

# **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)**

**July 2009**

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### About PILCH

The Public Interest Law Clearing House (**PILCH**) is an independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of *pro bono* legal services, and by undertaking law reform, policy work and legal education.

PILCH's objectives include to:

- (a) improve access to justice and the legal system for the marginalised and disadvantaged;
- (b) identify matters of public interest requiring legal assistance;
- (c) seek redress in matters of public interest;
- (d) refer individuals, community groups and not for profit organisations to lawyers in private practice and to others in ancillary or related fields willing to provide their services without charge;
- (e) support community organisations to pursue the interests of the communities they seek to represent; and
- (f) encourage, foster and support the work and expertise of the legal profession in *pro bono* and/or public interest law.

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### About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

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## 1. Executive Summary

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### 1.1 Summary

1. The rights to non-discrimination and substantive equality are fundamental components of human rights law that are entrenched in a wide range of human rights treaties,<sup>1</sup> human rights instruments,<sup>2</sup> national laws,<sup>3</sup> and jurisprudence.<sup>4</sup> In Victoria, the rights to non-discrimination and substantive equality are guaranteed in the *Equal Opportunity Act 1995* (Vic) (**EO Act**)<sup>5</sup> and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**).<sup>6</sup>
2. Notwithstanding, discrimination is a significant problem in Australia, including in the State of Victoria.<sup>7</sup> PILCH and the HRLRC regularly receive inquiries from and assist individuals who allege that they have been discriminated against on a prohibited ground, such as disability, sex or race.

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<sup>1</sup> See, eg, International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171 (**ICCPR**), arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3 (**ICESCR**), art 2; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13 (**CEDAW**); International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**), Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006) (**CRPD**), art. 5.

<sup>2</sup> See, eg, Human Rights Committee (**HRC**), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); Committee on Economic, Social and Cultural Rights (**CESCR**), *General Comment No. 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Elimination of Discrimination against Women (**CEDAW Committee**), *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004).

<sup>3</sup> See, eg, *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>4</sup> See, eg, *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001); *Schuler-Zgraggen v Switzerland*, Ser. A No. 263 (1993).

<sup>5</sup> See EO Act, ss 3, 6-9, 13, 14, 15, 30-31, 37, 42, 49, 59, 65, 67. But see EO Act, s 12, Parts 3 and 4.

<sup>6</sup> Victorian Charter, preamble, s 8.

<sup>7</sup> See generally HRC, *Concluding Observations: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), at paras 14-17; CESCR, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), at paras 12, 14, 26; CEDAW Committee, *Concluding Observations: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006), at paras 10, 12-13; CERD, *Concluding Observations: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), at para 9.

**(a) Permanent exceptions**

3. PILCH and the HRLRC submit that the permanent exceptions to the EO Act have had a notable role to play in facilitating and condoning discrimination in Victoria. In essence, permanent exceptions permit certain forms of differential treatment that would otherwise be characterised in law as discriminatory.
4. In many cases, permanent exceptions have institutionalised, or are at risk of reinforcing, systemic discrimination against the most marginalised and disadvantaged members of the Victorian community. Many exceptions to the EO Act 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. In contrast to the objectives of the EO Act, many of the permanent exceptions also perpetuate discriminatory practices. Moreover, as the current exceptions cannot adapt to natural shifts in community values without legislative reform, they enable the stagnation of such practices.
5. For these reasons, PILCH and the HRLRC submit that the permanent exceptions in Parts 3 and 4 of the EO Act should be repealed. This does not mean that a person or organisation will never be able to lawfully discriminate. Repealing the permanent exceptions in the EO Act would simply mean that before discrimination is deemed permissible, that person or organisation must justify the reasons why they should be allowed to discriminate in the manner proposed.
6. In the event that the Scrutiny of Acts and Regulations Committee (**SARC**) decides not to recommend the repeal of all of the permanent exceptions in the EO Act, PILCH and the HRLRC submit that all permanent exceptions that fail a reasonable limitations test analysis under section 7(2) of the Victorian Charter should be repealed. We further submit that it is important that the remaining exceptions are subject to ongoing and regular review for compatibility with section 7(2).

**(b) Exemptions**

7. Exemptions, like permanent exceptions, have also had a notable role to play in facilitating and condoning discrimination in Victoria, although to a lesser extent. Because exemptions in the EO Act permit conduct and activities that would otherwise be characterised in law as discriminatory, they should be granted only on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis.
8. PILCH and the HRLRC submit that the exemptions regime in section 83 of the EO Act should be amended in line with section 7(2) of the Victorian Charter to explicitly require VCAT to take into account the relevant factors set out in section 7(2), when deciding

whether or not to exercise its discretion to grant an individual exemption. This model ascribes value to all human rights and does not automatically privilege one human right or fundamental freedom over another. It also helps to ensure that the rights to non-discrimination and equality are only limited in circumstances where it is necessary, reasonable and proportionate to do so.

9. PILCH and the HRLRC further submit that the EO Act should incorporate a requirement that successful exemption applicants consider, on an ongoing basis, the need for their respective exemptions, taking into account the considerations outlined in section 7(2)-based limitations provisions.

**(c) Guidelines**

10. Whilst PILCH and the HRLRC submit that the permanent exceptions in the EO Act should be repealed and replaced with an amended section 83, we submit that, in the interests of certainty and security, there may well be circumstances where it is useful to have Guidelines on permissible limitations to the rights to non-discrimination and equality. Such Guidelines would foster understanding about when it is or is not appropriate to discriminate and when it is necessary to apply for an individual exemption under a reformed section 83 of the EO Act. They would also help to prevent unnecessary litigation before Victorian courts and tribunals.
11. PILCH and the HRLRC submit that the EO Act is not an appropriate instrument in which to provide guidance on permissible limitations. The primary focus of the EO Act should be the elimination of all forms of discrimination and the realisation of substantive equality, and not the circumstances in which it is permissible to discriminate. Legislative guidelines could only be reformed by an Act of Parliament, a requirement that is cumbersome and inflexible. Moreover, inclusion in the EO Act of guidelines on permissible limitations would result in *de jure* discrimination.
12. Instead, PILCH and the HRLRC submit that Guidelines should be developed apart from the EO Act and be subject to ongoing, regular review and judicial oversight. PILCH and the HRLRC submit that only those current exceptions that pass a section 7(2) limitations analysis should be included in the Guidelines. For instance, as the permanent exceptions for religious bodies and institutions (s 77), private clubs (s 78) and gender identity (s 27B) do not satisfy section 7(2) of the Victorian Charter, they should not be included in the Guidelines, and persons or organisations wishing to discriminate in these areas should be required to apply to VCAT under an amended section 83 to demonstrate why it is justifiable for them to discriminate. Conversely, as the permanent exception in section 17 of the EO Act for bona fide occupational requirements does pass a section 7(2) analysis, that exception should be included in the Guidelines and individual employers would not be

required to apply to VCAT, under an amended section 83, for individual exemptions to the EO Act.

**(d) Temporary Special Measures**

13. The Equal Opportunity Review, conducted by Mr Julian Gardner for the Department of Justice (DOJ) in 2007-2008, recommended that '[t]he existing provision in the Charter that provides that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated in the Act'.<sup>8</sup>
14. PILCH and the HRLRC support this recommendation and consider that the EO Act should be amended to reflect the legal distinction between permissible discrimination and special measures. Special measures do not constitute discrimination; rather they are part of a necessary strategy to achieve substantive equality for some groups in the community.
15. In accordance with this recommendation, those permanent exceptions that are designed to address existing disadvantage (and are therefore properly characterised as 'special measures') should not be included in any legislative or quasi-legislative exceptions scheme. Rather, they should be contained in a separate part of the EO Act that deals specifically with special measures.

**1.2 Recommendations**

16. PILCH and the HRLRC make the following recommendations for reform:

**Recommendation 1:**

Proposed reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter.

**Recommendation 2:**

All permanent exceptions in Parts 3 and 4 of the EO Act should be repealed.

**Recommendation 3:**

The exemptions regime in the EO Act should be reformed to ensure that exemptions are granted only on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under an amended section 83 of the EO Act, which is based on section 7(2) of the Victorian Charter.

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<sup>8</sup> *An Equality Act for a Fairer Victoria* (June 2008), at 14, available at:  
<http://www.humanrightscommission.vic.gov.au/pdf/EOARReviewFinalReport.pdf>

**Recommendation 4:**

The EO Act should incorporate a requirement that a successful exemption applicant be required to consider, on an ongoing basis, the need for their exemption, taking into account the considerations outlined in an amended section 83 of the EO Act, which is based on section 7(2) of the Victorian Charter.

**Recommendation 5:**

Guidelines should be developed that outline the nature and scope of permissible limitations to the rights to non-discrimination and equality, as guaranteed in the EO Act. Such Guidelines should be informed by and compatible with section 7(2) of the Victorian Charter.

**Recommendation 6:**

Exceptions and exemptions that are designed to address existing disadvantage (and are therefore properly characterised as 'special measures') should not be included in any legislative or quasi-legislative exceptions and exemptions scheme. Rather, they should be contained in a separate part of the EO Act that deals specifically with special measures.



## **2. Scope of Submission**

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### **2.1 Nature and Scope of Submission**

17. PILCH and the HRLRC welcome the opportunity to make a submission to the SARC inquiry into whether or not any amendments should be made to the exceptions and exemptions in the EO Act. The legal framework for eliminating and remedying discrimination in Victoria, enshrined in the EO Act, has remained largely unchanged since its introduction almost 30 years ago. With the enactment and entry into force of the Victorian Charter, a review of the EO Act is both necessary and timely. We commend the initiative to undertake this important inquiry.
18. This joint PILCH/HRLRC submission is supplementary to, and should be read in conjunction with, our joint submission to the Department of Justice.<sup>9</sup> In summary, that submission recommended that:
- proposed reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter;
  - the EO Act should contain an equivalent to section 7(2) of the Victorian Charter to ensure that the rights to non-discrimination and equality are limited only where it is necessary, reasonable and proportionate to do so;
  - all of the permanent exceptions in the EO Act should be repealed;
  - any proposal to retain the exceptions in the EO Act should ensure that they are subject to a limitations analysis under section 7(2) of the Victorian Charter; and,
  - any application for an exemption under the EO Act should be subject to a limitations analysis under section 7(2) of the Victorian Charter, and any decision granting an exemption should require an applicant to regularly consider the exemption's necessity, in a manner that is consistent with section 7(2).

To the extent of any inconsistency between this submission and our previous joint submission to the Department of Justice, the arguments put forward in this submission should be taken to represent our position on reform of the exceptions and exemptions in the EO Act.

19. The purpose of this joint submission is to:
- elaborate the key elements and recommendations made in our original submission;

- identify significant jurisprudential developments that have occurred since we made that submission; and,
- further articulate our views on the impact of international human rights law on the permanent exceptions and exemptions in the EO Act.

A particular effort has been made to concretely identify and explain how PILCH and the HRLRC believe permanent exceptions and exemptions should be dealt with. It is not the intention of this submission, however, to engage in a detailed analysis of all of the permanent exceptions enumerated in the EO Act.

## **2.2 Structure of Submission**

20. Part 3 of the submission examines the nature and scope of the rights to non-discrimination and substantive equality and considers in what circumstances it is legally permissible to limit the exercise and enjoyment of those rights. Particular attention is paid to the obligations imposed under international human rights law and section 7(2) of the Victorian Charter.
21. Part 4 of the submission analyses the appropriateness of the exceptions and exemptions in the EO Act, through a human rights framework. It begins by canvassing the reasons why PILCH and the HRLRC believe that the permanent exceptions in Parts 3 and 4 of the Act should be repealed. Part 4 then outlines a proposal to reform the exemptions regime in section 83 of the EO Act, to bring this regime in line with section 7 of the Victorian Charter and international human rights law. Part 4 next examines the usefulness of establishing Guidelines, apart from the EO Act, on permissible limitations on the rights to non-discrimination and equality. Last, Part 4 addresses the question of temporary special measures (ie, 'affirmative action') and considers how to address them effectively in the EO Act.

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<sup>9</sup> HRLRC & PILCH, *Exceptions Review of the Equal Opportunity Act 1995 (Vic)*, Joint Submission to the Department of Justice (2008), available at: <http://www.hrlrc.org.au/files/BSGRI96CNC/Joint%20HRLRC%20PILCH%20Submission.pdf>.

### **3. Ensuring the Elimination of Discrimination and Realising Substantive Equality**

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#### **3.1 The Rights to Non-Discrimination and Equality**

22. Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.<sup>10</sup> Australia is obliged under several international human rights instruments to ensure full and effective legislative protection of the rights to non-discrimination and equality. In addition, recent studies have shown that equality not only increases social welfare, but is also associated with increased growth and prosperity.<sup>11</sup>
23. Both the ICCPR and ICESCR contain comprehensive prohibitions on discrimination.
24. Article 2(2) of ICESCR provides that States Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. CESCR, the treaty body responsible for monitoring States Parties' compliance with ICESCR, has confirmed that not only are States Parties required, under article 2(2), to eliminate discrimination, but that they are also required to ensure substantive equality. 'Substantive equality', CESCR has explained, 'is concerned, in addition [to formal equality], with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.<sup>12</sup>
25. Article 2(1) of the ICCPR provides that States Parties are obligated to respect and ensure the rights in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Article 26 of the ICCPR further provides that

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The HRC has explained that 'State parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to

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<sup>10</sup> See HRC, *General Comment No. 18*, above n 2.

<sup>11</sup> See, eg, The Equality Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007), at 133-138.

<sup>12</sup> CESCR, *General Comment No. 16*, above n 2, at para 7.

take all steps necessary ... to put an end to discriminatory actions both in the public and the private sector which impair the equal enjoyment of rights<sup>13</sup>.

26. Article 2(1) of the ICCPR prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the ICCPR extends considerably further than article 2(1). Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the ICCPR but prohibits discrimination – in fact or in law – in all aspects of public life.
27. The right to equality is also protected by other key international human rights instruments including CEDAW, ICERD and the CRPD.
28. In Victoria, the rights to non-discrimination and equality are enshrined in the EO Act and the Victorian Charter. The EO Act was introduced in 1995 to promote recognition and acceptance of the rights to non-discrimination and equality and to eliminate and provide redress for discrimination and sexual harassment.<sup>14</sup> The EO Act prohibits direct and indirect forms of discrimination on the grounds enumerated in section 6, which include age, gender identity, impairment, political belief or activity, race, religious belief or activity, sex and sexual orientation.
29. Section 8 of the Victorian Charter provides:
  - (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 person disadvantaged because of discrimination do not constitute discrimination.

Section 3 of the charter further provides that discrimination is prohibited in the grounds outlined in section 6 of the EO Act. In addition, the Victorian Charter lists equality as one of its founding principles.

### **3.2 Permissible Limitations under Human Rights Law**

30. At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited.

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<sup>13</sup> HRC, *General Comment No. 28*, above n 2, at para. 3.

<sup>14</sup> EO Act, s 3.

31. CESCR has recently issued a General Comment that specifically addresses permissible limitations on the rights to non-discrimination and equality. In its recent General Comment No. 20, CESCR explained that

[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.<sup>15</sup>

32. In its General Comment No. 31, the HRC stated that, where limitations or restrictions are made, 'States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right'<sup>16</sup>.
33. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)*.
34. Among other things, the Siracusa Principles provide that:
- no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;
  - all limitation clauses should be interpreted strictly and in favour of the rights at issue;
  - any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
  - limitations must not be arbitrary or unreasonable;
  - limitations must be subject to challenge and review;
  - limitations must not discriminate on a prohibited ground;
  - where a limitation is required to be 'necessary', it must:

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<sup>15</sup> CESCR, *General Comment No. 20*, above n 2, at para 13.

<sup>16</sup> HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), at para 6.

- be based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
- respond to a pressing need;
- pursue a legitimate aim; and,
- be proportionate to that aim.<sup>17</sup>

### **3.2 Permissible Limitations Under the Victorian Charter**

35. Reflecting the Siracusa Principles, the Victorian Charter contains a limitation provision, section 7(2), which is modelled on broadly equivalent provisions in section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.
36. Section 7(2) of the Victorian Charter provides that
- [a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society<sup>18</sup> based on human dignity, equality and freedom and taking into account all relevant factors.
37. Section 7(2) also sets out the following inclusive list of these relevant factors:
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relationship between the limitation and its purpose; and,
  - (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
38. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged. The Human Rights Consultative Committee, which investigated and recommended the adoption of the Victorian Charter, recognised that rights need to be balanced against one another and against competing

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<sup>17</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

<sup>18</sup> According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

public interests. This view is consistent with the case law of comparative jurisdictions, such as the UK and New Zealand, and international jurisprudence.

39. It is significant that the EO Act does not contain a similar limitation provision.
40. PILCH and the HRLRC submit that any reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter. A human rights approach to the development of equal opportunity law will ensure that Australia's international obligations are fulfilled, and assist in the development of laws, policies, practices and programmes that promote the aims and objectives of the EO Act in an efficient and effective way.

**Recommendation 1:**

Proposed reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter.

## 4. A Human Rights Approach to the Exceptions and Exemptions in the EO Act

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### 4.1 Exceptions and Exemptions Regime

41. The EO Act prohibits direct or indirect discrimination on the basis of protected attributes, including age, religious belief or activity, sex, race, sexual orientation, impairment and marital status.<sup>19</sup> Discrimination is prohibited in the areas of activity set out in Part 3 of the Act, which include employment, education and accommodation.
42. Notwithstanding, section 12 of the EO Act provides that the EO Act 'does not prohibit discrimination if an exception in Part 3 ... or Part 4 or an exemption under Part 4 applies'. The EO Act contains over 50 permanent exceptions, including for single sex clubs (s 78), sporting clubs (s 66) and religious institutions and bodies (ss 75(1)-(3), 76, 77). In addition, VCAT has granted numerous individual exemptions under Part 4 of the Act.<sup>20</sup> The effect of the permanent exceptions and individual exemptions is to permit, in specified circumstances, conduct or activity that would otherwise be characterised in law as discrimination on the basis of one or more of the prohibited attributes outlined in section 6 of the EO Act.

### 4.2 Permanent Exceptions should be Repealed

43. PILCH and the HRLRC submit that the permanent exceptions in Parts 3 and 4 of the EO Act should be repealed.
44. Many of the permanent exceptions, including for religious beliefs or principles,<sup>21</sup> are *extremely broad*. Whilst permanent exceptions may allow for justifiable discrimination in some circumstances, the breadth of those exceptions means that they also allow for unjustifiable discrimination. For example, as discussed in section 4.4(a) below, the permanent exception for religious beliefs or principles in section 77 of the EO Act prioritises the freedom of religion over the rights to non-discrimination and equality *in all circumstances*. The blanket exception undermines the rights to non-discrimination and equality by excluding consideration of individual cases and permitting discrimination in the name of religious freedom, regardless of whether or not the discrimination is fair and

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<sup>19</sup> EO Act, s 6.

<sup>20</sup> See generally section 4.3.

<sup>21</sup> EO Act, s 77 (providing: 'Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles').



reasonable in the circumstances. This regime precludes analysis or consideration of either the merit or the effect of the discrimination in question.<sup>22</sup>

45. In many cases, permanent exceptions have *institutionalised, or risk reinforcing, systemic discrimination* against marginalised and disadvantaged members of the Victorian community. For example, a number of permanent exceptions in the EO Act, including those for private clubs<sup>23</sup> and sports,<sup>24</sup> appear to protect traditional social structures and gender hierarchies that discriminate disproportionately against women. These exceptions appear to be in violation of CEDAW, in particular, articles 2(f)<sup>25</sup> and 5(a)<sup>26</sup> and its overarching purpose that requires States Parties to 'address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions'.<sup>27</sup>
46. The current exceptions *cannot adapt to natural shifts in community values without legislative reform*, a process that is dependent upon a Member of Parliament introducing a Bill with the specific purpose of repealing or amending an outdated permanent exception. The requirement of legislative reform is cumbersome and inflexible and can lead to the perpetuation of discriminatory practices. For example, notwithstanding requirements under international<sup>28</sup> and domestic<sup>29</sup> law to prohibit discrimination on the ground of gender identity as well as the shift in community values in favour of the elimination of this form of discrimination,<sup>30</sup> the permanent exception in section 27B(1) of the EO Act<sup>31</sup> has enshrined

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<sup>22</sup> See generally See Carolyn Evans and Beth Gaze, 'Between Religious Freedom and Equality: Complexity and Context', (2008) 49 *Harvard International Law Journal* 40.

<sup>23</sup> See EO Act, s 78(1) (providing: 'Nothing in Part 3 applies to the exclusion of people from a private club or from any part of the activities or premises of a private club').

<sup>24</sup> See EO Act, s 66(1) (providing 'A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant').

<sup>25</sup> Article 2(f) of CEDAW provides: 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

<sup>26</sup> Article 5(a) of CEDAW provides: 'States Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

<sup>27</sup> CEDAW, *General Recommendation No. 25*, above n 2, at para 7.

<sup>28</sup> See, eg, ICESCR, art 2(2).

<sup>29</sup> See, eg, Victorian Charter, ss 8, 15.

<sup>30</sup> See *Community Attitudes to Discrimination Legislation Report* (2009), available at: <http://www.coalitionforequality.org.au/GalaxyPoll-AntiDiscrimination.pdf>.

this insidious practice. As section 27B(1) of the EO Act can only be repealed through legislative reform and since the Victorian Parliament has failed to initiate such reform, employers may lawfully and with impunity discriminate against a person because of his or her gender identity. Moreover, the person discriminated against has no legal recourse to assert a violation of his or her rights to non-discrimination and equality, as guaranteed in the EO Act and under international human rights law.

47. Instead of allowing a nuanced balancing of rights in cases where particular rights conflict, many permanent exceptions appear to be *arbitrary, inflexible, and unreasonable*. The blanket exceptions in the EO Act undermine equality by excluding consideration of individual cases and permitting discrimination in the name of religious freedom or, for example, sport, regardless of whether or not the discrimination is fair and reasonable.
48. Contrary to much of the misinformation that has surrounded this inquiry, repeal of the permanent exemptions would not result in a situation wherein a person or organisation could never discriminate in pursuit of a legitimate and reasonable aim. Repealing the permanent exceptions would simply mean that before discrimination is deemed permissible, regard must be had to the particular circumstances of the case and an effort must be made to strike an appropriate balance between competing rights and interests.
49. In the event that SARC decides not to recommend the repeal of all of the permanent exceptions in the EO Act, PILCH and the HRLRC submit that all permanent exceptions that fail a reasonable limitations test analysis under section 7(2) of the Victorian Charter should be repealed. We further submit that it is important that the remaining exceptions are subject to ongoing and regular review for compatibility with section 7(2).

**Recommendation 2:**

All permanent exceptions in Parts 3 and 4 of the EO Act should be repealed.

**4.3 Exemption Regime should be Reformed**

50. Under section 83 of the EO Act, the Victorian Civil and Administrative Tribunal has a broad discretion to grant an individual exemption from any provision of the EO Act. An exemption may be granted for up to 3 years, and may be renewed or revoked by VCAT. There are no explicit criteria in section 83 that VCAT must consider in determining whether or not to exercise its discretion to grant an individual exemption.<sup>32</sup>

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<sup>31</sup> EO Act, s 27B (providing that an employer may discriminate on the basis of gender identity in the area of employment if a person 'does not give the employer adequate notice of the person's gender identity' or, if adequate notice is provided, 'it is unreasonable in the circumstances for the employer not to discriminate against the person').

<sup>32</sup> SARC Discussion Paper (2009), 147.

51. Generally, the regime is used to grant exemptions to activities or classes of activities that may technically discriminate but are considered to be compatible with the rights to non-discrimination and equality. That is to say, they are granted for the purposes of authorising positive discrimination in the community.<sup>33</sup> For example, in 2009, VCAT granted an individual exemption to an organisation to allow it to conduct women-only swimming sessions and related programmes to enable Muslim women to participate in them.<sup>34</sup> In 2005, VCAT granted an individual exemption to a government department to allow it to introduce a recruitment and training strategy for Indigenous people only to improve their recruitment to, and retention in, the department.<sup>35</sup>
52. Despite this, VCAT's broad discretion has often been used to condone conduct and activities that would otherwise be characterised in law as discriminatory. As a result, the current exemption regime has played a role to play in facilitating and condoning discrimination in Victoria,<sup>36</sup> although to a much lesser extent than the regime for permanent exceptions.
53. Following the introduction of the Victorian Charter, all statutory provisions 'must be interpreted in a way that is compatible with human rights'<sup>37</sup>. In addition, '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'<sup>38</sup>. This means that VCAT must interpret and apply section 83 compatibly with human rights and, in so doing, may have regard to relevant international law and decisions of domestic, regional and international courts and tribunals.
54. In order to ensure full compliance with the Victorian Charter and to avoid prejudicial discriminatory treatment, PILCH and the HRLRC submit that section 83 of the EO Act should be amended to require VCAT to take into account the following relevant factors, amongst others, when deciding whether or not to exercise its discretion to grant an individual exemption:

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<sup>33</sup> See, eg, *Positive Women (Victoria) Ltd (Anti Discrimination Exemption)* [2006] VCAT 1652 (granting an exemption to an organisation that wanted restrict ordinary membership to women suffering HIV/AIDS and associate membership to women); *Domestic Violence Victoria (Anti Discrimination Exemption)* [2005] VCAT 2139 (granting an exemption to an organisation that wanted to restrict advertisement for employment to women only); *State of Victoria – Department of Natural Resources and & Environment Rural Women's Network* [2000] VCAT 824 (granting an exemption to a Government Department to establish a register that profiled women only with a view to improving women's participation on boards and decision-making bodies in the agriculture and resource management sector).

<sup>34</sup> See *YMCA – Ascot Vale Leisure Centre (Anti Discrimination Exemption)* [2009] VCAT 765.

<sup>35</sup> See *Department of Infrastructure (Anti Discrimination Exemption)* [2005] VCAT 2257.

<sup>36</sup> See, eg, *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532.

<sup>37</sup> Victorian Charter, s 32(1).

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and,
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>39</sup>

This amendment would help to ensure that the rights to non-discrimination and equality, guaranteed in the EO Act, are limited only where it is necessary, reasonable and proportionate to do so.

55. PILCH and the HRLRC further submit that section 83 of the EO Act should be amended to incorporate a requirement that successful exemption applicants must consider, on an ongoing basis, the need for their respective exemptions, taking into account the relevant factors outlined in the preceding paragraph.
56. The model proposed ascribes value to all human rights and does not automatically privilege one human right or fundamental freedom over another. Instead, this model requires that competing interests are considered and balanced against each other.
57. This does not mean that a person or organisation could never discriminate in pursuit of a legitimate and reasonable aim. Rather, it means that, before discriminatory treatment is deemed permissible, regard must be had to the particular circumstances of the case and an effort must be made to strike an appropriate balance between competing rights and interests. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate, then the discrimination should be permitted under a reformed section 83 of the Act.
58. The notion of balancing competing rights and interests is not radical. Schemes for limiting human rights to allow for the realisation of other rights or public goods are an integral part of the human rights framework and have been successfully applied for decades. For example, in *Slaight Communication Inc v Davidson*<sup>40</sup> the Supreme Court of Canada found that, where a tribunal is legislatively empowered to make an order that will limit a human right, the legislation should be interpreted narrowly and consistently with section 1 of the Canadian Charter of Rights and Freedoms. Section 1 provides that the rights and

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<sup>38</sup> Ibid, s 32(2).

<sup>39</sup> Ibid, s 7(2).

<sup>40</sup> *Slaight Communication Inc v Davidson* [1989] 1 SCR 1038.

freedoms set out in the Charter are subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In that case, the Supreme Court held that, where a tribunal adjudicator grants an order which cannot be demonstrably justified in a free and democratic society, he or she exceeds his or her jurisdiction, as the Charter does not delegate a power to infringe the Charter in this way.

59. Just as the notion of balancing competing rights and interests is not radical, nor is the model proposed here a radical departure from the current exemptions regime under the EO Act. In fact, all persons that are not subject to the permanent exceptions are already subject to this process. What differs is the proposed treatment of those applications by VCAT.

**Recommendation 3:**

The exemptions regime in the EO Act should be reformed to ensure that exemptions are granted only on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under an amended section 83 of the EO Act, which is based on section 7(2) of the Victorian Charter.

**Recommendation 4:**

The EO Act should incorporate a requirement that a successful exemption applicant be required to consider, on an ongoing basis, the need for their exemption, taking into account the considerations outlined in an amended section 83, which is based on section 7(2) of the Victorian Charter.

**4.4 Guidelines should be Introduced**

60. Whilst PILCH and the HRLRC submit that the permanent exceptions in the EO Act should be repealed and replaced with a revised individual exemption regime that incorporates a limitations provision based on section 7(2) of the Victorian Charter, we acknowledge that it may be beneficial to develop Guidelines on permissible limitations to the rights to non-discrimination and equality.
61. The purpose of such Guidelines might be to foster understanding about when it is or is not appropriate to discriminate on a prohibited ground, and to promote awareness about when it is or is not necessary to apply for an individual exemption under a reformed section 83 of the EO Act. For example, the Guidelines might state that it is not necessary for single-sex schools to apply for individual exemptions under the Act. Guidelines might also serve to prevent unnecessary litigation before Victorian courts and tribunals.

62. PILCH and the HRLRC consider that the EO Act is not an appropriate vehicle in which to articulate guidance on permissible limitations to the rights to non-discrimination and equality. This is because:
- the EO Act was introduced to promote recognition and acceptance of the rights to non-discrimination and equality and to eliminate and provide redress for discrimination and sexual harassment.<sup>41</sup> The primary focus of the EO Act should therefore be the elimination of all forms of discrimination and the realisation of substantive equality; its primary focus should not, as it currently is, be the circumstances in which it is permissible to discriminate on prohibited grounds.
  - legislative guidelines could only be reformed by an Act of Parliament, a requirement that is cumbersome, inflexible and dependent on a Member of Parliament introducing a Bill for this specific purpose. This would have the likely effect that the Guidelines would (much like the current permanent exceptions) be unable to adapt to natural shifts in community values in a timely fashion. It would also likely result in discriminatory treatment that is no longer condoned by the Victorian community.
  - inclusion in the EO Act of Guidelines on permissible limitations to the rights to non-discrimination and equality would likely give rise to a violation of the legal obligation to eliminate *de jure* (ie, formal) discrimination.<sup>42</sup>
63. Instead of introducing legislative guidance, PILCH and the HRLRC submit that Guidelines should be developed apart from the EO Act that outline the nature and scope of permissible limitations on the rights to non-discrimination and equality, as guaranteed in the EO Act. Such Guidelines should be subject to ongoing, regular review and judicial oversight, and be informed by and compatible with section 7(2) of the Victorian Charter.
64. An example of a permanent exception that could be included in the Guidelines is section 17 of the EO Act. Section 17(1) provides that '[a]n employer may limit the offering of employment to people of one sex if it is a genuine occupational requirement that the employees be people of that sex'. Section 17(2) outlines a number of genuine requirements of employment, including if 'the employment includes the conduct of searches of the clothing or bodies of people of that sex' and 'the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress'.
65. The Victorian Equal Opportunity and Human Rights Commission has explained that the exception in section 17 of the EO Act

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<sup>41</sup> EO Act, s 3.

<sup>42</sup> See, eg, CEDAW, art 2.

has an important purpose in that it aims to facilitate the delivery of services that have as their purpose the welfare and advancement of disadvantaged groups by permitting that employment may be limited to people with the same attributes if a particular service can best be delivered by people with those attributes.<sup>43</sup>

The Commission further explained that '[t]his is an important purpose in a democratic society which values high quality and appropriate service provision, therefore the limitation is reasonable, rational and proportionate to the purpose' and that '[t]here are no less restrictive means to achieve this purpose...'.<sup>44</sup>

66. Examples of permanent exceptions that should not be included in Guidelines on permissible limitations on the rights to non-discrimination and equality because they do comply with a limitations analysis under section 7(2) of the Victorian Charter are set out in the remainder of this section.

**(a) Religious Bodies and Institutions**

67. Section 77 of the EO Act permits discrimination if it is necessary to enable a person to comply with his or her 'genuinely held religious belief'. A 'religious belief' is defined in section 4 of the Act to include holding or not holding a lawful religious belief or view and also engaging in, not engaging in or refusing to engage in a lawful religious activity. When a religious belief is 'genuinely held' is not defined under the Act.
68. The Options Paper identifies that section 77 'purports to prioritise any claimed religious belief over any other human right, regardless of the situation and relative importance of the two'.<sup>45</sup> The example provided is of taxi services being refused to people with guide dogs based on religious grounds.<sup>46</sup>
69. Section 77 has an extremely broad and potentially subjective application which means that, while it may allow for justifiable discrimination in some circumstances, it may also allow for discrimination that is not 'justified in a free and democratic society'. There is no scope for analysis or consideration of either the merit or the effect of the discrimination in question. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality. For these reasons PILCH and the HRLRC consider that section 77 would not be deemed an acceptable limitation on human rights under section 7(2) of the Charter.

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<sup>43</sup> Victorian Equal Opportunity & Human Rights Commission, Submission to The Exceptions Review: Consultation Paper 2008; A Review of Exceptions and Exemptions to from the *Equal Opportunity Act 1995* (Vic) (April 2008), 17.

<sup>44</sup> Ibid.

<sup>45</sup> SARC Options Paper, at 130.

<sup>46</sup> Ibid.

70. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights.<sup>47</sup> However, freedom of religion is not absolute either in law or practice.
71. International and domestic human rights law allows for limitations on the right to manifest religion and belief.<sup>48</sup> Any discussion of whether legislation is in breach of the right must consider whether a limitation is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (under the Charter),<sup>49</sup> or 'prescribed by law and ... necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others' (under the ICCPR).<sup>50</sup> The HRC has stated that the ICCPR 'permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'.<sup>51</sup>
72. In practice, ordinary civil and criminal laws are applied to religious institutions and individuals. For example, in Australia, individuals can only be married to one person at a time regardless of how deeply entrenched polygamy is in their religion.<sup>52</sup> Similarly, the ritual use of narcotic substances and misleading and deceptive trade practices are prohibited even where the prohibition infringes upon religious belief.
73. On the other hand, there are some cases where concessions are made to religious groups, and laws are altered to provide for religious freedom. For example, in some jurisdictions exemptions from animal cruelty laws allow religious groups to slaughter animals in a manner that is kosher or halal.<sup>53</sup>
74. The point is that neither full religious freedom in all circumstances, nor complete disregard for religious autonomy is expected or accepted in Australia. Rather, through discussion and debate, a line is drawn between those religious practices that can be accommodated in a fair and functioning society and those which cannot. Drawing this line is not a simple or uncontroversial exercise, but it is a legitimate and important subject for discussion and

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<sup>47</sup> See ICCPR, art 18(3).

<sup>48</sup> See Victorian Charter, s 7(2); ICCPR, art 18(3).

<sup>49</sup> Victorian Charter, s 7(2).

<sup>50</sup> ICCPR, art 18(3).

<sup>51</sup> HRC, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion*, UN Doc. CCPR/C/21/Rev.1/Add.4 (1993), at para 8.

<sup>52</sup> See generally Evans & Gaze, above n 22; Cass R. Sunstein, *On the Tension between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No. 167 (2007).

<sup>53</sup> See Evans and Gaze, *ibid*, at 43.



debate. Currently, section 77 precludes this discussion in the context of religious discrimination and equality.

75. In order for a meaningful limitations analysis under section 7(2) of the Charter to occur, the aim sought to be achieved by the limitation must be 'specific' and not merely general.<sup>54</sup> Section 77 sets up a regime whereby religious freedom (so long as it is exercised in pursuit of a 'genuinely held' belief) can't ever be limited in the name of equality.
76. It is possible to conceive of many activities that would be permitted under section 77 that would not meet the requirements of a section 7(2) limitations analysis. For example, a landlord's refusal of a tenancy application from a gay couple, a restaurant failing to serve a blind customer with a guide dog, or a small business refusing to employ married women. All of these actions could conceivably be based on a 'genuinely held religious belief', but none are reasonable and proportionate limitations on human rights, in particular, the rights to non-discrimination and equality.
77. Therefore, due to the extremely broad application of section 77, PILCH and the HRLRC consider that this section limits the right to equality in a manner that is inconsistent with the requirements of section 7(2) of the Victorian Charter.

**(b) Private Clubs**

78. Section 78 of the EO Act grants private clubs an automatic exception from the requirements of the Act. The section provides that 'nothing in Part 3 [of the Act] applies to the exclusion of people from a private club or from any part of the activities or premises of a private club'<sup>55</sup>. The effect of this blanket exception is that any private club can discriminate on any of the prohibited grounds in section 6 of the EO Act, including impairment, race, sex, or sexual identity, in assessing applicants for membership or in providing access to their premises or activities. For example, a number of private men's clubs in Victoria exclude women from their membership.
79. Section 78 of the EO Act enables private clubs to prioritise the freedom of association over the rights to non-discrimination and equality, regardless of the situation and their relative importance. Indeed, some proponents of private clubs have argued that, in a society that values individual liberty, free association is a basic human right that allows individuals to choose whom they associate with. It is argued that private clubs play an important role in

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<sup>54</sup> See, eg, *Zundel v R* [1992] SCR 731.

<sup>55</sup> A private club is defined as 'a social, recreational, sporting or community service club or a community service organisation, other than one that – (a) occupies any Crown land; or, (b) directly or indirectly receives any financial assistance from the State or a municipal council:' EO Act, s 78(2).

maintaining social networks and centuries of tradition and heritage.<sup>56</sup> Currently, section 78 establishes a regime wherein the freedom of association of members of private clubs can never be limited in the pursuit of the elimination of discrimination and the realisation of equality. This regime perpetuates a false hierarchy of rights and perpetuates discrimination by entrenching discriminatory social structures and gender hierarchies, in violation of international human rights law.<sup>57</sup>

80. Whilst the freedom of association is of vital importance and its recognition is necessary for the full realisation of human rights, its exercise and enjoyment is not absolute. For example, the freedom of association may be lawfully restricted in cases involving national security, public safety, public order, and protection of public health and public morals.<sup>58</sup> As one commentator has explained, '[a]ssociations that advocate *national, racial or religious hatred* are to be prohibited in the interests of the rights of others...'.<sup>59</sup>
81. Section 7(2) of the Victorian Charter requires that the freedom of association be balanced against the rights to non-discrimination and equality. Yet, rather than balancing these rights, the blanket exception in section 78 of the EO Act prioritises the freedom of association of individual members of private clubs over the rights to non-discrimination and equality. It does so without requiring any consideration of where the balance between these rights should lie, or whether the limitation is justified in a free and democratic society, as contemplated by section 7(2) of the Victorian Charter. Put simply, there is no scope for analysis of either the merit or the effect of the discriminatory conduct and practices of private clubs.
82. Private gentlemen's clubs should be required to demonstrate how excluding women and denying them the opportunity to network and establish business relationships with other elite leaders and professionals is justifiable, including in light of the under-representation of women in public and political life due to past discrimination. Private gentlemen's clubs should be required to demonstrate why it is necessary that they exclude women when other comparable clubs, such as those in the United Kingdom, have recognised that the exclusion of women is no longer justified.<sup>60</sup>
83. PILCH and the HRLRC submit that section 78 should be repealed from the EO Act so that private clubs are not entitled to an automatic exception from the obligations imposed by the

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<sup>56</sup> See, eg, Chris Berg, 'Leave the Poor Old Chaps Alone', *The Age* (Melbourne), 18 January 2009.

<sup>57</sup> See, eg, CEDAW, art. 5(a); Victorian Charter, s 8.

<sup>58</sup> See, eg, ICCPR, art 22(2); Victorian Charter, s 7(2).

<sup>59</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2005), at 507-508.

<sup>60</sup> See, eg, Athenaeum Club, at: <http://www.athenaeumclub.co.uk/>.

EO Act. We further submit that the exception for private clubs should not be included in guidelines on permissible limitations on the rights to non-discrimination and equality. Rather, private clubs should be required to apply on an individual basis, under a reformed section 83, for an individual exemption to the EO Act. Private clubs should be required to justify their reasons for excluding people from membership or activities on the basis of prohibited grounds of discrimination. In particular, they should be required to demonstrate the reasons why a limitation on the rights to non-discrimination and equality is justified in the circumstances of their application, and that there are no less restrictive means available to achieve the purpose of the limitation.

**(c) Gender Identity**

84. Section 27B of the EO Act provides that employers may discriminate against another person on the basis of his or her gender identity if 'the person does not give the employer adequate notice of the person's gender identity' or, if adequate notice is provided, 'it is unreasonable in the circumstances for the employer not to discriminate against the person'.<sup>61</sup> The effect of this blanket exception is that any employer can discriminate on the basis of gender identity. For example, pursuant to section 27B, an employer might lawfully refuse to hire or promote a transsexual or transgender person.
85. Section 27B of the EO Act enables employers to discriminate on the basis of gender identity, entrenches this form of discrimination, and sends a message to the community that it is socially and culturally acceptable to discriminate against a person because of his or her gender identity. The continued existence of section 27B is particularly troubling in light of evidence concerning the socially pervasive and persistent nature of gender identity discrimination in Victoria<sup>62</sup> and evidence suggesting that an overwhelming number of Australians oppose gender identity discrimination. A surveyed undertaken in 2009 for the Australian Coalition for Equality has revealed that '[a] strong majority (85%) of Australians support federal laws protecting Australians from discrimination on the grounds of sexual orientation and gender identity (42% strongly support, 43% support). In comparison, just 10% oppose such laws (4% strongly oppose, 6% oppose)'.<sup>63</sup>
86. PILCH and the HRLRC consider that the right not to be discriminated against in the workplace because of gender identity is extremely significant. This is because

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<sup>61</sup> Section 27B(2) of the EO Act stipulates the relevant facts and circumstances that must be considered in determining whether or not it is unreasonable for the employer not to discriminate against the person, and includes the cost to the employer of not discriminating and the impact of the proposed discrimination on the person.

<sup>62</sup> See generally Victorian Gay and Lesbian Rights Lobby, *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria* (2000), available at: <http://www.vglrl.org.au/files/publications/Enough-is-Enough-VGLRL-2000.pdf>.

<sup>63</sup> *Community Attitudes to Discrimination Legislation Report* (2009), above n 30.

discrimination in the workplace, especially on the ground of gender identity, can result in poor morale, increased sick leave, exacerbated employee stress, anxiety and depression, and loss of confidence.<sup>64</sup> This affects both employers and employees. In contrast, the importance of the permanent exception in section 27B for employers seems minimal, at best. Section 27B has never been used by any employer as justification for discrimination on the ground of gender identity, nor has it been referred to in any case law.<sup>65</sup> This suggests that the provision is not only redundant and unnecessary, but that it also serves unjustifiably to endorse discriminatory attitudes. It is significant that this provision was introduced after the original Bill and appears to have been passed for a greater utilitarian purpose of ensuring the Bill's safe passage through Parliament.<sup>66</sup>

87. PILCH and the HRLRC submit that section 27B should be repealed from the EO Act so that employers are not entitled to an automatic exception from the obligations imposed by the EO Act. We further submit that the exception in section 27B should not be included in the proposed Guidelines on permissible limitations on the rights to non-discrimination and equality. Rather, employers wishing to discriminate on the basis of gender identity should be required to apply, under an amended section 83, for an individual exemption to the EO Act. Employers should be required to justify their reasons for excluding employees on the basis of their gender identity. In particular, they should be required to demonstrate the reasons why a limitation on the rights to non-discrimination and equality is justified in the circumstances of their application, and that there are no less restrictive means available to achieve the purpose of the limitation.

**Recommendation 5:**

Guidelines should be developed that outline the nature and scope of permissible limitations to the rights to non-discrimination and equality, as guaranteed in the EO Act. Such Guidelines should be informed by and compatible with section 7(2) of the Victorian Charter.

#### **4.5 Temporary Special Measures**

88. Special measures are measures taken to accelerate the equal participation of disadvantaged groups in the political, economic, social, cultural, civil or any other field, with the aim of achieving substantive equality.<sup>67</sup> The Attorney-General's Justice Statement

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<sup>64</sup> See Jamie Magel, *Sexual Orientation and Gender Identity in the Workplace: Challenges and Opportunities*, Diversity at Work, Melbourne, available at: <http://www.diversityatwork.com.au/node/120>.

<sup>65</sup> See SARC Options Paper (2009), at 65.

<sup>66</sup> Ibid.

<sup>67</sup> See CEDAW Committee, *General Recommendation No. 25*, above n 2, at para 18.

provides that: '[s]pecial measures are needed to ensure the promise of equality is not destroyed by social and economic disadvantage, and that disadvantage does not deny people their rights or their ability to seek redress when those rights are breached'<sup>68</sup>.

89. In 2008, Julian Gardner, author of the report on the Equal Opportunity Review, recommended that: '[t]he existing provision in the Charter that provides that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated in the [EO] Act'<sup>69</sup>.
90. PILCH and the HRLRC consider that the adoption of special measures is an essential step towards substantive equality and urge the Government to amend the EO Act to reflect the legal distinction between permissible discrimination and special measures. In accordance with this distinction, those permanent exceptions that are designed to address existing disadvantage (and are therefore properly characterised as 'special measures') should not be included in any legislative or quasi-legislative exceptions scheme. Rather, they should be contained in a separate part of the EO Act that deals specifically with special measures.
91. The distinction between special measures and discrimination is recognised in section 8(4) of the Victorian Charter, which states that: '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'. The purpose of section 8(4) is to recognise that substantive equality is not necessarily achieved by treating everyone equally, and that special measures may be required to achieve equality for some groups in the community.<sup>70</sup>
92. The distinction between discrimination and special measures is also recognised in international human rights law. For example, Article 1(4) of ICERD provides that 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination...'.<sup>71</sup>
93. In its General Recommendation on special measures, the CEDAW Committee stated that temporary special measures are 'part of a necessary strategy by States parties directed towards the achievement of *de facto* or substantive equality of women with men in the enjoyment of human rights and fundamental freedoms'<sup>71</sup>.

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<sup>68</sup> Department of Justice, *New Directions for the Victorian Justice System 2004 – 2014: Attorney-General's Justice Statement* (2004), at 14.

<sup>69</sup> *An Equality Act for a Fairer Victoria*, above n 8, at 14.

<sup>70</sup> This provision is modelled on section 19(2) of the *New Zealand Bill of Rights Act 1990* (NZ).

<sup>71</sup> CEDAW Committee, *General Recommendation No. 25*, above note 2, at para 18.

94. In its *General Comment No. 20*, CESCR stated:

In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities.<sup>72</sup>

95. Currently the EO Act contains a number of special measures that are mischaracterised as exceptions. Among these are the provisions that allow for:

- welfare measures in accommodation (s 55);
- clubs for disadvantaged people and minority cultures (s 61); and,
- welfare measures and special needs (s 82).

96. These provisions – and any others that are designed to address existing disadvantage – should not be considered exemptions from discriminatory behaviour (and therefore should not be repealed in line with our recommendation No. 2). Instead, the EO Act should clarify that such conduct is not discriminatory at all.

**Recommendation 6:**

Exceptions and exemptions that are designed to address existing disadvantage (and are therefore properly characterised as ‘special measures’) should not be included in any legislative or quasi-legislative exceptions and exemptions scheme. Rather, they should be contained in a separate part of the EO Act that deals specifically with special measures.

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<sup>72</sup> CESCR, *General Comment No. 20*, above n 2, at para 9.