

**Submission to the Victorian  
Attorney-General's Review of the  
exceptions to and exemptions  
from the *Equal Opportunity Act*  
1995 (Vic)**

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## 1. Introduction

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### 1.1 Introduction

This submission is made by the PILCH Homeless Persons' Legal Clinic (*the Clinic*) in response to the Victorian Attorney-General's Consultation Paper entitled: 'A review of the exceptions to and exemptions from the Equal Opportunity Act 1995 (Vic)' (*the Consultation Paper*).

The Consultation Paper invites responses to a series of questions. It also seeks comments on if and how the exceptions to and exemptions from the *Equal Opportunity Act 1995 (Vic)* (*the EO Act*) should be reformed to better promote and protect the right to equality and to ensure compatibility with the *Charter of Human Rights and Responsibilities Act 2006 (the Charter)*.

The purpose of the Consultation Paper is to identify whether any of the exceptions and exemptions in the EO Act limit the enjoyment of human rights protected by the Charter. The aim of the Consultation Paper is to examine whether the exceptions and exemptions are compatible with the right to equality and non-discrimination under section 8 of the Charter.

### 1.2 Scope of this Submission

The Clinic's submission to the Consultation Paper focuses on the protection of the right to equality and non-discrimination, in the context of international human rights law and the Victorian legal framework. It considers the case for reforming the EO Act by examining the extent and deleterious consequences of discrimination faced by marginalised members of the Victorian community. In particular, the submission looks at the following groups of people:

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

As a starting point, the Clinic considers the current operation of the EO Act, with respect to its protection of the right to equality and non-discrimination and its compliance with the Charter, and the general effect of the exceptions. The Clinic's submission then focuses on the specific exceptions that allow discrimination in circumstances of employment, the provision of goods and services and accommodation. Our focus on these specific exceptions adopts the hypothetical, and in our view correct, scenario that social status and criminal record are incorporated as protected attributes under the EO Act (as submitted in recommendation 2).

The Clinic's submission does not intend to cover the field with respect to the right to equality and non-discrimination and the operation of the EO Act in the broader human rights framework. Rather we highlight our general concerns regarding the exceptions and exemptions in the EO Act and then examine the particular impact of the exceptions on disadvantaged and marginalized groups on the basis that the characteristics of social

status and criminal record are included as protected attributes under the EO Act in the future.

The Human Rights Law Resource Centre Ltd (**HRLRC**) and the Public Interest Law Clearing House (Vic) Inc (**PILCH**) have made a joint submission in response to the Consultation Paper, which comprehensively considers the operation of the EO Act within the broader human rights framework. The Clinic recognises the significant expertise of the HRLRC and PILCH and, as such, strongly endorses their joint submission.

### **1.3 Overview of the Clinic**

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

Free legal services are offered on a weekly basis at 11 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.<sup>2</sup>

Since its establishment in 2001, the Clinic has assisted almost 3000 people at risk of, or experiencing, homelessness in Victoria. The Clinic also undertakes significant community education, public policy advocacy and law reform work to promote and protect the right to housing and other fundamental human rights.

#### **(a) Aims and Objectives of the Clinic**

The Clinic has the following aims and objectives:

- (ii) to provide free legal services to people who are homeless, or at risk of homelessness, in a professional, timely, respectful and accessible manner, that has regard to their human rights and human dignity;
- (iii) to use the law to promote, protect and realise the human rights of people experiencing homelessness;
- (iv) to use the law to redress unfair and unjust treatment of people experiencing homelessness;
- (v) to reduce the degree and extent to which homeless people are disadvantaged or marginalised by the law; and
- (vi) to use the law to construct viable and sustainable pathways out of homelessness;

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

- (i) provides free legal assistance, advice, casework and advocacy in the areas of civil and administrative law;

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<sup>1</sup> See <http://www.pilch.org.au>.

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

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

**(b) Areas of Law**

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

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

**1.4 Definitions**

For the purposes of identifying the need to reform the EO Act to include social status and criminal record as protected attributes and in order to inform the discussion concerning the impact of specific exceptions if such attributes are incorporated into the EO Act, the Clinic adopts the following definitions:

**(a) Social status**

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

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

**(b) Homelessness**

For the purpose of identifying the extent of homelessness and assisting governments to appropriately develop and deliver services, the Australian Bureau of Statistic (**ABS**) has adopted the definition of homelessness proposed by Chamberlain and MacKenzie.<sup>3</sup> The Clinic also adopts this widely accepted definition of 'homelessness'.

Chamberlain and MacKenzie argue that homelessness is best defined in relation to common community standards regarding the minimum accommodation necessary to live according to the 'conventions of community life'.<sup>4</sup> Pursuant to this definition,

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<sup>3</sup> Chris Chamberlain and David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274; Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11.

<sup>4</sup> Chris Chamberlain, *Counting the Homeless: Implications for Policy Development* (1999) 9-11, at 49.

a person is homeless if he or she experiences 'primary', 'secondary' or 'tertiary' homelessness.<sup>5</sup>

Primary homelessness refers to people living without conventional accommodation, such as people living on the streets, sleeping in parks, squatting in derelict buildings, or using cars or railway carriages for temporary shelter. Secondary homelessness refers to people who move frequently from one form of temporary shelter to another. This includes people using emergency accommodation (such as refuges or night shelters) or people residing temporarily with other families and those using boarding houses on an occasional or intermittent basis. Tertiary homelessness refers to people who live in boarding or rooming houses on a medium to long-term basis. They are categorized as homeless because such accommodation is below the minimum community standard and they do not have security of tenure provided by a lease.<sup>6</sup>

The *Supported Accommodation Assistance and Act 1994* (Cth) provides the following definition of homelessness:

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

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

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

This definition is consistent with the international law definition of 'homelessness' developed by the United Nations Committee on Economic, Social and Cultural Rights which provides, in effect, that a person is homeless unless he or she has adequate housing that affords the right to live in security, peace and dignity.<sup>7</sup>

**(c) Unemployed**

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

**(d) Recipient of social security payments**

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

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<sup>5</sup> Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 1-2.

<sup>6</sup> Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 1-2.

<sup>7</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4 in Relation to the Right to Adequate Housing*, UN Doc E/CN4/1991/4 (12 December 1991).

## 2. Executive Summary

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### 2.1 Introduction

As a starting point for this submission, the Clinic reiterates its position put forward in response to the Attorney-General's Independent Review of the *Equal Opportunity Act 1995 (Vic)* (January 2008).<sup>8</sup> That is, that there is an immediate need for legislative change to include discrimination on the grounds of social status and criminal record as protected attributes under the EO Act. This is imperative to enable people experiencing homelessness, the unemployed, social security recipients and people with criminal records to enjoy the same freedom from discrimination as people with homes, jobs, and means. This law reform is also required in order for Australia to discharge its relevant obligations under international human rights law and for Victoria to keep pace with anti-discrimination developments in many common law jurisdictions.

In relation to the specific questions raised in the Consultation Paper, the Clinic submits that the current exceptions and exemptions operate in a way that reduces the effectiveness of the EO Act's overall protection of the right to equality and non-discrimination and further entrenches discrimination encountered by many disadvantaged individuals.

One of the stated objectives of the EO Act is to 'eliminate, as far as possible'<sup>9</sup> discrimination and sexual harassment. That objective is substantially hindered by the exceptions and exemptions to the prohibition on discrimination that are contained in the EO Act. The effect of the exceptions and exemptions is that certain conduct, carried out in certain circumstances, will not amount to unlawful discrimination. Not only does this undermine the objectives of the EO 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 current exemptions and exceptions regime does not include such a reasonableness test, which would involve a balancing exercise that takes account of human rights and public policy considerations. The operation of the exemptions undermine Australia's obligation to ensure access to and the fulfillment of the right to equality and non-discrimination.

We further submit that the exceptions and exemptions are inconsistent with the requirements set out in the Charter. The comprehensive limitations on the right to equality and non-discrimination that are enabled by the exceptions are generally inconsistent with the right to equality and non-discrimination and, as is highlighted in this submission, will unreasonably impact upon the rights of people who hold the characteristics of social status or criminal record. The Clinic's analysis of the unreasonable limitations placed on the rights of people experiencing social status or criminal record discrimination is a hypothetical discussion as such attributes are not currently protected by the EO Act. Nonetheless, this discussion is important as it reveals the substantial adverse impact of such discrimination, which is clearly unreasonable under the Charter. On basis of this hypothetical discussion, the Clinic reiterates that the exceptions must be removed or, alternatively, replaced with appropriate provisions that incorporate a proportionality analysis which recognises that human rights can only be limited in *reasonable* circumstances. This is imperative in order that the right to equality and non-discrimination is realised and fulfilled by the EO Act in a

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<sup>8</sup> See <http://www.pilch.org.au/files/N67SPT5FHN/HPLC%20Submission%20-%20EOA%20Review%20-%20Final.pdf>

<sup>9</sup> Section 3 of the EO Act.

way that is consistent with the Charter and Australia's international human rights obligations.

## **2.2 Recommendations**

The Clinic makes the following recommendations for reform:

### **Recommendation 1**

*The EO Act must be amended so that it is consistent with Australia's international human rights obligations. In particular, the EO Act must 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. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are successfully identified and adequately addressed.*

### **Recommendation 2**

*Section 6 of the EO Act must be amended to include social status and criminal record as protected attributes.*

### **Recommendation 3**

*The exceptions under the EO Act should be repealed.*

### **Recommendation 4**

*In the alternative, if all or some of the exceptions under the EO Act must be retained, they should be replaced with a general or specific limitation provision(s) that encompasses a human rights compatible assessment of any limit on the right to equality and non-discrimination. Such a provision must require that the right to equality and non-discrimination can only be limited in specific circumstances; i.e. where the limitation is reasonable under the Charter and is consistent with international human rights law.*

### **Recommendation 5**

*Repeal the statutory authority exception under section 69 of the EO Act, as it is inconsistent with human rights obligations under the Charter.*

### **Recommendation 6**

*Repeal the exemption under section 83 of the EO Act.*

### **Recommendation 7**

*In the alternative, if the exemption under section 83 of the EO Act must be retained, it should be amended so as to incorporate the requirement that a reasonable limitations analysis (under section 7(2) of the Charter) must be undertaken when determining whether to grant an exemption.*

### **Recommendation 8**

*In addition to recommendation 7, section 83 should be amended to incorporate a requirement that the applicant holding the exemption must, over the period of the exemption, review the necessity and implementation of the exemption in a manner that is consistent with section 7(2) of the Charter.*

### 3. Legal Framework

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#### 3.1 International Framework

##### (a) Human right of equality and non-discrimination

The right to equality and freedom from all forms of discrimination is an integral component of the international human rights normative framework. The obligation of all Australian governments to guarantee, by law, equal and effective protection against discrimination, including on the ground of social origin or status, is set out in the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>10</sup>.

Article 26 of the ICCPR provides that:

*All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*<sup>11</sup>

This article is a free-standing non-discrimination provision that is not confined to the enjoyment of rights in the ICCPR, but extends to all human rights and fundamental freedoms, including economic and social rights such as the right to an adequate standard of living and social security.<sup>12</sup>

Australia's obligation to protect and promote the norm of non-discrimination is set out in article 2(1) of the ICCPR:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The ICESCR also enshrines the norm of non-discrimination promotes and protects people's cultural, economic and social rights. Article 2 of the ICESCR requires that States use all their available resources to progressively realise, through the enactment of laws, the economic, social and cultural rights within the Covenant. For example, article 9 of the ICESCR recognises the right of everyone to receive social security, article 11 recognises the right to an adequate standard of living, which includes adequate housing and article 12 provides that everyone has the right to enjoy the highest attainable standard of physical and mental health. These rights must be exercised and enjoyed by *all* persons without discrimination of any kind, including discrimination on the basis of 'other status'.<sup>13</sup>

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

<sup>11</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, (1980) ATS (entered into force generally 23 March 1976 and for Australia 13 August 1980). See also article 7 of the *Universal Declaration of Human Rights* (entered into force generally and for Australia 10 December 1948).

<sup>12</sup> See, for example, *Broeks v The Netherlands* (172/84) and *Zwaan de Vries v The Netherlands* (182/84), in which the United Nations Human Rights Committee found article 26 to be applicable to complaints concerning discrimination in the field of social security.

<sup>13</sup> Article 2 of ICESCR provides that: (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the

International jurisprudence clearly establishes that the term 'other status' refers to a definable group of people linked by their common status.<sup>14</sup> This would include their status as 'homeless', or 'unemployed', or a 'recipient of social security payments', or as having a 'criminal record'.<sup>15</sup>

The term 'discrimination' has been authoritatively stated by the Human Rights Committee (*HRC*) to imply any distinction, exclusion, restriction or preference which is based on any ground identified in the ICCPR and which has the purpose or effect or nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>16</sup> However, not all differential treatment will constitute discrimination. The criteria for assessing the lawfulness of any differential treatment are that it must be reasonable and objective and must be in order to achieve a purpose which is legitimate under the ICCPR.<sup>17</sup>

The Clinic submits that the HRC's views regarding reasonable limitations on the right to equality and non-discrimination should be taken into account when conducting a review of the exceptions and exemptions and when considering appropriate amendments to the EO Act.

**(b) Implementation of the human right of equality and non-discrimination**

The implementation of the norm of non-discrimination has three key aspects.<sup>18</sup> First, the right to freedom from discrimination imposes an immediate obligation on the Victorian government to *respect* the right to non-discrimination; that is, to itself abstain from discrimination. Second, the right to be free from discrimination imposes an immediate obligation on the Victorian government to effectively *protect* people from discrimination; that is, to ensure that legislation prohibits unwarranted discrimination. Third, the right imposes a further substantive obligation on governments to *fulfil* the right to non-discrimination; that is, to take positive steps to address the special needs of people.<sup>19</sup>

In addition, the EO Act must be interpreted and applied in accordance with human rights principles so as to make its safeguards practical and effective.<sup>20</sup> Essentially, this principle requires that human rights be interpreted in a practical and effective manner so that the rights protected under the EO Act are real and not merely 'theoretical or illusory'.<sup>21</sup> A further principle of international human rights law

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maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>14</sup> Also, see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2<sup>nd</sup> ed, 2004), 689.

<sup>15</sup> The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record: see *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97. Also, see generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases Commentary and Materials* (2<sup>nd</sup> ed, 2004), 689.

<sup>16</sup> HRC General Comment 18 (Thirty-seventh session, 1989): Non-discrimination, A/45/40 vol. I (1990) 173, [7] available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>.

<sup>17</sup> *Ibid.*, [13].

<sup>18</sup> 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

<sup>19</sup> Human Rights Committee, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

<sup>20</sup> *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99 [72].

<sup>21</sup> *Airey v Ireland* (1979) 2 EHRR 305, [24].

requires that human rights instruments be interpreted as living instruments, in light of present day conditions.<sup>22</sup>

**(c) Reasonable limitations on human rights**

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

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.*<sup>23</sup>

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* (the **Siracusa Principles**). The Siracusa Principles include such principles as:

- the requirement that a limitation on a human right must be consistent with the essence of the particular right concerned;
- all limitation clauses must be interpreted strictly in favour of the rights at issue;
- the requirement that any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR; and
- the requirement that limitations must not be arbitrary or unreasonable etc.

The reasonable limitation test set out in section 7(2) of the Charter reflects the Siracusa Principles. Section 7(2) of the Charter recognises that the human rights protected by the Charter are not absolute rights.<sup>24</sup>

### 3.2 Victorian Framework

**(a) Charter of Human Rights and Responsibilities Act 2006 (Vic)**

As of 1 January 2008 the Charter became fully operational.<sup>25</sup> The Charter is the result of the Victorian Government's 'commitment to provide better protection for human rights for *all* people in Victoria through the enactment of a charter of rights and responsibilities'.<sup>26</sup>

<sup>22</sup> *Tyrer v United Kingdom* 5856/72 [1978] ECHR 2 (25 April 1978); *Goodwin v United Kingdom* 28957/95 [2002] ECHR 588 (11 July 2002).

<sup>23</sup> 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].

<sup>24</sup> Explanatory Memorandum, *Victorian Charter of Human Rights and Responsibilities Bill 2006* (Vic) 9.

<sup>25</sup> Note, however, that on 18 December 2007 the *Charter of Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007* were enacted ('the Regulations'). The Regulations have the effect of exempting the Adult Parole Board, the Youth Residential Board and the Youth Parole Board from being a public authority under the Charter until 1 January 2009.

<sup>26</sup> Second Reading Speech, *Charter of Human Rights and Responsibilities Bill 2006* (Mr Rob Hulls, Attorney-General, Legislative Assembly, 4 May 2006, p 1289).

The Charter sets out the human rights that Parliament seeks to promote and protect. Those rights are largely derived from the rights contained in the ICCPR.

Section 8 of the Charter deals with recognition and equality before the law, and provides that:

- Every person has the right to recognition as a person before the law;
- Every person has the right to enjoy his or her human rights without discrimination;
- 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; and
- Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

We note, however, that 'discrimination' for the purposes of section 8 of the Charter is limited to the attributes set out in section 6 of the EO Act, which currently do not include social status or possession of a criminal record.

Although the human rights listed in the Charter are based on those set out in the ICCPR, they are not absolute rights as they can be reasonably limited under section 7(2) of the Charter. According to the Explanatory Memorandum, section 7 of the Charter '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'.<sup>27</sup>

Section 7(2) establishes the test to determine whether the limit on the human right is reasonable and 'demonstrably justified in a free and democratic society'.<sup>28</sup> The test in section 7(2) is essentially a proportionality test, which has been adapted from similar provisions in foreign human rights instruments and also reflects the Siracusa Principles described above.<sup>29</sup>

Section 7(2) of the Charter provides that a human right may be subject under Victorian law only to such reasonable limits as can be demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom. The test under section 7(2) requires consideration of the following relevant factors:

- The nature of the right; and
- The importance of the purpose of the limitation; and
- The nature and extent of the limitation; and
- The relationship between the limitation and its purpose; and
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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<sup>27</sup> Explanatory Memorandum, *Victorian Charter of Human Rights and Responsibilities Bill 2006* (Vic) 8.

<sup>28</sup> *Charter of Human Rights and Responsibilities Act 2006* ('Charter') section 7.

<sup>29</sup> For example: *South African Constitution* (1996), Chapter 2, Bill of Rights (section 36(1) – Limitation of Rights).

Human rights are protected and promoted under the Charter by the placement of specific responsibilities on the three arms of government (parliament, the executive and the courts). Section 32(1) of the Charter requires that courts interpret statutory provisions, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights. When interpreting a statutory provision, international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered (section 32(2)). Where a court cannot interpret a statutory provision consistently with human rights they may make a declaration of inconsistent interpretation under section 36 of the Charter. A declaration of inconsistency does not affect the validity, operation or enforcement of the statutory provision, nor does it create any legal right or give rise to any civil cause of action.<sup>30</sup>

The Charter operates as a 'dialogue model' of human rights protection. The dialogue model 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 within and between the arms of government is facilitated by the Charter in a number of ways, some of which are discussed above (such as the interpretative function under section 32).

As a whole, the Charter provides a process whereby legislation must be vetted by either government (as new Bills are introduced) or by the courts (as a question of interpretation arises) to ensure the compatibility of the legislation with human rights. Thus, a human rights approach to the interpretation and application of Victorian laws is provided for within the Charter.

If the Victorian government is to take its obligations under the Charter seriously it must adopt a human rights approach to the review of the EO Act. Such an approach must have regard to international human rights principles and obligations to inform Victoria's understanding of the requirements imposed on government and public authorities under the Charter. This is essential given that the Charter is based on international law and principles due to the substantial lack of domestic human rights law. Current and proposed Victorian laws that are not consistent with human rights should be repealed or appropriately amended to ensure human rights consistency. This is particularly the case for the EO Act and its current exceptions and exemptions regime.

This approach will improve policy development and implementation,<sup>31</sup> rather than cause confusion and uncertainty; a likely result if legislation is challenged in court. A litigation remedy to inconsistent legislation may result in either the application of section 32 and a consistent interpretation or a declaration of inconsistent interpretation under section 36 of the Charter. A consistent interpretation may require the reading in of words or the reading down of a provision. In contrast, a declaration of inconsistent interpretation is merely a declaration by the court and

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<sup>30</sup> *Charter*, s 36(5). Section 32, interpretative function, is an effective and immediate remedy as opposed to s 36, which gives rise to no available remedies.

<sup>31</sup> 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).

the legislation continues to have effect despite being incompatible with human rights.

The Clinic refers to the joint submission of the HRLRC and PILCH for a more detailed analysis of the right to equality and non-discrimination in the context of international human rights law and the Charter.

**(b) Equal Opportunity Act 1995 (Vic)**

Discrimination under the EO Act is defined (under s 7) as direct or indirect discrimination on the basis of an attribute (listed under s 6), including age, gender identity, impairment, religious beliefs, race, and sexual orientation.

The prohibited grounds of discrimination set out in section 6 of the EO Act are exhaustive. Discrimination against a person on the basis of his or her status as a homeless person, an unemployed person, a recipient of social security payments or a person with a criminal record is not prohibited and therefore is currently lawful in Victoria. Such discrimination often forms a barrier to employment, accommodation, health care and other basic goods and services. Part 3 of the EO Act prohibits discrimination in a range of activities or circumstances including employment, education, provision of goods and services and accommodation. Part 3 also lists a number of exceptions that apply to the prohibition of discrimination in the above circumstances and Part 4 of the EO Act lists some general exceptions to and exemptions from the prohibition.

The exceptions and exemptions provided under Part 3 and 4 of the EO Act operate so as to create an absolute exception/exemption, in specific circumstances, to the prohibition against discrimination. In the Clinic's experience, these exceptions and exemptions (such as exceptions relating to the provision of goods and services and accommodation) only serve to perpetuate discrimination. It therefore follows that these exceptions and exemptions operate to undermine the protection of the right to equality and non-discrimination provided under the EO Act.

**3.3 Conclusion**

A human rights approach to the development of equal opportunity law will ensure that Australia's international human rights obligations are fulfilled and will result in the proper application of the Charter. Such an approach will also assist to develop laws and policies that will best promote the ends that are sought to be achieved by the EO Act, namely, the elimination of discrimination in society. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are successfully identified and adequately addressed.

***Recommendation 1***

*The EO Act must be amended so that it is consistent with Australia's international human rights obligations. In particular, the EO Act must 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. Lessons and experiences from international, regional and comparative jurisdictions will be highly informative and useful in ensuring that issues of discrimination in Victoria are successfully identified and adequately addressed.*

## **4. Do the exceptions need to be reformed to improve equality of opportunity and the elimination of discrimination in Victoria?**

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### **4.1 Overview**

The exceptions regime under the EO Act must be reformed in order to ensure that the right to equality and non-discrimination is adequately promoted and protected by Victorian law.

The EO Act exceptions currently allow for discrimination in specific circumstances which may be incompatible with the Charter. There is a clear tension between the exceptions in the EO Act and the commitment by the Victorian government to protect the right to equality and non-discrimination under the Charter. This tension exists because the Charter expressly requires that a limit on a human right must be reasonable, having regard to certain factors (i.e. the proportionality analysis). The exceptions in the EO Act statutorily enshrine a number of limitations on the right to be free from discrimination which cannot be individually scrutinised to determine whether the limit is proportionate. This results in a disproportionate and unreasonable limit on an individual's right to be free from discrimination.

### **4.2 Adequate protection of the right to equality and non-discrimination is required**

As has been highlighted above, the right to equality and non-discrimination in international law imposes a positive obligation on governments to ensure that the right is practically and effectively realized by *all* people. This obligation requires that governments enact adequate laws and protections so that people can enjoy their human rights without discrimination. For example, all people should be able to access adequate housing without being discriminated against because they have a disability or other impairment, on the basis of their physical features, because they are homeless or have a criminal record.

However, the practical and full realization of human rights also requires that human rights can only be limited where such a limitation is proportionate and reasonable. In international law, some human rights are absolute while other human rights may be limited in certain circumstances and subject to certain conditions. Where limitations are made, they must be proportionate and reasonable (see paragraph 3.1(c) above).

The Clinic acknowledges that some EO Act exceptions allow for positive discrimination to assist in overcoming disadvantage for groups and individuals that have historically endured some form of discrimination. These exceptions are generally described as *special measures*, which are designed to achieve substantive equality through affirmative action. Section 8(4) of the Charter recognises that measures taken for the purpose of assisting or advancing persons or groups of persons who are disadvantaged because of discrimination do not constitute discrimination. Accordingly, a human rights assessment of the exceptions in the EO Act would recognise that special measures do not constitute a violation of the right to equality or non-discrimination.

### **4.3 Impact of the exceptions**

While a person, for example, with a disability is protected from discrimination the operation of the exceptions under the EO Act may undermine this protection and result in discrimination. The effect of the exceptions, as they currently stand, is that they generally

restrict the right to be free from discrimination by allowing discrimination in certain circumstances. The exceptions under the EO Act are absolute. The exceptions require do not require an assessment of whether the limit on the right to equality and non-discrimination is proportionate and reasonable.

A statutory provision that imposes an unreasonable limit on an individual's right to be free from discrimination would be inconsistent with the Charter and would require that the provision be read, if possible, in a way that is compatible with human rights (section 32(1)) or the provision would be declared inconsistent with human rights (section 36). The application of the interpretative function to all Victorian statutes will create a horizontal human rights effect, so that private industry acting pursuant to statutory obligations will be required to act in a way that is human rights consistent. Therefore, there is a clear tension between the operation of the exceptions in the EO Act and the protection of human rights provided in the Charter.

#### **4.4 Conclusion**

The absolute and far-reaching limitation on the right to equality and non-discrimination, as a result of exceptions under the EO Act, requires immediate reform in order to ensure that Victorian laws are consistent with international human rights law and the Charter. The exceptions should be repealed.

In the alternative, if all or some of the exceptions under the EO Act must be retained, the Clinic proposes that they be replaced with a general or specific limitation provision(s) that encompasses a human rights compatible assessment of the limitation on the right to equality and non-discrimination. Such a provision must require that the right to equality and non-discrimination can only be limited in specific circumstances; i.e. where the limitation is reasonable under the Charter and is consistent with international human rights law. The reasonable limitation of a human right takes into account any special measures and considers such affirmative action as appropriate in order to achieve substantive equality. In this regard, the Clinic reiterates the importance of international, domestic and comparative jurisprudence to assist with an evaluation of whether a limitation of a human right is proportionate and reasonable.

#### **Recommendation 2**

*Section 6 of the EO Act must be amended to include social status and criminal record as protected attributes.*

#### **Recommendation 3**

*The exceptions under the EO Act should be repealed.*

#### **Recommendation 4**

*In the alternative, if all or some of the exceptions under the EO Act must be retained, they should be replaced with a general or specific limitation provision(s) that encompasses a human rights compatible assessment of any limit on the right to equality and non-discrimination. Such a provision must require that the right to equality and non-discrimination can only be limited in specific circumstances; i.e. where the limitation is reasonable under the Charter and is consistent with international human rights law.*

## 5. Are the exceptions reasonable limitations on the right to equality? How can they be justified?

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### 5.1 Overview

Currently, the EO Act does not adequately protect the right to equality and non-discrimination. This is evident in the EO Act's failure to include social status and criminal record as protected attributes and by the imposition of unreasonable limitations on the right to equality and non-discrimination; a result of the absolute exceptions to the prohibition against discrimination, which fails to incorporate a human rights assessment.

This submission will now consider some examples of how the exceptions under the EO Act relating to employment, the provision of goods and services and accommodation impose unreasonable limits on the right to equality. These exceptions will be discussed based on our proposition that social status and criminal record are incorporated as protected attributes under the EO Act in the future. It will also consider other attributes that many of our clients have, which are currently protected under the EO Act. 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 criminal record as a protected attribute under the EO Act, the Clinic reiterates 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>32</sup>

Accordingly, the Clinic 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 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.

The Clinic's fourth recommendation, above, addresses the need for a balancing exercise to be considered when determining whether a person can reasonably be discriminated against on the basis of their criminal record.

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<sup>32</sup> Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

## **5.2 Employment and employment related areas exceptions**

In general terms, these provisions enable an employer to discriminate against people in certain circumstances. Some of these exceptions would adversely affect people who hold the proposed protected attributes of social status and criminal record, resulting in the denial of their right to equality and non-discrimination.

Section 24 of the EO Act enables an employer to discriminate against people by setting and enforcing standards of dress, appearance and behaviour. The practical effect of such an exemption may be that a person experiencing homelessness who applies for an employment position is denied the job because of his/her dress, appearance or behaviour. Some examples of this might include being denied a job because of poor dental health, the existence of tattoos or piercings, or simply because a person does not have access to clothes that the potential employer deems appropriate. While the Clinic acknowledges that section 24 includes a requirement that such discrimination be 'reasonable' having regard to the nature and circumstances of the employment, it is not clear what is entailed by the test of reasonableness. The question of reasonableness would now need to be considered in light of the human rights and obligations under the Charter. It should be made clear that this exception is subject to a human rights consistent interpretation under the Charter so as to ensure that this exception is not used in an arbitrary and unfair way.

The exception under section 27B of the EO Act allows an employer to discriminate against another person on the basis of gender identity where the person does not give notice of their gender identity or where they do give notice, but it is unreasonable in the circumstances not to discriminate. As an organisation that provides services to people in the community who are marginalised and disadvantaged, such as persons with a mental illness or those struggling with their gender identity, the Clinic is of the view that this exception operates as an unreasonable limit on a person's right to equal protection and non-discrimination. The requirement that gender identity details be provided also arbitrarily interferes with a person's right to privacy. Given that this provision enables an absolute exception to the prohibition against discrimination, and unreasonably limits other human rights without any apparent policy justification, it is unlikely that it could be read to be a justifiable limit on human rights under the Charter.

## **5.3 Provision of goods and services exceptions**

The Clinic notes that discrimination against people who rely on social security payments manifests itself most commonly in the area of the provision of goods and services, particularly banking services. Negative stereotypes about the ability of social security recipients to meet rent or loan repayments are often relied upon to deny people the opportunity to secure a home or finance. Such denials of service are rarely based on relevant financial information, but on preconceived or imputed notions about the ability to pay, and general trustworthiness, of people in receipt of social security payments. The recognition of receipt of social security payments and unemployment as protected attributes, and the repeal of exceptions that unfairly and unreasonably limit the right to non-discrimination, would help to work against the continuation of such discrimination.

An example of unreasonable discrimination against a person on the basis of their social status is provided in the following case study:

*Sally's mentally ill son, Ben, lives in public housing and receives a disability support pension due to his mental illness. Ben approached Y Company a while back and was successful in obtaining a home and contents insurance policy. Home and contents insurance was extremely important to Ben because he spent significant amounts of time in hospital and wanted to ensure his possessions were safe during his absences. When Ben moved addresses and needed to transfer the policy, the Y Company refused him insurance and the opportunity to transfer his current policy because his public housing had no deadlocks. Sally spoke to the manager of the insurance division who admitted that the real reason the Y Company refused the home and contents insurance was because Ben's was in public housing. The issue of deadlocks was effectively an excuse. The manager also noted that Ben had first received his home and contents insurance erroneously, because his first address was also public housing. The result for Ben and for other public housing tenants, who cannot live anywhere else, is that they cannot obtain insurance with the ease of those who live in private rental or own their own homes.*<sup>33</sup>

The above case study reflects discriminatory policy and practices by Y Company. It is clear that Ben experienced discrimination in this case study on the basis of his social status (i.e. because he is in receipt of social security payments and lives in public housing). Under the EO Act the Y Company is prohibited from discriminating in the provision of goods and services unless an exception applies. It would be open to the company to allege that the exception in section 43 of the EO Act applies in this case. Section 43 enables an insurer to discriminate against a person by refusing to provide an insurance policy if the discrimination is based on actuarial or statistical data or, if there is no such data, other data upon which it is reasonable to rely. In the context of the above case study, the Clinic is of the view that this exception cannot be reasonably justified under the Charter. This is because the only apparent policy justification for this provision is the financial considerations of private industry. A provision that considers the needs of private industry over individual human rights is not a fair or reasonable justification for allowing discrimination. Accordingly, this provision must be repealed.

#### **5.4 Accommodation exceptions**

The Clinic has collected numerous case studies over a number years, from its own work and that of community and welfare organisations, which detail persistent discrimination against homeless persons, unemployed persons and social security recipients – including women, children and families – in the provision of accommodation.<sup>34</sup> These case studies were detailed in the Clinic's previous submission relating to the comprehensive review of the EO Act.<sup>35</sup> One of these case studies is set out below by way of example:

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

<sup>33</sup> Details provided reflect a true case, however, names and identifying details have been changed.

<sup>34</sup> All case studies that appear in this submission have been taken from the following PILCH Homeless Persons' Legal Clinic Submissions and Reports: PILCH Homeless Persons' Legal Clinic Report to the Department of Justice, *Discrimination on the Grounds of Homelessness or Social Status* (2007); PILCH Homeless Persons' Legal Clinic Submission, *Promoting Equality: Homeless Persons' and Discrimination* (2002); PILCH Homeless Persons' Legal Clinic Submission, *Homelessness and Human Rights in Victoria* (2005); and *Discrimination in Employment on the Basis of Criminal Record* (2005).

<sup>35</sup> See: <http://www.pilch.org.au/files/N67SPT5FHN/HPLC%20Submission%20-%20EOA%20Review%20-%20Final.pdf>

*However, the minute her history became evident the accommodation was no longer available. To her credit this young lady had stayed clean for six months and was actively participating in an employment program. Due to her youth, employment status, housing history...this client was shunned by the private rental agencies.<sup>36</sup>*

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

While some of the exceptions 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 appear to be reasonable. While the Clinic recognizes 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, in relation to offences and offenders warranting particular attention from the point of view of community safety, an absolute exception that allows any form of discrimination on any ground is not appropriate.

Instead, 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. Accordingly, the exception must be repealed and, if necessary, replaced with a balancing exercise exception that considers the reasonableness of limitations on human rights and obligations under the Charter.

## **6. Should the statutory authority exception be repealed?**

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### **6.1 The statutory authority exception under section 69 of the EO Act should be repealed**

Section 69 of the EO Act provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of an Act (other than the EO Act) or an enactment (other than an enactment under the EO Act).

The Charter requires that all statutory provisions in Victoria must now be interpreted consistently with human rights. This means that section 69 of the EO Act is now subject to a human rights consistent interpretation. If a human rights consistent interpretation cannot be achieved, then section 69 may be declared inconsistent with the Charter under section 36. In addition, any current or newly proposed Act or enactment that engages and limits the right to equality and non-discrimination, by allowing discrimination in accordance with section 69, will be subject to a human rights consistent interpretation or a declaration of inconsistency.

Section 69 of the EO Act specifically enables discrimination, whereas the Charter specifically protects people's right to equality and non-discrimination by creating obligations on the three arms of government to ensure that legislation is consistent with the right to equality and non-discrimination. Section 69 of the EO Act is subject to the human rights

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<sup>36</sup> See PILCH Submission to Independent Review of EO Act, p 16.

obligations set out under the Charter. If challenged in court, it is possible that section 69 of the EO Act would be declared inconsistent with the Charter because it facilitates discrimination in a way that cannot be reconciled with the human rights obligations established by the Charter. Accordingly, section 69 of the EO Act should be repealed.

**Recommendation 5**

*Repeal the statutory authority exception under section 69 of the EO Act, as it is inconsistent with human rights obligations under the Charter.*

## **7. Is the VCAT exemption process appropriate?**

### **7.1 Current use of the VCAT exemption**

Section 83 of the EO Act enables VCAT to grant an exemption from any of the provisions of the EO Act in relation to a person or class of people or an activity of class of activities (section 83(1)(a)). VCAT may also grant an exemption in the circumstances referred to under section 28 (section 83(1)(b)) or an exemption may be granted from any of the provisions in the EO Act in any other circumstances specified by VCAT (section 83(1)(c)).

Section 83 gives VCAT a broad, discretionary power to grant an exemption from the EO 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 EO Act is granted by VCAT to allow for circumstances of positive discrimination.<sup>37</sup> However, the power is broad and can be granted for any circumstances specified by VCAT.

In *Boeing Australia Holdings Pty Ltd*<sup>38</sup> (*Boeing*) VCAT granted Boeing an exemption under section 83 of the EO Act. The exemption related to various sections of the EO Act and allows Boeing to discriminate in its employment practices on the basis of the nationality of persons applying for employment with Boeing. The exemption was granted in order to enable Boeing to meet the requirements of the Department of State of the United States of America (US) and US security laws. In that decision, Stuart Morris, President of VCAT, considered that the discretion to grant an exemption under section 83 of the EO Act 'is unconfined, except to the extent that it is only to be exercised to ensure that equal opportunity legislation does not operate unreasonably.'<sup>39</sup> It was also accepted that the reasonable limitations test under section 7(2) of the Charter will be helpful considerations when exercising the discretion under section 83.<sup>40</sup> However, the reasonable limitations test was not adopted by his Honour, as he doubted 'that the considerations [under section 7(2)] do more than expand on a more succinct test, which I prefer, of whether the proposed exemption is necessary or desirable to avoid an unreasonable outcome.'<sup>41</sup> His Honour

<sup>37</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>38</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532.

<sup>39</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 [33].

<sup>40</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 [34].

<sup>41</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 [34].

relied heavily on public interest considerations to achieve a 'convenient, economic and practical outcome, even though such [an] outcome may serve private interests.'<sup>42</sup>

## **7.2 Is the VCAT exemption consistent with the Charter?**

The decision of *Boeing* was decided before the Charter came into full force. Now that the Charter has fully commenced, all statutory provisions, including section 83, are subject to a human rights consistent interpretation in accordance with section 32 of the Charter. Accordingly, if the circumstances that were raised in *Boeing* were brought before VCAT now, the reasonable limitations test under section 7(2) of the Charter would need to be applied as the appropriate test to determine whether or not to grant the exemption. The application of the reasonable limitations test would ensure that the exemption granted under section 83 is only granted in a way that is compatible with human rights. Thus, the test set out in *Boeing* would require re-examination in light of the human rights obligations under the Charter.

## **7.3 The need for improved protection of human rights and a consistent approach by courts and tribunals**

The Clinic submits that in determining whether to grant an exemption, VCAT must now apply the reasonable limitations test set out in section 7(2) of the Charter, rather than the tests outlined in previous cases. The Clinic further submits 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 set out in section 7(2) of the Charter, namely:

- 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;
- 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.

### **Recommendation 6**

*Repeal the exemption under section 83 of the EO Act.*

### **Recommendation 7**

*In the alternative, if the exemption under section 83 of the EO Act must be retained, it should be amended so as to incorporate the requirement that a reasonable limitations analysis (under section 7(2) of the Charter) must be undertaken when determining whether to grant an exemption.*

### **Recommendation 8**

*In addition to recommendation 7, section 83 should be amended to incorporate a requirement that the applicant holding the exemption must, over the period of the exemption, review the necessity and implementation of the exemption in a manner that is consistent with section 7(2) of the Charter.*

<sup>42</sup> *Boeing Australia Holdings Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 532 [35].