The Law Institute of Victoria Advocacy & Practice

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Submission

Administrative Law & Human Rights and Workplace Relations Sections

The Exceptions Review

To: The Exceptions Review, Department of Justice

A submission from the Law Institute of Victoria (LIV)

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1 Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to comment on the review of the exceptions to and exemptions from the *Equal Opportunity Act* 1995 (Vic) (the Exceptions Review).

This submission responds to the questions posed in the Department of Justice *Exceptions Review Consultation Paper* (February 2008) (the Consultation Paper).

If you have any questions in relation to this submission, please contact Laura Helm, Administrative Law and Human Rights Section Adviser, Law Institute of Victoria on lhelm@liv.asn.au or (03) 9607 9381 or Elizabeth Hayes, Workplace Relations Section Lawyer, on ehayes@liv.asn.au or (03) 9607 9389.

2 General questions

2.1 Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?

Anti-discrimination legislation was first introduced in Victoria in 1977 and has since been progressively reformed to enhance equal opportunity on the basis of a number of protected attributes. Until recently, Victorian equal opportunity law has been governed by the *Equal Opportunity Act* 1995 (Vic) (the EO Act).[1]

The fundamental human right to equality and freedom from discrimination is now further protected in Victoria by the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter).

The purpose of exceptions and exemptions under the EO Act is to balance the competing rights and interests of persons affected by equal opportunity laws. The Charter also sets out a balancing test in s7(2), which assists in weighing up competing rights and policy considerations to determine a human rights compliant outcome. Section 7(2) provides that "a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society", taking into account a list of relevant factors.

The LIV submits that reform of the exceptions according to the Charter will enhance equality of opportunity and the elimination of discrimination in Victoria by

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[1] Equal opportunity is also promoted in federal legislation, including the *Race Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Age Discrimination Act* 2004 (Cth) the *Disability Discrimination Act* 1992 (Cth).

providing a new framework to balance competing interests and ensuring they are based on sound human rights principles.

2.2 What are the social and economic costs and benefits involved in reforming the exceptions in the Act to eliminate discrimination to the greatest possible extent?

The LIV considers that reform of the exceptions according to human rights principles will assist in reducing disadvantage in Victoria. Currently, disadvantage still exists within our community, often characterised as systemic discrimination. The LIV notes the findings of the report "More than Tolerance: Embracing Diversity for Health – Discrimination affecting migrant and refugee communities in Victoria, its heath consequences, community attitudes and solutions" (VicHealth 2007), which highlights the costs of discrimination including higher rates of depression and other forms of mental illness. The LIV notes that these costs are both direct, to the individuals affected and to the health system, and indirect, by reducing educational achievement and reducing productivity at work, leading to reduced economic output overall.

The LIV acknowledges the importance of some exceptions which seek to address historical disadvantage. However, as noted above, exceptions that aim to balance competing policy considerations may have the effect of perpetuating disadvantage and discrimination in the community. The LIV welcomes review of the exceptions in light of the Charter, which allows government to reassess the proportionality of exceptions using a human rights approach.

3 Exceptions and exemptions

3.1 Are the exceptions reasonable limitations on the right to equality? If so, how can they be justified?

The purpose of the Exceptions Review is to assess whether each of the exceptions and exemptions in the EO Act are compatible with the human rights protected under the Charter, including the human right to equality in s8. The LIV submits that following s7(2) of the Charter, this assessment will require consideration of whether each exception is a reasonable and demonstrably justified limit on the right to equality, having regard to:

(a) the fundamental importance of the right to equality; and

(b) the importance of the purpose of the exception; and

(c) the effect of the exception; and

(d) the relationship between the exception and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the exception seeks to achieve.

Many exceptions and exemptions allow for positive discrimination, to assist with overcoming systemic discrimination and the effects of historical disadvantage. The LIV submits that such exceptions are compatible with the Charter because the purpose of the limitation is to improve substantive equality. Section 8(4) of the Charter specifically provides that "measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination." International law recognises such positive discrimination as "special measures".[2]

In the LIV's view there are some exceptions and exemptions to the EO Act which neither seek to overcome systemic discrimination nor constitute a reasonable limitation within the meaning of the Charter. Where appropriate, this submission recommends whether an exception should be removed or amended, in accordance with human rights principles.

Further, the LIV submits that in some circumstances, "defence" provisions may be more appropriate than certain blanket exceptions. This would allow consideration of the facts of a particular case and shifts the burden to respondents in a similar way to the "unjustifiable hardship" test under federal anti-discrimination legislation (see further below).

3.2 Should any exceptions be repealed? If so, which exceptions and why?

3.2.1 Section 27B – Employers are able to discriminate on basis of gender identity

Section 27B provides that an employer may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person's gender identity or the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

In its submission to the Scrutiny of Acts Committee *Discrimination in the Law Inquiry under s.207 of the Equal Opportunity Act 1995 (Vic)*, the LIV made the following comments:

> [Section 27B] was inserted into the Equal Opportunity (Gender Identity and Sexual
>
> Orientation) Bill ("the Bill") on 29 August 2000. The purpose of the Bill was to protect people from discrimination on the basis of gender identity and sexual orientation. It is our understanding that it was not originally the Victorian Government's intention to exclude employers from these protections for transgender people, but that due to opposition from at least one Independent MP and the prospect of the Bill not being passed, the government had little choice but to introduce s27B.

[2] For example, *International Convention for the Elimination of All Forms of Racial Discrimination*, adopted 21 Dec 1965, entered into force 4 Jan 1969, 660 UNTS 195, Article 1(4).

> Section 27B was defended by one independent MP with the use of the example of a "country hardware store".[3] He referred to the drop-off in business that could result from employing a transgender person.
>
> There is no equivalent of s27B in NSW or Queensland and yet there is no evidence in either of those states of any economic problems for businesses as a result of employing a transgender person. Furthermore, s27B endorses discriminatory attitudes in society and is contrary to Australia's international obligations under Article 2 of the International Covenant on Civil and Political Rights.
>
> Since its enactment, s27B has not been referred to in any case law. An employer has never used it as a defence since its introduction. This section unnecessarily discriminates against transgender people and should not exist for the purpose of protecting businesses from the discriminatory attitudes of customers. Therefore it is submitted that s27B should be repealed in its entirety.

In addition to these comments, the LIV considers that s27B is not a reasonable limitation to the right to equality, according to s7(2) of the Charter. We do not consider there to be a legitimate purpose to justify discrimination on the basis of gender identity and submit that the effect of the provision does not create any demonstrable benefit. Rather, it merely reinforces existing prejudices.

The LIV recommends that the s27B exception be repealed.

3.2.2 Section 21 - small business exception to discrimination in employment and employment related areas

Section 21 provides that an employer may discriminate in determining who should be offered employment if the employer has no more than the equivalent of five people employed on a full-time basis. This operates as a blanket exception, so that all small business employers are able to discriminate on the basis of **any** attribute.

The LIV considers this exception to be an unreasonable limitation on the right to equality and the right to be free from discrimination.

The LIV recognises the policy consideration that small business should not be over-burdened by excessive regulation and compliance costs. We submit however that this policy tension can be addressed by an "unjustifiable hardship" defence, similar to that used in the *Disability Discrimination Act* 1992 (Cth).[4]

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[3] Victoria, Parliamentary Hansard, Legislative Assembly, Tuesday 29 August 2000, p. 251.

[4] Section 11 of the *Disability Discrimination Act* 1992 (Cth) provides:

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and

Alternatively, the LIV would support a framework that requires businesses to make "reasonable adjustments", similar to provisions in the recently enacted *Equal Opportunity Amendment (Family Responsibilities) Act* 2008[5] and discussed in the *Equal Opportunity Review Options Paper*.[6]

The LIV submits that amendments relating to "unjustifiable hardship" or a requirement to make "reasonable adjustments" would provide a less restrictive means to achieve the purpose of the small business exception. Further, such amendments would ensure that all businesses would be required to comply with equal opportunity laws, to the extent possible given their resources. In particular, we note that many attributes may not require any particular accommodation or incur any financial cost and that as a result, a blanket exception may serve only to permit discriminatory attitudes to continue.

In light of these less restrictive alternatives, the LIV recommends that the small business exception be repealed and that consideration be given to alternative means to alleviate the burden on small business.

3.2.3 Sections 66 - competitive sporting activities

Section 66 permits the exclusion of a person of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

The LIV considers that the words "or with a gender identity" do not constitute a reasonable limitation and we recommend they be omitted.

One of the ways that discrimination on the basis of gender identity is manifested is a refusal to accept and respect the transition of a person to their affirmed sex from the sex in which they were brought up. In light of this, the LIV recommends that competitive sporting activities in Victoria should recognise the affirmed sex of a person of transgender background.

We note that the International Olympic Committee's "Stockholm Consensus" of 2004[7] took a more restrictive view, requiring surgical as well as hormonal and legal reassignment to have taken place, for at least two years. While this position is more restrictive than that proposed by the LIV, the Stockholm Consensus highlights a less restrictive alternative to the current wording of s66.

(b) the effect of the disability of a person concerned; and
(c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
(d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

[5] In particular, see *Equal Opportunity Amendment (Family Responsibilities) Act* 2008, s7.

[6] Equal Opportunity Review Options Paper, March 2008, p 29 – 31.

[7] See http://www.olympic.org/uk/organisation/commissions/medical/full_story_uk.asp?id=841

We submit that where a less restrictive alternative exists, the current exception cannot be compatible with the Charter test of reasonableness and proportionality and therefore warrants amendment.

3.2.4 Section 82 – welfare measures and special needs

The LIV highlights that the Equal Opportunity Review is considering whether to amend the EO Act to incorporate a general exception for “special measures” taken for the purposes of assisting or advancing people disadvantaged because of discrimination.

In this context, the LIV queries whether s82 will become superfluous should such an amendment be made. We submit that it would be appropriate for an amended exception to provide objectively reasonable restrictions to eligibility for services designed to meet the special needs of particular groups so that only those for whom the special measures are designed receive them. The risk that it can be read as permitting other discrimination in the provision of welfare services must be removed.

3.2.5 Section 77 – Religious beliefs or principles

Section 77 provides that discrimination is not prohibited where it is necessary for a person to comply with their genuine beliefs or principles.

The LIV considers that s77 is too broad and too subjective, going far beyond the right to religious freedom as protected in s14 of the Charter. The LIV notes that other exceptions adequately protect the home and private sphere, including:

- ss16 (domestic and personal services) and 54 (shared accommodation);
- s38 (educational institutions for particular groups) and as proposed to be modified, s76 and s75(2)(3)).

The LIV recommends that s77 be repealed.

3.3 Should any exceptions be amended? If so, which exceptions and why?

3.3.1 Section 25 – care of children

Section 25 provides that an employer may discriminate against prospective and existing employees where an employment position involves the care, instruction or supervision of children and the employer believes that the discrimination is necessary to protect the physical, psychological or emotional wellbeing of the children.

The LIV notes that the Working with Children Check (WCC) now creates a mandatory minimum checking standard across Victoria, designed to protect children under 18 years of age from physical or sexual harm. The Consultation Paper notes that the key difference between the exception and the WCC is that the exception for the care of children also covers protection of the psychological and emotional well-being of children.

The LIV recognises the paramount importance of the safety of children. We are concerned however that this exception is too broad and may reinforce discriminatory stereotypes relating to particular attributes and the emotional well-being of children. This concern may be particularly relevant for discrimination on the basis of sexual orientation, gender identity, physical features, sex and impairment, though is not limited to these attributes.

We note that s25 provides there must be a “rational basis” for the employer’s genuine belief that discrimination is necessary to protect the physical, psychological or emotional well-being of children. The LIV submits that this is not clearly defined and may be used to justify a particular prejudice.

The LIV submits that s25 should be amended to state that where an employment position involves the care, instruction or supervision of children, it is not discrimination to refuse employment where the applicant has no WCC or on the basis of a negative WCC.

3.3.2 Section 40 – Standards of dress and behaviour (education)

Section 40 allows education authorities to set and enforce reasonable standards of dress, appearance and behaviour for students. Notably, a standard for appearance must be taken to be reasonable if the educational authority has taken into account the views of the school community in setting the standard.

The LIV submits that this exception does not adequately account for the obligation of an educational authority not to indirectly discriminate against students when setting standards of dress and behaviour.[8]

The LIV also notes that most education authorities now have additional responsibilities under the Charter (where they are defined as a public authority under s4 of the Charter). Section 38 of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

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[8] *EO Act*, s9.

In light of this new obligation on education authorities, the LIV submits that s40 should be amended to recognise human rights obligations under the Charter. This would require recognition that in setting and enforcing reasonable standards of dress and behaviour, an educational authority must have regard to relevant human rights.

Many of the international trends on dress standards in schools have concerned the right to freedom of religion. In particular, the LIV notes a growing body of case law in the United Kingdom discussing the issue of school uniforms and the right of people to manifest their religion under the UK *Human Rights Act* 1998.

In the case of *Begum, R (on the application of) v Denbigh High School*,[9] the House of Lords found that the school did not interfere with a pupil's right to manifest her religion by refusing to let her wear a jilbab (a full length, loose cloak) to school because "Article 9 [of the European Convention on Human Rights on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest one's religion at any time and place of one's choosing".[10] The Lords' majority judgment turned on the fact that the claimant chose to attend a school that did not allow the jilbab to be worn, when in fact three other schools in the area did allow for the jilbab in their dress code.

The Lords also held that even if there had been an interference with the claimant's rights, the interference was objectively justified following the reasoning of the European Court of Human Rights (the European Court) in *Sahin v Turkey*.[11] In that case, the European Court held that there is a need for compromise and balance, recognising "the value of religious harmony and tolerance between competing groups and of pluralism and broadmindedness."[12] The Lords found that the school uniform policy at Denbigh High was developed following extensive consultation with Muslim students, parents and local mosques and that it served the wider educational purposes of promoting harmony. This aim was deemed important given the complex make-up of the school, with students from 21 different ethnic backgrounds and 79 per cent of students who were practising Muslims.

This case has been followed in the recent case of *R (on the application of X) v Head teachers of Y School and Governors of Y School*,[13] in which the High Court of England and Wales upheld a school uniform policy that prohibited the

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[9] *Begum, R (on the application of) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (the *Begum* case).

[10] As per Lord Hoffman, [2006] UKHL 15 at para 50.

[11] *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported).

[12] As per Lord Bingham, [2006] UKHL 15 at para 32.

[13] *R (on the application of X (by her father and litigation friend)) v Head teachers of Y School and Governors of Y School* [2006] EWHC 298.

niqab (a veil that covers the face, also known as a burqa). The LIV also notes recent media reports about a teenage girl in the UK banned from wearing a Christian chastity ring at school who is taking her case to the High Court.[14]

The position taken in the UK and in the European Court can be contrasted with developments in Canada. In the case of *Multani v Commission scolaire Marguerite-Bourgeoys*,[15] an orthodox Sikh student had been banned from wearing a kirpan (a knife-like religious object). The Supreme Court of Canada found for the student, concluding that the ban on wearing a kirpan violated the student's freedom of religion under s2(a) of the *Canadian Charter of Rights and Freedoms* (Canadian Charter) and could not be justified under the reasonable limits permitted under s1 of the Canadian Charter. The Court rejected the school's claim that the kirpan might be used to commit violent acts and held that "the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified". This relies on a test of proportionality, so that where two or more rights conflict, the least restrictive measure should be implemented to balance these rights.

In a submission to the Education and Training Committee *Inquiry into Dress Codes and School Uniforms in Victorian Schools*, the LIV proposed that the Department of Education should develop a more formal policy to guide Victorian schools that elect to have a student dress code on how best to develop and implement the code.[16]

The LIV submits that government policy and individual school dress codes on standards of dress and behaviour must strike an appropriate balance between allowing students to exercise their rights – such as the right to practise their religion – and the limits to be placed on that right having regard to the overriding purposes of the EO Act as well as the considerations set out in s7(2) of the Charter.

In light of the above discussion, the LIV recommends that s40 be amended to recognise that where an educational authority is a public authority under the Charter, the "reasonableness" of any prescribed standards of dress, appearance and behaviour for students should be assessed by reference to compliance with obligations under the Charter.

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[14] Daily Telegraph, 29 April 2007 available at:

http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/28/nring28.xml

[15] *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, available at

http://scc.lexum.umontreal.ca/en/2006/2006scc6/2006scc6.html

[16] *Inquiry into Dress Codes and School Uniforms in Victorian Schools*, Law Institute of Victoria, 5 June 2007, available at https://www.liv.asn.au/members/sections/submissions/20070605_44/index.html

3.3.3 Sections 75 and 76 - religious bodies and schools

Section 75 provides that religious bodies can legally discriminate where the action conforms to the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of the people of the religion. Section 76 provides a general exception for religious schools.

(i) Conduct excused by the exception

The LIV acknowledges that the exceptions provided for religious schools or schools run by religious bodies provided for in subss75(2)&(3) and s76 of the EO Act have a legitimate purpose, protected by s14 of the Charter. However, the LIV considers that subss75(2)&(3) and s76 are too subjective to pass the reasonable limitations test of s7(2) of the Charter.

The LIV submits that to satisfy the reasonable limitations test, any exception should provide that a school's discriminatory actions must be *reasonably necessary* to conform to the religious doctrines and sensitivities of the school. This objective test means that it is not enough to show merely that discrimination conforms to the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion. Section 7(2) requires that the limitation on rights be only as much as can be reasonably justified, and no more.

The LIV considers that ordinarily, it will only be reasonable for religious bodies and schools to discriminate against employees and contract workers who have a direct role in worship, observance, practice or teaching. This will necessarily include teachers, chaplains, and related support staff with pastoral responsibilities.

(ii) Bodies to whom the exception applies

The Charter requires limitations on rights to be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom". The LIV notes that Australian society is also based on egalitarian, representative and pluralistic principles. The LIV recognises the importance of the right to freedom of thought, conscience, religion and belief to an egalitarian and representative society, set out in s14 of the Charter.

The LIV notes that only persons have human rights. The right to freedom of religion does not extent to an organisation, although we recognise that individuals have the right to demonstrate their religion in worship, observance, practice and teaching "in community". In this context, we suggest that the current framing of the religious schools exceptions is too broad in its definition of "religious body".

The LIV notes that the current Victorian exceptions for religious education providers broaden the previous "religious body" exception in the 1977 EO Act.

We understand that the scope of the exception was broadened to reflect a trend for religious schools to incorporate separately from the religious institutions with which they may have been originally associated, for taxation or other reasons. These new corporations delivered “religious-style” education programs to students.

The public policy justification for the wider exception for “religious education providers” was clearly linked to the need to respect religious faith and observance. Interpretation and application of the principles of faith, religious observance and codes of conduct in schools were subject to the overriding governance of religious bodies.

Given that many schools no longer have any links to a formal religious body, the LIV queries whether it is still appropriate to exempt schools run on “religious grounds”.

The LIV recommends an amendment to the exception so that religious schools (that is, those who are subject to the discipline of a religious body), may discriminate against employees and contract workers where they have role in worship, observance, practice or teaching, insofar as such discrimination is reasonably necessary to avoid conflict with the tenets of that religion.

3.3.4 Section 78 - private clubs

The LIV recognises the policy tension arising in equal opportunity and human rights law relating to regulation of the public versus the private sphere. As noted above (under 3.2.5), many exceptions protect the home and the private sphere from regulation.

The Charter also recognises that limitations should be placed on government interference in the affairs of private citizens, in ss13 (privacy and reputation) and 16 (peaceful assembly and freedom of association).

The LIV submits that many private clubs today do not constitute a projection of the private sphere of individuals. Rather, they enter the public sphere by activities such as advertising and offering a range of membership services, activities and benefits in much the same way as other profit-making service providers. Many clubs are large-scale enterprises with hundreds, sometimes thousands of members, sharing common interests and pursuits.

Given the diversity of size and activities of many private clubs, the LIV does not consider a blanket exception for private clubs to be a reasonable limitation on the right to be free from discrimination.

The LIV notes that many private clubs discriminate in an attempt to address historical disadvantage experienced by particular groups of people. We recognise the importance of these private clubs in assisting members to

overcome systemic discrimination. The LIV submits that such clubs are adequately protected by exceptions in ss61-63 of the EO Act. Further, the LIV notes that charities are protected under s74, where the discrimination is in accordance with the provisions of a charitable deed or will.

The LIV recommends amendment to s78 to recognise that unless a private club is established to promote the interests of a group entitled to protection under the EO Act, (a "special measure"), the restriction of membership of a club to a particular attribute should not be subject to exception from the EO Act.

3.3.5 Section 63 – separate access to benefits for men and women

The LIV notes that the EO Act currently permits private clubs to discriminate on the basis of sex on the grounds of the "practicability" of providing services to a particular sex (s63). We understand that this exception was originally intended to allow clubs a reasonable opportunity to provide facilities and benefits, such as changing rooms and hygiene facilities suitable for the other sex, than a club's current dominant membership.

The LIV submits that s63 should be amended, so that private clubs are required to make reasonable adjustments to accommodate for the opposite sex, except where they can show unjustifiable hardship or protection by another exception.

3.4 Is the VCAT exemption process appropriate? How could it be improved?

3.4.1 Interpretation of s83 in light of the Charter

Section 83 of the EO Act provides a mechanism for the Victorian Civil and Administrative Tribunal (VCAT) to grant an exemption from any of the provisions of the EO Act in relation to a person or a class of people or an activity or class of activities. This mechanism effectively enables VCAT to create exceptions to the EO Act on the basis of particular facts and competing interests.

The LIV recognises the importance of s83 in ensuring flexibility in Victoria's equal opportunity regime. We note that many exemptions are sought to ensure that positive discrimination, or special measures, do not constitute discrimination under the EO Act.

When exercising its discretion under s.83, VCAT considers criteria as developed in *Stevens v Fernwood Fitness Centre*.[17] This test requires VCAT to consider whether the proposed exemption is appropriate and reasonable in the light of the objectives and scheme of the EO Act and anticipates that

[17] (1996) EOC 92-782.

exemptions will only rarely be granted. This test has been refined in the recent case of *Boeing*,[18] in which President Morris held that the test to be considered is "whether the proposed exemption is necessary or desirable to avoid an unreasonable outcome."

The LIV submits that the EO Act should be amended to set out the circumstances in which VCAT may grant an exemption and the criteria for granting that exemption. The LIV considers the test propounded by Justice Morris in *Boeing* to be vague and open-ended and we are concerned that it would allow an exemption whenever the costs outweigh the benefits. The LIV reiterates that the right to equality is a fundamental human right and should not be subject to a costs/benefit analysis.

We note that following the commencement of the Charter, s83 must be interpreted in a way that is compatible with human rights.[19] Given that exemptions effectively represent a limitation on human rights, (specifically the right to equality), the LIV supports the submission of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in *Boeing* that when exercising its discretion under s83 of the EO Act, VCAT should apply a reasonable limitations test, as set out in s7(2) of the Charter.[20]

3.4.2 Transparency and efficiency of the process

The LIV submits that the exemption process should be more transparent and accessible.

Under federal legislation, the Human Rights and Equal Opportunity Commission (HREOC) is able to grant temporary exemptions from some parts of the *Sex Discrimination Act* 1984 (Cth), the *Disability Discrimination Act* 1992 (Cth) and the *Age Discrimination Act* 2004 (Cth). HREOC has sought to make accountable decisions by publishing criteria and procedures and seeking public comment on exemption applications before making a decision.

The LIV submits that Victorian exemption applications should be similarly published to enable interested parties to make submissions during the exemption process. Further, we suggest that the current practice of notifying VEOHRC of exemption applications should be formalised as a requirement under the EO Act.

We note that currently many "routine" exemptions are granted on paper without a hearing, where they are special measures designed to achieve substantive

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

[19] *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s32.

[20] *Boeing*, at [34].

equality or correct historical disadvantage. The LIV suggests that these applications could be dealt with more easily by incorporating s8(4) of the Charter into the EO Act, providing that “measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination”. Criteria for such special measures could be further set out in guidelines or regulations.

4 Statutory authority exception

4.1 Should the statutory authority exception (section 69 of the *Equal Opportunity Act 1995*) be repealed? If not, why not?

The LIV supports recommendation 27 of the Scrutiny of Acts Committee (SARC) in 2005[21] and thus recommends that the statutory authority exception (s69 of the EO Act 1995) be repealed.

4.2 Are there any examples of Acts and enactments that cannot be reconciled with the Act?

The LIV refers to the recommendations made in the Final Report of SARC in 2005 and its submission to that inquiry, attached for your reference.

4.3 Is a mechanism to prescribe certain Acts under the *Equal Opportunity Act 1995* necessary?

Where Acts cannot be reconciled with the EO Act (and/or the Charter), the LIV proposes that an express override declaration should be included in the schedule to the Act. We further recommend that such an override declaration should be subject to a (renewable) sunset clause, as provided for in s31 of the Charter.

4.4 Is a three year sunset period for the repeal of the statutory authority exception appropriate? If not, why not?

The LIV notes that in 2005, SARC proposed a three year transition period to allow government departments and statutory entities to audit their Acts and enactments for compliance with the EO Act. Given that government departments have been auditing Acts and enactments for compatibility with the rights set out in the Charter, we do not consider a further three year transition period necessary. In light of this, we propose a sunset period of at most one year from the date of Royal Assent to the amending legislation.

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[21] Scrutiny of Acts and Regulations Committee (2005), ‘Final Report, Chapter *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995,* [Victoria] 2005, 46.