

Companion Card and Discrimination Guidelines for AEIA Members

28 August 2002

AEIA, in conjunction with a Members' Working Party and Equal Opportunity Commission Victoria (EOCV), has been working for over a year on the implementation of Companion Card (CC) for people with severe disabilities who require a constant attendant carer. CC is due to be implemented end of 2002.

These Guidelines provide background on the issues raised by the implementation of CC, and are intended to guide members as to what may or may not be considered discriminatory behaviour. However, individual organizations should adopt our recommended CC Policy (see page 7) or develop their own policy, and possibly seek legal advice on their position.

It should be noted that, whilst CC is a Victorian-based initiative, all members should be mindful of their obligations under the discrimination laws of their own state and the federal Disability Discrimination Act 1992 (Commonwealth). These Guidelines provide information on relevant Victorian and federal legislation, as well as the CC.

EOCV is an independent statutory body that investigates and conciliates complaints of discrimination. Please contact the Commission if you have a query about any information in these Guidelines relating to the Equal Opportunity Act or the role of EOC. Free advice is available from the Commission on its enquiry line (see page 7).

Companion Card and Discrimination Guidelines for AEIA Members

WHAT IS COMPANION CARD?

The Companion Card (CC) is an initiative of VicNord, and is supported by the Equal Opportunity Commission of Victoria (EOCV) and the Victorian Government. However, CC is not an Act of the Victorian Parliament, and neither is it based directly on legislation.

The CC is a tool to assist in identifying people who, due to their severe disability, require the assistance of a constant attendant carer in order to pursue day to day activities within the community.

The Equal Opportunity Act 1995 (Vic) makes it illegal to discriminate against a person with a disability. In the case of the entertainment industry, it is possible that it is discriminatory to ask a person with a severe disability, who requires the assistance of a constant attendant carer, to pay for an admission ticket for that carer. This can be viewed as discriminatory because the person with a severe disability has to pay for the price of their own admission ticket in addition to that of their carer. Most other people in the community can attend an event for the price of one admission.

Therefore, EOCV recommends that holders of a CC should be issued a second ticket at no charge when they have purchased a first admission ticket.

COMPANION CARD ELIGIBILITY

In order to qualify for a CC, a person with a severe disability must meet strict criteria approved by the Victorian Department of Human Services, DisAbility Services. The person with a severe disability must first apply to the Department, which then identifies whether the disability necessitates assistance and support from an attendant carer in order for them to participate in leisure or recreational activities. Such a disability may not necessarily be immediately obvious to a casual observer, and means that the person is likely to need support in at least two of the following areas:

- Self care and management – this includes, but is not limited to, ensuring a person is not exposed to abuse, exploitation or potential harm from other people they may encounter, in either a physical, psychological, or monetary sense.
- Mobility – including moving from one area to another, walking, navigating wheelchair, sighted guiding and finding their way around.
- Communication – including purchasing tickets/refreshments/merchandise, verbal descriptions or explanations of visual arts, asking for assistance with finding the right seat/facilities, etc.
- Learning/cognition – includes reinforcing where the person is and what the person is doing there, helping the person adapt to a new environment, including familiarising them with key areas/ events on arrival and reassurance.

The CC is issued direct to the person with the severe disability – not the carer/companion. The carer/companion could be any person chosen by the person with a severe disability (i.e. the CC holder).

WHAT DOES THE EQUAL OPPORTUNITY ACT 1995 (VIC) SAY?

The relevant sections of the Act deal with 'direct' and 'indirect discrimination' based on a person's 'impairment' (disability). Under the *Equal Opportunity Act* 'impairment' (disability) means:

- (a) total or partial loss of a bodily function;
- (b) the presence in the body of organisms that may cause disease;
- (c) total or partial loss of a part of the body, including:
 - (i) a mental or psychological disease or disorder;
 - (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder;
- (d) malformation or disfigurement of a part of the body

Companion Card and Discrimination Guidelines for AEIA Members

The sections of the *Equal Opportunity Act* that are relevant to the entertainment industry and which are addressed by the CC scheme are:

SECTION 8

Direct Discrimination

(1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

(2) In determining whether a person directly discriminates it is irrelevant

(a) whether or not that person is aware of the discrimination or considers the treatment less favourable;

(b) whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.

The concept of direct discrimination is clear. You must not discriminate against a person based on their impairment or disability.

SECTION 9

Indirect Discrimination

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice:

(a) that someone with an attribute does not or cannot comply with; and

(b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and

(c) that is not reasonable.

(2) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case including:

(a) the consequences of failing to comply with the requirement, condition or practice;

(b) the cost of alternative requirements, conditions or practices;

(c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.

(3) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

Indirect discrimination is less clear. Generally it means that if a person is required to meet a requirement, condition or practice to achieve a similar outcome to people who do not have an impairment or disability, and the requirement, condition or practice is unreasonable, that person is being discriminated against.

This relates to CC in that, if a person requires an attendant carer to participate in day to day activities in the community, but has to pay for that person to attend an event or venue, then the financial impost constitutes 'indirect discrimination'.

SECTION 42

Discrimination in the provision of goods and services

(1) A person must not discriminate against another person –

(a) by refusing to provide goods or services to the other person;

(b) in the term in which goods or services are provided to the other person;

(c) by subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.

(2) Sub-section (1) applies whether or not the goods and services are provided for payment.

Companion Card and Discrimination Guidelines for AEIA Members

SECTION 10

Motive is irrelevant to discrimination

In determining whether or not a person discriminates, the person's motive is irrelevant.

WHO IS CONSIDERED RESPONSIBLE FOR THE DISCRIMINATION?

The Act is very clear in saying that all parties to a discriminatory act are equally responsible for that discrimination. In AEIA's long and detailed discussions with EOCV, it was made clear that, should discrimination occur in the usual entertainment ticketing model then the promoter/producer, venue and ticketing agent are all equally responsible for the discrimination.

The relevant sections of the Act dealing with the issue of responsibility are:

SECTION 11

Discrimination by acting with others and by not acting It is irrelevant whether discrimination occurs by a person –

- (a) acting alone or in association with any other person;
- (b) doing an act or omitting to do an act.

SECTION 98

Prohibition of authorising or assisting discrimination

A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 3, 5 or 6.

SECTION 99

Liability of person who authorises or assists

If, as a result of a person doing any of the things specified in Section 98, the other person contravenes a provision of Part 3, 5 or 6, both person must be taken to have contravened the provision and a complaint about the contravention may be lodged against either or both of them.

SECTION 102

Vicarious liability of employers and principals

If a person in the course of employment or while acting as an agent –

- (a) contravenes a provision of Part 3, 5 or 6; or
- (b) engages in any conduct that would, if engaged in by the person's employer or principal, contravene a provision of 3, 5 or 6 – both the person and the employer or principal must be taken to have contravened the provision, and a complaint about the contravention may be lodged against either or both of them.

EXCEPTIONS – IS THERE PROVISION FOR EXCEPTIONS UNDER THE ACT?

Parts 3 and 4 of the Act, provide for exceptions. For example, venues built prior to the introduction of laws requiring access for mobility impaired patrons are sometimes allowed to offer limited access to wheelchairs due to the architecture of the building and the financial burden of Modifications.

It is important to note though that it is inadvisable to assume that an exception will be made in any circumstances, without first seeking legal advice or a formal exception from the Victorian Civil and Administrative Tribunal (VCAT).

Any judgment on an exception is based on what can be considered 'reasonable' in the circumstances.

There is a specific section in the Act that deals with possible exceptions in the provision of goods and services:

SECTION 46

Exception – special manner providing a service

Companion Card and Discrimination Guidelines for AEIA Members

A person may refuse to provide a service, or set reasonable terms for the provision of a service, to another person if the service would be required to provide in a special manner because of the other person's impairment or physical features and –

- (a) the person cannot reasonably provide the service in that manner; or
- (b) the person can only reasonably provide the service in that manner on more onerous terms than the person could reasonably provide the service to a person without that impairment or those physical features.

During discussions with EOCV, the AEIA posed a number of other relevant entertainment industry-based examples or questions regarding possible exceptions. Whilst there are no hard and fast rules, some practical examples of possible exceptions include:

- Demand – if an event is sold out completely or a price category or section is sold out completely and all sections of the community, including persons with disabilities, have had an equal access to tickets.
- Financial hardship – if the issuing of CC tickets is going to cause substantial hardship or greatly increase the financial impost on other patrons. It should be noted that it could be very difficult to prove such hardship.
- Physical constraints of the venue – if it not possible to offer mobility impaired people access to all price breaks or all sections. (Note – CC holders are not necessarily mobility impaired so this may not be a defence against a blanket policy, only in individual cases.)

EQUIVALENT PROVISIONS IN THE DISABILITY DISCRIMINATION ACT 1992 (COMMONWEALTH)

As previously mentioned, whilst CC is a Victorian-based initiative, all AEIA members should be mindful of their obligations under the discrimination laws of their own state, and the federal Disability Discrimination Act 1992 (Commonwealth). Relevant provisions from the federal legislation appear below.

5. Disability discrimination

(1) For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.

(2) For the purposes of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

6. Indirect disability discrimination

For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

11. Unjustifiable hardship

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and

Companion Card and Discrimination Guidelines for AEIA Members

(d) in the case of the provision of services, or the making available of facilities – an action plan given to the Commission under section 64.

24. Goods, services and facilities

(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

As with the Privacy Policy Guidelines issued by AEIA, the overriding consideration when considering a case brought before EOCV and possibly federal legislation, is whether the policy, practice or requirement is 'reasonable' having regard to:

- The consequences for the individual(s) who cannot receive or enjoy the service because of a particular attribute
- The availability and cost of alternatives available to the service provider.
- The financial resources of the service provider.

These factors are assessed objectively taking into account the views of the service provider and the person who requests the service.

Q: DO I HAVE TO HONOUR A COMPANION CARD AND ISSUE NO CHARGE TICKETS AT ALL TIMES?

A: The safest and easiest way to protect your organisation from accusations of discrimination, is to provide an additional ticket at no extra cost to the holder of a CC. This additional ticket for the carer should be of the same standard/value as that purchased, and for obvious practical reasons needs to be located physically close to the person with a CC.

It is recommended that CC tickets should also be available at every price break and for every event, in the same manner that tickets are available for all other members of the public.

Q: HOW DO I HANDLE SEAT AVAILABILITY AND CC?

A: Provision of CC seating, is dependent on seat availability at venue/s and event. However, every attempt should be made to advise potential patrons of CC availability. If additional tickets become available, potential CC holders should be given the opportunity to subscribe, as with other potential ticket buyers. In any event, if the event is over-subscribed, CC holders should also have been given reasonable access to tickets before such oversubscription.

SUGGESTED STATEMENT OF SUPPORT FOR COMPANION CARD

Members are encouraged to adopt a statement of support for CC, which should appear with ticket information and be displayed at ticket outlets. The following wording has been developed by AEIA in conjunction with the Equal Opportunity Commission.

Companion Card and Discrimination Guidelines for AEIA Members

COMPANION CARD POLICY

[Name of organisation] is committed to ensuring that events it presents can be accessed and enjoyed by people with severe disabilities, including those people who rely on the assistance on a carer. Accordingly, [name of organisation] recognises and supports the principles of CC. Subject to the conditions [below], [name of organisation] will endeavour to ensure that patrons who require the assistance of a carer will not be required to pay for the cost of admission for their carer, when attending events presented by [name of organisation].

ADDRESSING COMPLAINTS

As already noted, individual organizations should develop their own policy with regard to CC. Any policy developed should include a complaints procedure. If appropriate, the organisation's existing complaint handling procedure may be applied.

USEFUL CONTACTS

DisAbility Services Division
Department of Human Services
Level 2, 555 Collins Street
MELBOURNE VIC 3000
Telephone: (03) 9616 8654
Fax: (03) 9616 7403
<http://hnb.dhs.vic.gov.au/ds/disabilitysite.nsf/>

Equal Opportunity Commission Victoria
3rd floor, 380 Lonsdale Street
MELBOURNE VIC 3000
Telephone: (03) 9281 7111
Toll free: 1800 134 142
Facsimile: (03) 9281 7171
www.eoc.vic.gov.au

Australian Human Rights and Equal
Opportunity Commission
Level 8, Piccadilly Tower
133 Castlereagh Street
SYDNEY NSW 2000
GPO Box 5218
SYDNEY NSW 1042
Telephone: (02) 9284 9600
Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
Facsimile: (02) 9284 9611
www.hreoc.gov.au