



# **pilch**

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## **Submission to the Scrutiny of Acts and Regulations Committee on its Review of the *Equal Opportunity Bill 2010 (Vic)***

**March 2010**

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## 1. Executive Summary

The *Equal Opportunity Act 1995* (Vic.) (**EO Act** or **Act**) has served Victoria well over the past thirty-odd years. However, a substantial body of evidence suggests that the Act is ill equipped to address modern day experiences of discrimination and inequality and that, consequently, the time is ripe to reform Victoria's equal opportunity framework.<sup>1</sup>

The Public Interest Law Clearing House (Vic) Inc (**PILCH**) and the PILCH Homeless Persons' Legal Clinic (**HPLC**) therefore commend the Attorney-General on his commitment to reforming the EO Act. PILCH and the HPLC also commend the Scrutiny of Acts and Regulations Committee (**SARC**) for the active and ongoing role it has played in reviewing the Act. PILCH welcomes the opportunity to make a submission to SARC's inquiry into the *Equal Opportunity Bill 2010* (Vic.) (**EO Bill** or **Bill**).

In the view of PILCH and the HPLC, the EO Bill is a significant step forward in the struggle against discrimination and inequality in Victoria. Importantly, it helps to bring the equal opportunity framework in line with the *Charter of Human Rights and Responsibilities Act 2006* (Vic.) (**Victorian Charter** or **Charter**). The EO Bill's emphasis on *prevention* of discrimination, for example, is crucial to addressing the underlying causes of discrimination and stopping discrimination (and its consequent harms) in its tracks. The Bill's proposed expansion of available enforcement mechanisms will prove key in equipping Victoria with the tools necessary to respond effectively to systemic discrimination, to empowering marginalised and disadvantaged individuals to realise their rights to non-discrimination and equality, and to de-institutionalising discrimination from laws, policies and practices. Moreover, in line with international human rights law, the EO Bill's focus on *substantive* equality makes it clear that it is not enough to address direct and indirect discrimination on prohibited grounds. Steps must also be taken to improve the de facto position of all individuals, especially the most marginalised and disadvantaged. This requires the adoption of positive measures to address the underlying causes of discrimination and inequality, and to ensure equality of opportunities and outcomes. Other reforms supported by PILCH and the HPLC include the characterisation of special measures as central to the realisation of substantive equality (and not as a form of discrimination), inclusion of volunteers in protections against discrimination, and the repeal of certain permanent exceptions (e.g., the exception in section 27B of the EO Act related to discrimination on the ground of gender identity).

Notwithstanding these positive developments, there are weaknesses in the EO Bill that threaten to undermine its effective operation, including, most significantly, its overarching object and purpose of eliminating discrimination and achieving substantive equality. In the view of PILCH and the HPLC, those weaknesses also render certain aspects of the EO Bill inconsistent with the Victorian Charter. Because of the short time frame for submissions, we have not had sufficient time to comment on all of the Bill's weaknesses (e.g., whether the reasonableness standard in the section 9 definition of indirect discrimination establishes a lower standard than that required by the

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<sup>1</sup> See generally Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) [**Gardner Report**].

Victorian Charter). We are concerned about the limited opportunity afforded to the community to comment on the specifics of the Bill and would, therefore, welcome the opportunity to discuss our submission further.

Focusing on some of the Bill's major shortcomings, and drawing on the authors' expertise and experience, PILCH and the HPLC make the following recommendations:

**Recommendation 1**

'Homelessness' should be included in the list of attributes enumerated in section 6 of the EO Bill.

**Recommendation 2**

'Irrelevant criminal record' should be included in the list of attributes enumerated in clause 6 of the EO Bill.

**Recommendation 3**

Permanent exceptions retained in the EO Bill should be repealed.

**Recommendation 4**

Persons wishing to discriminate in violation of the EO Bill should be required to apply to the Victorian Civil and Administrative Tribunal for an individual exemption. Such exemptions should be granted on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under section 7(2) of the Victorian Charter.

**Recommendation 5**

Section 75(1) of the EO Bill should be omitted.

**Recommendation 6**

A provision in any other Act that is intended to override the EO Bill should be explicitly identified in that other Act and should be subject to a sunset or review provision.

**Recommendation 7**

Existing laws that are not intended to override the EO Bill should be identified and amended as a matter of priority.

**Recommendation 8**

Section 89(2) of the Bill should not increase the maximum period of operation of exemptions from three to five years.

**Recommendation 9**

The exemptions regime should require successful exemption applicants to consider, on an ongoing basis, the need for their restrictive exemptions, taking into account the factors outlined in section 7(2) of the Victorian Charter.

**Recommendation 10**

Section 128(2) of the Bill should be omitted.

**Recommendation 11**

Adequate funding for the equal opportunity regime should be guaranteed.

**2. About PILCH and the HPLC**

PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights, by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to: address disadvantage and marginalisation in the community; effect structural change to address injustice; foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

The PILCH Homeless Persons' Legal Clinic (**HPLC**) is a specialist legal service that provides free legal assistance and advocacy to people who are homeless or at risk of homelessness. The HPLC also undertakes significant law reform, public policy, advocacy, legal education, and community development activities to promote and protect the fundamental human rights of people experiencing homelessness.

PILCH and the HPLC have a particular interest in the elimination of all forms of discrimination and the realisation of substantive equality. To this end, PILCH and the HPLC have facilitated numerous pro bono referrals and made countless submissions<sup>2</sup> related to discrimination on the grounds of homelessness, sex/gender, criminal records, and sexual orientation, amongst others. Moreover, PILCH and the HPLC have made significant contributions to the review of the EO Act, including the exceptions and exemptions regime. The present submission is made in the context of PILCH's efforts to address systemic discrimination and inequality.

**3. Prohibited Grounds of Discrimination**

Under its terms of reference, SARC is required to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly trespasses unduly upon rights or freedoms,<sup>3</sup> or is incompatible with the human rights set out in the Victorian Charter.<sup>4</sup> For the reasons set out in this submission, PILCH and the HPLC note that the continued omission of 'homelessness' and 'irrelevant criminal record' from the EO Act (and, by extension, the Charter) will continue to trespass unduly upon the rights of people experiencing homelessness and disadvantage, and is inconsistent with the purpose of both the amended EO Act and the Charter.

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<sup>2</sup> For further information, see PILCH, available at: [http://www.pilch.org.au/Law\\_Reform/](http://www.pilch.org.au/Law_Reform/); HPLC, available at: <http://www.pilch.org.au/hplcpolicy/>.

<sup>3</sup> See *Parliamentary Committees Act 2003* (Vic), s 17(a)(i).

<sup>4</sup> *Ibid*, s 17(a)(vii).

### 3.1 The Effect of Discrimination

#### (a) *Individual Consequences*

For PILCH clients, and particularly clients of the HPLC, discrimination can have extremely negative consequences. These can include hindering access to accommodation, employment, goods and services; exacerbating social exclusion and stigmatisation; entrenching homelessness; and, harmful mental and psychological effects.

Discrimination systematically excludes people from the things the general population takes for granted, including goods and services. The consequences of such discrimination can be particularly serious for people experiencing homelessness – who rely on those services to a greater extent than people with secure housing.

Discrimination can exacerbate social exclusion and stigmatisation of such individuals. An inability to access services, or the experience of unequal treatment when attempting to access services further marginalises and creates barriers to reintegrating into the community. People facing discrimination on the basis of their homelessness report feeling: ‘persecuted, sad, distressful, resentful, outraged, “small”, humiliated, confused, stressed out and lost’<sup>5</sup>.

Discrimination can entrench homelessness. For example, discrimination in the private rental market can prevent a person from breaking a cycle of homelessness. An inability to secure private rental increases the need to rely on transitional and crisis housing, which makes it more difficult to secure private rental accommodation in the future where a person’s recent housing history is disjointed and welfarised. Not having secure or permanent housing can impact an individual’s ability to access other goods and services, or to gain employment, which will also make escaping homelessness harder. The HPLC has found that almost half of respondents to a 2006 survey reported that discrimination on the grounds of homelessness or social status had prolonged their homelessness and had made it difficult to find a sustainable pathway out of homelessness.

Experiencing discrimination can also have health consequences. Recent research undertaken by VicHealth<sup>6</sup> clearly illustrates that people who suffer from discrimination are also more likely to develop problems such as depression and anxiety. The report notes that there is a strong link between poor mental health and poor physical health, so the impact of mental distress from discrimination is a double burden of ill-health. The report discusses a range of responses that people can have to discrimination, including suffering from depression, anxiety and anger, or engaging in self-destructive behaviour such as smoking, drinking, substance abuse or violence.

Discrimination, especially in the areas of private housing, room and caravan rental, and also in health, is both widespread and can result in significant psychological deterioration as well as material deprivation of the recipient. Indeed, consistent discrimination of this nature results in

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<sup>5</sup> PILCH Homeless Persons’ Legal Clinic, *Submission to the Victorian Attorney-General’s Independent Review of the Equal Opportunity Act 1995* (Vic) (2008), at 22.

<sup>6</sup> See VicHealth, *More than Tolerance: Embracing Diversity for Health* (2007), available at: <http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources/Freedom-from-discrimination/More-than-Tolerance.aspx>. Although the VicHealth research focuses on discrimination on the basis of race and cultural heritage, it is important to note that these negative effects extend to all forms of discrimination.

deepening of identification with the marginalised condition so as to make negotiation through their issues more difficult.<sup>7</sup>

(b) *Social Consequences*

Discrimination poses serious consequences for an individual, but also has a broader social effect.

The economic implications of discrimination are significant. By entrenching homelessness, unemployment and recidivism, discrimination can also put strain on public spending. A recent City of Sydney study showed that the public cost of someone remaining homeless is as much as \$34,000 per person every year.<sup>8</sup>

Discrimination also exacerbates social inequality by further disadvantaging those who are already disadvantaged. The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies. In the poorest areas of unequal societies, the quality of social relations and the social fabric are stretched to breaking point. A recent UK report, *Fairness and Freedom: The Final Report of the Equalities Review* notes:

There are substantial benefits to be gained from living in a more equal society. Gaps in educational attainment, employment rates or other opportunities impoverish us all. Research shows that not only does absolute poverty in itself reduce our productivity; so does the size of the gap between those at the top of society and those at the bottom. On several measures, that gap creates a drag on economic performance. This does not mean that the answer is to hold back those at the top or to sacrifice prosperity; but it does require focused effort on those who seem rooted at the bottom of the pile.<sup>9</sup>

### 3.2 Homelessness

Research indicates that people experiencing homelessness suffer direct and indirect discrimination on a regular basis. PILCH refers to, and endorses, the submission of the Council to Homeless Persons (CHP), and notes the examples contained in the CHP submission are strikingly similar to the stories expressed to the HPLC. For example, St Vincent de Paul Society reports that '[o]ur extensive experience in the [homelessness] sector leads us to believe that there is a significant issue in relation to discrimination against this particular group in the community who have very complex needs and are very vulnerable'<sup>10</sup>.

Direct discrimination is based on unfair and inaccurate assumptions about a person's lifestyle, character, capacity for work, and ability to pay for goods and services. Discrimination also occurs indirectly when requirements are imposed to access employment, or goods and services, which people experiencing homelessness are unable to meet. For example, service providers often require a permanent address or landline telephone number.

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<sup>7</sup> See Letter of Support from Jesuit Social Services to PILCH Homeless Persons' Legal Clinic (22 August 2002).

<sup>8</sup> City of Sydney and St Vincent's Mental Health Services, 'Help the Homeless: Spend Less, Spend Wisely', available at: <http://www.mhcc.org.au/images/uploaded/CitySydney-HelpHomeless.ppt#257.2,Overview>.

<sup>9</sup> The Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007), at 19, available at: [http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality\\_review.pdf](http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf).

<sup>10</sup> Letter of support from St Vincent de Paul Society to PILCH Homeless Persons' Legal Clinic dated 12 August 2002.

Discrimination on the basis of homelessness can occur for a number of reasons. People who are homeless find they are discriminated against because of factors such as: their appearance; their source of income (such as Centrelink benefits); association with or assistance by a welfare or specialist homelessness agency; or, being unable to meet certain requirements – such as having a fixed address. Poor presentation is a common trigger for discrimination. Participants in a 2006 consultation by the HPLC noted that being homeless and poor made it difficult to always present well: ‘the hospital thought I was in casualty because I wanted drugs, although I had an injury that was clearly visible (broken hand). Turned away by security (I never even got to see the Triage nurse). Police are constantly pulling me over as a result of my appearance’<sup>11</sup>. Discrimination also often occurs when despite an ability to pay for accommodation or services, an individual's only income is from Centrelink benefits. As one woman explained, ‘although I can’t prove it, I applied for more than 40 flats in 4 weeks and didn’t get one. Some places (share accommodation) also said ‘no’ once I said I was on a benefit’<sup>12</sup>. Welfare agencies and community organisations report that the mere association of a person with certain support services can be a ground of discriminatory treatment. For example, the Salvation Army Social Housing Service in Warrnambool reported that:

A middle aged man approached a local backpacker accommodation facility in Warrnambool and enquired whether they had any vacancies. He was told yes, so he went to the Salvation Army Social Housing Service for financial assistance. He went back to the backpackers and handed over a Salvation Army cheque for his accommodation. When the proprietor saw the cheque he said to the man, ‘Sorry. We’ve just had a busload arrive and no longer have any vacancies.’<sup>13</sup>

(a) *Discrimination in Accommodation*

Seventy per cent of homeless people surveyed by the HPLC in 2006 reported that they had experienced discrimination on the basis of homelessness or social status at the hands of accommodation providers. Respondents had experienced discrimination in private rental, boarding houses, transitional or crisis accommodation, hotels and public housing.

Discrimination in the provision of accommodation often occurs when accommodation providers refuse to accept full or even partial payment of bonds and rent from welfare agencies or the Office of Housing under the Housing Establishment Fund (HEF). Applicants on Centrelink benefits may face tougher conditions than other people. The Hamilton Accommodation Program reports that ‘[r]eal estate agents demand higher bonds from social security recipients. No real estate agents accept a full Office of Housing bond – tenants must put in at least one week’s cash themselves’<sup>14</sup>.

This discriminatory conduct serves to undermine the policy aims of the HEF, which is particularly disturbing given the heavy reliance on HEF as a means of securing emergency and medium term accommodation where crisis accommodation is unavailable.

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<sup>11</sup> PILCH Homeless Persons' Legal Clinic, *Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995* (Vic) (2008), at 18.

<sup>12</sup> *Ibid* at 16.

<sup>13</sup> *Ibid* at 17.

<sup>14</sup> PILCH Homeless Persons' Legal Clinic, *Promoting Equality: Homeless Persons and Discrimination* (2002), at 13.

Discrimination against people who are homeless may multiply the harms caused by the trigger for homelessness. For example, when women and children are fleeing domestic violence, discrimination may further serve to force them back into unsafe situations where they are unable to secure alternative accommodation. Emergency Accommodation Support Enterprise reported that women fleeing domestic violence often experience discrimination on the basis of their homelessness:

It is this organisation's general experience that single women with children – whether they be victims of domestic violence or young homeless women who are pregnant or parenting – have great difficulty in obtaining private rental regardless of whether it is housing or caravan park accommodation. One particular central caravan park in Bendigo advised a client that they had accommodation available. As soon as the client mentioned that the Emergency Accommodation Support Enterprise were working with her, they realised that she was homeless and a victim of domestic violence and advised her that they had made an error and had no vacancies.<sup>15</sup>

(b) *Discrimination in the Provision of Goods and Services*

A similar picture of discrimination emerged in relation to goods and services providers. Almost 60 per cent of respondents to a 2006 consultation had been discriminated against by goods and services providers on the basis of their homelessness. Discrimination was most often experienced from restaurants, cafés or bars, followed by banks, retail shops, hospitals and telecommunications providers.

Trams – target. Restaurants – look down on you. Bottle shop – won't serve people. Shops – get followed assume stealing. Phone – couldn't get extension, lost phone to cash converters. Hospitals – treated differently, 20 people come in after [me], get dealt with first, seem to serve everyone else first. Community Centre good – Oz House.<sup>16</sup>

Discrimination often results in rude and unequal treatment. One man stated that 'after walking into a pub, I was asked if I had any money before they would serve me'<sup>17</sup>. Another commented that, 'in shops if you are not dressed neatly or in a suit they take longer to get to you then you get a bum steer, they just want to get rid of you'<sup>18</sup>.

Philip Lynch, a former coordinator of the HPLC, reported that he experienced overt discrimination in a restaurant on the basis of the appearance of his client:

I recently arranged to meet some colleagues and an elderly homeless client at an inner-city café in Melbourne. When I arrived with the client, I was told that we were unable to be seated as we didn't have a reservation. There were numerous vacant tables in the café. My colleagues encountered no such problems when I waited around the corner with the client while they tried to get a table about five minutes later.<sup>19</sup>

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<sup>15</sup> PILCH Homeless Persons' Legal Clinic, *Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995* (Vic), January 2008, 17.

<sup>16</sup> Ibid at 18.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid at 19.

(c) *The Need to Add 'Homelessness' as an Attribute in the Bill*

Despite the pervasiveness of discrimination on the basis of homelessness and the serious consequences of discrimination, there is currently no legislation in Victoria or in Australia that provides equality and protection from discrimination to people who are homeless.

PILCH notes, and endorses, the submission of the Human Rights Law Resource Centre (**HRLRC**), and repeats and reiterates that international law requires Victoria to protect its citizens from discrimination and non-equality.

Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights (ICCPR)* and article 2(2) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* contain lists of attributes that are protected against discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. International jurisprudence establishes that the term 'other status' refers to a definable group of people linked by their common status.<sup>20</sup> Attributes are 'commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation'<sup>21</sup>.

The UN Committee on Economic, Social and Cultural Rights has commented that

[I]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.<sup>22</sup>

The Victorian Charter has enshrined certain civil and political rights in Victorian domestic legislation. Section 8 of the Charter deals with recognition and equality before the law, and provides that:

- every person has the right to recognition as a person before the law;
- every person has the right to enjoy his or her human rights without discrimination; and
- 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.

However, 'discrimination' for the purposes of section 8 of the Charter is limited to the list of attributes set out in the EO Act, which currently does not include homelessness. This is in

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<sup>20</sup> See generally Sarah Joseph, Jennie Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004), at 689 (discussing UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status').

<sup>21</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination Economic, Social and Cultural Rights*, UN Doc. E/C.12/GC/20/CRP.2 (2009), at para 27.

<sup>22</sup> *Ibid* at para 35.

contrast to other parts of the world that act to protect people from discrimination on the basis of homelessness as a component of their social status.<sup>23</sup>

In August 2007, the Attorney-General appointed former Victorian Public Advocate, Julian Gardner, to conduct a review of the current EO Act. The final report, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report (Gardner Report)*, found that '[d]iscrimination is considered to be a cause and consequence of homelessness'<sup>24</sup> and that:

[t]here is sufficient evidence to suggest that discrimination on the basis of homelessness is occurring in Victoria. The size of this problem is significant and the impact of discrimination on this large and particularly vulnerable group can be severe, further entrenching disadvantage.

For these reasons, it is recommended that 'homelessness' be included as an attribute upon the basis of which discrimination is prohibited under the Act.<sup>25</sup>

Adequate and effective protection against discrimination on the ground of homelessness would enable people experiencing homelessness to access employment, accommodation and other goods and services on an equal footing with the rest of the community. Social inclusion and participation in civil, political, social, cultural and economic life can reduce and resolve marginalisation, disadvantage and poverty, all of which are causal factors and risk indicators of homelessness, unemployment and criminal activity.

Including homelessness as an attribute in section 6 of the Bill would have concrete benefits for people experiencing homelessness. It would:

- establish a norm of non-discrimination against homeless people;
- create public awareness that homeless people should not be treated less favourably;
- give homeless people an avenue to complain and seek redress when they have experienced discrimination;
- impose an obligation upon the Victorian Government to respect the right to non-discrimination on the basis of homelessness and abstain itself from discriminating against homeless people; and
- encourage the Victorian Government to take positive steps to address the special needs of people who are homeless.

The cost of not addressing discrimination on the ground of homelessness for society, from both an economic and a human rights perspective, as well as for the individuals themselves, is more than can be afforded. PILCH and the HPLC therefore submit that 'Homelessness' should be included in the list of attributes enumerated in section 6 of the EO Bill.

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<sup>23</sup> See, eg, *Quebec Charter of Human Rights and Freedoms* article 10; *Canadian Charter of Rights and Freedoms* Article 15(1); *Commission Des Droits De La Personne Du Quebec v Gauthier* (1993-11-15) QCTDP 500-53-000024-925. *D'Aoust v Vallieres* (1993) 19 CHRR D/322.

<sup>24</sup> Gardner Report, above note 1, at para 5.97.

<sup>25</sup> *Ibid* at paras 5.100-5.101.

## Recommendation 1

'Homelessness' should be included in the list of attributes enumerated in section 6 of the EO Bill.

### 3.3 Criminal Record

Discrimination on the ground of criminal record is widespread in Victoria, particularly in obtaining and maintaining employment and housing. (For a further discussion of this issue, PILCH refers to, and endorses, the submission of the Fitzroy Legal Service). There has been a significant increase in the number of criminal record checks undertaken in Victoria over the past decade. Victoria Police data shows a 6,000 per cent increase in checks between 1992-93 and 2003-04,<sup>26</sup> and another 10,000 per cent increase to 2008-09.<sup>27</sup> Indeed, in the employment sphere, 'criminal record checks are fast becoming a routine part of the recruitment process'<sup>28</sup>. In this context, it is increasingly concerning that there is no law in Victoria prohibiting discrimination on the basis of a person's irrelevant criminal record.

Direct discrimination against individuals with a criminal record is based on stereotypes about what a criminal record means for a person's financial capacity or 'trustworthiness'. People with previous convictions should be considered on their merits, assessed on their strengths and weaknesses in terms of skills, knowledge, experience, reliability and any other relevant factor. However, research conducted in the UK shows that 'employers who routinely ask for information on previous convictions as part of the recruitment process tend to use it in a blanket discriminatory way rather than to inform their assessment of the general suitability of candidates, and any risk they may present in the workplace'<sup>29</sup>.

In some circumstances, a criminal record will be relevant to a job a person is seeking or the service they are trying to access. However, only where the nature of the offence indicates a real likelihood of re-offending, or where there is a genuine need for someone not to have a criminal record, should a criminal record be relevant to a person's employment or their ability to access a service. As Hugh de Kretser, now Executive Officer of the Federation of Community Legal Centres, explained in his 2006 opinion piece in *The Age*:

It is perfectly legitimate for a child-care centre to ensure that no staff have relevant sex offences. But it is unreasonable for a real estate agency to refuse to hire a receptionist because she was fined \$50 for using cannabis nine years ago. A bank could refuse to hire someone with a recent fraud or dishonesty offence, but it would be unreasonable for a supermarket to dismiss a shelf-stacker because the criminal record check revealed a drunk and disorderly conviction six years ago.<sup>30</sup>

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<sup>26</sup> The relevant statistics are: 3459 in 1992-93 compared to 221,236 in 2003-04. Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

<sup>27</sup> CrimTrac, *Annual Report 2008-09*, at 47, available at: [http://www.crimtrac.gov.au/documents/Crimtrac\\_0809\\_full.pdf](http://www.crimtrac.gov.au/documents/Crimtrac_0809_full.pdf).

<sup>28</sup> de Kretser, above note 26. See also CrimTrac, *ibid* at 47.

<sup>29</sup> United Kingdom Home Office, *Breaking the Circle: A Report on the Review of the Rehabilitation of Offenders* (2002), at para 3.16, available at: <http://www.homeoffice.gov.uk/documents/breaking-the-circle.html>.

<sup>30</sup> Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

(a) *Discrimination in Employment*

As previously noted, criminal record checks are increasingly becoming a standard part of the recruitment process. Individuals with a criminal record will often self-exclude from applying for positions that require a criminal record check as they believe that the existence of a criminal record – no matter how irrelevant, minor or old, will prevent them from being fairly considered for the position.

Employers will often not consider applicants with a criminal record. As this case study from a 2005 report by the Fitzroy Legal Service and Job Watch shows, even a finding of guilt with no conviction recorded can create barriers to employment:

Rhianna was charged and found guilty on several counts of obtaining property by deception. Rhianna pleaded guilty and no conviction was recorded. She received a fine and a Community Based Order for six months to perform 70 hours of unpaid community work.

When Rhianna applied for work a short time later she was requested to undergo a police check. To her surprise the check revealed the guilty verdict. She was refused employment due to her record. Not only was Rhianna shocked because she did not think that a non-conviction would be recorded on her criminal record; she was also upset because she did not feel that the charges were relevant to the job.<sup>31</sup>

In other circumstances, individuals may not disclose their criminal record – either because they are not asked to when applying for the job, or because they had no conviction recorded by the court and (incorrectly) believe that it will not show up on a criminal record. Often when an employer subsequently finds out that an employee has a criminal record the employer terminates the employee's employment regardless of how well they were performing their job, or how irrelevant or old the offence is. This case study demonstrates a typical response of an employer, following the discovery of a criminal record:

Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his prison record. Dimitri was devastated, having completely run his own cleaning business in the past. He was assisted to find similar employment at an organisation that did not conduct criminal record checks.<sup>32</sup>

(b) *Discrimination in Accommodation*

Individuals with a criminal record also experience difficulty in securing accommodation. It is difficult for an individual to explain gaps in rental history without explaining their prison history. Real estate agents will often refuse to consider applicants with a criminal record.

The following case study, reported by John Clonan, a support worker with the Salvation Army, demonstrates the difficulty former offenders experience in seeking private rental accommodation:

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<sup>31</sup> Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005), at 28.

<sup>32</sup> *Ibid* at 19.

Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to our service by police after his relationship broke down and he became homeless. Kelvin stayed in our service for six weeks, during which time he investigated private rental with my support. He was apprehensive as he believed he had no hope of finding private rental. At one real estate agent I accompanied him to the front door and he went in to make an enquiry. Shortly after he came out saying, 'I told you they won't even listen to my enquiry', as he was only able to give them a brief window of the past and his prison story. Next day I wrote a letter to the management but no answer was received, despite follow up calls.

During his time with us, Kelvin was an excellent tenant, rigid in keeping his unit clean and in paying rent. The real issue was discrimination by the real estate agent towards homeless people and ex-prisoners. In fact, if one reflects upon a prison existence, many prisoners have pretty good living and house skills which can be carried into civilian life.<sup>33</sup>

(c) *The Inadequacy of Current Protections and the Need for Reform*

Discrimination on the ground of 'irrelevant criminal record' is prohibited under international law and legislation in other Australian jurisdictions. However, Victorian legislation is silent on the issue of criminal record discrimination, meaning that discrimination on this basis is not prohibited. PILCH notes (and endorses) the submission of the HRLRC in this regard, and repeats and reiterates that international law requires Victoria to protect its citizens from discrimination and inequality.

*International Law*

As explained above, articles 2(1) and 26 of the ICCPR and article 2(2) of ICESCR prohibit discrimination on the ground of other status. International jurisprudence establishes that the term 'other status' refers to a definable group of people linked by their common status,<sup>34</sup> which has been interpreted as including non-discrimination on the basis of criminal record.<sup>35</sup> Further, Australia has ratified the International Labour Organisation Convention 111 (the *Discrimination (Employment and Occupation) Convention 1958*), which imposes an obligation on all Australian governments to pursue policies to ensure that discrimination on the ground of criminal record is eliminated.<sup>36</sup>

*Australian Law*

At the Commonwealth level, legislation prohibits discrimination on a number of grounds, including criminal record.<sup>37</sup> Where a potential or existing employee considers that they have been discriminated against on the basis of their criminal record, a written complaint

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<sup>33</sup> Ibid at 21.

<sup>34</sup> See generally Joseph, Schultz and Castan, above note 20.

<sup>35</sup> See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. See also Committee on Economic, Social and Cultural Rights, *General Comment 20 on Non-Discrimination*, above note 21, at paras 27, 35.

<sup>36</sup> *Discrimination (Employment and Occupation) Convention* (ILO No. 111), 362 U.N.T.S. 31, entered into force June 15, 1960 [ILO 111]. In addition to specifying certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, the ILO 111 allows for States Parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including criminal record: *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth).

<sup>37</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 3(1); *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth), r 4(b)(ii).

can be made to the Australian Human Rights Commission, which has the power to investigate and conciliate the complaint. If conciliation is unsuccessful, the Commission can report the breach to the Commonwealth Attorney-General who can, in turn, table a report in Federal Parliament. However, there is no power to award compensation and no enforcement power to remedy a breach.

Some state and territory governments have already introduced legislation to prohibit discrimination on the basis of criminal record.<sup>38</sup> However, there is little protection in Victoria against criminal record discrimination.

In 2008, the Gardner Report recommended that:

- the EO Act be amended to include 'irrelevant criminal record' as a protected attribute;
- guidelines be developed for employers and service providers to assist in determining whether a person's criminal record is relevant; and,
- discrimination on the basis of irrelevant criminal record should only be lawful in the area of employment where a person is unable to satisfy the 'inherent requirements' of the position.<sup>39</sup>

(d) *Spent Conviction Schemes*

Spent convictions schemes are set out in legislation and provide that after a qualifying period, convictions are permanently removed from a person's criminal record. In most circumstances, these regimes operate such that no obligation is imposed on job applicants or employees to disclose the existence of a spent criminal record. Spent convictions also do not appear on a criminal record check. All states and territories, except for Victoria and South Australia, have a spent convictions scheme.<sup>40</sup>

As Victoria does not have a spent conviction scheme, the release of criminal history information is governed by the Victoria Police Information Release Policy.<sup>41</sup> Victoria Police releases criminal history information on the basis of findings of guilt. This means that findings of guilt without conviction are released on a person's criminal record in the same way as findings of guilt with conviction. This creates a situation in Victoria where unjustifiable discrimination is more likely to occur as employers who seek criminal record checks will have access to information where an individual has pleaded guilty but no conviction has been recorded, or where they have been subject to a good behaviour bond without conviction.

All findings of guilt (except convictions that resulted in a custodial sentence of 30 months or more) will cease to appear on a person's criminal record if ten years lapses after the person's last finding of guilt. If the person was a child at the time of the last finding of guilt, then all findings of guilt will cease to appear if five years has lapsed.

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<sup>38</sup> See *Anti-Discrimination Act 1998* (Tas), s 16(q); *Anti-Discrimination Act 1992* (NT), s 19(q).

<sup>39</sup> Gardner Report, above note 1, recoms. 48, 49, 50.

<sup>40</sup> See *Discrimination Act 1991* (ACT); *Spent Convictions Act 2000* (ACT); *Spent Convictions Act 1998* (WA) and *Equal Opportunity Act 1994* (WA); *Criminal Record (Spent Convictions) Act 1992* (ACT).

<sup>41</sup> Victoria Police, *Information Release Policy – National Police Certificate* (2009), available at: [http://www.police.vic.gov.au/content.asp?Document\\_ID=692](http://www.police.vic.gov.au/content.asp?Document_ID=692).

The Standing Committee of Attorneys-General is working towards a national model Bill for spent convictions. In November 2008, they released a Consultation Paper and consultation draft Model Spent Convictions Bill (**Model Bill**). If adopted, the Model Bill would introduce a spent convictions scheme in Victoria. The Model Bill proposes that eligible convictions will appear on a criminal record, not findings of guilt. Further, all eligible convictions of an adult, or of a juvenile who is tried as an adult, would become spent if a ten year period lapses during which the person: is not convicted of any further offences; or, is convicted of an offence but no penalty is ordered or a fine is imposed of \$500 or less (the period would be five years for a juvenile who was dealt with as a juvenile).

PILCH strongly supports the introduction of a spent convictions scheme in Victoria. But spent convictions regimes are no substitute for effective anti-discrimination laws. The very nature of a spent conviction means that discrimination can only be prevented when the relevant crime-free period has expired. In every other instance a spent convictions regime does nothing to prevent a job applicant or employee from being discriminated against on the basis of their criminal record.

(e) *Anti-Discrimination Legislation*

Adequate and effective protection from discrimination would enable people with a criminal record to access employment, accommodation and other goods and services on an equal footing with the rest of the community. Social inclusion and participation in civil, political, social, cultural and economic life can reduce and resolve marginalisation, disadvantage and poverty, all of which are causal factors and risk indicators of homelessness, unemployment and criminal activity.

Including irrelevant criminal record as an attribute would have concrete benefits for former offenders. It would:

- establish a norm of non-discrimination against people with an irrelevant criminal record;
- create public awareness that former offenders should not be treated less favourably;
- give people an avenue to complain and seek redress when they have experienced discrimination on the basis of an irrelevant criminal record;
- impose an obligation upon the Victorian Government to respect the right to non-discrimination on the basis of irrelevant criminal record and abstain itself from discriminating on that basis; and,
- encourage the Victorian Government to take positive steps to address the special needs of people who are former offenders.

Moreover, while Victoria has no spent convictions scheme, and Victoria Police continue to release criminal records on the basis of guilt (including records for which no conviction was recorded), anti-discrimination legislation could offer further protection to individuals who have committed offences in circumstances where a Court did not consider that a conviction should be recorded.

PILCH and the HPLC submit that the inclusion of 'irrelevant criminal record' as a prohibited ground of discrimination would ensure that all persons are subject to the equal protection of the law and that people with criminal records can compete on a rational basis in the market for employment, accommodation and goods and services.

The cost of not addressing discrimination on the ground of criminal record for society, from both an economic and a human rights perspective, as well as for the individuals themselves, is more than can be afforded.

### **Recommendation 2**

'Irrelevant criminal record' should be included in the list of attributes enumerated in clause 6 of the EO Bill.

## **4. Exceptions and Exemption Regime**

### **4.1 Permanent Exceptions**

#### *(a) General*

PILCH and the HPLC welcome the removal in the EO Bill of many permanent exceptions. The removal of certain exceptions that were incompatible with the Victorian Charter helps to de-institutionalise, and minimise the risk of, discrimination on prohibited grounds. In this way, their removal helps to maximise the exercise and enjoyment of the rights to non-discrimination and equality, and strengthen the effectiveness of the EO Bill as a tool to eliminate discrimination and achieve substantive equality. For example, the proposed removal of the permanent exception in section 27B of the EO Act<sup>42</sup> helps to eliminate discrimination on the ground of gender identity.<sup>43</sup>

Notwithstanding the removal of a number of permanent exceptions, PILCH and the HPLC are concerned that the EO Bill purports to retain a number of exceptions that are incompatible with the Victorian Charter. PILCH has previously made several submissions that identify numerous permanent exceptions in the EO Act (many of which are replicated in the EO Bill) that are inconsistent with the Victorian Charter. We refer to and reiterate those submissions and note, again, that many of the permanent exceptions 'appear to protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups. Rather than allowing a nuanced balancing of rights in cases where particular rights conflict, many permanent exceptions appear to be arbitrary, inflexible, broad, and unreasonable'<sup>44</sup>.

In the view of PILCH and the HPLC, the permanent exceptions retained in the EO Bill should be repealed. Persons wishing to discriminate in violation of the EO Bill should be required to apply to the Victorian Civil and Administrative Tribunal for an individual exemption. Such exemptions

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<sup>42</sup> EO Act, s 27B (providing that an employer may discriminate against another person based on their gender identity in certain circumstances).

<sup>43</sup> But see the submissions of the Federation of Community Legal Centres, the Victorian Gay & Lesbian Rights Lobby, and TransGender Victoria (which PILCH and the HPLC endorse) (discussing the problematic definition of gender identity proposed in section 4 of the EO Bill and significant aspects of the EO Bill that remain incompatible with the Charter).

<sup>44</sup> PILCH and HRLRC, *Eliminating Discrimination and Ensuring Substantive Equality*, Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the *Equal Opportunity Act 1995* (Vic) (2009), at para 4, available at: <http://www.pilch.org.au/Assets/Files/Joint%20HRLRC%20PILCH%20Submission%20to%20DOJ%20Exceptions%20%20Exemptions%20Review%202008.pdf>.

should be granted on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under section 7(2) of the Victorian Charter.

### **Recommendation 3**

Permanent exceptions retained in the EO Bill should be repealed.

### **Recommendation 4**

Persons wishing to discriminate in violation of the EO Bill should be required to apply to the Victorian Civil and Administrative Tribunal for an individual exemption. Such exemptions should be granted on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under section 7(2) of the Victorian Charter.

#### **(b) *Things Done with Statutory Authority***

Section 75(1) of the EO Bill provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of any other Act or enactment.

PILCH and the HPLC submit that the effect of this provision is to institutionalise discrimination in Victorian laws by permitting discrimination on prohibited grounds, thereby directly undermining the operation of the EO Act and the Victorian Charter. Indeed, the Statement of Compatibility for the EO Bill acknowledges that this exception 'may facilitate the limitation of a number of charter rights, including the right to equality'<sup>45</sup>.

PILCH is aware of several individuals who have been discriminated against on prohibited grounds and who have been unable to seek redress for those violations because the discrimination is entrenched in Victorian laws (e.g., *Births, Deaths and Marriages Registration Act 1996* (Vic.), *State Superannuation Act 1988* (Vic.)).<sup>46</sup> The permanent exception for discrimination prescribed by law has had devastating impacts on their lives, including by impeding their access to official government documentation (e.g., birth certificates) that accurately records their sex/gender and their ability to pass superannuation benefits to their partners when that person dies.

In line with the recommendations made by SARC in its 2009 report on exceptions and exemptions,<sup>47</sup> PILCH and the HPLC submit that section 75(1) of the EO Bill should be omitted and that a provision in any Act that is intended to override the EO Bill should be explicitly identified in that other Act and should be subject to a sunset or review provision. PILCH and the HPLC further submit that existing laws that are not intended to override the EO Bill should be identified and amended as a matter of priority. In our view, these recommendations constitute less restrictive means of enabling the Victorian Parliament to introduce provisions that place (reasonable) limitations on the rights to non-discrimination and equality and, as such, are more consistent with section 7(2)(e) of the Victorian Charter.

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<sup>45</sup> EO Bill, Statement of Compatibility, Legislative Assembly, Daily Hansard (10 March 2010), at 109.

<sup>46</sup> See EO Act, s 69.

<sup>47</sup> See SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009), at 54-55.

**Recommendation 5**

Section 75(1) of the EO Bill should be omitted.

**Recommendation 6**

A provision in any other Act that is intended to override the EO Bill should be explicitly identified in that other Act and should be subject to a sunset or review provision.

**Recommendation 7**

Existing laws that are not intended to override the EO Bill should be identified and amended as a matter of priority.

**4.2 Exemptions**

Sections 89-91 of the EO Bill purport to amend the exemptions regime.

PILCH and the HPLC welcome the requirement in section 90(b) of the Bill that the Victorian Civil and Administrative Tribunal – when deciding whether or not to grant, renew or revoke an exemption – consider whether a proposed exemption is a reasonable limitation on the right to equality. In our view, section 90(b) helps to ensure that:

- the rights to non-discrimination and equality are limited only where it is necessary, reasonable and proportionate to do so pursuant to section 7(2) of the Victorian Charter;
- all human rights are valued; and,
- no human right or fundamental freedom is automatically privileged over another right or freedom.

PILCH and the HPLC are concerned, however, that section 89(2) of the Bill provides '[t]hat an exemption remains in force for the period, not exceeding 5 years, that is specified in the notice'. Increasing the maximum period of operation of exemptions from three to five years will have the effect of undermining the rights to non-discrimination and equality, as guaranteed in the EO Act and section 8 of the Victorian Charter.

PILCH and the HPLC submit that increasing the maximum period of operation of exemptions from three to five years, with limited opportunities to review or revoke those exemptions, is not a reasonable limitation of the rights to non-discrimination and equality under section 7(2)(e). Five years is an extremely long time to experience discrimination, and exemptions that condone conduct and activities that would otherwise be characterised in law as discriminatory should be granted sparingly and in the least restrictive way possible.

PILCH and the HRLRC therefore submit that section 89(2) of the Bill not increase the maximum period of operation of exemptions to five years. In addition, we refer to and reiterate PILCH's earlier submission (made jointly with the HRLRC) to SARC, which called for the introduction of a requirement that successful exemption applicants consider (on an ongoing basis) the necessity of their exemptions.<sup>48</sup>

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<sup>48</sup> See PILCH and HRLRC, above note 44, at paras 50-59.

**Recommendation 8**

Section 89(2) of the Bill should not increase the maximum period of operation of exemptions from three to five years.

**Recommendation 9**

The exemptions regime should require successful exemption applicants to consider, on an ongoing basis, the need for their restrictive exemptions, taking into account the factors outlined in section 7(2) of the Victorian Charter.

**5. Public Inquiries**

Section 128 of the EO Bill purports to amend the EO Act to allow the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries. Section 128(2) of the Bill proposes that this power be contingent on the consent of the Attorney-General.

PILCH and the HPLC welcome the establishment of a procedure for public inquiries. Public inquiries will prove instrumental in addressing systemic discrimination in the community, promoting systematic change, and ensuring substantive equality. In addition, public inquiries will help to overcome many of the limitations of the individual complaints model currently relied on in the EO Act. In these ways, public inquiries will help to maximise the exercise and enjoyment of the human rights and fundamental freedoms guaranteed in the EO Act and the Victorian Charter.

PILCH and the HPLC are concerned, however, that public inquiries can only be initiated with the consent of the Attorney-General. The Commission is a statutory authority with expert knowledge and considerable experience in addressing discrimination. Due to its unique experience and expertise, the Commission (and not the Attorney-General) is best placed to decide whether or not a matter is sufficiently serious to warrant public inquiry. Moreover, the requirement to obtain the consent of the Attorney-General threatens the independence of the Commission, and is an unnecessary administrative burden that could potentially impede the timely initiation of important public inquiries.

**Recommendation 10**

Section 128(2) of the Bill should be omitted.

**6. An Adequately Resourced Equal Opportunity Regime**

PILCH and the HPLC submit that in order to ensure the equal exercise and enjoyment of human rights and fundamental freedoms and to ensure access to justice, especially for the marginalised and disadvantaged, it is essential that steps are taken to put in place adequate funding for the equal opportunity regime. This includes adequate funding to enable the Victorian Equal Opportunity and Human Rights Commission to effectively carry out its proposed new functions, and to ensure the proposed independent specialist legal advice and assistance service can operate effectively. It also includes adequate funding to enable Victoria Legal Aid and Community Legal

Centres to provide effective legal assistance to, and facilitate redress for, persons who have experienced discrimination. Failure to provide adequate funding undermines the operation of the EO Act and the Victorian Charter, with negative repercussions for the human rights and fundamental freedoms of all Victorians.

**Recommendation 11**

Adequate funding for the equal opportunity regime should be guaranteed.