

# SECTION 8

## RECOGNITION AND EQUALITY BEFORE THE LAW

### Section 8

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

#### **POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 8?**

You will need to consider section 8 if you are preparing or assessing legislation, or a policy or a program that draws distinctions between people or groups based on one or more of the attributes in the *Equal Opportunity Act 1995*, where this may result in less favourable treatment to some people or groups. You will also need to consider section 8 if the legislation, policy or program would have a disproportionate impact on a person or group of people with a particular attribute even though no distinction is drawn overtly.

The attributes are currently age; breastfeeding; gender identity; impairment; industrial activity; employment activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes. As the protection against discrimination under the Charter is linked to the attributes set out in s. 6 of the Equal Opportunity Act, which may change over time, you should check the Equal Opportunity Act to see if any additional attributes have been included.

For example, consideration of s. 8 and the reasonableness of any proposal to limit it may be required if your legislation, policy or program:

- establishes eligibility criteria for payment plans (for example, under the *Infringements Act 2006*);
- contains measures that are attempting to assist persons who have been socially, culturally and/or economically disadvantaged;
- takes steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged;
- provides for the delivery of an entitlement or service to some sectors of society and not others;
- assists or recognises the interests of Aboriginal persons or members of other ethnic groups;
- is stated in neutral terms but has a disproportionate impact on a sector of the community whose members have one or more of the attributes listed above;
- deals with any of the human rights set out in the Charter in a discriminatory way: for example, if the legislation curtails freedom of expression if a person has engaged in industrial activity;

- sets age bands that are expressed as protective measures (for example, for lawful consumption of alcohol); graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting);
- establishes eligibility requirements for access to legal aid.

These policy triggers are not comprehensive.<sup>44</sup>

## DISCUSSION

Section 8 establishes a series of recognition and equality rights.

### Recognition before the law

The right to recognition as a person before the law means that the law must recognise that all people have legal rights. However, this right does not mean that persons who do not otherwise have legal capacity, for example, to enter a contract, have such capacity. Whether a person has legal capacity is determined by separate rules not contained in the Charter. In the same way, this right does not confer 'standing' upon a person to bring proceedings in a court; the rules relating to legal standing are not contained in the Charter.

### Equal protection against discrimination

The right of every person to be equal before the law and to be entitled to the equal protection of the law without discrimination 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities.'<sup>45</sup>

This means that the government ought not to discriminate against any person, and the content of all legislation ought not to be discriminatory. For example, when the government regulates the provision of education services it should legislate and deliver those services in a non-discriminatory way. It also means that public authorities must not discriminate against people when enforcing the law and they must not apply legislation in an arbitrary or discriminatory manner. However, this is not to say that the Charter guarantees or seeks to give effect to the International Covenant on Economic, Social and Cultural Rights, for it does not. Rather, the Charter requires that if a public authority decides to offer a social service or government program, it must not discriminate in the way the service is provided.

### What is discrimination?

Discrimination is already prohibited under Victorian law. Discrimination, in relation to a person, is defined in s. 3 (1) of the Charter to mean: 'discrimination (within the meaning of the *Equal Opportunity Act*) on the basis of an attribute set out in section 6 of that Act'. Legal and policy officers should apply this definition when examining s. 8, and, in particular, they should refer to ss. 7 – 9 of the Equal Opportunity Act for guidance.

Discrimination is an impermissible differential treatment that results in less favourable treatment, based on one or more of the attributes listed in the Act. The Equal Opportunity Act prohibits **direct discrimination**: that is, a law or policy that expressly treats people differently on the basis of a particular characteristic. It also prohibits **indirect discrimination**: for example, an apparently general law or policy that, although it appears neutral on its face, impacts differently on different groups in its effect. For example:

- a policy that requires a person to be over fifty years old to work as a judge. This is direct discrimination on the basis of age.
- a law that required all employees of a public authority to be clean shaven. This is an example of indirect discrimination on the basis of religious belief or activity. It discriminates against those men whose religion requires them to grow a beard.

44 Recall that the policy triggers listed in the Charter Guidelines are not indicative of whether a particular legislative provision infringes the right. Their purpose is rather to draw your attention to whether a provision is likely to have some impact on the right, or 'interfere' with, or impose some limit on, a particular right. If a provision does so, it will be necessary to consider whether the interference or limitation imposed on the right is *reasonable and justified*.

45 *United Nations Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 26 (1994) [12].*

The discrimination must relate to one of the attributes listed in the *Equal Opportunity Act 1995*.

Differentiation will also be justified if the criteria for differentiation are reasonable and objective and the aim is to achieve a legitimate purpose. This is discussed further below.

The case law from other jurisdictions suggests that differentiation on the basis of inherent, immutable characteristics such as race, sex and sexual orientation will be especially difficult to justify.<sup>46</sup>

### Enjoyment of rights without discrimination

This provision ensures that every person should be able to enjoy the human rights that are set out in the Charter, without discrimination. For example, as all people have the right to peaceful assembly, this right should not be restricted to only people who possess particular political beliefs. This section is limited to the right to enjoy the human rights that are set out in the Charter, as the term 'human rights' is defined in s. 3(1) to mean the civil and political rights set out in Part 2 of the Charter.

### REASONABLE LIMITS

Not all differences in treatment are discriminatory – only those that treat one group less favourably and that have no objective and reasonable justification. If you think an aspect of your policy, program or legislative provision may not comply with s. 8, you will need to consider whether it is nonetheless permitted under the Charter. This may occur in two ways:

- the provision may come within the exception in s. 8(4) of the Charter;
- like all of the human rights protected in the Charter, s. 8 may also be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

### Section 8(4): express exception

Human rights law recognises that formal equality can lead to unequal outcomes. To achieve substantive equality, differences of treatment may be necessary. Section 8(4) recognises this and provides that certain differential measures do not constitute discrimination, namely, measures 'taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination'. This sub-section ensures that such measures do not breach the Charter.

Under this section, measures taken for the purpose of assisting or advancing persons or groups of persons who are disadvantaged because of prior discrimination do not themselves constitute discrimination.

For example, if you are able to demonstrate that a specific group within the community is in need of specific short-term assistance, which is unavailable to others, for the purposes of addressing or alleviating ongoing disadvantage related to their membership of that group, then it is unlikely that such a measure will amount to discrimination.

Note that s. 8(4) differs considerably from s. 82 of the Equal Opportunity Act which relates to welfare measures and special needs. If your policy or program does not comply with ss. 8(2) or 8(3) of the Charter, you will need to ensure it satisfies s. 8(4) (or section 7) **and** section 82 of the Equal Opportunity Act.

### Section 7: general limitations clause

If the policy gives rise to a *prima facie* issue of discrimination under s. 8 but does not fall within s. 8(4), you will need to consider whether s. 7 applies. Discrimination will only occur if it cannot be demonstrated that the measures are justified under the general limitations clause outlined in s. 7 of the Charter. That is, if the measures are a 'reasonable limit as can be demonstrably justified in a free and democratic society' they will not constitute discrimination. You should refer to Part 2 of these Charter Guidelines for more information on s. 7.

<sup>46</sup> See *Ghaidan v Godin-Mendoza* [2004] UKHL 30; *Quilter v Attorney-General* [1998] 1 NZLR 523.

### KEY POINTS TO REMEMBER:

- The law must recognise that all people have legal rights, but this does not mean that persons who do not otherwise have legal capacity obtain that capacity because of s. 8.
- Public authorities must not discriminate against people when enforcing or applying the law and all people have the right to be protected against discrimination.
- Legislation must not be applied in an arbitrary or discriminatory manner.
- A policy or program will give rise to a *prima facie* issue of discrimination if it results in direct or indirect discrimination on the basis of one or more of the attributes in the Equal Opportunity Act.
- These attributes are currently: age, breastfeeding, gender identity, impairment, industrial activity, employment activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.
- Discrimination can arise on more than one ground (for example, a policy refusing pregnant employees access to sick leave may involve discrimination on the basis of both sex and pregnancy) and an attribute may be broken up into sub-categories (for example, the provision of different services to people with disabilities based on the nature of their disability may constitute discrimination).<sup>47</sup>
- Not every form of differential treatment is discriminatory.

<sup>47</sup> Note though that any legislation, policy or program making intra-attribute distinctions will need to be carefully assessed under the Charter, in particular under s. 8(4) and s. 7.

### Circumstances in which discrimination is permitted

- The prohibition on discrimination will not apply to:
  - measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination: s. 8(4). For example, if you are able to demonstrate that members of a specific group within the community are in need of specific short-term assistance, which is unavailable to others, for the purposes of addressing or alleviating ongoing disadvantage related to their membership of that group, then it is unlikely that such a measure will amount to discrimination.
  - measures that can be justified under the general limitations clause in s. 7 of the Charter. That is, if the measures are a 'reasonable limit as can be demonstrably justified in a free and democratic society'.

### MEASURES TO IMPROVE COMPLIANCE

The *Equal Opportunity Act* has been in operation for many years now in Victoria. Most departments and government agencies will have already developed policies covering issues around the prohibition of discrimination. An important initial step for legal and policy officers will be to consider the ways in which the Charter interacts with the Equal Opportunity Act.

There are a number of ways to increase compliance of your policy with s. 8 of the Charter:

- If your policy or program makes a distinction on the basis of one of the attributes listed in the Equal Opportunity Act, make sure it is inclusive and not exclusive in its effect. For example, if your policy or program is aimed at people living in relationships, it should be developed so that, where relevant, it applies equally to married couples, de facto couples, and same-sex couples.

- If your policy or program appears to be discriminatory, consider the underlying purpose or reason for the distinction it relies on. Ask whether:
  - the reason for the distinction is consistent with the objectives of the policy;
  - the intention of the policy is to achieve an important policy objective and it is not designed to discriminate;
  - the distinction is sufficiently clear to meet its purpose;
  - there was no alternative means to achieve the policy objective without discrimination;
  - the basis for the distinction can be supported by reliable information.

When considering whether a provision in legislation, a policy or a program is a measure falling within the exception in s. 8(4), you will need to consider the following questions:

- Is the legislation, policy or program shaped this way because it is aimed at assisting or advancing persons or groups of persons who are disadvantaged?
- What is the nature of the disadvantage suffered by the person or group?
- Is there any evidence to support the existence of that disadvantage?
- How will your legislation, policy or program assist in addressing that disadvantage?
- Can you measure the results of your action? For example, can you currently determine or will you be able to determine in the future whether your action has been successful in assisting or advancing persons who have been disadvantaged by discrimination?<sup>48</sup>

<sup>48</sup> These questions were drawn from *The Guidelines on the New Zealand Bill of Rights Act 1990*. (Section 8(4) of the Charter was modelled on section 19(2) of the New Zealand *Bill of Rights Act 1990*). (New Zealand Ministry of Justice, *The Guidelines on the New Zealand Bill of Rights Act 1990* (2004) <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>).

If you can demonstrate that your legislation, policy or program is a measure falling within the exception in s. 8(4), it will not constitute discrimination under the Charter. However, any such programs should be regularly reviewed to ensure the justification still exists.

## RELATED RIGHTS AND FREEDOMS

Section 8 requires policy officers to consider the impact of government policy on all sectors of society. It is consequently related to all of the other human rights protected in the Charter and is specifically related to:

- protection from torture and cruel, inhuman or degrading treatment (s. 10);
- freedom of movement (s. 12);
- the right to freedom of thought, conscience, religion and belief (s. 14);
- the right to freedom of expression (s. 15);
- protection of families and children (s. 17);
- cultural rights (s. 19).

## HISTORY OF THE SECTION

Section 8(1) was modelled on article 16 of the ICCPR. Section 8(2) was modelled on article 2(1) of the ICCPR. Section 8(3) was modelled on article 26 of the ICCPR. Section 8(4) was modelled on section 19(2) of the New Zealand Bill of Rights Act 1990.

Similar rights exist in comparative law. Refer to Appendix H for further information.

## BIBLIOGRAPHY

1. *United Nations Human Rights Committee, General Comment 18*, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR\GEN\1\Rev.1 at 26 (1994).