

***Equal Opportunity Bill 2010***  
**Submission to the Scrutiny of Acts  
and Regulations Committee**



human  
rights

law  
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**Summary and Recommendations**

The Human Rights Law Resource Centre (**HRLRC**) commends the Victorian Government on the introduction of the *Equal Opportunity Bill 2010* (**Bill**). The Bill creates a stronger and more effective framework for the protection and promotion of human rights in Victoria. The HRLRC particularly welcomes those aspects of the Bill that recognise and respond to systemic forms of discrimination and aim to promote substantive, rather than merely formal, equality.<sup>1</sup>

This submission raises two issues which may be considered under the Scrutiny of Acts and Regulations Committee's (**SARC**) Terms of Reference, namely:

1. the Bill fails to provide protection from discrimination on the basis of homelessness and irrelevant criminal record; and
2. the Bill includes permanent exceptions that do not meet the requirements of section 7(2) of the Charter on permissible limitations on human rights.

**Protected Attributes – Homelessness and Irrelevant Criminal Record**

The Government's decision not to implement the recommendations contained in the Gardner Review of the *Equal Opportunity Act 1995* (Vic) concerning the inclusion of homelessness and irrelevant criminal record as protected attributes renders the Bill inconsistent with domestic anti-discrimination laws and international human rights law.

Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* (**ICCPR**) and article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) contain lists of attributes that are protected against discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.

International jurisprudence establishes that the term 'other status' refers to a definable group of people linked by their common status.<sup>2</sup> Attributes are 'commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation'.<sup>3</sup>

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<sup>1</sup> Of particular significance are the introduction of a positive duty to eliminate discrimination (section 15), the strengthening of the Commission's role in issuing guidelines, action plans, education and research (parts 10 and 11) and the new powers of the Commission to conduct investigations and public inquiries into serious instances of systemic discrimination (part 9).

<sup>2</sup> See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

<sup>3</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20 on Non-Discrimination*, 10 June 2009, [27].

The Committee on Economic, Social and Cultural Rights has commented that:<sup>4</sup>

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.

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.<sup>5</sup>

Further, Australia has ratified the International Labour Organisation Convention 111 (the *Discrimination (Employment and Occupation) Convention 1958*) which imposes an obligation on all Australian governments to pursue policies to ensure that discrimination on the ground of criminal record is eliminated.<sup>6</sup>

At the federal level, the *Australian Human Rights Commission Act* (Cth) provides protection against discrimination on the basis of criminal record and creates a mechanism for complaints to the Australian Human Rights Commission.

The HRLRC refers to and endorses the submissions of the PILCH Homeless Persons' Legal Clinic (in relation to the inclusion of homelessness as a protected attribute) and Fitzroy Legal Centre (in relation to the inclusion of irrelevant criminal record as a protected attribute).

### **Permanent Exceptions**

The HRLRC has previously made submissions to SARC and other bodies contending that the permanent exceptions in the *Equal Opportunity Act 1995* (Vic) (many of which are replicated in the Bill) are inconsistent with the Charter and with international human rights law.

We refer to and reiterate our submission (made jointly with the Public Interest Law Clearing House) to the 2009 SARC inquiry into the exceptions and exemptions which states that:<sup>7</sup>

Many exceptions to the EO Act appear to protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups. Rather than allowing a nuanced balancing of rights in cases where particular rights conflict, many permanent exceptions appear to be arbitrary, inflexible, broad, and unreasonable.

The HRLRC has consistently argued that exceptions to the operation of equal opportunity legislation should be granted only on a case-by-case basis and only after an individual application for exemption has been subject to a limitations analysis under section 7(2) of the Charter.

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<sup>4</sup> Ibid, [35]

<sup>5</sup> See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

<sup>6</sup> ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). In addition to specifying certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, the ILO 111 allows for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including criminal record: *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth).

<sup>7</sup> Available at <http://www.hrlrc.org.au/files/eo-review-pilch-hrlrc-submission-to-sarc.pdf>

Examples of permanent exceptions in the Bill which we believe are incompatible with the Charter are contained in clauses 75 and 84.

(a) *Clause 75 – things done with statutory authority*

Clause 75(1) provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of any other Act. The Statement of Compatibility recognises that this exception ‘may facilitate the limitation of a number of charter rights, including the right to equality.’

In its 2009 report on the exceptions and exemptions, SARC recommended that the equivalent section in the *Equal Opportunity Act 1995* be repealed and that a provision in an enactment which is intended to override the Act be prescribed in the Act and made subject to a sunset or review provision.<sup>8</sup> This recommendation constitutes a less restrictive means of achieving the purpose of clause 75 (i.e. enabling parliament enact provisions that constitute reasonable limitations on the right to equality) as required by s. 7(2)(e) of the Charter.

The Statement of Compatibility contends that the checks and balances already available to ensure that legislation is Charter-compatible – including an audit of legislation undertaken in 2007 and 2008 – are sufficient to guarantee that law inconsistent with the *Equal Opportunity Act* will only permit reasonable limitations on rights.

This argument presumes that all existing and future Victorian laws are necessarily Charter compatible. Such a presumption is unsound because, to our knowledge, there has not been a comprehensive review of all existing legislation to ensure Charter compatibility.<sup>9</sup> Moreover, such a review could never be entirely comprehensive as the interpretation and application of legislation is not always foreseeable. Finally, the Charter does not require that parliament pass only Charter compatible legislation.<sup>10</sup>

Given that the processes for ensuring the Charter-compatibility of legislation are not unassailable, clause 75 of the Bill fails to meet the requirements of section 7(2) of the Charter.

(b) *Clause 84 – discrimination to comply with religious doctrines, beliefs or principles*

Clause 84 establishes a regime whereby religious freedom (so long as its exercise is ‘reasonably necessary’ in the circumstances) can’t ever be curtailed to prevent discrimination by a person against another person on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

This provision has an extremely broad application which means that, while it may allow for justifiable discrimination in some circumstances, it may also allow for discrimination that is not ‘justified in a free and democratic society’ in accordance with section 7(2) of the Charter.

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<sup>8</sup> SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009), p. 54.

<sup>9</sup> See, for example, *R v Momcilovic* [2010] VSCA 50 in which the Court of Appeal identified a provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) as being incompatible with s 25 of the Charter.

<sup>10</sup> See, for example, the *Summary Offences and Control of Weapons Acts Amendment Act 2009* which the Government acknowledged to be incompatible with the Charter in the Statement of Compatibility.

In effect, clause 84 'purports to prioritise any claimed religious belief over any other human right, regardless of the situation and relative importance of the two'.<sup>11</sup> This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination, restrains society's pursuit of equality and undermines the objectives of the Bill. It is fundamentally incompatible with Australia's (and Victoria's) obligations under international human rights law, including the ICCPR, ICESCR and the Siracusa Principles.

The Statement of Compatibility that accompanied the Bill contends that 'there is no less restrictive means reasonable available to achieve the purpose of this limitation.' However, the repeal of this exception would simply mean that before discrimination is deemed permissible, a temporary exemption would have to be granted. All groups that do not receive special protection from a permanent exception in the Equal Opportunity Act are already subject to this process.

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<sup>11</sup> SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Options Paper* (2009), p. 130.