The Charter of Human Rights and Responsibilities

> Section 8 – Right to recognition and equality before the law

**Scope of the right**
Section 8 of the Charter protects three different but related rights.

1. **The right to recognition as a person before the law**
   The first right in section 8 is the right to recognition as a person before the law. This is an absolute right which, under international law, cannot be limited under any circumstances.
   The essence of this right is equality of legal capacity, for example, the capacity to enter into contracts or access Government services. In some countries, such capacity is denied to certain groups (such as women or particular ethnic groups).

2. **The right to enjoy other human rights free from discrimination**
   The second right in section 8 is the right to enjoy other human rights without ‘discrimination’. Everyone has the same rights and deserves the same level of respect. This means that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory way.

   **Note:** Under the Equal Opportunity Act 2010, public authorities also have a positive duty to take reasonable steps to eliminate discrimination when they are acting as an employer or service provider, for example, in education or the provision of accommodation.

   Discrimination refers to the definition of discrimination in the Equal Opportunity Act, which includes discrimination on the basis of:
   - age
   - breastfeeding
   - employment activity
   - gender identity
   - disability
   - industrial 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
   - personal association with a person who is identified by reference to any of the above attributes.

3. **The right to the protection of the law without discrimination**
   Section 8 of the Charter also provides that everyone is entitled to equal protection of the law without discrimination.
   This right refers to the enforcement and administration of the law.
Special measures

Section 8(4) of the Charter makes clear that measures taken for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. This allows for what are sometimes called ‘special measures’. For example, some programs aimed at addressing disadvantage confronting many Aboriginal Victorians would qualify as special measures. Employment programs for people with disabilities, when there is evidence that that group has been traditionally under-employed, could also qualify as special measures.

Case examples

*Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009)

In this matter, Lifestyle Communities Ltd, which runs aged care facilities, sought an exemption from the *Equal Opportunity Act 1995* (Vic) to enable it to provide places only to people aged over 50. The Victorian Civil and Administrative Tribunal held that such an exemption would not constitute a special measure under section 8(4) of the Charter, nor was it justified under section 7 as a reasonable limitation on the right to equality before the law. In the Tribunal’s view, there was no reason to exclude all applicants under 50 – the company’s proposal to do so being based on stereotypes about their suitability to live in the type of accommodation it provides.

*Parks Victoria (Anti-Discrimination Exemption) [2011]*

In another case, Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. The Tribunal found that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The Tribunal was satisfied that the measure was proportionate because at the time the application was made only 7.6 per cent of Parks Victoria’s workforce was Indigenous. This measure of limiting the employment opportunity to Aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

Section 8 of the Charter of *Human Rights and Responsibilities Act 2006* says that:

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.

These rights are modelled on Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

Note: Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.
Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights.

Section 8 could be engaged by activities that:

• provide for the delivery of an entitlement or service to some groups but not others
• assist or recognise the interests of Aboriginal persons or members of other ethnic groups
• are stated in neutral terms but have a disproportionate impact on a sector of the community whose members have one or more protected attributes under the Equal Opportunity Act 2010 (for example, sex, race, age or disability)
• deal with any of the human rights set out in the Charter in a discriminatory way. For example, if the legislation curtails freedom of expression or if a person has engaged in industrial activity
• set age brackets that are expressed as protective measures, graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting)
• establish eligibility requirements for access to services or assistance (such as legal aid)
• contain measures that aim to assist people who have been socially, culturally or economically disadvantaged
• take steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged (positive discrimination)
• regulate access to infrastructure and public facilities including building, roads, transport, schools, housing and hospitals
• affect information and communications services including electronic services
• regulate access to public services including education, healthcare, the justice system, courts, voting and advocacy
• provide for mobility aids, assistive devices and technologies designed for people with disabilities
• set standards or guidelines for access to facilities and services to ensure businesses that provide public services take into account access for people with disabilities.

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