

Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995 (Vic)

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1. Executive Summary

1.1 Introduction

This submission is made by the PILCH Homeless Persons' Legal Clinic (*the Clinic*) in response to the Victorian Attorney-General's Discussion Paper entitled *Equal Opportunity Review (the Discussion Paper)*.

The Discussion Paper invites responses to a series of questions and seeks comments on if and how the *Equal Opportunity Act 1995* (Vic) (*the EO Act*) should be reformed to better promote the right to equality and improve protection from discrimination.

In response to some of the questions raised in the Discussion Paper, this submission considers the case for reforming the EO Act, and examines the extent and deleterious consequences of discrimination faced by marginalised members of the Victorian community. In particular, the submission looks at the following groups of people:

- (i) People experiencing homelessness;
- (ii) The unemployed;
- (iii) Recipients of social security; and
- (iv) People with a criminal record.

This submission also examines the social and economic costs of discrimination.

The current provisions of the EO Act do not make it unlawful to discriminate against a person on the basis of their homelessness, their unemployment status, or the fact that they are receiving social security payments. For the purposes of this submission and the argument for reform, these three statuses can be generally referred to as an individual's 'social status'. Discrimination on the grounds of social status defined in this way is currently lawful in Victoria. It is also currently lawful to discriminate against someone on the basis of their criminal record.

This submission argues that law reform is necessary to protect people with these attributes from discrimination. It further argues that legislative change is required for Australia to discharge its relevant obligations under international human rights law and for Victoria to keep pace with anti-discrimination developments in many common law jurisdictions. Perhaps most importantly, this submission demonstrates, through quantitative and qualitative data collected over a number of years, that law reform is necessary to counteract the devastating impact of social status and criminal record discrimination on some of the most marginalised and disadvantaged members of our society.

The Clinic has lobbied for many years, in conjunction with numerous social services organisations, for the changes to the EO Act to prohibit social status and criminal record discrimination. A large number of surveys and consultations have been conducted, in addition to academic research, to track the instance and impact of these forms of discrimination in Victoria. Regrettably, year after year and survey after survey, the Clinic's findings are the same. There remains an extremely high incidence of social status and criminal record discrimination in the Victorian community.

Furthermore, as this Submission will reveal, the experience of discrimination is very destructive for individuals and for society more generally. Discrimination can lead to and further entrench homelessness, unemployment and poverty. As the law currently stands, a service provider, such as a real estate agency or caravan park owner, can refuse accommodation to someone (who may already be precariously housed) because they want to pay either with a cheque from a welfare agency, or from their social security benefits. Another example of the deleterious impact of discrimination can be evidenced in the workplace, where people are regularly refused jobs they can adequately perform due to an old or irrelevant criminal record. This not only stymies a person's genuine attempts to integrate into the community and contribute to Australia's economy, but, it can also entrench people in homelessness, unemployment and poverty. Disturbingly, it also often leads to recidivism.

The Clinic is convinced, as it was in 2002 when it first lobbied on these issues, that discrimination on the basis of social status and criminal record must be countered by legislative prohibition in the EO Act. This is imperative to enable the homeless, the unemployed, social security recipients and people with criminal records to enjoy the same freedom from unwarranted discrimination as people with homes, jobs, and means, thus being afforded equality before and under the law. Adding the grounds of social status and criminal record to the EO Act would also have an educational and deterrent effect.

A summary of key findings and recommendations is set out below.

1.2 Conclusions

Discrimination against people on the ground of their status as homeless, unemployed or a recipient of social security payments, or on the basis of their criminal record, is widespread in Victoria in many aspects of public and private life.

Discrimination against people on these grounds has a devastating impact on the individuals concerned and the community as a whole.

The EO Act does not provide any protection from, or redress in relation to, discriminatory treatment on the ground of social status. Reform of the EO Act by adding 'social status' and 'criminal record' as prohibited grounds of discrimination, is imperative to ensure that some of the most vulnerable members of our community are protected from unfair and unjust treatment. Reform is also necessary to ensure compliance with international human rights law, overseas developments and progressive public policy.

1.3 Recommendations

The Clinic makes the following recommendations for reform:

Recommendation 1

Amend section 6 of the EO Act to include 'social status' as an attribute on the basis of which discrimination is prohibited.

Recommendation 2

Amend section 6 of the EO Act to include 'criminal record' as an attribute on the basis of which discrimination is prohibited.

Recommendation 3

Amend section 4 of the EO Act to include the following definition of 'social status':

'Social status' includes a person's status of being:

- (a) homeless;
- (b) unemployed; or
- (c) a recipient of social security payments.

Recommendation 4

Amend section 4 of the EO Act to include the following definition of 'homeless', which is taken from the *Supported Accommodation Assistance and Act 1994* (Cth):

A person is taken to be 'homeless' if he or she has inadequate access to safe and secure housing.

A person is taken to have inadequate access to safe and secure housing if the only housing to which a person has access:

- (a) damages, or is likely to damage, the person's health; or
- (b) threatens the person's safety; or
- (c) marginalises the person through failing to provide access to:
 - (i) adequate personal amenities; or
 - (ii) the economic or social supports that a home normally affords; or
- (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

Recommendation 5

Amend section 4 of the EO Act to include the following definition of 'unemployed':

'Unemployed' in relation to a person means not having a job or being unable to earn a sufficient livelihood.

Recommendation 6

Amend section 4 of the EO Act to include the following definition of 'recipient of social security payments':

'Recipient of social security payments' in relation to a person means being a recipient of a payment, benefit, pension or allowance under the *Social Security Act 1991* (Cth).

1.4 Endorsements

The Clinic has received specific endorsements for its contentions in relation to social status discrimination from both the Salvation Army Victoria State Council and the Homeless Persons' Legal Service in New South Wales.

The Clinic notes that the Human Rights Law Resource Centre Ltd (**HRLRC**), the Public Interest Law Clearing House (Vic) Inc (**PILCH**) and the Federation of Community Legal Centres (**FCLC**) have made submissions to the Review of the EO Act. The Clinic recognises the significant expertise of the HRLRC, PILCH and the FCLC, and as such, strongly endorses each of their submissions to the Review.

In particular, the Clinic notes that the HRLRC has provided strong human rights based arguments for the need to amend the scope of the EO Act to provide broader powers and measures to address systemic discrimination. The Clinic supports the HRLRC's view that, as a result of this amendment, the EO Act will be better placed to address discrimination that is based on or results from patterns, structures and systems that produce or are capable of producing inequalities between certain defined categories of persons.

In addition, the Clinic endorses PILCH's recommendation for a substantial overhaul of the complaints-based system provided for under the EO Act. The Clinic also supports PILCH's view that the Commission should be granted a more interventionist role, empowered to investigate individual cases and systemic issues, to issue codes of practice and guidelines, to conduct education and training and to undertake increased research for law reform purposes.

2. PILCH Homeless Persons' Legal Clinic

2.1 Overview of the Clinic

The Clinic is a project of PILCH and was established in 2001 in response to the great unmet need for targeted legal services for people experiencing homelessness.¹ The Clinic is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund administered by VLA. This funding is supplemented by fundraising and donations. The Clinic does not receive any money from the Commonwealth of Australia.

Free legal services are offered on a weekly basis at 12 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.²

Since its establishment in 2001, the Clinic has assisted almost 2800 people at risk of, or experiencing, homelessness in Victoria. The Clinic also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights.

2.2 Aims and Objectives of the Clinic

The Clinic has the following aims and objectives:

- (i) to provide free legal services to people who are homeless, or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;

¹ See <http://www.pilch.org.au> <at 16 August 2007>.

² The legal services are provided by volunteer lawyers from Allens Arthur Robinson, Baker & McKenzie, Blake Dawson Waldron, Clayton Utz, Malletts Stephen Jaques, Minter Ellison, DLA Phillips Fox, Corrs Chambers Westgarth and the legal departments of Goldman Sachs JBWere and the National Australia Bank.

- (ii) to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- (iii) to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- (iv) to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- (v) to use the law to construct viable and sustainable pathways out of homelessness;

The Clinic undertakes the following activities to achieve its aims and objectives:

- (i) provides free legal assistance, advice, casework and advocacy in the areas of civil and administrative law;
- (ii) identifies and seeks to redress gaps in the delivery of legal services to homeless people;
- (iii) collaborates with homelessness service providers to ensure that homeless people can access legal services;
- (iv) in consultation with homeless people, identifies and advocates in relation to relevant law and policy reform issues; and
- (v) conducts community legal education in relation to homelessness, human rights and the law.

2.3 Areas of Law

The Clinic focuses on the provision of services in civil and administrative law matters. The principle areas of civil and administrative law in which the Clinic practises are social security, including Centrelink breaches and debt, housing and tenancy, guardianship and administration and issues with State Trustees, victim of crime compensation, discrimination and bankruptcy.

Despite this civil and administrative law focus, the Clinic also does some summary criminal law work, mainly in the area of fines and infringement notices in the Magistrates' Court of Victoria.

3. Legal Framework

3.1 International Framework

(a) Human Right to Non-Discrimination

The right to equality and freedom from all forms of discrimination is an integral component of the international human rights normative framework. The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination, including on the ground of social origin or status, is set out in article 26 of the *International Covenant on Civil and Political Rights (ICCPR)*:

All persons are equal before the law and are entitled without 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.*³

This article is a free-standing non-discrimination provision that is not confined to the enjoyment of rights in the ICCPR, but extends to all human rights and fundamental freedoms, including economic and social rights such as the right to an adequate standard of living and social security.⁴

Following ratification, the ICCPR entered into force for Australia on 13 August 1980. Australia's obligation to protect and promote the norm of non-discrimination is set out in article 2(1) of the ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present 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.

The norm of non-discrimination is also enshrined in article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, which has also been ratified by Australia.⁵ Article 2 provides that all States must use all their available resources to progressively, including through the enactment of laws, realise the rights recognised in the Covenant which cover a range of economic, social and cultural rights, including the right to be free from poverty, the right to work and the right to adequate housing. These rights must be exercised without any discrimination of any kind, including discrimination on the basis of 'other status'.⁶

International jurisprudence clearly establishes that the term 'other status' refers to a definable group of people linked by their common status.⁷ This would include their status as 'homeless', or 'unemployed', or a 'recipient of social security payments', or as having a 'criminal record'.⁸

³ *International Covenant on Civil and Political Rights*, 19 December 1966, (1980) ATS (entered into force generally 23 March 1976 and for Australia 13 August 1980). See also article 7 of the *Universal Declaration of Human Rights* (entered into force generally and for Australia 10 December 1948).

⁴ See, for example, *Broeks v The Netherlands* (172/84) and *Zwaan de Vries v The Netherlands* (182/84), in which the United Nations Human Rights Committee found article 26 to be applicable to complaints concerning discrimination in the field of social security.

⁵ *International Covenant on Economic Social and Cultural Rights*, 19 December 1966 (1976) ATS 5 (entered into force generally 3 January 1976 and entered into force for Australia 10 March 1976).

⁶ Article 2 of ICESCR provides that: (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (2) The States Parties to the present Covenant 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.

⁷ Also, see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2nd ed, 2004), 689.

⁸ The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record: see *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. Also, see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2nd ed, 2004), 689.

(b) Implementation of the Human Right of Non-Discrimination

The implementation of the norm of non-discrimination has three key facets in relation to people who are homeless, unemployed, in receipt of social security payments, or who have a criminal record.⁹

First, the right to freedom from discrimination imposes an immediate obligation on the Victorian government to *respect* the right to non-discrimination on the basis of social status or criminal record; that is, to themselves abstain from discrimination on the basis of a person's social status or criminal record.

Second, the right to freedom from discrimination imposes an immediate obligation on the Victorian government to effectively *protect* people from discrimination on the basis of their social status or criminal record; that is, to ensure that legislation prohibits unwarranted discrimination against people because of their social status or criminal record and provides 'effective remedies' in the case of violations. To this end, the EO Act should be amended and enforced to prohibit discrimination on the ground of social status and criminal record and provide redress where such discrimination occurs.

Third, the right imposes a further substantive obligation on governments to *fulfil* the right to non-discrimination; that is, to take positive steps to address the special needs of people who are homeless, unemployed, or in receipt of social security payments, or who have a criminal record so as to enable them to realise all of their rights and freedoms.¹⁰ These steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources. Such steps should include developing and implementing policies and programs to ensure that they are afforded opportunities to obtain adequate housing, employment and the other requirements of an adequate standard of living.

3.2 Equal Opportunity Legislation in Australia

Equal opportunity legislation exists in Australia at commonwealth and state and territory level. Regrettably, despite the existence of the international human rights framework (under which both Australian Federal and State Governments have obligations) and a several overseas examples, homelessness, unemployment and social security reciprocity are not attributes that are currently protected by the EO Act, or any anti-discrimination legislation around Australia. Accordingly, it is still currently lawful to discriminate against a person on the basis of their social status in Australia. The Australian position on criminal record discrimination is discussed below.

Although Australia is a long way from ensuring that those with a criminal record are equal within society, there is some legislation operating across the country purporting to prohibit discrimination on this ground. In Victoria however, the EO Act is silent on

⁹ 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

¹⁰ Human Rights Committee, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

the issue of criminal record discrimination, meaning that discrimination on this basis is not prohibited.

At the Commonwealth level, legislation prohibits discrimination on a number of grounds, including criminal record.¹¹ Some state and territory governments have also introduced similar local legislation.¹² Other states and territories rely on 'spent conviction' regimes (in some cases supplemented by anti-discrimination legislation) to deal with this issue.¹³ 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. Victoria does not have spent conviction legislation, meaning that ex-offenders must rely on police policy relating to the circumstances in, and content of, police record disclosure.¹⁴ Across the board, and particularly in Victoria, this legislative regime provides little protection against criminal record discrimination which therefore remains widespread.¹⁵

3.3 Victorian Charter on Human Rights and Responsibilities Act

In Victoria, the *Charter on Human Rights and Responsibilities Act* (2006) (***the Charter***) has enshrined certain civil and political rights in domestic legislation. Section 8 of the Charter deals with recognition and equality before the law, and provides that:

- (i) Every person has the right to recognition as a person before the law;
- (ii) Every person has the right to enjoy his or her human rights without discrimination; and
- (iii) 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 attributes set out in section 6 of the EO Act, which currently do not include social status, that is, homelessness, unemployment, or receipt of social security, or possession of a criminal record.

3.4 Conclusion

There is currently no legislation in Victoria, or indeed in Australia, that provides equality and protection from discrimination to people who are homeless, unemployed or in receipt of social security. While some legislation has been enacted at a commonwealth and state and territory level in relation to criminal record discrimination, again in Victoria there is no legislative protection available for people who are discriminated against on the basis of their criminal record.

¹¹ *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* s 3(1); *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)* reg 4(b)(ii).

¹² See *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*; *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)*; *Anti-Discrimination Act 1998 (Tas)*; *Anti-Discrimination Act 1992 (NT)*;

¹³ 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)*.

¹⁴ See Victoria Police's *Information Release Policy*.

¹⁵ See generally, Department of Human Services (Vic), *Charter of Rights and Enhanced Complaints Mechanism: Report and Consumer Consultations* (2004); Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295-321.

In consultations undertaken by the Clinic in 2005 with 106 homeless people about their human rights, 68 per cent of people consulted considered that current frameworks protecting the right to be free from discrimination were either inadequate or very inadequate.¹⁶ Accordingly, if the Victorian Government's commitment to international human rights, as evidenced by the recently introduced Charter, is to ring true and have real consequences in Victorian society, reform of the EO Act to include social status and criminal record as protected attributes is urgently required.

4. Definitional Issues

4.1 Definition and causes of homelessness

For the purpose of identifying the extent of homelessness and assisting governments to appropriately develop and deliver services, the Australian Bureau of Statistic (**ABS**) has adopted the definition of homelessness proposed by Chamberlain and MacKenzie.¹⁷ Chamberlain and MacKenzie argue that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the 'conventions of community life'.¹⁸ In Australia, the accepted minimum community standard is said to be a small, rented flat with basic amenities, such as a bedroom, bathroom and kitchen.¹⁹ Having regard to this standard, Chamberlain and MacKenzie identify three categories of homelessness:

- (i) Primary homelessness
People without conventional accommodation, such as people living on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter.
- (ii) Secondary homelessness
People who move frequently from one form of temporary shelter to another. Secondary homelessness covers people using emergency accommodation (such as hostels for the homeless or night shelters), teenagers staying in youth refuges, women and children escaping family violence (staying in women's refuges), people residing temporarily with other families and those using boarding houses on an occasional or intermittent basis.
- (iii) Tertiary homelessness
People who live in boarding houses on a medium to long-term basis. Residents of boarding houses do not have a separate bedroom and living room, they do not have kitchen and bathroom facilities of their

¹⁶ PILCH Homeless Persons' Legal Clinic Submission, *Homelessness and Human Rights in Victoria* (2005), 23-24.

¹⁷ Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11.

¹⁸ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11, at 49.

¹⁹ Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11, at 49. The Clinic recognises that notions such as 'conventions of community life' and 'minimum community standards' are culturally contingent and that any definition derived from such notions does not necessarily reflect whether persons subject to the definition self-identify as homeless. To the extent that definitions are used to assess need and eligibility for services, and to appropriately target and delivery such services, it is important that they account for subjective understandings of homelessness.

own, their accommodation is not self-contained, they do not have security of tenure provided by a lease.²⁰

Using the definition proposed by Chamberlain and MacKenzie, the ABS enumerated that on Census night in 2001 there were almost 100,000 people experiencing homelessness across Australia, with over 20,000 of those in Victoria.²¹ This national figure includes over 14,000 people sleeping rough or in squats, more than 14,000 in crisis accommodation and refuges, almost 23,000 in boarding houses, and nearly 49,000 people staying temporarily with friends or relatives.²² A further 23,000 people across Australia live temporarily in caravan parks.²³

Data from the 2006 Census is soon to be released and is tipped to show an increase in the homeless population across Australia and in Victoria. Importantly Census data only captures those people who respond to the Census survey and those who identify as homeless. Research shows that, for example, while many young people and indigenous people may fall within the above definition of homeless in that they have no fixed address and seek transitory accommodation from friends and extended family, they may not identify as homeless. It is therefore reasonable to assume that the actual number of people experiencing homelessness exceeds the official figure.

The categories of person defined as homeless in Chamberlain and MacKenzie's widely used definition accord with section 4 of the *Supported Accommodation Assistance Act 1994* (Cth), which provides that:

A person is taken to be 'homeless' if he or she has inadequate access to safe and secure housing.

A person is taken to have inadequate access to safe and secure housing if the only housing to which a person has access:

- (a) damages, or is likely to damage, the person's health; or
- (b) threatens the person's safety; or
- (c) marginalises the person through failing to provide access to:
 - (i) adequate personal amenities; or
 - (iii) the economic or social supports that a home normally affords; or
- (d) places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

This is consistent with the international definition of 'homelessness' developed by the United Nations Committee on Economic, Social and Cultural Rights, which provides in effect that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity.²⁴ This submission adopts the *Supported Accommodation Assistance Act 1994* (Cth) definition of homelessness.

The causes of homelessness are complex and varied. However, they are generally acknowledged to include:

²⁰ Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 1-2.

²¹ Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 6.

²² Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 1-2.

²³ Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 1-2.

²⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing*, UN Doc E/CN4/1991/4 (12 December 1991).

- (i) Structural causes (such as poverty, unemployment and inadequate supply of affordable housing);²⁵
- (ii) Fiscal, social and public policy causes;
- (iii) Periods of incarceration;
- (iv) Individual causes, including family violence and family fragmentation; and
- (v) Cultural causes, particularly for NESB women and Indigenous women.

In many cases of homelessness, these causes are intersectional and interrelated.

4.2 Do the Proposed Grounds – Homelessness, Unemployment and Receipt of Social Security – Constitute Social Statuses?

(a) Introduction

In light of the Clinic's recommendations regarding the inclusion of 'social status' as a protected attribute, it is important to consider its individual components – homelessness, unemployment and receipt of social security – and why they should be linked under this umbrella attribute.

(b) Homelessness

The commonality of experience and of discriminations of homeless persons makes homeless persons a 'social group' and 'homelessness' a 'social status'.²⁶ Homelessness has many causes. A number of those causes are themselves attributes within the meaning of section 6 of the EO Act. For example, a homeless person suffering mental illness may be unlawfully discriminated against on the basis of that mental illness. However, the discrimination experienced by homeless persons is referable not only to the characteristics of component groups of the homeless population (such as the mental health of persons suffering from mental illness, the disability of persons suffering from drug or alcohol addictions, the gender and age of women and children fleeing domestic violence, or the unemployed status and reliance on social security payments of many homeless people), but also to the very status of those persons as 'homeless'.

(c) Unemployment

Like homelessness, 'unemployment' is a condition affecting a discrete and identifiable group of people. According to the ABS, in November 2001 there were 161,800 unemployed people in Victoria.²⁷ However, this estimate only takes into account those persons aged 15 years and over who were not employed and were actively looking for, and available for, work. As the New Zealand Human Rights Commission has pointed out, the unemployed constitute a broader range of people than those who are unable to find, but

²⁵ Following the 2001 Census, the ABS identified unemployment and inadequate income as significant structural factors contributing to and causing homelessness across Australia: Australian Bureau of Statistics, *Counting the Homeless 2001* (2003).

²⁶ The classification of homeless persons as a 'social group' and of 'homelessness' as a social status has been recognised in the United States: see, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

²⁷ Australian Bureau of Statistics, *Labour Force, Victoria* (2001) paragraph 6202.2.

are seeking, paid work. It includes people who are unable to earn a sufficient livelihood. In addition, the category of 'unemployed persons' includes persons not employed in paid work for various reasons, including illness, disability, family responsibilities, retirement or study.

The social stigma and prejudice associated with unemployment is linked to the emphasis in our society on the importance of paid work and leads to negative stereotyping and discrimination against unemployed people. Accordingly, it is appropriate to refer to unemployed persons as a definable social group.

(d) Receipt of Social Security Payments

Receipt of social security payments is an attribute that is connected to, but distinct from, homelessness and unemployment. While many people are discriminated against, directly or indirectly, for not having a 'real job', including housewives and students, there is also a significant amount of negative stereotyping specifically related to '*dole bludgers*' who live off '*government handouts*'. This is so despite the fact that the right to receive welfare assistance is recognised under the ICESCR, and that Australia has a long history of providing a welfare safety-net for citizens.

Discrimination against people who rely on social security payments manifests itself in the public arena most commonly in the area of provision of accommodation and in the provision of goods and services, particularly banking and insurance services. Negative stereotypes about the ability of social security recipients to meet rent or loan repayments are often relied upon to deny people the opportunity to secure a home or finance. Such denials of service are rarely based on relevant financial information, but rather on preconceived or imputed notions about the ability to pay, and general trustworthiness, of people receiving social security payments.

4.3 Intersection of the proposed grounds of social status discrimination

There is a frequent intersection between homelessness, unemployment, receipt of social security payments and other attributes which are protected under the EO Act. For example, many homeless people also experience discrimination on the basis of race, disability, gender, sexual orientation and family status. The recognition of social status as a ground of discrimination would not lessen or invalidate claims based on other forms of discrimination. Instead, it would advance and enrich the principle of non-discrimination by recognising the complex nature of the experiences of homeless and unemployed people.²⁸

Without protection on the basis of social status, the EO Act is unable to truly address the complex experiences of this profoundly disadvantaged group. The evidence of Victorian welfare organisations suggests that the existing grounds in the EO Act do not provide sufficient or consistent protection for homeless or unemployed people. In Canada, it has been recognised that the inclusion of social status as a prohibited

²⁸ 'Finding a Place for the Jobless in Discrimination Theory' (1997) 110 *Harvard Law Review* 1609, 1623.

ground of discrimination advances a more sophisticated intersectional approach to discrimination.²⁹

It is for this reason that the Clinic recommends that three additional grounds, namely homelessness, unemployment and being a recipient of social security payments, be included in the EO Act under an umbrella attribute of 'social status'.

As discussed in this submission, receipt of social security payments and unemployment are common elements of homelessness, but do not of themselves adequately encapsulate the experiences of the treatment afforded to many homeless persons. Similarly, the proposed income source related grounds need to include references both to employment status and to status as a recipient of social security payments. The inclusion of only, for example, 'being a recipient of social security payments' as a prohibited ground under the EO Act could make protection capricious – that is, available one week, but not the next, depending on the income source of the individual at the time of suffering the discrimination. Many people would only be protected temporarily while receiving welfare assistance and would lose that protection if their source of income changed, notwithstanding that the disadvantages and discriminatory treatment they suffer might remain the same.

In the Clinic's view, the introduction of the ground of 'social status', incorporating homelessness, unemployment and receipt of social security payments, would provide the broad protection required.

5. The Extent and Impact of Social Status and Criminal Record Discrimination

5.1 The Extent of Social Status Discrimination in the Victorian Community

Many persons are subject to discriminatory treatment on the basis of their social status, in particular their status as a homeless person, an unemployed person, or a recipient of social security payments.

St Vincent de Paul Society reports that:

Our 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.³⁰

In 2006, the Clinic conducted a series of detailed consultations with over 180 homeless Victorians about their experience of discrimination (***Discrimination Consultations***). The purpose of these consultations was to gather qualitative and quantitative data regarding the nature and extent of social status discrimination in Victoria. This project was conducted in order to inform a Victorian Government initiative to introduce voluntary guidelines for businesses to reduce the incidence of discrimination on the grounds of homelessness or social status (***the Guidelines***).

²⁹ A Wayne Mackay, Tina Piper and Natasha Kim, 'Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act', <http://canada.justice.gc.ca/chra/en/socond2.html>.

³⁰ Letter of support from St Vincent de Paul Society to PILCH Homeless Persons' Legal Clinic dated 12 August 2002.

These Guidelines and their effectiveness in reducing the extent of social status discrimination are discussed below at section 7.1.

The results of the Clinic's Discrimination Consultations are both illuminating and disturbing. Seventy per cent of people surveyed reported that they had experienced discrimination on the basis of homelessness or social status at the hands of accommodation providers. The findings showed that most people are discriminated against in private rental or by private real estate agents, boarding houses, transitional or crisis accommodation, hotels and public housing.³¹

As one homeless 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 accomm) also said "no" once I said I was on a benefit. (Credo Café)

Another person said that he '*frequently experiences discrimination by real estate agents due to my homelessness and poverty*'. This statement was backed up by another survey participant who felt he had been discriminated against:

probably because I was unshaven, had coffee on my shirt and no socks. They said they had no space – I know that wasn't true. If a person is unemployed or on a pension the estate agent will never give it to them... (St Mary's House of Welome)

The Clinic has also collected numerous case studies over a number years, from its own work and that of community and welfare organisations, which detail persistent discrimination against homeless persons, unemployed persons and social security recipients – including women, children and families – in the provision of accommodation.³²

The most direct and immediate effect of the discrimination is that people who have been homeless in the past, have gaps in their rental history, are using their social security payments to cover the rent, or are being assisted by a welfare agency, are denied tenancies despite of their ability to pay rent.

Jan Kenny of Hamilton Accommodation Program reports:

*Real 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.*³³

Another caseworker told the story of a young homeless woman:

The client visited many agencies looking for private rental properties. Each agency required that she fill out a form with her particulars, including her history. Her story to me was that, in most instances, when she first approached an agency they were polite and friendly. However, the minute her history became evident, the accommodation

³¹ PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 12-13. Private rental or real estate agents (41% or 75 respondents), boarding houses (24% or 44 respondents), transitional or crisis accommodation (20% or 36 respondents), hotels and public housing (each 19% or 35 respondents) and caravan and backpackers (each 17% or 32 respondents).

³² All case studies and individual stories that appear in this submission have been taken from the following PILCH Homeless Persons' Legal Clinic Submissions and Reports: PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007); PILCH Homeless Persons' Legal Clinic Submission, *Promoting Equality: Homeless Persons' and Discrimination* (2002); PILCH Homeless Persons' Legal Clinic Submission, *Homelessness and Human Rights in Victoria* (2005); and *Discrimination in Employment on the Basis of Criminal Record* (2005).

³³ PILCH Homeless Persons' Legal Clinic Submission, *Promoting Equality: Homeless Persons' and Discrimination* (2002), 13.

*was no longer available. To her credit this young lady had stayed clearn for six months and was actively participating in an employment program. Due to her youth, employment status, housing history...this client was shunned by the private rental agencies..*³⁴

Discrimination against single homeless women fleeing domestic violence

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.

Case Worker, Emergency Accommodation Support Enterprise, Loddon Campaspe Region

Many welfare agencies and community organisations report that the mere association of a person with certain support services can be a ground of discriminatory treatment.

Discrimination by a hostel against a homeless man

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.'

Lindsay Stow, the Salvation Army Social Housing Service, Warrnambool

Discrimination by boarding houses against referrals from homelessness agencies

Evan is a seasonal fruitpicker. He receives a Disability Support Pension in connection with his mental illness. After returning to Melbourne from his seasonal employment, Evan obtained accommodation at a rooming house in Fitzroy. The Society of St Vincent de Paul undertook to pay rental amounts to the rooming house proprietor, upon invoice, until Evan obtained stable accommodation. About a week later, the rooming house proprietor bodily evicted Evan from the premises for 'failure to pay rent'. St Vincent de Paul had never been invoiced. The proprietor refused to grant Evan access to his belongings, including compact discs and a leather jacket, which remained locked in his room. When Evan's caseworker contacted the rooming house to formally complain, the proprietor apologised for the 'mistake' but stated that, unfortunately, Evan could not return as there were no longer any vacancies. He denied the existence of Evan's belongings. Happily, the Clinic was able to negotiate an apology and monetary compensation in connection with Evan's eviction.

³⁴ Ruth Skinner, Support Worker, Child and Family Services, Ballarat in PILCH Homeless Persons' Legal Clinic Submission, *Promoting Equality: Homeless Persons' and Discrimination* (2002), 14.

Unfortunately, the practice of evicting 'undesirable boarders' (that is, homeless persons referred by a welfare agency) when a rooming house is full, remains widespread.

Philip Lynch, Former Coordinator, Homeless Persons' Legal Clinic, Melbourne

A similar picture of unrelenting discrimination has emerged from the Clinic's research in relation to goods and services providers. Almost 60 per cent of respondents to the Clinic's Discrimination Consultations had been discriminated against by goods and services providers on the basis of their homelessness or social status. Discrimination was most often experienced from restaurants, cafés or bars, followed by banks, retail shops, hospitals and telecommunications providers.³⁵

One homeless man wrote about his experience of goods and services 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. (Homeground).

Respondents who informed service providers that they were living in crisis accommodation, or were homeless or unemployed, all reported delays in receiving medical treatment and were even refused medical treatment in some cases. In particular, respondents noted that being homeless and poor made it difficult to always present well. Poor presentation was a common trigger for discrimination. One respondent stated, *'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'* (Homeground).

Food outlets and retail shops also came in for criticism. One man stated that *'after walking into a pub, I was asked if I had any money before they would serve me'* (Christ Church, Geelong). 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'* (St Peter's Eastern Hill).

The following case studies further reinforce the extensive social status discrimination in the provision of goods and services.

Discrimination by service providers against itinerants and rough sleepers

Homeless people are discriminated against because of their status and appearance. Anthony is homeless and has a mental illness. He is often asked to leave services due to his appearance, which is perceived to be threatening and upsetting to other service users. Services that discriminate against people because of their appearance include Centrelink, hospitals, police, schools, banks and boarding houses.

Anne Emery, Community Development Worker, St Mary's House of Welcome, Melbourne

³⁵ PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 14-15. Restaurants, cafes, bars (30% or 55 respondents), Banks (28% or 52 respondents), retail shops (22% or 40 respondents), hospitals (21% or 38 respondents), telecommunications providers (19% or 34 respondents) and health and employment service providers (each 16% or 29 respondents).

Discrimination by a restaurant against an elderly homeless man

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.

Philip Lynch, Former Coordinator, Homeless Persons' Legal Clinic, Melbourne

Disturbingly, many consumers are simply unaware that such treatment or service might constitute a form of discrimination. Others have simply become accustomed to a lesser standard of service and treatment, such that it no longer occurs to them that they are being treated unfavourably.

5.2 The Extent of Criminal Record Discrimination in the Victorian Community

Use of information about an older minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives.³⁶

Discrimination on the ground of criminal record is also widespread in Victoria and has significant detrimental impacts in many areas, particularly in obtaining and maintaining housing and employment.

Statistics show that there has been a significant increase in the number of criminal record checks being undertaken in Victoria over the past decade. Victoria Police data shows a 6000 per cent increase in checks between 1992-93 and 2003-04.³⁷ Indeed, in the employment sphere, 'criminal record checks are fast becoming a routine part of the recruitment process'.³⁸

In a written submission provided to the Clinic as a part of its Human Rights Consultations in 2005, one homeless woman, wrote that she had been '*singled out many times because of my criminal record*'. Many others reported difficulties gaining employment due to their criminal records. Another homeless woman wrote:

After being unemployed for some period of time, I gained employment. On my way to work one morning a police car drove past and the police recognized me. They stopped me and questioned me as to where I was going and what I was doing. I went to work and 15 minutes later the police turned up to my work to verify information I had given them. After this, my employer questioned me about my past and present lifestyle.³⁹

This type of discriminatory treatment is also very common in the provision of accommodation services, as the following case study demonstrates:

³⁶ CCH, *Federal Privacy Handbook: A Guide to Federal Privacy Law and Practice*, ¶145-520.

³⁷ The relevant statistics are: 3459 to 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.

³⁸ Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

³⁹ PILCH Homeless Persons' Legal Clinic Submission, *Homelessness and Human Rights in Victoria* (2005) 26.

Discrimination by a real estate agent against a homeless ex-prisoner

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.

John Clonan, Support Worker, Salvation Army

This is not to deny that there are some offences and offenders warranting particular attention from the point of view of community safety. In some instances, a criminal record will be relevant to a job a person is seeking, or the service they are trying to access. However, it is important to ensure that the anti-discriminatory objectives of equal opportunity legislation are met. 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 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 dishonest 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.⁴⁰

Accordingly, the Clinic agrees that employers and service providers should be entitled to take a person's criminal record into consideration in certain circumstances. However, we do not accept that all former offenders should be subject to this level of scrutiny about their past criminal behaviour in circumstances where it is often an unreliable indicator of their future behaviour. To this end, the Clinic notes that the EO Act currently contains an 'exceptions and exemptions regime' for specific deviations from the standard of non-discrimination. We would argue that employers and goods and service providers can rely on this regime where criminal record discrimination can be justified.

⁴⁰ Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

5.3 The Impact of and Consequences of not addressing Social Status and Criminal Record Discrimination

The experience of homelessness, unemployment and poverty produce a pervasive set of discriminations, including stigmatisation, socio-economic marginalisation, violations of rights, negative stereotyping, lack of mobility and the denial of autonomy or authority.⁴¹ As the Canadian Bar Association has argued:

People who live in poverty are subject to widespread discrimination. These people are routinely denied housing and access to services and they are reviled in popular culture as being morally inferior. People who live in poverty are not even on the political agenda. They are marginalised to the point of invisibility. This is precisely the kind of social disadvantage that human rights legislation is meant to alleviate.⁴²

The data, case studies and anecdotes included in sections 5.1 and 5.2 illustrate that discrimination is not simply another obstacle or challenge for people made vulnerable by homelessness, unemployment, or periods of incarceration to deal with. In many instances this form of discrimination can actually lead to or entrench homelessness, unemployment and poverty. The prevalence of discrimination is often at its cruellest where an individual is trying to reintegrate into the community after a period of homelessness or incarceration, by making genuine attempts to seek employment and stable accommodation, but is unreasonably punished by harsh community attitudes.

In these circumstances, not only can discrimination systematically exclude people from access to goods, services, the justice system, health care, housing, employment and other things which can result in homelessness, unemployment and recidivism, it also frustrates attempts at social inclusion and participation in civil, political, social, cultural and economic life.

As Jesuit Social Services states:

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 deepening of identification with the marginalised condition so as to make negotiation through their issues more difficult.⁴³

The impacts of discrimination are not confined to the denial of opportunity and social inclusion or the access of necessary goods and services. Research shows that significant social, health and economic costs also flow from discrimination. According to the World Health Organisation, 'discrimination violates one of the fundamental principles of human rights and often lies at the root of poor health status'.⁴⁴ This is consistent with an emerging consensus that discrimination and stigmatisation are major causal factors and consequences of social exclusion and ill-health among people experiencing homelessness and unemployment, including higher anxiety, depression, worsened quality of life, a sense of loss of control and difficulty coping.⁴⁵

⁴¹ 'Finding a Place for the Jobless in Discrimination Theory' (1997) 110 *Harvard Law Review* 1609, 1616.

⁴² Canadian Bar Association (British Columbia Branch), *Human Rights for the Next Millennium* (1998).

⁴³ Letter of support from Jesuit Social Services to the PILCH Homeless Persons' Legal Clinic, dated 22 August 2002.

⁴⁴ World Health Organisation, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) 6.

⁴⁵ Lisa Waller, 'Living with Hepatitis C: From Self-Loathing to Advocacy' (2004) 180 *Medical Journal of Australia* 293; S Zickmund, E Y Ho, M Masuda et al, 'They Treated Me Like a Leper: Stigmatisation and the Quality of Life of Patients

For example, there is enormous value and importance placed on paid work in Australian society. Employment imparts a sense of identity, self-worth and social connections. Conversely, the personal and social costs of unemployment include severe financial hardship and poverty, debt, homelessness and housing stress, family tensions and breakdown, boredom, alienation, shame and stigma, increased social isolation, crime, erosion of confidence and self-esteem, and the atrophying of work skills and ill-health.⁴⁶ A legal system that allows for discrimination based on a person's unemployment or criminal record not only ignores the personal and social costs of unemployment, but also serves to entrench it.

Recent research undertaken by VicHealth clearly illustrates that 'people who suffer from discrimination are also more likely to develop problems such as depression and anxiety'.⁴⁷ As Associate Professor Harry Minas explains in the VicHealth Report: 'there is good evidence of a strong link between poor mental health and poor physical health, so the impact of such mental distress is a double whammy of ill-health'.⁴⁸ He reports that 'how people respond to discriminatory...actions can vary...they can become depressed, anxious frightened or angry. They can also engage in self-destructive behaviour, whether smoking, drinking or by the abuse of other substances...[or] may respond with violence'.⁴⁹

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. Indeed, almost half of those surveyed during the Clinic's Discrimination Consultations reported that discrimination on the grounds of homelessness or social status had prolonged their homelessness and had made it increasingly difficult to find a sustainable pathway out of homelessness.⁵⁰ Poor physical health was also a frequent consequence in 35 to 40 per cent of cases.⁵¹ Poor mental health, social isolation and family or relationship difficulties were each indicated as a consequence of discrimination in 37 to 40 per cent of cases.⁵²

The personal implications of discrimination are outlined in these individual responses from participants:

'Life was worse. I didn't feel hopeful of a future let alone a life. Most of the time you just wish you were dead'

'I felt terrible. I felt not wanted and couldn't understand it. I thought it was unreasonable. I wasn't going to do anything bad to anybody' (St Mary's House of Welcome)

'Pissed off, persecuted, sad, distressful, resentful, outraged, "small", humiliated, confused, stressed out and lost' (Anonymous).

with Hepatitis C' (2003) 18 *Journal of General International Medicine* 835. See also Alison McClelland and Fiona Macdonald, 'The Social Consequences of Unemployment' (Business Council of Australia, July 1998).

⁴⁶ Alison McClelland and Fiona Macdonald, 'The Social Consequences of Unemployment' (Business Council of Australia, July 1998) <<http://www.bsl.org.au/pdfs/social.pdf>>.

⁴⁷ 'Tackling Discrimination is Good for Health', VicHealth Letter, Winter 2007, 4.

⁴⁸ 'Tackling Discrimination is Good for Health', VicHealth Letter, Winter 2007, 5.

⁴⁹ 'Tackling Discrimination is Good for Health', VicHealth Letter, Winter 2007, 4-5.

⁵⁰ PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 17.

⁵¹ PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 17.

⁵² PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007), 17.

Equally, the economic implications of discrimination can be immense. Just as discrimination can entrench homelessness, unemployment and recidivism, it can also put strain on public spending. For example, a recent City of Sydney study showed that the public cost of someone remaining homeless could be as much as \$34,000 per person every year.⁵³ In addition, the financial impacts of recidivism were highlighted in a study conducted by the Australian Institute of Criminology, which found that the total estimated bill associated with crime and imprisonment amounts to over \$19 billion per year.⁵⁴

A recent UK Report, *Fairness and Freedom: The Final report of the Equalities Review* elucidates perfectly the economic and social case for legal protection from discrimination:

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.⁵⁵

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...⁵⁶

Notwithstanding the substantial evidence the Clinic has provided of both the social and economic costs of discrimination, along with the Federation of Community Legal Centres, we note this approach is contrary to a human rights approach which concentrates on the elimination of discrimination as a social necessity and a legal obligation. In light of the recent introduction of the Victorian Charter of Rights and Responsibilities and the Victorian Government's stated commitment to developing a human rights culture in the State, it is important that the debate about the elimination of discrimination does not lose its human rights frame of reference.

5.4 Conclusion

The Clinic's Discrimination Consultations highlighted that the majority of homeless people or people at risk of homelessness routinely experience discrimination at the hands of accommodation and goods and services providers. As a result, consumers are often unable to secure accommodation and are denied access to fundamental services such as social security, banks and health services. Similarly, criminal record discrimination routinely excludes many ex-offenders from, in particular, employment opportunities and stable accommodation. As this Submission demonstrates, such discrimination can have extremely negative consequences, leading to poor physical and mental health, social exclusion and poverty.

⁵³ Figures quote on ABC Radio, 'The Cost of Homelessness', 702 Sydney Breakfast Show, 2 March 2006 <http://www.abc.net.au/sydney/stories/s1582528.html>.

⁵⁴ Pat Mayhew, *Counting the Costs of Crime in Australia* (2003) Australian Institute of Criminology <http://www.aic.gov.au/publications/tandi/tandi247t.html>.

⁵⁵ Equalities Review Panel, *Fairness and Freedom, the Final Report of the Equalities Review* (2007) London, 23.

⁵⁶ Equalities Review Panel, *Fairness and Freedom, the Final Report of the Equalities Review* (2007) London, 25.

On the other hand, adequate and effective protection from discrimination in these areas would enable homeless and unemployed people, recipients of social security and 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.⁵⁷ The cost of not addressing discrimination on the ground of social status and 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.

6. Lessons from Overseas

6.1 Introduction

In amending the EO Act it is useful to examine how social status and criminal record discrimination are dealt with in overseas jurisdictions. These overseas experiences highlight the positive effect that the prohibition of discrimination can have in ensuring equal access to legal protection and promoting social awareness.

(a) New Zealand

In New Zealand, the *Human Rights Act 1993* includes 'employment status' as a prohibited ground of discrimination. 'Employment status' is defined in the Act as 'being unemployed, receiving an income support benefit or receiving accident compensation payments'. The term 'being unemployed' is not defined further. However, in a report by the Human Rights Commission to the New Zealand Minister of Justice, the Commission stated that it preferred a broad interpretation of 'unemployment' as having no occupation, disengaged, at leisure or temporarily out of work. The Report states that:

There seems little doubt that 'being unemployed' should be broadly interpreted to refer to not just those who are temporarily unable to find paid work, but to those who are not gainfully employed for a raft of reasons including illness, disability, family responsibilities, retirement and more.⁵⁸

Discrimination on the basis of employment status is unlawful in any of the prohibited areas of public life, including the provision of accommodation, goods or services and employment.

The ground of 'employment status' has been successfully relied on by many applicants to the New Zealand Human Rights Commission.¹ For example, in *S v B Ltd & E Ltd* (C279/66), the complainant, who received social security payments, bought a mobile phone. In order to be connected to the mobile telephone network run by E Ltd, customers with income under \$18,000 were required to provide a guarantor. B Ltd was a retailer of the mobile phone network. The complainant had an income of slightly more than the threshold, but was still asked to provide a guarantee by an employee of B Ltd because

⁵⁷ See, for example, Jenny Mouzos, 'Homicidal Encounters: A Study of Homicide in Australia 1989–1999' (Research and Public Policy Series Paper No 28, Australian Institute of Criminology, 2000) 39–40.

⁵⁸ Human Rights Commission, *Consistency 2000 Report* (2000) Part C, 2.

she was on a benefit. Her complaint of discrimination was upheld against B Ltd, as they were found to have treated her differently because she received social security payments.⁵⁹

The *Human Rights Act 1993* (NZ) does not prohibit discrimination on the grounds of criminal record. There is however a spent conviction regime provided for in the *Criminal Records (Clean Slates) Act 2004* (NZ), whereby the elapsing of a certain period of time means that a conviction will be treated as spent and a person is 'deemed to have not criminal record for the purpose of any question asked'⁶⁰

(b) Canada

Article 15(1) of the *Canadian Charter of Rights and Freedoms* provides that:

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination.⁶¹

Article 15(1) of the Charter lists a number of prohibited grounds of discrimination, but such grounds are not exhaustive. Thus, at a federal level there is a guarantee of freedom from discrimination in Canada.

The provinces in Canada provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor. Discrimination on the basis of 'source of income' is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term 'receipt of public assistance'.⁶²

The province of Québec has human rights legislation prohibiting discrimination on the ground of 'social condition'. Article 10 of the *Québec Charter of Human Rights and Freedoms* provides that:

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.⁶³

The Québec Human Rights Tribunal defined the term in the *Gauthier Case* as follows:

The definition of "social condition" contains an objective component. A person's standing in society is often determined by his or her occupation,

⁵⁹ In addition to ensuring equal access to goods and services, the provisions in New Zealand have been used to ensure effective and equal access to essential health care. Thus, in *K v J* (11/12/97), the complainant, a social security beneficiary, made a complaint that her dentist refused to treat her when he was told that payment would be met by the Department of Social Welfare. The evidence was that the dentist refused treatment because he believed that the Department of Social Welfare should not have to pay for what he considered to be non-urgent dental work. K subsequently went to another dentist, who noted that she had evidence of acute toothache. The Human Rights Commission found that the dentist had discriminated against K because of her beneficiary status and had treated her rudely and dismissively.

⁶⁰ Sections 2(a) and 14 of the *Criminal Records (Clean Slates) Act 2004* (NZ).

⁶¹ *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canadian Act 1982* (UK) 1982, c 11.

⁶² Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>>.

⁶³ *Québec Charter of Human Rights and Freedoms* Article 10.

income or education level, or family background. It also has a subjective component, associated with the perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one of more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.⁶⁴

In the *Gauthier Case*, a landlord was found to have denied accommodation to a welfare recipient, irrespective of his ability to pay the monthly rent. The Tribunal ruled that the landlord, in presuming that the complainant would not be a dependable tenant capable of paying the rent monthly, discriminated against him on the basis of social condition.⁶⁵

There has been considerable public discussion in Canada about the introduction of the ground of 'social condition' into other provincial legislation, and in particular into the *Canadian Human Rights Act*.⁶⁶ In June 1998, the Canadian Senate passed a bill to add 'social condition' as a prohibited ground of discrimination in the *Canadian Human Rights Act*. The Bill received its first reading in the House of Commons on 19 October 1998, but was subsequently defeated. The Canadian Human Rights Act Review Panel, established by the Canadian Justice Minister in 1999 following the defeat of the Bill, recommended that 'social condition' be added to the federal legislation. The Panel's Report stated that 'we believe it is essential to protect the most destitute in Canadian society against discrimination'.⁶⁷ In December 1998, the United Nations Committee on Economic, Social and Cultural Rights also recommended that the Canadian Government 'expand protection in human rights legislation to include...social or economic status'.⁶⁸ The recommended reforms to the *Canadian Human Rights Act* have yet to be introduced.

Federal anti-discrimination legislation in Canada prohibits discrimination of a 'conviction for which a pardon has been granted'.⁶⁹ Protection from

⁶⁴ *Commission Des Droits De La Personne Du Quebec v Gauthier*, (1993-11-15) QCTDP 500-53-000024-925.

⁶⁵ In another case, a credit union was found to have discriminated against the complainant on the basis of social condition when it failed to consider her loan application. The complainant, a single mother of two children, was a recipient of social security payments. Evidence showed that the complainant had sufficient means to obtain a mortgage, but was refused when the institution found out she was a welfare recipient. The Tribunal held that a person's social condition could be *temporary*. The Tribunal further held that the fact that the complainant was only temporarily receiving public assistance was sufficient to constitute 'social condition': *D'Aoust v Vallieres* (1993) 19 CHRR D/322.

⁶⁶ See, for example, Bruce Porter, 'Rewriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada' (Plenary Presentation, Ottawa Bar Association, April 2001); A Wayne Mackay, Tina Piper and Natasha Kim, 'Social Condition as a Prohibited Ground of Discrimination Under the Canadian Human Rights Act' <<http://canada.justice.gc.ca/chra/en/research.html>>; Richard Shillington, 'Adding Social Condition to the Canadian Human Rights Act: Some Issues' <<http://canada.justice.gc.ca/chra/en/research.html>>; Lucie Lamarche, 'Social Condition as a Prohibited Ground of Discrimination in Human Rights Legislation: Review of the Quebec Charter of Human Rights and Freedoms' (November 1999) <<http://canada.justice.gc.ca/chra/en/research.html>>; Ontario Human Rights Commission, 'Social Condition - An Option for Human Rights Commissions' <<http://www.ohrc.on.ca/english/publications/index.shtml>>.

⁶⁷ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>> 113.

⁶⁸ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* (10 December 1998) paragraph 51.

⁶⁹ Section 3(1) of the *Canadian Human Rights Act*.

discrimination on the basis of a person's criminal record can be found in provisional anti-discrimination legislation.⁷⁰

(c) Europe

Article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* contains a prohibition on discrimination, including discrimination on the grounds of social origin, property or other status.⁷¹ All Member States of the European Union are signatories to the ECHR. The 12th Protocol to the ECHR also contains a more general prohibition of discrimination.⁷² Some commentators have argued that the attribute of 'social origin' includes the ground of 'social status'.⁷³ As has been noted previously, the European Court has also interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.⁷⁴

(d) United Kingdom

In the United Kingdom, parliament enacted the *Human Rights Act 1998* (UK) to give legislative effect to article 14 of the ECHR. Section 2 of the *Human Rights Act* incorporates Article 14 of the ECHR which, as discussed above, guarantees a right to freedom from discrimination on any ground, including social status, in the enjoyment of certain rights and freedoms.

In terms of criminal record discrimination, other than the possible protection offered under the *Human Rights Act 1998* (UK), the *Rehabilitation of Offenders Act 1974* (UK) provides for a spent conviction regime such that ex-offenders are not obliged to disclose spent convictions when applying for jobs.⁷⁵

(e) United States

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits every state from denying any person within its jurisdiction the equal protection of the laws.⁷⁶ In other words, the laws of the state must treat an individual in the same manner as others in similar circumstances and conditions. This has been interpreted to prohibit discrimination on the basis of status, including socio-economic status and homelessness.⁷⁷

⁷⁰ Section 13 of the *Human Rights Code* (British Columbia); section 18.2 of the *Quebec Charter of Human Rights and Freedoms*; section 6(1) of the *Human Rights Act* (Prince Edward Island); section 5 of the *Human Rights Code* (Ontario).

⁷¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe - ETS Number 005. Article 14 provides that: the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁷² Article 1: the enjoyment of any rights set forth by law shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This Protocol was opened for signature in April 2000 and has been signed by 27 Member States and ratified by two Member States. Ten ratifications are required before it enters into force.

⁷³ See, for example, P Lynch and B Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 Deakin Law Review 295.

⁷⁴ See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

⁷⁵ Sections 4(1)(b) and 4(2)(b) of the *Rehabilitation of Offenders Act 1974* (UK).

⁷⁶ While this serves to protect individuals from discriminatory laws, it does not protect them from discrimination by individuals or companies who provide their services in a discriminatory way.

⁷⁷ See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

7. The Case for Legislative Reform

7.1 Voluntary Guidelines

The Victorian Government clearly has a commitment, and recognises the need, to better protect Victorians from unwarranted discrimination. Judging by recent initiatives it is also apparent that the Victorian Government acknowledges that homeless people often find themselves the subject of discriminatory behaviour.

In 2007 the Victorian Government developed a Homelessness Guidelines Project (***the Project***). The purpose of the Project was to produce and introduce voluntary guidelines on discrimination on the grounds of homelessness or social status (***the Guidelines***) that would apply to businesses and other entities that provide accommodation or goods and services. It is intended that the Guidelines will protect against and reduce the extent of social status discrimination in Victoria. The Project also had an educative component, which involved the production of two DVDs – *Homelessness: Myths and Memories* and *Business to Business*.

The Clinic participated in this Project in a number of ways: we sat on the Project Working Group which was comprised of consumers, as well as business and community representatives; we conducted extensive research into the incidence of social status in Victoria, which formed the basis of our Report to the Department of Justice which is discussed at section 5.1 above; and the Clinic and members of its Consumer Advisory Group, helped develop the *Homelessness: Myths and Memories* DVD.

Despite the Victorian Government's good intentions, the process of developing the Guidelines and participating in the Project Working Group highlighted both the difficulties inherent in a voluntary 'code of conduct' and the pervasive misconceptions that exist about homelessness and other aspects of social status.

First, the process demonstrated that it is extremely difficult to get business to engage in something that they believe will constrain their business decisions, is ultimately voluntary and does not have any compliance obligations. Indeed, a number of the original participants on the Working Group from the business sector dropped out after one or two meetings. Others refused to endorse the Guidelines unless the 'behavioural problems' of people who are homeless were emphasised. Second, throughout the Project, the Clinic confronted a fundamental lack of understanding, on the part of the business community, of homelessness and the ways in which discrimination on the grounds of homelessness presents itself. The Clinic does not consider that it is possible to improve understanding of this issue through a stand-alone voluntary system. Similarly, voluntary guidelines provide no deterrent to discriminatory behaviour because they do not compel a minimum standard of behaviour and a business' adherence to them is not monitored. The educative and deterrent functions of the reforms proposed by the Clinic are further discussed below at section 7.2.

Moreover, the Guidelines do not apply across the range of goods and service providers that are bound by the EO Act. They do not, for example, apply to the Victorian Police, the Department of Human Services (including the Office of Housing)

schools, and medical and health services. The resultant scope and application is very narrow partly because a number of these providers refused to be a part of the project.

While they are a small step in the right direction, the Clinic submits that voluntary guidelines are insufficient to fulfil the Victorian Government's commitment to protect the rights of, and reduce barriers to opportunity for, marginalised and disadvantaged groups in our community.⁷⁸ Furthermore, voluntary guidelines do not comply with Australia's international treaty obligations nor do they bring Victoria into line with the internationally recognised human right to be free from any form of discrimination, including discrimination on the basis of one's housing, social and economic status. Omission of these protections is inconsistent with the spirit of the EO Act and the very people whom the EO Act tries to protect.⁷⁹

7.2 Educative and Deterrent Functions of Legislative Reform

In addition to providing protection from and redress for discriminatory and unfair treatment, the Clinic considers that the proposed reforms of the EO Act would have the further effect of empowering a disadvantaged group in our society and also increasing recognition and understanding of the substantial issues faced by homeless and unemployed people and other vulnerable Victorians. As the Project and recent research published by Hanover Welfare Services indicate, community perceptions of homelessness are still very much rooted in the idea that homelessness is a choice and represents some form of individual moral dysfunction.⁸⁰

The broader educative objective of the Clinic's suggested reform accords with the overriding objective of the EO Act 'to promote recognition and acceptance of everyone's right to equality of opportunity'.⁸¹ It is hoped that protection in the EO Act would enable the unjust treatment highlighted in this submission to be recognised, named and addressed.

The introduction of the sexual discrimination provisions into the EO Act provides a useful comparison. These provisions have not only provided a mechanism for complaint, but they have led to the introduction of a raft of preventative measures to counter the incidence of sexual discrimination. Perhaps most importantly, as a result of this preventative work, there is an increased understanding of the meaning and experience of sexual discrimination in Victorian society. As is the case for the proposed social status provisions, the Clinic contends that the same level of public awareness would not have been achieved had the sexual discrimination provisions formed part of a set of voluntary guidelines.

As the Canadian Human Rights Act Review Panel stated in relation to the introduction of the ground of 'social condition' in Canada:

At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of

⁷⁸ See: *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) and Victorian Government Policy Statement, *Fairer Victoria*, 3.

⁷⁹ *Equal Opportunity Act 1995* (Vic) s 3. The objectives of the EO Act include the promotion of recognition and acceptance of everyone's right to equality of opportunity; and the elimination, as far as possible, of discrimination against people by prohibiting discrimination on the basis of various attributes.

⁸⁰ Hanover Welfare Services, 'Quantitative Research Report', October 2006.

⁸¹ *Equal Opportunity Act 1995* (Vic) s 3(a).

private and public institutions. We feel that this ground would perform an important educational function. It sends out a signal about assumptions and stereotypes to be taken into account by policy makers. ... Perhaps the addition of this ground will spark more ... activity. We hope so.⁸²

7.3 Addressing Perceived Concerns about Effects on Business Decisions

The inclusion of 'social status' and 'criminal record' as prohibited grounds of discrimination is not intended to, and would not have the effect of, vesting persons of a designated social status with additional rights. The reforms are intended to rectify existing injustices. They are intended to ensure that all persons are subject to the equal protection of the law and that homeless persons, unemployed persons, recipients of social security payments, and people with criminal records, can compete on a rational basis in the market for goods, services and accommodation.

As noted above in relation to criminal records, the Clinic recognises that people or businesses providing employment, accommodation or other goods or services are concerned to retain the right to differentiate between potential employees and customers in order to ensure the continued viability of their business. For example, it is acknowledged that a bank has a legitimate right to perform a credit check on a potential customer before issuing a credit card, or that a landlord can require a prospective tenant to pay a bond before entering into a lease.

However, too often stereotypes about a person's social status or the fact of their criminal record are relied upon to unjustly discriminate. Preconceived notions based on a person's social status or criminal record are not legitimate grounds for making judgments about financial capacity or "trustworthiness". The proposed amendments would not inhibit the right of Victorian businesses to make legitimate decisions on the basis of objective, unbiased information about a person. However, where such decisions were taken, for example, on the basis of prejudices against, or imputations in respect of, people in receipt of social security payments, or against homeless or unemployed people, or those with a criminal record, the EO Act would provide a basis for redress.

The New Zealand case of *V v M & C* (C384/97), involving discrimination on the basis of employment status, highlights the difference between decision-making on valid, objective grounds and decision-making on the basis of preconceived notions and stereotypes. In that case, a woman made a complaint to the New Zealand Human Rights Commission that she had been discriminated against by a bank because of her employment status. The woman was receiving accident compensation payments as her main source of income. She was refused a home loan from her bank unless she could provide a letter from the Accident Rehabilitation and Compensation Insurance Corporation detailing medical information about the woman's condition and stating that her disability was 'permanent' and 'non-reviewable'. The bank told the woman that without proof that the complainant had a permanent disability it could not be satisfied that her income was permanent and guaranteed.

⁸² Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.htm>> 113.

The Human Rights Commission found that the complainant was being directly discriminated against by the bank. It noted that the bank had already established that the woman met the required income threshold, and it was not until the bank manager discovered that the complainant was in receipt of Accident Compensation Corporation weekly compensation that he asked her for evidence of the permanence of her disability, and therefore her income. There was no evidence to indicate that other home loan applicants were required to show proof of permanency of income, and the Commission acknowledged that, in a time where there is no guarantee of lifetime employment, many people would be unable to satisfy such a requirement.

This case is an example of a decision made on the basis of prejudice, not on the basis of an unbiased assessment about the customer's financial capacity and the bank's potential exposure.

The case studies provided in this submission indicate that discriminatory treatment such as that referred to in the New Zealand case of *V v M & C* (C384/97), is rife in Victoria. It is these types of cases that would be caught by the proposed reforms to the EO Act. The purpose of the Clinic's recommendations is to ensure that all persons are equal before and under the law and have the same chance to benefit when subject to the same policies.