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P I L C H VIC

Public Interest Law Clearing House

**Joint Submission to the
Department of Justice**

**Exceptions Review of the
*Equal Opportunity Act 1995 (Vic)***

April 2008

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About the Human Rights Law Resource Centre

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

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

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

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

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About PILCH

PILCH is an independent, not-for-profit legal referral service. It seeks to meet the legal needs of community groups/not-for-profit organisations, and individuals from disadvantaged or marginalised backgrounds by facilitating their access to pro bono legal assistance from PILCH members. Its main role is to receive, assess and refer requests for pro bono legal assistance.

PILCH's objectives include to:

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

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1. Introduction

1.1 Impetus for the Exceptions Review of the Equal Opportunity Act 1995 (Vic)

1. On 1 January 2008, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) came fully into force. Section 8 of the Victorian Charter provides that 'every person has the right to enjoy his or her human rights without discrimination' and 'has the right to equal and effective protection against discrimination'.
2. As a result, the Department of Justice is undertaking a review of the exemptions from and exceptions to the prohibition on discrimination in the *Equal Opportunity Act 1995* (Vic) (**EO Act**) to determine their compatibility with the Victorian Charter (**Exceptions Review**). As part of the Exceptions Review, the Department of Justice has prepared a Consultation Paper entitled *The Exceptions Review – a review of the exceptions to and exemptions from the Equal Opportunity Act 1995* (Vic) (**Consultation Paper**). The Consultation Paper invites submissions on a series of questions and seeks comments on the compatibility of the exemptions from and exceptions to the prohibition on discrimination under the EO Act with the Victorian Charter.
3. The purpose of the Exceptions Review is to identify whether any of the exemptions and exceptions in the EO Act limit the enjoyment of the human rights protected by the Victorian Charter. In particular, the Exceptions Review aims to examine whether the exemptions are compatible with the right to equal and effective protection against discrimination found in section 8 of the Victorian Charter.
4. One of the stated objectives of the EO Act is to 'eliminate, as far as possible' discrimination and sexual harassment.¹ The limits to the full elimination of discrimination are a number of exemptions to the prohibitions on discrimination that are contained in the EO Act. The effect of the exemptions is that certain conduct, carried out in certain circumstances, will not amount to unlawful discrimination. The EO Act provides a number of exemptions to its prohibitions on discrimination in a number of different areas, which may operate to reduce the effectiveness and equality of the EO Act's overall protection.

¹ Section 3 of the EO Act.

1.2 Scope of this Submission

5. This submission is made jointly by the Human Rights Law Resource Centre (**HRLRC**) and the Public Interest Law Clearing House (**PILCH**) and focuses on the relevance of international human rights law to certain questions raised in the Consultation Paper. In this context, this submission discusses the application of the Victorian Charter, which has particular relevance to the scope of the Exceptions Review; 'discrimination' in the Victorian Charter is defined in the same way in which 'discrimination' is defined in the EO Act.
6. This submission addresses the following aspects of the Consultation Paper:
 - (a) the ways in which the current exceptions in the EO Act should be reformed to improve the equality of opportunity and the elimination of discrimination in Victoria;
 - (b) whether the current exceptions contained in the EO Act are reasonable limitations on the right to equality;
 - (c) the current exceptions in the EO Act which should be amended or repealed; and
 - (d) the appropriateness of the VCAT exemption procedure.

2. Executive Summary

2.1 The Human Right to Freedom from Discrimination

7. Discrimination is at the heart of virtually all human rights violations. As identified in the Introduction to the Discussion Paper, the right to equality and freedom from discrimination are basic human rights.² The Preamble to the Victorian Charter recognises that human rights belong to all people in the Victorian community without discrimination and that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom. The objectives of the EO Act include promoting recognition and acceptance of everyone's right to equality of opportunity and the elimination, as far as possible, discrimination on the basis of various attributes.³
8. In this context, the HRLRC and PILCH consider that the most effective way to eliminate discrimination and promote equal opportunity in Victoria is through a human rights framework. The HRLRC and PILCH submit that the current legislative framework which allows exceptions and exemptions under the EO Act should be repealed. The EO Act currently may, in some circumstances, operate in a way that is arbitrary and broad, while a human rights framework calls for a nuanced balancing of the specific human rights that are in conflict.

2.2 Recommendations

9. The HRLRC and PILCH make the following recommendations for reform:

Recommendation 1:

Proposed reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are adequately identified and addressed.

² See also, HRC General Comment 18 (Thirty-seventh session, 1989): Non-discrimination, A/45/40 vol. I (1990) 173, [1] available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

³ Sub-sections 3(a) and (b) of the EO Act.

Recommendation 2:

The EO Act should contain an equivalent to section 7(2) of the Victorian Charter to ensure that the right to non-discrimination and equality before the law protected in the EO Act is limited only where it is necessary, reasonable and proportionate to do so.

Recommendation 3:

All of the exceptions to and exemptions from the EO Act should be repealed as they enable a party to discriminate in a way which is incompatible with the Victorian Charter and undermine the opportunity to achieve substantive equality.

Recommendation 4:

Any proposal to retain exceptions or exemptions should ensure that the exceptions to and exemptions from the EO Act are subject to the limitations analysis contained in section 7(2) of the Victorian Charter.

Recommendation 5:

Any application for exemption should be subject to the limitations analysis contained in section 7(2) of the Victorian Charter and incorporate a requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with section 7(2) of the Victorian Charter, on an ongoing basis.

3. A Human Rights Framework

3.1 A Human Rights Approach to the Exceptions Review

10. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. They include freedom of speech, freedom of religion, the right to vote, the right to a fair trial and the right to be free from discrimination. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value.
11. The HRLRC and PILCH consider that the Exceptions Review raises issues that relate to Australia's international human rights obligations. These obligations are found in a number of the major international human rights treaties to which Australia is a party, including:
 - (a) the International Covenant on Civil and Political Rights (*ICCPR*);⁴
 - (b) the International Covenant on Economic, Social and Cultural Rights (*ICESCR*);⁵ and
 - (c) the International Convention on the Elimination of All Forms of Racial Discrimination (*CERD*).⁶
12. Australia's ratification of these instruments has created international law obligations that require all arms of the federal system – including the Victorian Government (legislature, executive and judiciary) – to act to respect, protect and fulfil human rights.
13. As discussed in further detail in the next section, equality is the most important principle that inspires the concept of human rights.⁷ The right to equality and freedom from discrimination is a norm of international human rights law. The fundamental nature of the principle of

⁴ The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

⁵ The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

⁶ The CERD was signed on 13 October 1966 and ratified on 30 September 1975. Other relevant international law regarding the exemptions and exceptions in the EO Act and their compatibility with Australia's international obligations include the *Convention on the Rights of the Child*; *Declaration of the Rights of the Child*; *Declaration on the Rights of Mentally Retarded Persons*; *Declaration on the Rights of Disabled Persons*; *Declaration on the Elimination of all forms of Intolerance and on Discrimination based on Religion or Belief*; *ILO Convention Concerning Discrimination in Respect of Employment and Occupation*; *International Convention on the Elimination of all forms of Racial Discrimination*; *Convention on the Elimination of Discrimination against Women*; and the *Discrimination in Employment and Occupation Convention 1958*.

⁷ M Nowak, *CCPR Commentary* (2nd ed, 2005), 598.

equality of treatment is not only recognised in international law, but also underpins the common law and is enshrined in the constitutions of many common law jurisdictions.⁸

14. The exceptions in the EO Act currently provide for discrimination to be lawful in circumstances which may be incompatible with the Victorian Charter. Given the enactment and entry into force of the Victorian Charter, it is now necessary to reform the current exceptions and the exemptions process under the EO Act to improve equality of opportunity and the elimination of discrimination in Victoria.

3.2 Social and Economic Benefits of Reform

15. The experience in comparative jurisdictions, such as the United Kingdom, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:⁹
- (a) a 'significant, but beneficial, impact on the development of policy';
 - (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
 - (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
 - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.
16. In this sense, the experience of legislative human rights instruments is that they have far greater impact at the 'front end' by influencing policy development and implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious and less reactive framework that is more focused on

⁸ Lord A Lester and D Pannick QC, *Human Rights Law and Practice* (2nd ed, 2004), 414.

⁹ See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

individuals. This serves to address some of the underlying, systemic causes of human rights violations, rather than react in a limited, ad hoc way.

17. By providing blanket rules, the EO Act focuses on specific requirements as set out in the legislation rather than the specific needs of individuals. It makes no allowance for the diversity within the community and provides no flexibility with which to address the issues of individuals with special needs. The purpose of anti-discrimination law is to protect those who are marginalized and disadvantaged, however blanket rules such as those contained in the EO Act may increase disadvantage by failing to recognise difference. The social and human cost of systemic discrimination is great. For example, in relation to homelessness, research has shown that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment.¹⁰
18. Exclusion and social fragmentation inevitably result as a consequence of any form of discrimination. This in turn leads to an inability to participate in fields such as employment, education and the market generally, which ultimately results in a variety of inequalities and a waste of human potential. It is clear that inequalities may have broader social costs:

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.¹¹
19. The HRLRC and PILCH submit that a human rights approach to the development of equal opportunity law will ensure that Australia's international obligations are fulfilled and will also assist to develop laws and policies that will best promote the ends that are sought to be achieved by EO Act in an efficient and effective way.

Recommendation 1:

Proposed reforms to the EO Act must be consistent with Australia's international human rights obligations and the Victorian Charter. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are adequately identified and addressed.

¹⁰ Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', *Written statement submitted by the National Association of Community Legal Centres*, UN Doc A/HRC/4/NGO/46 (6 March 2007).

¹¹ United Kingdom Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (28 February 2007), 21.

4. The Victorian Charter

4.1 Overview of the Victorian Charter

20. The Victorian Charter enshrines a body of civil and political rights derived from the *ICCPR*. The substantive rights recognised in the Victorian Charter include the fundamental rights to non-discrimination and equality before the law.¹²
21. The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities'¹³) and the courts — is facilitated through a number of mechanisms.
22. First, prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Victorian Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.
23. Second, all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.
24. Third, public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.
25. Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.
26. Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months.
27. Finally, the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Victorian Charter.

¹² Victorian Charter, section 8.

¹³ Victorian Charter, section 4 defines public authority.

28. The Victorian Charter entered into full force on 1 January 2008.

4.2 Application of the Victorian Charter to the Exceptions Review

29. The following overarching principles should be considered in the interpretation and application of the Victorian Charter in conducting the Exceptions Review:

- (a) Division 1 of Part 3 of the Victorian Charter requires that all new legislation introduced in Victoria be considered for its compatibility with the human rights set out in the Victorian Charter. Accordingly, in conducting the Exceptions Review, the Department of Justice should take into account the human rights set out in the Victorian Charter and their relationship with the EO Act.

- (b) Section 32(1) of the Victorian Charter states,

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The purpose and effect of this provision is to require that any person or entity that interprets and applies legislation does so in a way that gives effect to human rights. Section 32(1) requires, as a matter of law, that a human rights consistent interpretation be adopted whenever it is possible to do so, regardless of whether there is any ambiguity and regardless of how the provision in question may have been previously interpreted and applied.¹⁴ As discussed in further detail throughout this submission, the HRLRC and PILCH consider that the current framework of the EO Act does not allow for human rights compatible interpretations of the permissible limitations to the right to be free from discrimination.

- (c) The human rights contained in the Victorian Charter are largely modelled on the civil and political rights enshrined in the *ICCPR*.¹⁵ Many of these civil and political rights are also enshrined in regional human rights instruments (such as the *European Convention on Human Rights*) and domestic human rights instruments (such as the United Kingdom *Human Rights Act 1998*). There is a vast body of international and comparative jurisprudence that can and should therefore be considered in the elucidation of the content and application of the Victorian Charter.

¹⁴ *Victorian Charter* s 49(1). See, eg, *R v Offen* [2001] 2 All ER 154 which held that, in light of the interpretative requirement under the *Human Rights Act 1998* (UK), a decision made a year earlier in relation to the interpretation and application of a provision of the *Criminal (Sentences) Act 1977* was no longer good law. See also *Re S (Care Order: Implementation of Care Plan)* [2002] AC 291, 313.

¹⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

- (d) The Victorian Charter is founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom. Having regard to this, the rights should be interpreted broadly. In situations where a person alleges that their rights have been breached, the rights should be interpreted in favour of that person, particularly where they bear on issues of civil liberty, equality or human dignity.¹⁶ The UN Human Rights Committee (**HRC**) has, on a number of occasions, been critical of the tendency of states to interpret and apply rights too narrowly.¹⁷
- (e) The rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.¹⁸ Consistently with the nature of human rights obligations articulated by the HRC (namely, that states have obligations to *respect, protect* and *fulfil* human rights)¹⁹ and the approach adopted by UK courts under the *Human Rights Act 1998* (UK) and the European Court of Human Rights under the *European Convention on Human Rights*,²⁰ rights may impose both negative and positive obligations on public authorities. The right to life, for example, may require public authorities to not only refrain from taking life but to take positive measures to protect human life.
- (f) The Victorian Charter is a 'living document' which should be interpreted and applied in the context of contemporary and evolving values and standards.²¹ The European Court of Human Rights has stated that:

The Convention is a living instrument which must be interpreted in light of present day conditions...the increasingly high standard being required in the area of the protection

¹⁶ See generally, Conor Gearty, *Principles of Human Rights Adjudication* (2004).

¹⁷ See, eg, UN Human Rights Committee, *General Comment No 6: The Right to Life* (1982) [5], available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

¹⁸ *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

¹⁹ See, eg, UN Human Rights Committee, *General Comment 3: Implementation at the National Level*, UN Doc HRI/GEN/1/Rev.1 (1981) available at <http://www.ohchr.org/english/bodies/hrc/comments.htm> in which the HRC stated:

The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the *Covenant* is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

²⁰ See, eg, *Marckx v Belgium* (1979) 2 EHRR 330; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Airey v Ireland* (1979) 2 EHRR 305; *Plattform Artze fur das Leben v Austria* (1988) 13 EHRR 204.

²¹ *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10.

of human rights and fundamental liberties correspondingly and inevitably requires firmness in assessing breaches of the fundamental values of democratic societies.²²

- (g) Recognising that human rights are interdependent and indivisible, the rights should be read so as to complement and reinforce each other.

30. The HRLRC and PILCH also emphasise the importance of a human rights approach to conducting the Exceptions Review and drafting recommendations to the EO Act's amendment. As the Department of Justice will be aware, pursuant to Division 1 of Part 3 of the Victorian Charter, any Bill to amend the EO Act will have to be accompanied by a Statement of Compatibility and reviewed by the Scrutiny of Acts and Regulations Committee for compatibility with the Victorian Charter.

4.3 Relevance of International and Comparative Jurisprudence

31. Section 32(2) of the Victorian Charter states that:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

32. The Explanatory Memorandum to the Victorian Charter suggests that section 32(2) of the Victorian Charter 'will operate as a guide' and goes on to state that

a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations.²³

33. It also suggests that decisions of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including HRC) will be particularly relevant.²⁴ Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.²⁵
34. The right to non-discrimination and equality before the law under section 8 of the Victorian Charter mirrors provisions in other jurisdictions, although the wording used varies slightly.

²² *Selmouni v France* (2000) 29 EHRR 403, [101].

²³ Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

²⁴ *Ibid.*

²⁵ *Ibid.*

5. The Right to Non-Discrimination and Equality Before the Law

5.1 Content of the Right

35. In light of the relevance of a human rights approach to the Exceptions Review, by virtue of section 32 of the Victorian Charter, this section discusses in more detail the right to non-discrimination and equality before the law.

36. The right to equality and freedom from discrimination is an integral component of the international human rights normative framework and is entrenched in both the *ICCPR* and *ICESCR*.²⁶ Both the *ICCPR* and the *ICESCR* contain comprehensive prohibitions on discrimination. Article 2(1) of the *ICCPR* provides:

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 recognized 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.

37. Article 2(1) of the *ICCPR* prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the *ICCPR* extends considerably further than article 2(1). Article 26 of the *ICCPR* provides:

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

38. Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the *ICCPR* but prohibits discrimination – in fact or in law – in all aspects of public life.²⁷

²⁶ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 3. See also *ICCPR*, above n 15, arts 2(1), 26; *ICESCR* article 2(2).

²⁷ UN Human Rights Committee, General Comment 18, above n 2, [1].

39. The term 'discrimination' has been authoritatively stated by the HRC to imply any distinction, exclusion, restriction or preference which is based on any ground identified in the Covenant and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁸ However, not all differentiation of treatment will constitute discrimination. The criteria for assessing the lawfulness of any differentiation is that it must be reasonable and objective and must be in order to achieve a purpose which is legitimate under the *ICCPR*.²⁹ The HRLRC and PILCH submit that the HRC's criteria on when a limitation to the right to be free from discrimination will be permissible be taken into account in carrying out the Exceptions Review and amending the EO Act.
40. In regards to the exemptions and exceptions set out in the EO Act, the Canadian experience is relevant. Canada's constitutional *Charter of Rights and Freedoms* (**Canadian Charter**) ensures that every individual has the right to equal protection and equal benefit of the law without discrimination.³⁰ The rights and freedoms set out in the Canadian Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.³¹ Under section 27(2) of the Canadian *Human Rights Act 1985*, the Canadian Human Rights Commission may issue a guideline setting out the extent to which and the manner in which the right to be free from discrimination may be limited. These guidelines may relate to areas such as employment, housing, public services and membership in labour unions and professional associations.³² In determining whether a guideline should be issued, the Canadian Human Rights Commission interprets its discretion consistently with international human rights law, including treaties ratified by Canada such as the *ICCPR* and the *Universal Declaration of Human Rights*, and the Canadian Charter.³³

²⁸ Ibid., [7].

²⁹ Ibid, [13].

³⁰ *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act 1982* being Schedule B to the *Canada Act 1982* (UK), Article 15(1).

³¹ Ibid., Article 1. This language reflects that found in the New Zealand *Bill of Rights Act 1990*,³¹ on which section 7(2) of the Victorian Charter is modelled: Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9.

³² For example, see the New Brunswick Human Rights Commission Guideline on Social Condition, adopted 27 January 2005, 2 (<http://www.gnb.ca/hrc-cdp/e/Guideline-Social-Condition-Discrimination-New-Brunswick.pdf>, accessed 14 April 2008).

³³ Ibid., 2.

41. Reflecting the importance of the norm, section 8 of the Victorian Charter sets out a range of equality rights:

8. Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law;
 - (2) Every person has the right to enjoy his or her human rights without discrimination; and
 - (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.³⁴
42. Section 8(4) further states that measures taken to assist disadvantaged groups because of discrimination do not themselves amount to discrimination. The purpose of this provision is to recognise that substantive equality is not necessarily achieved by treating everyone equally, and that special measures may be required to achieve equality for some groups in the community.³⁵
43. The definition of ‘discrimination’ in the Victorian Charter has the same meaning as provided in the EO Act.³⁶ Thus, for the purpose of the Victorian Charter, discrimination is less favourable treatment on the grounds of a ‘protected attribute’, or the imposition of an unreasonable requirement condition or practice with which people with a particular attribute may have difficulty complying. ‘Protected attributes’ include: age; breastfeeding; gender identity; impairment; industrial activity; lawful sexual activity; marital status; parental or carer status or status; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; and sexual orientation.
44. Having regard to comparative and international law regarding the right to equality and non-discrimination, the likely interpretations and applications of section 8 seem to include the following:
- (a) First, pursuant to section 8(2), it is unlawful to discriminate against a person in any area that falls within the wide ‘ambit’ of a relevant human right even though there may

³⁴ As explained in the Explanatory Memorandum, section 8(1) is modelled on article 16 of the *ICCPR*, section 8(2) is modelled on article 2(1) of the *ICCPR* and section 8(3) is modelled on article 26 of the *ICCPR*. For HRC jurisprudence on the right to non-discrimination and equality before the law, see HRC, *General Comment 18: Non-Discrimination* (1989), available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>. See also <http://www.bayefsky.com/bytheme.php/id/856>.

³⁵ This provision is modelled on s 19(2) of the *New Zealand New Zealand Bill of Rights Act 1990* (NZ).

³⁶ The accompanying note to the definition of discrimination in section 3(1) of the Victorian Charter states that section 6 of the EO Act lists a number of attributes in respect of which discrimination is prohibited.

not be any violation of that right.³⁷ The application of section 8(2) does not presuppose a breach of any of the Victorian Charter's substantive provisions. A measure which itself conforms with the other human rights in the Victorian Charter *may* nevertheless violate section 8(2) if it is discriminatory. Thus, in a UK case concerning treatment in detention, the House of Lords held that, notwithstanding that the detention involved did not violate any of the substantive rights of the *European Convention on Human Rights*, the detention did fall within the 'ambit' of the right to liberty and security such as to engage the prohibition on discrimination in the enjoyment of this right.³⁸ On this issue, the House of Lords followed the European Court of Human Rights in *Stec v United Kingdom*³⁹ where the Court stated that:

Article 14 (the prohibition on discrimination) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention...it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the Convention Articles.

The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide.

- (b) Second, pursuant to section 8(3), there is an immediate obligation on the government and public authorities to ensure that legislation, policies and programs prohibit discrimination and are themselves non-discriminatory.

³⁷ Looking at the equivalent provision of the *Human Rights Act 1998* (UK), the Court of Appeal considered that four questions should be asked:

1. Do the facts fall within the ambit of one of more of the substantive provisions?
2. If so, was there different treatment as between the complainant and other comparators?
3. Were the comparators in an analogous situation to the complainant?
4. If so, did the differential treatment pursue a legitimate aim and bear a reasonable relationship of proportionality to the aim?: *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [20]; [2003] 1 WLR 617, 625.

³⁸ *R (on the application of Cliff) v Secretary of State for the Home Department* [2006] UKHL 54 (13 December 2006).

³⁹ (2005) 41 EHRR SE 295, [38].

- (c) Finally, pursuant to sections 8(2) and (4), read together, there may be a further substantive obligation on the government and public authorities to take positive steps and adopt special measures to address the needs of people experiencing disadvantage so as to enable them to realise all of their rights and freedoms.⁴⁰ Having regard to international jurisprudence, these steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources.⁴¹

45. The HRLRC and PILCH also note that article 2 of the *CERD* requires parties to the Convention to 'condemn racial discrimination' and undertake to engage in no act or practice of racial discrimination against persons and to ensure that public authorities act likewise. Similarly, States Parties undertake not to support discrimination by organisations. The current exceptions outlined in the EO Act enable both public authorities and organisations to discriminate on the basis of race and, in certain circumstances, largely without justification. The Exceptions Review represents an opportunity for the Victorian Government to ensure Australia's compliance with article 2(1)(c) of *CERD* which requires Australia to nullify laws which have the effect of creating or perpetuating racial discrimination.

5.2 Permissible Limitations

46. At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited.
47. In *General Comment 31*, the HRC stated that, where limitations or restrictions are made:
- States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.⁴²
48. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (***Siracusa Principles***).

⁴⁰ UN Human Rights Committee, General Comment 18, above n 2. See also *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 278.

⁴¹ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 3, [11]. See also *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624.

⁴² UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

49. Among other things, the Siracusa Principles provide that:
- (a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;
 - (b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;
 - (c) any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
 - (d) limitations must not be arbitrary or unreasonable;
 - (e) limitations must be subject to challenge and review;
 - (f) limitations must not discriminate on a prohibited ground;
 - (g) any limitation must be 'necessary', which requires that it:
 - (i) is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - (ii) responds to a pressing need;
 - (iii) pursues a legitimate aim; and
 - (iv) is proportionate to that aim.⁴³
50. Reflecting the Siracusa Principles, the Victorian Charter contains a limitation provision, section 7(2), which is modelled on broadly equivalent provisions in section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.
51. Section 7(2) of the Victorian Charter provides that:
- A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society⁴⁴ based on human dignity, equality and freedom and taking into account all relevant factors.

⁴³ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

⁴⁴ According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

52. Section 7(2) also sets out the following inclusive list of these relevant factors:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose; and
 - (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
53. It is desirable that, so far as possible, section 7(2) is interpreted and applied consistently with international law and the Siracusa Principles including placing the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate.⁴⁵
54. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. This provision was included to safeguard against the possibility that the Victorian Charter might be misused to destroy or limit human rights.⁴⁶ For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged.
55. The Human Rights Consultative Committee which investigated and recommended the adoption of the Victorian Charter recognised that rights need to be balanced against one another and against competing public interests. According to the Explanatory Memorandum, section 7 'reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests'.⁴⁷
56. While the Victorian Charter does not provide that certain rights are non-derogable, unlike many other human rights instruments, the preferable view is that, consistently with article 4(2) of the *ICCPR*, certain human rights are absolute and must not be subject to limitation or derogation. Pursuant to article 4(2) of the *ICCPR*, these rights relevantly include the right to recognition as a person before the law (article 16) and freedom of thought, conscience and religion (article 18).

⁴⁵ See, eg, P Hogg, *Constitutional Law of Canada* (2004) 795-6.

⁴⁶ Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

⁴⁷ Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

57. Similarly to the *ICCPR*, article 37(5) of the South African Bill of Rights provides that components of particular human rights are non-derogable, including in relation to the right to equality and the right to human dignity.
58. Section 5 of the Victorian Charter recognises that rights or freedoms arising in international law must not be taken to have been abrogated or limited only because the right or freedom is not included in the Victorian Charter. This is compatible with section 7 of the Victorian Charter which requires a balanced and nuanced approach to any permissible limitation on human rights. Accordingly, while the right to work and the right to education are not rights protected by the Victorian Charter, it cannot be used to limit those rights. Further, even though the Victorian Charter does not explicitly recognise any right to be non-derogable, the preferable approach is that those rights which international law recognises as not subject to derogation or limitation should be treated as such pursuant to the Victorian Charter.

6. Current Exceptions under the EO Act

6.1 Do the Exceptions need to be Reformed?

59. The system for human rights protection and compliance in Victoria, enshrined in the EO Act, has remained largely unchanged since the introduction of the State's first anti-discrimination laws nearly thirty years ago. With the enactment and entry into force of the Victorian Charter, a review of the EO Act is both necessary and timely. The HRLRC and PILCH consider that the exceptions in the EO Act currently provide for discrimination to be lawful in circumstances which may be incompatible with the Victorian Charter. Accordingly, there is a critical need to reform the provisions relating to exemptions and exceptions as found in the EO Act to ensure its compliance with the Victorian Charter.

6.2 Are the Exceptions Reasonable Limitations on the Right to Equality?

60. In order to analyse whether the exceptions outlined in the EO Act represent reasonable limitations on the right to equality, the HRLRC and PILCH urge the Exceptions Review to consider international human rights jurisprudence in regards to its consideration of limitations on human rights resulting from the exceptions in the EO Act. International and comparative jurisprudence provide instructive lessons for Victoria due to the fact that the current legislative framework under the EO Act results in complaints, if voiced, often being resolved privately, rather than proceeding to the courts and resulting in decisions being reported.
61. This submission details both the international human rights law and the Victorian Charter position with regard to the limitations on human rights found in the exceptions.

6.3 A Limitations Analysis of the Exceptions

62. In the context of the limitations analysis outlined above in section 5.2, this section considers the compatibility of the exceptions set out in the EO Act with the Victorian Charter.
63. The HRLRC and PILCH submit that rather than providing a list of exceptions, the EO Act should incorporate a section which provides guidance on permissible limitations to the right to equality of opportunity found in the EO Act. In this regard, the EO Act should include a section which replicates section 7(2) of the Victorian Charter. Alternatively, and less preferably in the view of the HRLRC and PILCH, the EO Act may refer to section 7(2) of the Victorian Charter in section 12 of the EO Act to provide that discrimination is not unlawful within the meaning of the EO Act where it is a permissible limitation within the meaning of section 7(2) of the Victorian Charter.

64. The HRLRC and PILCH note the following concerns with the compatibility of the current exceptions contained in the EO Act with the Victorian Charter.

(a) *The nature of the right*

65. Section 7(2)(a) of the Victorian Charter requires that in determining whether a limitation is justified in a free and democratic society, the nature of the right being limited must be considered. While there is no 'hierarchy' of rights as such, human rights that are considered absolute and non-derogable under international law, such as the prohibition on torture, would clearly require a much higher level of justification so far as limitations are concerned than, say, the right to freedom of expression.
66. The right to equality and freedom from discrimination are important human rights recognised by both the EO Act and the Victorian Charter (see paragraph 7). However, in some circumstances the exceptions appear to prioritise other rights or interests. For example, the exceptions relating to employment may seek to ensure that business interests are not unduly restrained, and the exceptions relating to domestic employment might seek to protect the right to privacy and the rights of the child. While these competing interests may be legitimate in certain circumstances, the exceptions do not currently seek to balance these interests or competing rights with the rights to be free from discrimination, or indeed other relevant rights such as the right to work or the right to education. The HRLRC and PILCH submit that the importance of the right to be equal before the law is essential to a free and democratic society and any limitation must be justified in accordance with the human rights principles relevant to limiting human rights, namely those outlined in section 7(2) of the Victorian Charter.

(b) *The importance of the purpose of the limitation*

67. Section 7(2)(b) of the Victorian Charter provides that the limitation must fulfil a pressing need and pursue a legitimate aim.⁴⁸ The aim sought to be achieved by the limitation should be 'specific' and not merely general, and must be compelling and important and not 'trivial'.⁴⁹ Again, the HRLRC and PILCH are concerned that many of the exceptions pose general rather than specific and adapted limitations. Further, many exceptions, on their face, fail to indicate a compelling reason for the limitation. For example, the provision that a councillor must not discriminate against another councillor, unless they do so on the basis of political belief or

⁴⁸ See, eg, *Derbyshire County Council v Times Newspapers* [1993] AC 534, 550; *Handyside v UK* [1976] 1 EHRR 737. See also *R v Oakes* [1986] 1 SCR 103, in which the Supreme Court of Canada stated that the aim must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom', which required that it must 'relate to concerns which are pressing and substantial'.

⁴⁹ See, eg, *Zundel v R* [1992] SCR 731.

activity,⁵⁰ engages the rights to freedom of thought, conscience and expression contained in the Victorian Charter.⁵¹ It is difficult to see a compelling need to ensure complete uniformity of political views in local council that justifies this limitation on human rights, particularly rights essential to a free and democratic society. Political belief is a broad term and would encompass beliefs that fall within broader political labels such as left or right. Organisational or credibility imperatives – legitimate aims – may underpin this exception, however, the exception does not currently require the discriminator to balance this aim with the adverse consequences of infringing the victim's rights.

68. It is the aim of the limit itself that should be the subject of scrutiny rather than the aim of the law as a whole.⁵² This supports a case by case analysis of discrimination and a balancing act between rights, rather than providing a provision which enables discrimination in a broad category of circumstances.
69. The HRLRC and PILCH also highlight that financial considerations in and of themselves will almost never constitute a legitimate aim or justify a limitation on human rights.⁵³ Many of the current exceptions to the EO Act, such as when offering employment, goods or services, education or accommodation, indicate that the exceptions aim to avoid the financial cost that a non-discriminatory offer may entail. The HRLRC and PILCH recognise the relevance of financial and resource allocation considerations to private entities and public authorities. These considerations, however, cannot be the sole justification for an exception to the prohibition on discrimination.
70. It is not evident in the current list of exceptions that they respond to a pressing social, security-based or other need. Rather, in certain circumstances the exceptions appear arbitrary and inconsistent in form and substance. While some exceptions may operate to protect other relevant human rights, this protection is applied in an arbitrary and irregular fashion. The HRLRC and PILCH are concerned that the legitimacy of the limitations found in the exceptions, in terms of their importance or purpose, varies greatly.

⁵⁰ EO Act, sections 67 and 68.

⁵¹ Victorian Charter, sections 14 and 15.

⁵² See, eg, *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, 335.

⁵³ See, eg, *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 38.

(c) The nature and extent of the limitation

71. Section 7(2)(c) of the Victorian Charter requires consideration of the nature and extent of the limitation. This requires that the limitation be proportionate.⁵⁴ The HRLRC and PILCH are concerned that by statutorily enshrining a number of limitations on the right to be free from discrimination, which are available to public and private entities in a number of fields and circumstances, these limitations cannot be individually scrutinised as to proportionality. This results in a disproportionate limitation on the right to non-discrimination.
72. The EO Act provides that 'This Act does not prohibit discrimination if an exception in Part 3 ... or Part 4 or an exemption under Part 4 applies.' This enables any party, including a public authority, as defined by the Victorian Charter, to discriminate where the circumstances fall into one of the categories provided for in the exceptions. The exceptions are phrased broadly and do not require the discriminating party to moderate or tailor their behaviour to minimise the extent to which the right is infringed. For example, an exception to the prohibition on discrimination in the area of employment provides, 'An employer may discriminate in determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any persons' home.'⁵⁵ While there may be competing rights which are engaged by the circumstances of employment in someone's home (the right to privacy, family life, life), the exception does not require the discriminator to balance these rights against the right to be free from discrimination.

(d) The relationship between the limitation and its purpose

73. Section 7(2)(d) of the Victorian Charter requires an analysis of the relationship between the limitation and its purpose in order to determine whether it is a permissible limitation that is demonstrably justified in a free and democratic society. The limitation must have a reasonable and rational connection to the aim, which can be evidenced. It should be accompanied by 'relevant and sufficient reasons'.⁵⁶ It should not be, or operate in a way which is, arbitrary, unfair or not based on rational considerations.⁵⁷
74. As the exceptions are provided for in a general sense, there is limited opportunity to explore or elucidate the purpose for the limitation expressed by the exception. Accordingly, under the current framework of the EO Act, it is difficult to examine the relationship between the limitation and its purpose.

⁵⁴ See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

⁵⁵ EO Act, section 16.

⁵⁶ See, eg, *Stanková v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

⁵⁷ See, eg, *R v Oakes* [1986] 1 SCR 103, 139.

75. This may result in arbitrary and unreasonable limitations in breach of the Siracusa Principles. That the exceptions often provide enable a party to discriminate on the basis of any one of 17 attributes in a number of different circumstances (ranging from small business to schools and sporting clubs) may result in a limitation on the right to equality that is both arbitrary and unreasonable.
76. Further, some of the exceptions are more developed than others and incorporate a reasonableness requirement. For example, section 25 of the EO Act, which relates to employment for the care of children, only enables discrimination where the employer genuinely believes, and has a rational basis for that belief, that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children.
77. Other exceptions partially limit discrimination to that which is reasonable in the circumstance. For example, section 27B(1)(a) enables discrimination on the basis of gender identity if the person did not give the employer 'adequate notice of the person's gender identity' in any circumstances and even where such gender identify is irrelevant to that person's capacity to perform their job. However, section 27B(1)(b) enables the employer to discriminate on the basis of gender identity where the employer was given adequate notice but it is unreasonable for the employer not to discriminate having regard to a range of (any relevant) factors.
78. Other exceptions fail to incorporate any reasonableness requirement. For example, exceptions in relation to discrimination in the provision of accommodation, including, sections 53-57.
79. In summary, the HRLRC and PILCH are concerned that the relationships between the limitations on the right to equality, as expressed by the current exceptions found in the EO Act, and the purpose of such limitations vary greatly.

(e) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve

80. Section 7(2)(e) of the Victorian Charter requires a party to consider whether there is any less restrictive means available which will achieve the purpose that the limitation seeks to achieve. This involves a consideration of whether the objective of the limitation can be achieved in a way that does not interfere with, or interferes less with, human rights.⁵⁸

⁵⁸ These factors are drawn from s 36(1) of the *South African Constitution* which, in turn, was informed by the decision of Chaskalson P in *State v Makwanyane* (1995) Case No CCT/3/04 (Constitutional Court of the Republic of South Africa) where it was stated at [104] that:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on

81. The current exceptions fail to require the discriminating entity to examine whether there is any less restrictive means reasonably available to that party to achieve the purpose of the exception without restricting the relevant human rights.

6.4 Summary

82. In summary, the HRLRC and PILCH consider that the current limitations contained in the EO Act on the rights to be free from discrimination and equal before the law as provided by the exceptions are unnecessary.
83. It is not clear that the exceptions respond to any pressing need in Victorian society in 2008. Many of the exceptions fail to pursue a legitimate aim (for example, enabling discrimination in admitting students on the grounds of dress or appearance⁵⁹). Finally, in many circumstances, the exceptions are not proportionate to a legitimate aim as they fail to require the person invoking the exception to balance the limitation with the legitimate aim.
84. A determination of whether a limitation on the right to non-discrimination may be permissible requires an analysis of the relevant rights as discussed above in 6.3.

Recommendation 2:

The EO Act should contain an equivalent to section 7(2) of the Victorian Charter to ensure that the right to non-discrimination and equality before the law protected in the EO Act is limited only where it is necessary, reasonable and proportionate to do so.

Recommendation 3:

All of the exceptions to and exemptions from the EO Act should be repealed as they enable a party to discriminate in a way which is incompatible with the Victorian Charter and undermine the opportunity to achieve substantive equality.

proportionality...[P]roportionality...calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

⁵⁹ EO Act, section 24.

7. Should any Exceptions be Repealed?

85. As discussed in the previous section, the HRLRC and PILCH consider that all of the current exceptions in the EO Act should be repealed.
86. Alternatively, if the Exceptions Review does not consider appropriate the repeal of all exceptions under the EO Act, our comments in relation to some exceptions are outlined briefly below. Without providing an exhaustive review of all of the exceptions and exemptions contained in the EO Act, the HRLRC and PILCH have identified the following exceptions that, *prima facie*, appear to be incompatible with the Victorian Charter.

7.1 Review of Particular Exceptions

87. The HRLRC and PILCH note that if the Exceptions Review elects to retain any of the exceptions in the EO Act, such exceptions must be consistent with the Victorian Charter. This would require that section 12 of the EO Act be amended.
88. The exception found in section 18 of the EO Act provides that an employer may discriminate on the basis of political belief in offering employment to another person as, for example, a political advisor or staff of a political party. In addition to the comments outlined above in paragraph 64, the exception found in section 18 of the EO Act may, in some circumstances, infringe the right to take part in public life. Under section 18 of the Victorian Charter, a person has the opportunity to engage in public affairs and access to the Victorian public service and public office, without discrimination. Under article 25(c) of the *ICCPR*, Australia undertook an obligation to ensure its citizens 'have access, on general terms of equality, to public service in his country'. These rights and obligations may be inconsistent with the provisions in section 18 of the EO Act.
89. The exception found in section 21 of the EO Act relates to small business and provides a blanket entitlement to discriminate, on the basis of any of the protected attributes, regardless of the rationale for doing so. This exception is highly problematic and lacks any justification.

Section 23 – reasonable terms of employment

90. The exception found in section 23 of the EO Act enables an employer to set 'reasonable terms or requirements of employments' to take into account both the genuine employment requirements of the business and a person's impairment might impose on their capacity to perform the position. This exception engages the right to 'enjoyment of just and favourable conditions of work' found in article 7 of *ICESCR*.

91. The exception found in section 24 of the EO Act relates to an employer setting and enforcing standards of dress, appearance and behaviour and may, in certain circumstances, operate in a way to undermine the rights under the Victorian Charter to freedom of religion and belief,⁶⁰ freedom of expression⁶¹ and cultural rights.⁶²

Section 27B – gender identity

92. On its face, the exception found in section 27B of the EO Act – which enables an employer to discriminate where an employee's gender identity were not known to the employer at the time of hiring – is intrinsically inconsistent with Australia's obligations under *ICESCR* and *ICCPR* in regards to discrimination on the basis of gender identity. There appears no justification for this exception given the prohibition on discrimination based on gender elsewhere in the EO Act. Other than for the exception stipulated in section 17(1), there is no basis for allowing discrimination on the basis of gender. The financial considerations for determining unreasonableness provide inadequate foundation for such discrimination.

Recommendation 4:

Any proposal to retain exceptions or exemptions should ensure that the exceptions to and exemptions from the EO Act are subject to the limitations analysis contained in section 7(2) of the Victorian Charter.

⁶⁰ Victorian Charter, section 14.

⁶¹ Victorian Charter, section 15.

⁶² Victorian Charter, section 19.

8. Exemptions under the EO Act

8.1 VCAT Exemption Process

93. Since the entry into force of the Victorian Charter, applications to VCAT for exemptions under section 83 of the EO Act have demonstrated that previous cases no longer provide an appropriate test. In particular, the method of how to balance the different interests which are taken into consideration with each application needs re-examination.
94. As discussed in paragraph 40, in the HRLRC's and PILCH's view, if the exemptions process is retained in the EO Act, the approach adopted in Canada should be incorporated into the EO Act such that VCAT's discretion to grant an exemption must be made consistently with international human rights law and in accordance with section 7(2) of the Victorian Charter.
95. For example, in the Canadian decision *Slaight Communication Inc v Davidson*,⁶³ the Supreme Court considered that, where a tribunal is empowered, under legislation, to make an order that will limit a right, the legislation should be interpreted narrowly and consistently with the Canadian Charter.⁶⁴ Specifically, the discretion should be exercised consistently with section 1 of the Canadian Charter which requires that a reasonable limit is one which is demonstrably justified in a free and democratic society.⁶⁵ Where a tribunal adjudicator grants an order which *cannot* be demonstrably justified in a free and democratic society, the adjudicator has exceeded his or her jurisdiction because the Canadian Charter has not delegated to him or her a power to infringe the Charter.
96. The HRLRC and PILCH consider that, in determining whether to grant an exemption, VCAT should now apply the test set out in section 7(2) of the Victorian Charter, rather than the tests outlined in previous cases. The HRLRC and PILCH further submit that any exemption granted should be made conditional on an ongoing requirement that the applicant review the necessity and implementation of the exemption in accordance with the principles relevant to section 7(2) of the Victorian Charter, namely:
- (a) the nature of the right which is limited by the exemption;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

⁶³ [1989] 1 SCR 1038.

⁶⁴ *Ibid.*, per Lamer J.

⁶⁵ *Ibid.*

- (d) the relationship between the limitation and its purpose; and
- (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

97. Previous cases have examined the conflict between the public interest in preventing discrimination and the public interest in allowing private companies to pursue legitimate business activities.⁶⁶ A test to determine the appropriateness of an exemption was expressed in VCAT's decision in *Boeing*.⁶⁷ The test provided an unconfined discretion under section 83 of the EO Act in so far as the outcome is not unreasonable and that consideration is given to the 'community's demonstrated commitment to human rights and equal opportunity'.⁶⁸
98. Since the *Boeing* decision, the Victorian Charter has come into force requiring Victorian legislation to be interpreted in a way that is compatible with human rights, in so far as it is consistent with the stated purpose of the EO Act.⁶⁹ As outlined above in section 5.2 of this submission, section 7(2) of the Victorian Charter provides a test for allowing reasonable limitations on human rights in a free and democratic society based on human dignity, equality and freedom and other specific considerations listed there under. To remain consistent with section 32 of the Victorian Charter, VCAT should apply section 7(2) of the Victorian Charter when determining whether to grant an exemption under section 83 of the EO Act. The reasonable limitations test set down in the Victorian Charter is preferred to the test expressed in *Boeing*. Under *Boeing*, VCAT was required to only consider the outcome of the exemption rather than examine whether a proposal to limit protection is reasonable. Furthermore, under the *Boeing* test, VCAT was only asked to examine whether a limitation is desirable rather than the Victorian Charter's requirement that a limitation be reasonably and demonstrably justified.⁷⁰

⁶⁶ Submission by Victorian Equal Opportunity and Human Rights Commission in regards to VCAT's consideration of an application by Ms Rosalind Spencer and TransGender Victoria for revocation of exemption number A76/2007 previously granted to Hanover Welfare Services Ltd, permitting specified conduct that might otherwise constitute discrimination on the basis of sex and gender identity in the course of employment, the provision of services and accommodation, requests for information and advertising in breach of sections 6, 13, 14, 42, 49, 100 and 195 of the *Equal Opportunity Act 1995* (Vic) (**VEOHRC Hanover Submission**), [12].

⁶⁷ *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532

⁶⁸ *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532, [33].

⁶⁹ Victorian Charter, section 32.

⁷⁰ Submission by Victorian Equal Opportunity and Human Rights Commission, [44].

Recommendation 5:

Any application for exemption should be subject to the limitations analysis contained in section 7(2) of the Victorian Charter and incorporate a requirement that the exemption applicant continue to consider the necessity of the exemption, in a manner consistent with section 7(2) of the Victorian Charter, on an ongoing basis.

9. Conclusion

99. Freedom from discrimination is essential to the protection of virtually all human rights. The centrality and importance of the right to equality and freedom from discrimination is recognised both in the Discussion Paper and the Victorian Charter. These rights are essential to a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.
100. In the HRLRC's and PILCH's submission, the objectives of the EO Act to promote recognition and acceptance of everyone's right to equality of opportunity and the elimination, as far as possible, of discrimination on the basis of various attributes may only be effectively achieved by substantial reform of the EO Act.
101. In this context, the most effective way to eliminate discrimination and promote equal opportunity in Victoria is through a human rights framework. The current legislative framework which allows exceptions and exemptions should be reformed. The exceptions and exemptions procedures operate in a way that is arbitrary and broad, where a human rights framework calls for a nuanced balancing of the specific human rights that are in conflict.