#). Under that Act, statutory disability standards may be made to deal with reasonable adjustments, unjustifiable hardship and exemptions from the standards. Discrimination will also be permitted where a determination has been made under [section 160B](#) of the Building Act, which exempts a person from having to comply with disability standards under the [Disability Discrimination Act 1992 \(Cth\)](#) in relation to the building or land on which the relevant premises or facilities are situated.<sup>480</sup>

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474 [Equal Opportunity Act 2010 \(Vic\)](#), s 58(1).

475 [Ibid](#) s 58(2)(a).

476 [Ibid](#) s 58(2)(b).

477 [Ibid](#) s 58(2)(c).

478 [Ibid](#) s 58(2)(d).

479 [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869](#) [30].

480 [Building Act 1993 \(Vic\)](#) s 160B.

## Exceptions relating to clubs

### Clubs: clubs for minority cultures

523. A club that operates principally to preserve a minority culture may exclude a person from membership if that person is not a member of the group of people with an attribute for whom the club was established.

### Clubs: clubs for political purposes

524. [Section 66A](#) of the Equal Opportunity Act provides an exception for clubs that were established principally for a political purpose, to allow them to exclude from membership a person on the basis of political belief or activity.
525. The section was inserted in 2011, immediately prior to the commencement of the Equal Opportunity Act. According to the Explanatory Memorandum,<sup>481</sup> the exception was introduced to protect the operation of political clubs which now fall within the new definition of 'clubs'. Under the 1995 Act, a political club was not captured under the definition of 'club'.

### Clubs: clubs and benefits for particular age groups

526. Clubs established for people of a particular age group are permitted by [section 67](#) of the Equal Opportunity Act to exclude people from membership who are outside that age group. It must be reasonable to do so in the circumstances.

### Clubs: single sex clubs

527. The exception in [section 68](#) of the Equal Opportunity Act permits clubs to exclude a person from membership on the basis of that person's sex, if membership of the club is available only to persons of the opposite sex.
528. [Section 68\(2\)](#) imposes an obligation on a club relying on the exception to make its rules of eligibility for membership publicly available, without charge.

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481 [Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011 \(Vic\)](#).

## Clubs: separate access to benefits for men and women

529. Clubs are allowed to limit a member's access to benefits on the basis of their sex where it is not practicable for men and women to enjoy the same benefit together, and access to the same or an equivalent benefit is provided separately for men and women, or men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit.<sup>482</sup>
530. [Section 69\(2\)](#) of the Equal Opportunity Act sets out five matters that must be considered in determining whether the exception is valid, including the purposes for which the club is established, the membership of the club, the nature of the benefits provided, the opportunities for the use and enjoyment of those benefits by men and women, and any other relevant circumstances.
531. The Explanatory Memorandum uses the following example to illustrate the exception:

This exception may apply to allow clubs to limit access to facilities to members of one sex at certain times if the facilities only have change rooms suitable for use by members of one sex at a time. However, if a club does restrict access in this way it would need to provide equivalent access to members of the opposite sex in order to attract the protection of the exception.<sup>483</sup>

## Exceptions relating to local government

### Local government: political belief or activity

532. [Section 74](#) of the Equal Opportunity Act provides an exception to the prohibition in [section 73](#) of the Equal Opportunity Act on councillors discriminating against fellow councillors and council committee members in the performance of their public functions.
533. The exception means that a councillor of a municipal council may discriminate against another councillor or member of a council committee on the grounds of their political belief or activity. This exception is intended to allow councillors to form political alliances within municipal councils and to act on the basis of the political-parties to which councillors are members.

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482 [Equal Opportunity Act 2010 \(Vic\)](#), s 69.

483 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

# Chapter 9

## > Temporary exemptions by the Tribunal

### The exemptions

534. [Section 89](#) of the Equal Opportunity Act provides for the granting, renewing or revoking of exemptions by the Tribunal. The purpose of this section is 'to empower the Tribunal to exercise a broad discretion to grant, renew or revoke exemptions from provisions of the Equal Opportunity Act'.<sup>484</sup> This section states as follows.

#### 89 Exemptions by the Tribunal

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

- a. from any of the provisions of this Act in relation to –
  - i. a person or class of people
  - ii. an activity or class of activities
- b. from any of the provisions of this Act in any other circumstances specified by the Tribunal.

(2) An exemption remains in force for the period, not exceeding 5 years, that is specified in the notice.

535. This provision is reflective, in the main part, of section 83 of the 1995 Act. However, it is notable that the maximum period for which an exemption can remain in force under the Equal Opportunity Act has been extended to five years, from three years in the 1995 Act.

### Factors to be considered by the Tribunal

536. [Section 90](#) of the Equal Opportunity Act contains a list of the factors that must be considered by the Tribunal when assessing applications for the grant, renewal or revocation of an exemption.

537. The list of factors is as follows:

- a. whether the proposed exemption is unnecessary because:
  - i. an exemption or exception already applies to the conduct
  - ii. the conduct would not amount to prohibited discrimination (such as is a special measure).
- b. whether the proposed conduct is a reasonable limitation on the right to equality in the Charter.
- c. all the relevant circumstances of the case.

538. These factors were determined with the intention of reflecting the Tribunal's approach, at the time of drafting the Equal Opportunity Act, to considering exemption applications.<sup>485</sup>

539. A clear focus for Parliament in drafting [section 90](#) of the Equal Opportunity Act was the aim of providing the framework for consistency of exemption decisions by the Tribunal, in addition to providing clearer guidance to applicants about when exemption applications are required, and the information required to support an application.<sup>486</sup>

540. For the purposes of [section 90\(a\)](#), conduct will not amount to discrimination if it is a special measure under [section 12](#) of the Equal Opportunity Act. [Chapter 15](#) of this resource includes a detailed discussion of the special measures provision.

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484 [Georgina Martina Inc \[2012\] VCAT 1384](#).

485 [Explanatory Memorandum to the Equal Opportunity Bill 2010 \(Vic\)](#).

486 *Ibid*.

## Compatibility with the Charter

541. In exercising its powers to grant, renew or revoke exemptions from the Equal Opportunity Act, the Tribunal is acting in its capacity as a public authority and is, therefore, bound by obligations under the Charter.
542. As such, the Tribunal must consider whether the exercise of its powers limits any relevant Charter rights in a manner that is consistent with [section 7\(2\)](#) of the Charter. This requires the Tribunal to undertake a ‘balancing act’, weighing up the nature of the right; importance, purpose, nature and extent of the proposed limitation; whether the proposed limitation is reasonably likely to achieve its purpose; and, whether there is any other less restrictive means available of achieving that purpose.<sup>487</sup>
543. The Tribunal must also exercise the exemption power consistently with the purpose and objectives of the Equal Opportunity Act.

544. As stated by Justice Bell in [Lifestyle Communities \(No 3\)](#), in relation to the exemption power under section 83 of the 1995 Act:

[O]n my reading of the exemption provisions and in the context of the purposes of the *Equal Opportunity Act* and the legislation as a whole, the discretion to grant an exemption must be exercised taking those purposes into account. It could not be exercised in a way that would defeat them. To interpret the provision otherwise is to allow the exercise of the discretion to be directly disobedient of the parent legislation, which I cannot accept on first principles. In the legislative order of things, the human rights purposes are primary and the exemption power is secondary. The Charter steps in to strengthen the operation of the discretion in these respects by requiring it to be exercised compatibly with human rights.<sup>488</sup>

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487 See, for example, [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869](#).

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488 [Lifestyle Communities Pty Ltd \(No. 3\) \[2009\] VCAT 1869 \[30\]](#).