

10 July 2009

Attention: Mr Carlo Carli  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
EAST MELBOURNE VIC 3002

**By email to: [andrew.homer@parliament.vic.gov.au](mailto:andrew.homer@parliament.vic.gov.au) and [carlo.carli@parliament.vic.gov.au](mailto:carlo.carli@parliament.vic.gov.au)**

Dear Chairperson,

**Inquiry into Exceptions and Exemptions to the *Equal Opportunity Act 1995***

We are writing in response to the Scrutiny of Acts and Regulations Committee (***the Committee***) Options Paper in relation to its inquiry into the exceptions and exemptions to the *Equal Opportunity Act 1995* (***the Options Paper***).

The PILCH Homeless Persons' Legal Clinic (***HPLC***) made submissions in April 2008 in response to the Department of Justice's review of the exceptions and exemptions (***the Exceptions Review***) in the *Equal Opportunity Act 1995* (***the Act***) to determine their compatibility with the *Charter of Rights and Responsibilities Act 2006* (***the Charter***). The HPLC also made submissions in January and May 2008 in response to the independent review by Julian Gardner of the Act (***the Independent Review***). The HPLC's response to the Options Paper is a reiteration of our comments and recommendations set out in our submissions under the Exceptions Review and the Independent Review. Accordingly, both submissions should be considered through the Inquiry process.

Our specific response to the Options Paper considers the following issues:

1. Review and reform of the Exceptions under Parts 3 and 4 of the Act;
2. Reform to the Exemption provision under section 83 of the Act;
3. Impact of Exceptions if the newly proposed attributes of homelessness and irrelevant criminal record are introduced; and
4. Temporary special measures;

It is our overall view that any review and reform of the Act must be conducted within a human rights framework. The right to equality and freedom from all forms of discrimination is an integral component of the

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 a wide range of international human rights instruments<sup>1</sup> and national laws.<sup>2</sup> The Victorian government is specifically mandated to promote and protect human rights under the Charter, including by developing policies and laws which are consistent with human rights. Accordingly, the HPLC recommends that the Act be amended so that it is consistent with Australia's international human rights obligations and the Charter. In particular the Act must operate to promote and protect the right to equality and non-discrimination in a practical and effective way so that all Victorians can enjoy and exercise their human rights.

### ***Review and reform to the Exceptions under Parts 3 and 4 of the Act***

One of the stated objectives of the Act is to 'eliminate, as far as possible'<sup>3</sup> discrimination and sexual harassment. That objective is substantially hindered by the exceptions to the prohibition on discrimination that are contained in the Act. The exceptions provided under Part 3 and 4 of the Act operate so as to create an absolute and permanent exception, in specific circumstances, to the prohibition against discrimination. Many of these exceptions appear to operate in an arbitrary, inflexible, broad and unreasonable way.

The effect of the exceptions regime is that certain discriminatory conduct, carried out in certain circumstances, will not amount to unlawful discrimination. Often, the effect of these exceptions is to institutionalise, or reinforce, systemic discrimination against marginalised and disadvantaged members of the Victorian community.<sup>4</sup> In the HPLC's experience, in many instances these exceptions (such as exceptions relating to the provision of goods and services and accommodation) only serve to perpetuate discrimination. Not only does this undermine the objectives of the Act but it also creates absolute restrictions on the right to equality and non-discrimination without regard as to whether such limits on human rights are reasonable.

The blanket exceptions in the Act operate so as to allow discrimination, rather than provide protections against it. While it is acknowledged that some of the exceptions such as those relating to accommodation provide for positive discrimination (for example, to enable women's refuges to be established) they also provide avenues for private landlords to discriminate against people who are seeking accommodation. The exception in relation to shared accommodation, under section 54, enables a private landlord of a rooming house to discriminate against people seeking accommodation. An absolute power to discriminate against any person does not, in the HPLC's view, appear to be reasonable. While the HPLC recognises that there may be instances where it might be appropriate to discriminate against someone in accommodation on the basis of their criminal record (for example, regarding offences and offenders warranting particular attention from a community safety standpoint) an absolute exception that allows any form of discrimination on any ground is not appropriate. Instead, the HPLC contends that a balancing exercise that considers the person's human rights and the rights of other people within community, and the accommodation, is far more appropriate.

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<sup>1</sup> For example: the International Covenant on Civil and Political Rights (*ICCPR*); the International Covenant on Economic, Social and Cultural Rights (*ICESCR*); the Convention on the Elimination of All Forms of Discrimination Against Women (*CEDAW*); the International Convention on the Elimination of All Forms of Racial Discrimination (*CERD*).

<sup>2</sup> For example: *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>3</sup> Section 3 of the EO Act.

<sup>4</sup> Refer to PILCH and HRLRC submission, *Eliminating Discrimination and Ensuring Substantive Equality* (July 2009), 13.

The HPLC agrees with the joint submission of the Public Interest Law Clearing House (**PILCH**) and the Human Rights Law Resource Centre (**HRLRC**), which states that:

Repeal of the permanent exemptions would not result in a situation wherein a person or organisation could never discriminate in pursuit of a legitimate and reasonable aim. Repealing the permanent exceptions would simply mean that before discrimination is deemed permissible, regard must be had to the particular circumstances of the case and an effort must be made to strike an appropriate balance between competing rights and interests.<sup>5</sup>

The HPLC endorses the joint submission of PILCH and the HRLRC and supports the recommendation that the exceptions in the Act must be repealed. The HPLC further submits, in the alternative, that if the Committee considers it necessary to retain some of the exceptions under the Act, those exceptions should be replaced with a balancing exercise/exception that considers the reasonableness of limitations on human rights in accordance with section 7(2) of the Charter.

The HPLC repeats the separate recommendation in its previous submission to the Exceptions Review that the statutory authority exception under section 69 of the Act must be repealed as it is inconsistent with human rights obligations under the Charter.

### ***Reform to the Exemption provision under section 83 of the Act***

Section 83 gives the Victorian Civil and Administrative Tribunal (**VCAT**) a broad, discretionary power to grant an exemption from the Act. VCAT's power to grant an exemption under section 83 does not expressly require a human rights approach to the assessment of whether or not the exemption should be granted. Generally, the exemption under section 83 of the Act is granted by VCAT to allow for circumstances of positive discrimination.<sup>6</sup> However, the power is broad and can be granted for any circumstances specified by VCAT.

The Charter is now fully in force and as a result all statutory provisions, including section 83 of the Act, 'must be interpreted in a way that is compatible with human rights.'<sup>7</sup> Accordingly, VCAT must interpret and apply section 83 in a way that is compatible with human rights. In this regard, the HPLC submits that exemptions should now only be granted by VCAT in circumstances that will not unreasonably limit human rights.

To ensure full compliance with the Charter and consistency across Victorian legislation, the HPLC submits that section 83 of the Act should be amended so as to incorporate the requirement that a reasonable limitations analysis (under section 7(2) of the Charter) must be satisfied when granting an exemption. This would require VCAT, when determining whether to grant an exemption, to consider:

- The nature of the right which is limited by the exemption;
- The importance of the purpose of the limitation;
- The nature and extent of the limitation;

<sup>5</sup> PILCH and HRLRC submission, *Eliminating Discrimination and Ensuring Substantive Equality* (July 2009), 15.

<sup>6</sup> Refer to: *Positive Women (Victoria) Ltd Exemption* (Anti Discrimination) [2006] VCAT 1652 (17 August 2006); *Domestic Violence Victoria* (Anti Discrimination Exemption) [2005] VCAT 2139 (21 September 2005); *State of Victoria – Dep of Natural Resources & Environment Rural Women's Network* [2000] VCAT 824 (30 April 2000); and *Loddon Mallee Housing Services Ltd Exemption* (Anti Discrimination) [2006] VCAT 1214 (15 June 2006).

<sup>7</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 32.

- The relationship between the limitation and its purpose; and
- Whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The HPLC further submits that any exemption granted should be made conditional on a requirement that the applicant review, on an ongoing basis, the necessity and implementation of the exemption in accordance with the principles set out in section 7(2) of the Charter.

The HPLC supports the joint submission of PILCH and the HRLRC and agrees that these amendments will help to ensure that the rights to non-discrimination and equality are limited only where it is necessary, reasonable and proportionate to do so.

***Impact of the Exceptions if the newly proposed attributes of homelessness and irrelevant criminal record are introduced***

The Independent Review recommended that 'homelessness' and 'irrelevant criminal record' be incorporated as protected attributes under the Act (refer to recommendations 46 and 48). The HPLC urges the Victorian government to amend the Act to incorporate 'homelessness' and 'irrelevant criminal record' as protected attributes and to ensure that all provisions within the Act afford adequate and effective protection of human rights for *all* Victorians in accordance with the Charter.

The HPLC's submission to the Exceptions Review, which has been made available to the Committee, discusses at Part 5 the impact of the exceptions on people experiencing homelessness or those with a criminal record. The discussion reveals the deleterious consequences and unreasonable limitations on human rights that are experienced, as a result of the exceptions, by those in society who are disadvantaged and marginalised.

With respect to the incorporation of the characteristic of 'irrelevant criminal record' as a protected attribute under the Act, the HPLC acknowledges 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 or accommodation. 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.<sup>8</sup>

Accordingly, the HPLC accepts 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

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<sup>8</sup> Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

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. Therefore, in our view, an appropriately worded definition of '*irrelevant criminal record*', alongside the incorporation of a balancing exercise to be considered when determining whether a person can reasonably be discriminated against on the basis of their criminal record, will provide adequate protection against unfair discriminatory practices whilst also ensuring community safety.

In previous submissions the HPLC has highlighted that the majority of people experiencing homelessness or at risk of homelessness routinely experience discrimination at the hands of accommodation and goods and service providers. For example, 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 be homeless or precariously housed because they want to pay either with a cheque from a welfare agency or from their social security benefits.

If homelessness is incorporated as a protected attribute and the accommodation exception under section 54 (which effectively enables a private landlord of a rooming house to discriminate against people seeking accommodation) continues to operate, people who have experienced homelessness, people with gaps in their rental history, those who are using their social security payments to cover the rent, or people that are being assisted by a welfare agency, will continue to be denied tenancies despite of their ability to pay rent. Consequently, the continuing operation of the accommodation exception under section 54 would undermine the very purpose of incorporating 'homelessness' as a protected attribute. This provides a clear example of the need to repeal the exceptions and, if necessary, replace with a balancing exercise/exception that considers the reasonableness of limitations on human rights and obligations under the Charter. Without this reform many of the exceptions will continue to perpetuate and reinforce discrimination against people experiencing or at risk of homelessness.

### ***Temporary special measures***

The HPLC acknowledges that some exceptions under the Act allow for positive discrimination to assist in overcoming disadvantage for groups and individuals that have historically endured some form of discrimination. These exceptions are often described as *special measures*, which are designed to achieve substantive equality through affirmative action.

The Independent Review of the Act recommended 'that special measures, taken for the purpose of assisting or advancing people disadvantaged because of discrimination do not constitute discrimination, should be incorporated in the Act.'<sup>9</sup> The HPLC supports this recommendation and further endorses the joint submission of PILCH and the HRLRC, which notes that the adoption of special measures is an essential step towards substantive equality and urges the government to amend the Act to reflect the legal distinction between permissible discrimination and special measures. However, as PILCH and the HRLRC indicate, 'those permanent exceptions that are designed to address existing disadvantage (and are therefore properly characterised as 'special measures') should not be included in any legislative or quasi-legislative exceptions

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<sup>9</sup> *An Equality Act for a Fairer Victoria* (June 2008), recommendation 4.

scheme. Rather, they should be contained in a separate part of the Act which deals specifically with special measures.<sup>10</sup>

### ***Concluding remarks***

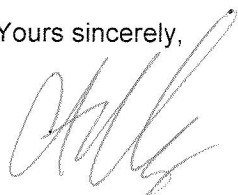
In addition to the specific issues raised by the Options Paper, the HPLC submits that the current exceptions and exemptions generally operate in a way that reduces the effectiveness of the Act's overall protection of the right to equality and non-discrimination and further entrenches discrimination encountered by many disadvantaged individuals. There is a clear and immediate need to reform the Act to ensure that the right to equality and non-discrimination is adequately promoted and protected by Victorian law.

The above comments and recommendations are directed towards the enhanced promotion and protection of human rights. Given the Victorian government's commitment to the fulfillment of human rights for *all* Victorians under the Charter, it has a mandate to give proper consideration to the adoption of these recommendations as a matter of urgency.

The HPLC thanks the Committee for the opportunity to provide this submission, which complements its previous submission to the Exceptions Review. The HPLC would welcome the opportunity to meet with the Committee to discuss its submissions in more detail.

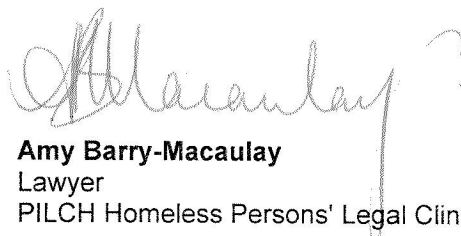
We look forward to hearing from you.

Yours sincerely,



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<sup>10</sup> PILCH and HRLRC submission, *Eliminating Discrimination and Ensuring Substantive Equality* (July 2009), 27.