



human
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**Submission to the
Victorian Attorney-General's
Independent Review of the
Equal Opportunity Act 1995 (Vic)**

January 2008



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

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

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

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the content, implementation, operation and review of the Victorian Charter of Human Rights and Responsibilities;
- (b) the treatment and conditions of detained persons, including asylum-seekers, prisoners and involuntary patients;
- (c) the importance, interdependence, indivisibility and justiciability of economic, social and cultural rights; and
- (d) equality rights, particularly the right to non-discrimination, including on the grounds of race, religion, ethnicity, disability, gender, age and poverty.

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1. Introduction

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

2. In May 2004, the Victorian Attorney-General, Rob Hulls MP, issued a *Justice Statement* outlining the need to address systemic barriers to equal opportunity. The Attorney-General has initiated an independent review (**Review**) to make recommendations in relation to particular aspects of the *Equal Opportunity Act 1995 (Vic)* (**EO Act**).
3. As part of the Review, the Reviewer, Julian Gardner, has prepared a Discussion Paper entitled *Equal Opportunity Review (Discussion Paper)* which outlines the key questions to be considered by the Review. The Discussion Paper invited responses to a series of questions and sought comments on how the EO Act should be reformed to better promote the right to equality and improve protection from discrimination.
4. The Victorian Government has recognised the particular relationship between systemic discrimination and entrenched disadvantage in Victoria and the need to address systemic barriers to equal opportunity.¹

1.2 Scope of this Submission

5. This submission is made by the Human Rights Law Resource Centre (**HRLRC**) and focuses on the relevance of international human rights law to certain questions raised in the Discussion Paper. In this context, this submission also discusses the potential application of the Victorian *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Victorian Charter**), which has particular relevance to the scope of the Review.
6. This submission addresses the following aspects of the Discussion Paper:
 - (a) the range of attributes that should be protected by the EO Act;
 - (b) the scope for the EO Act to address systemic discrimination;
 - (c) the powers of the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to investigate and remedy discrimination; and
 - (d) whether the EO Act should provide access to a broader range of complainants through additional mechanisms such as class actions and representative complaints.

¹ See *Attorney-General's Justice Statement 2004*, the Victorian Government's 2006 election commitment, as well as recent government policies including *Growing Victoria Together 2* and *A Fairer Victoria*.

1.3 About the HRLRC

7. The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law. The HRLRC’s activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.
8. The HRLRC has a significant and diverse body of stakeholders represented in its membership and the composition of both its Board and Advisory Committee. The HRLRC’s stakeholders include community legal centres, legal aid, a number of major commercial law firms, legal professional associations, a number of university law schools, and a range of local, state, national and international non-government organisations.

2. Executive Summary

2.1 The Human Right to Freedom from Discrimination

9. Discrimination is at the heart of virtually all human rights violations. As identified in the Foreword to the Discussion Paper, the right to freedom from discrimination is a basic human right. Indeed, the Preamble to the Victorian Charter recognises that human rights belong to all people in the Victorian community without discrimination and that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.
10. In this context, the HRLRC considers that the most effective way to eliminate discrimination and promote equal opportunity in Victoria is through a human rights framework. The HRLRC submits that:
- (a) the range of attributes that should be protected by the EO Act should be expanded to include all those attributes which constitute 'other status' for the purpose of the International Covenant on Civil and Political Rights (*ICCPR*) and the International Covenant on Economic, Social and Cultural Rights (*ICESCR*), including in particular criminal record, homelessness and social status;
 - (b) the scope of the EO Act should be amended to provide broader powers and measures to address systemic discrimination;
 - (c) the VEOHRC should be conferred with broader powers to investigate and remedy discrimination; and
 - (d) the test of standing should be broadened to allow class actions and complaints by representative organisations.

2.2 Recommendations

11. The HRLRC makes the following recommendations for reform:

Recommendation 1:

Proposed reforms of the EO Act must be consistent with Australia's international human rights obligations. 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 addressed.

Recommendation 2:

- (a) In accordance with the human right to freedom from discrimination, the EO Act should be amended to include 'other status' as an attribute on the basis of which discrimination is prohibited.
- (b) In the alternative, if (a) is not accepted, the EO Act should be amended to include 'criminal record' and 'social status' as protected attributes.

Recommendation 3:

In accordance with the human right to non-discrimination, measures should be introduced to the EO Act to address discrimination that is based on or results from patterns, structures and systems that produce or are capable of producing inequalities between certain defined categories of persons. Such measures must provide for or enable a mixture of both 'hard' and 'soft' regulation and remedies that are appropriately tailored to address issues of systemic discrimination.

Recommendation 4:

In accordance with the obligation on State parties to provide an effective remedy of violations of the right to non-discrimination, the EO Act should be amended to provide the VEOHRC with broader powers to:

- investigate potential breaches of the EO Act, including powers to enter premises and to require the production of material;
- take proactive steps to investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
- commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
- develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

Recommendation 5:

In accordance with the right to an effective remedy and the human right to a fair trial, the requirements in the EO Act for standing of representative bodies should be broadened so that:

- a representative body is not required to seek consent from each person named in the complaint; and
- a representative body need not be directly affected by the complaint.

Recommendation 6:

In accordance with the right to an effective remedy and the human right to a fair trial, the EO Act should be amended to introduce a class action mechanism for complaints of discrimination.

Recommendation 7:

In accordance with the right to an effective remedy and the human right to a fair trial, the EO Act should be amended to allow for representative proceedings where complainants are exposed to the same discriminatory act.

3. A Human Rights Framework

12. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. They include freedom of speech, freedom of religion, the right to vote, the right to a fair trial and the right to be free from discrimination. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value. As Australia grows and develops, governments at all levels are called upon to deal with an increasing number of complex issues and to address a wide range of problems.
13. Australia has ratified both the ICCPR and the ICESCR.² Australia's ratification of these instruments has created international law obligations that require all arms of the federal system - including the Victorian Government (legislature, executive and judiciary) - to act to respect, protect and fulfil human rights.
14. Equality is the most important principle that inspires the concept of human rights.³ The right to equality and freedom from discrimination is a norm of international human rights law. The fundamental nature of the principle of equality of treatment is not only recognised in international law, but also fundamentally underpins the common law and is enshrined in the constitutions of many common law jurisdictions.⁴
15. Both the ICCPR and the ICESCR contain comprehensive prohibitions on discrimination. Article 2(1) of the ICCPR provides:

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

Article 2(2) of the ICESCR provides:

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.

² The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980. The ICESCR was signed on 18 December 1972 and ratified on 10 December 1975.

³ M Nowak, *CCPR Commentary* (2nd ed, 2005), 598.

⁴ Lord A Lester and D Pannick QC, *Human Rights Law and Practice* (2nd ed, 2004), 414.

16. Article 26 of the ICCPR provides:

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

17. Article 2(1) of the ICCPR prohibits discrimination on certain grounds in the exercise of the Covenant's enumerated rights. However, article 26 of the ICCPR extends considerably further than article 2(1). Article 26 is a free-standing non-discrimination clause that is not confined to the enjoyment of the rights enumerated in the ICCPR but prohibits discrimination – in fact or in law – in all aspects of public life.

18. The term 'discrimination' has been authoritatively stated by the HRC to imply any distinction, exclusion, restriction or preference which is based on any ground identified in the Covenant and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁵ However, not any differentiation of treatment will constitute discrimination. The criteria for any differentiation must be reasonable and objective and in order to achieve a purpose which is legitimate under the ICCPR.⁶

⁵ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (Thirty-seventh session, 1989), [7].

⁶ *Ibid*, [13].

4. The Victorian Charter

4.1 Overview of the Victorian Charter

19. The Victorian Charter enshrines a body of civil and political rights derived from the ICCPR. The substantive rights recognised in the Victorian Charter include the fundamental rights to non-discrimination and equality before the law.⁷
20. The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities') and the courts — is facilitated through a number of mechanisms.
21. First, prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Victorian Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.
22. Second, all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.
23. Third, public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.
24. Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.
25. Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months.
26. Finally, the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Charter.
27. The Victorian Charter entered into full force on 1 January 2008.

⁷ Section 8 of the Victorian Charter.

4.2 The Right to Non-Discrimination and Equality Before the Law

28. The right to non-discrimination and equality before the law is recognised in section 8 of the Victorian Charter:

8. Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

29. The definition of 'discrimination' in the Victorian Charter has the same meaning as provided in the EO Act.⁸ Thus, for the purpose of the Victorian Charter, discrimination is less favourable treatment on the grounds of a 'protected attribute', or the imposition of an unreasonable requirement condition or practice with which people with a particular attribute may have difficulty complying.

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

31. The purpose of section 8(4) is to recognise that substantive equality is not necessarily achieved by treating everyone equally, and that special measures may be required to achieve equality for some groups in the community.⁹

4.3 Relevance of International and Comparative Jurisprudence

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

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

⁸ The accompanying note to the definition of discrimination in section 3(1) of the Victorian Charter states that section 6 of the EO Act lists a number of attributes in respect of which discrimination is prohibited.

⁹ This provision is modelled on section 19(2) of the *New Zealand Bill of Rights Act 1990* (NZ).

33. The Explanatory Memorandum to the Victorian Charter suggests that section 32(2) of the Victorian Charter ‘will operate as a guide’ and goes on to state that
- a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations.¹⁰
34. It also suggests that decisions of the International Court of Justice, the European Court of Human Rights (European Court), the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including the Human Rights Committee (HRC)) will be particularly relevant.¹¹ Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.¹²
35. The right to non-discrimination and equality before the law under section 8 of the Victorian Charter mirrors provisions in other jurisdictions, although the wording used varies slightly.

4.4 The Impact of Charters on Policy Development – Lessons from Other Jurisdictions

36. The experience in comparative jurisdictions, such as the United Kingdom, is that the introduction of legislative human rights instruments can have a significant impact on public sector culture and the development and interpretation of laws. Some of the benefits of using a human rights approach to the development by governments of laws and policies include:
- (a) a ‘significant, but beneficial, impact on the development of policy’;
 - (b) enhanced scrutiny, transparency and accountability in government;
 - (c) better public service outcomes and increased levels of ‘consumer’ satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
 - (d) ‘new thinking’ as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers ‘see seemingly intractable problems in a new light’;

¹⁰ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

¹¹ *Ibid.*

¹² *Ibid.*

- (e) the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
 - (f) awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.¹³
37. In this sense, the experience of legislative human rights instruments is that they have far greater impact at the 'front end' by influencing policy development and implementation, rather than as an avenue for litigious remedy. In other words, legislative human rights instruments provide mechanisms for a less litigious, less reactive and less individualistic focus and instead can address some of the underlying causes of human rights violations rather than react in a specific, ad hoc way.
38. Current anti-discrimination laws tend to be individualistic in their focus, drawing attention to specific, ad hoc requirements and conduct and away from factors that relate to a system as a whole. Such an approach is an inadequate way to address concerns that apply to all members of a group and not just individual members of a group.
39. The HRLRC submits that a human rights approach to the review of the EO Act will not only ensure that Australia's international obligations are fulfilled but will also assist to develop laws and policies that will best eliminate discrimination and promote equal opportunity in Victoria.

Recommendation 1:

Proposed reforms of the EO Act must be consistent with Australia's international human rights obligations. 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 addressed.

¹³ 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).

5. Protected Attributes

5.1 Introduction

40. The right to non-discrimination prohibits discrimination on the basis of certain grounds or attributes. Both articles 2(1) and 26 of the ICCPR 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.
41. International jurisprudence establishes that the term 'other status' refers to a definable group of people linked by their common status.¹⁴ The HRC has decided on a case-by-case basis whether a group of separate individuals constitutes a distinct group linked by their common 'status'.
42. This section discusses whether the EO Act should be amended to protect discrimination on the basis of the following attributes:
- (a) criminal record; and
 - (b) homelessness and social status.

5.2 Attributes Protected at International Law and in Other Jurisdictions

- (a) *'Other Status'*
43. As referred to above, the ICCPR and ICESCR prohibit discrimination against any person on the basis of certain grounds, including 'other status'. HRC decisions suggest that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. Based on the criteria adopted by the HRC, it is clear that discrimination on the grounds of 'criminal record', 'homelessness' and 'social status' would fall within the definition of 'other status'.

¹⁴ 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'.

44. In addition to the ICCPR and ICESCR, the European Convention on Human Rights (**ECHR**) contains a prohibition on discrimination, including discrimination on the ground of 'other status'.¹⁵ The list of grounds in article 14 is not exhaustive. The European Court of Human Rights (**European Court**) has interpreted 'other status' as meaning a 'personal characteristic'.¹⁶

(b) *Criminal Record*

45. The European Court has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.¹⁷

46. Australia has ratified the International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*.¹⁸ ILO 111 requires all countries who are parties to the Convention to:

declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

47. In addition to specifying certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, the ILO 111 also leaves room for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including criminal record.¹⁹ There is therefore an obligation on Australian governments to pursue policies to ensure that discrimination on the ground of criminal record is eliminated.

¹⁵ Article 14 of the ECHR provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

¹⁶ See *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733.

¹⁷ See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

¹⁸ 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).

¹⁹ *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth). Other grounds of discrimination added by this regulation include: age; medical record; impairment; marital status; mental, intellectual or psychiatric disability; nationality, physical disability; sexual preference; and trade union activity.

(c) *Homelessness and Social Status*

48. The HRC has found a difference between employed and unemployed persons to constitute discrimination on the basis of 'other status'.²⁰
49. The prohibition against discrimination on the basis of 'social status' is also contained in a number of overseas jurisdictions:
- (a) In New Zealand, the *Human Rights Act 1993* includes "employment status" as a prohibited ground of discrimination. "Employment status" is defined in the Act as "being unemployed, receiving an income support benefit or receiving accident compensation payments."
 - (b) The Canadian *Charter of Rights and Freedoms 1982* guarantees freedom from discrimination and contains a non-exhaustive list of prohibited grounds of discrimination.²¹ The provinces in Canada provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor. Discrimination on the basis of "source of income" is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term "receipt of public assistance".²² The province of Québec has human rights legislation prohibiting discrimination on the ground of "social condition".
 - (c) In the United States, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits every State from denying any person within its jurisdiction the equal protection of the laws.²³ In other words, the laws of the State must treat an individual in the same manner as others in similar circumstances and conditions. This has been interpreted to prohibit discrimination on the basis of status, including socio-economic status and homelessness.²⁴

²⁰ *Cavalcanti Araujo-Jongens v Netherlands* (418/90).

²¹ Article 15(1) provides that 'Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination'.

²² Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) at <<http://canada.justice.gc.ca/chra/en/index.html>>.

²³ While this serves to protect individuals from discriminatory laws, it does not protect them from discrimination by individuals or companies who provide their services in a discriminatory way.

²⁴ See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

- (d) In Europe, the right to freedom from discrimination on the grounds of 'social origin' is recognised in article 14 of the ECHR. Some commentators have argued that the attribute of 'social origin' includes the ground of 'social status'.²⁵
- (e) In the United Kingdom, the *Human Rights Act 1998 (UK) (UK HRA)* was enacted to give legislative effect to the ECHR. Section 2 of the UK HRA incorporates article 14 of the ECHR which, as discussed above, guarantees a right to freedom from discrimination on any ground, including social status, in the enjoyment of certain rights and freedoms.

5.3 Attributes Protected in Australian Domestic Law

- (a) *'Other Status'*
50. Protection against discrimination on the basis of 'other status' is currently not recognised in any Australian jurisdiction.
- (b) *Criminal Record*
51. At the Federal level, the *Human Rights and Equal Opportunity Commission Act (Cth) (HREOC Act)* provides protection against discrimination on the basis of criminal record and provides a mechanism for complaints may be made to the Human Rights and Equal Opportunity Commission (*HREOC*).²⁶
52. At the State and Territory level, anti-discrimination legislation in Victoria, New South Wales, South Australia and Queensland does not prohibit discrimination on the basis of criminal record. While Tasmania, Western Australia, Northern Territory and the ACT makes discrimination on the grounds of a criminal record unlawful, legislation in these jurisdictions contain exceptions (such as inherent requirements of the job) that, in practice, severely compromise the standards set by the legislation.²⁷

²⁵ See, for example, P Lynch and B Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

²⁶ See footnote 19 above.

²⁷ PILCH Homeless Persons' Legal Clinic, *Discrimination in Employment on the Basis of Criminal Record*, Submission to the Human Rights and Equal Opportunity Commission Inquiry into Discrimination in Employment on the Basis of Criminal Record (February 2005), 15-16.

53. Spent convictions legislation operates in some Australian states and territories, which in effect operates to prevent discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.²⁸
54. No spent conviction legislation operates in Victoria. As a result, there are no mechanisms that exist in Victoria to protect people from discrimination on the basis of an irrelevant criminal record.

(c) *Homelessness and Social Status*

55. Discrimination against people who are experiencing homelessness is currently lawful in all Australian jurisdictions. Homelessness, unemployment and social security reciprocity are not attributes that are currently protected by the EO Act, or indeed by any anti-discrimination legislation at the federal or state level in Australia. This is despite the strong evidence that discrimination on the grounds of a persons' homelessness or social status exists widely in Victoria, as discussed below.

5.4 Extent and Impact of Discrimination in Victoria

56. Notwithstanding the coverage of the grounds in the EO Act, many people in Victoria are subject to discriminatory treatment on the basis of their criminal record or social status. In relation to homelessness, for example, research has shown that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment.²⁹
57. The HRLRC refers to the submission to this Review of the PILCH Homeless Persons' Legal Clinic (*HPLC Submission*). The HPLC Submission discusses, in detail, the extent and impact of social status and criminal record discrimination in the Victorian community. That discussion concludes that discrimination on the grounds of social status and criminal record is frequent and pervasive in Victoria. This discrimination further marginalises already extremely vulnerable and disadvantaged groups in Victorian society.

²⁸ In every Australian state and territory, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia the spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

²⁹ Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', *Written statement submitted by the National Association of Community Legal Centres*, UN Doc A/HRC/4/NGO/46 (6 March 2007).

5.5 Recommendations

58. The HRLRC submits that the EO Act should be amended to include 'other status' as an attribute on the basis of which discrimination is prohibited. Inclusion of 'other status' as a protected attribute would harmonise the EO Act with articles 2(1) and 26 ICCPR and article 2(2) of the ICESCR.
59. In the alternative, the HRLRC submits that 'criminal record' and 'social status' should be included as protected attributes in the EO Act in order to comply with international human rights standards. This position is supported by legislation adopted in many other countries that recognises the particular vulnerability of, and therefore particular protection that must be afforded to, people that fall within these groups.
- (a) **In relation to 'criminal record':** Where specific exemptions to this broad prohibition are to be provided, those exemptions should be carefully restricted to areas related to the offence so that, while potential victims of re-offending are properly protected, the ex-offender is not precluded from gaining employment.³⁰ The HRLRC recommends that the prohibition should not be limited to 'irrelevant criminal records' (as is the case under Tasmanian legislation) and should not allow an employer to determine whether the criminal record will be relevant to the employment through either an 'inherent requirements of the job' (as is legitimate under both Commonwealth and Northern Territory legislation).
- (b) **In relation to 'social status':** 'Social status' should be defined to include a person's status as homeless, unemployed or a recipient of social security payments.³¹

Recommendation 2:

- (a) In accordance with the human right to freedom from discrimination, the EO Act should be amended to include 'other status' as an attribute on the basis of which discrimination is prohibited.
- (b) In the alternative, if (a) is not accepted, the EO Act should be amended to include 'criminal record' and 'social status' as protected attributes.

³⁰ PILCH Homeless Persons' Legal Clinic above n 27.

³¹ Lynch and Stagoll, above n 25.

6. Addressing Systemic Discrimination

6.1 Introduction

60. In addition to the prohibition of discrimination as the negative aspect of the right to equal protection of the law, article 26 of the ICCPR imposes a positive obligation on State parties to take steps to protect against discrimination. When certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.³² Positive measures of protection are particularly necessary in these circumstances.³³
61. Article 26 of the ICCPR calls for 'effective protection' against discrimination. As a result, the absence of adequate measures to prevent and protect against systemic discrimination may lead to a violation of this provision.
62. The HRLRC submits that the EO Act should be amended so that it provides for more direct and sophisticated ways of addressing insidious forms of discrimination that lie or may lie within the social structures and institutions of our society.

6.2 What is 'Systemic Discrimination'?

63. As identified in the Discussion Paper, systemic discrimination is caused by the underlying causes of discrimination that may be the outcome of institutional and social structures, policies and practices. Such structures and patterns fail to recognise and accommodate diversity and have the effect of excluding members of society from full participation in particular fields such as employment, education, the provision of goods and services and accommodation (among others).

6.3 Why Should Systemic Discrimination be Addressed?

64. As referred to above, State parties are under a positive obligation to ensure that all persons are guaranteed equal and effective protection against discrimination on any ground. In order to fulfil the right to non-discrimination, governments must take positive steps to address the special needs of individuals and groups who are particularly vulnerable to discrimination.³⁴ Such steps should include legislative, educative, financial, social and

³² Nowak, above n 3, 599.

³³ See, generally, UN Human Rights Committee, *General Comment No 3: Implementation at the national level* (29 July 1981).

³⁴ UN Human Rights Committee, *General Comment 18*, above n 5, [5].

administrative measures that are developed and implemented using the maximum of available governmental resources.

65. Taking as an example the protected attributes discussed in section 5 of this submission, it is clear that discrimination against particular groups exists due to inherent or institutionalised social patterns, traditional structures and legal constructs. Legislative protection against such discrimination is only one way to address such discrimination. Consideration must also be given to ensuring that people who are homeless, unemployed or in receipt of social security payments, or who have a criminal record, are protected from discrimination. Such measures may include developing and implementing policies and programs to ensure that they are afforded opportunities to obtain adequate housing, employment and the other requirements of an adequate standard of living.
66. Providing methods to address systemic discrimination should be considered a policy priority as such methods may, for example, tackle:
- (a) insidious forms of discrimination;
 - (b) issues of discrimination faced by groups and not just (important as they are) individuals (as is the case with current anti-discrimination laws); and
 - (c) social fragmentation and exclusion.
67. Exclusion and social fragmentation inevitably result as a consequence of any form of discrimination. This in turn leads to an inability to participate in fields such as employment, education and the market generally, which ultimately results in a variety of inequalities. It is clear that inequalities may have broader social costs:

The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies.³⁵

6.4 How to Address Systemic Discrimination?

68. The HRLRC submits that a human rights approach is the best way to address issues relating to systemic discrimination. In considering ways that the EO Act may be amended, guidance and inspiration can be drawn from measures that have been implemented or proposed in other jurisdictions to tackle systemic discrimination. Learnings from other jurisdictions, as explored below, illustrate that a range of measures are required in order to address systemic discrimination effectively. Effective measures may include a mixture of

³⁵ United Kingdom Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (28 February 2007), 21.

'hard' and 'soft' regulation to identify and remedy the underlying causes of systemic discrimination.

(a) Identifying Systemic Discrimination

69. The HRLRC submits that the following measures may assist to identify systemic discrimination:
- (a) investigations conducted by the VEOHRC on its own motion;
 - (b) expanding complaints mechanisms to a broader range of complainants; and
 - (c) increased responsibilities for employers to investigate and monitor inequalities that may exist within their workplaces.
70. Part 7 of this submission discusses in more depth the expansion of VEOHRC's powers in relation to investigation, compliance and regulation.
71. Instances of systemic discrimination may also be identified by giving a broader range of persons than is currently provided for under the EO Act the ability to make a complaint concerning systemic discrimination. Often, individuals will rarely have sufficient resources or interest to bring a claim. Broadening the range of people or groups who may bring a complaint under the EO Act is discussed in further detail below in Part 8 of this submission.

(b) Remediating systemic discrimination

72. Various kinds of remedies are required in order to address systemic discrimination adequately and effectively. While pecuniary penalties may have a role (as a deterrent and/or as a means of providing an incentive for persons to enforce provisions relating to systemic discrimination³⁶), such penalties may not be overly effective in removing the actual causes of the problem.
73. The strategy of discrimination remedies should be 'to devise a procedure that induces employers and other relevant actors to adopt to best practice without at the same time using threats of punishment that will drive employers to resist an open investigation and evaluation of their existing practice'.³⁷

³⁶ In industrial law, for example, it is in the usual course for statutory penalties to be awarded to a union for a contravention of the *Workplace Relations Act 1996 (Cth)*. This is in recognition of the importance of providing incentives to unions to police industrial laws as 'common informers'. See, eg., *Finance Sector Union v Commonwealth Bank of Australia (2005)* 147 IR 462, 481-3 [63]-[71] (Merkel J).

³⁷ H Collins, *Employment Law* (2003), 74.

74. The HRLRC identifies the following measures that have been introduced or proposed in other jurisdictions to address systemic discrimination:
- (a) *Equality Plans / Schemes*: A number of jurisdictions have introduced the requirement for certain bodies to formulate and implement plans which typically require standards and targets to be set that are aimed at reducing discriminatory practice and to monitor compliance with those standards and targets.³⁸
 - (b) *Codes of Practice*: Some jurisdictions have also introduced or proposed the measure of non-binding anti-discrimination codes of practice, which are developed by anti-discrimination bodies.³⁹ Codes of practice – even if non-binding – can provide an indication of standards and assist employers and other bodies to reduce discriminatory practices.
 - (c) *Equality Diagnostic Tools / 'Equality Scorecards'*: The Discrimination Law Review in the United Kingdom has proposed the formulation of an 'equality check tool', which may enable bodies to diagnose the extent to which they are eliminating discrimination.⁴⁰ The Equalities Review in the United Kingdom similarly proposed an 'Equality Scorecard', which scores the level of attainment of equality based on various criteria.⁴¹
 - (d) *Equality conditions imposed on public sector procurement*: The International Labour Organisation has recently reported that '[p]ublic procurement policies embodying racial or sex equality clauses are increasingly viewed as an effective tool to combat discrimination. The scale and economic importance of public tenders provide considerable potential for eliminating discrimination.' It stressed that such requirements should be transparent and widely promulgated.⁴²

³⁸ See, for example: in NSW, *Anti-discrimination Act 1977* (NSW) s 122J; in Northern Ireland, *Northern Ireland Act 1998* s 75; in Canada, *Employment Equity Act*, S.C. 1995, clause 44.

³⁹ See, for example, section 120A of the *Anti-discrimination Act 1977* (NSW). A similar scheme has been proposed to be introduced by Discrimination Law Review in the United Kingdom. See: United Kingdom, Communities and Local Government, *Discrimination Law Review: A framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007) 76.

⁴⁰ United Kingdom Communities and Local Government, *Discrimination Law Review: A framework for fairness: Proposals for a single equality bill for Great Britain*, Consultation Paper (June 2007), 112.

⁴¹ UK Equalities Review, above n 35, 18.

⁴² International Labour Organisation, *Equality at Work: Tackling the challenges* (2007), xi.

6.5 Recommendations

Recommendation 3:

In accordance with the human right to non-discrimination, measures should be introduced to the EO Act to address discrimination that is based on or results from patterns, structures and systems that produce or are capable of producing inequalities between certain defined categories of persons. Such measures must provide for or enable a mixture of both 'hard' and 'soft' regulation and remedies that are appropriately tailored to address issues of systemic discrimination.

7. Powers of the VEOHRC

7.1 Introduction

75. As discussed above, Australia's international obligations require that governments at all levels take steps to ensure that all persons are protected from discrimination on any ground. Pursuant to article 2(3) of the ICCPR, a State party is obliged to provide an 'effective remedy' for people whose rights are violated. Further, a remedy, if granted, should be enforceable. According to the UN Office of the High Commissioner for Human Rights:

Rights and obligations demand accountability; unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach ... emphasises obligations and requires that all duty-holders, including States, be held to account for their conduct in relation to international human rights.⁴³

Establishing effective mechanisms for seeking redress is critical to ensuring that all members of the community enjoy the benefits that the EO Act seeks to bring.

76. This section discusses the investigative and procedural powers that are vested through international instruments and in other comparative jurisdictions. The HRLRC submits that there is greater scope for the EO Act to empower the VEOHRC and its officers to enforce the EO Act. In particular, an analysis of powers exercised in other jurisdictions reveals a scope for providing broader and more substantial powers under the EO Act for the VEOHRC to:

- (a) investigate potential breaches of the EO Act, including powers to enter premises and to require the production of material;
- (b) take proactive steps to investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
- (c) commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
- (d) develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

77. It is submitted that such amendments are necessary for the Victorian Government to comply with Australia's international legal obligations and the Victorian Charter.

⁴³ Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), 15-16.

7.2 The ICCPR and Powers of Regulatory Bodies

78. While the ICCPR does not expressly deal with the powers of regulatory bodies, it is clear from article 2(3) that a State party is required to:
- (a) enact laws to implement the obligations in the ICCPR;
 - (b) provide an effective remedy; and
 - (c) institutionally safeguard rights by way of procedural guarantees, the establishment of legal institutions and other positive legislative, administrative, political or judicial measures⁴⁴.
79. The HRC has observed that:
- (a) the judiciary has a role by including direct applicability of the ICCPR, application of comparable constitutional or other provisions of law, or the interpretative effect of the ICCPR in the application of domestic law;
 - (b) administrative mechanisms are required to give effect to the general obligation to investigate violations through independent and impartial bodies;
 - (c) national human rights institutions, endowed with appropriate powers, can contribute;
 - (d) a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant; and
 - (e) cessation of an ongoing violation is an essential element of the right to an effective remedy.⁴⁵
80. While the HRLRC acknowledges that the VEOHRC is already vested with a number of broad functions and powers, there remain key deficiencies relating to VEOHRC's powers to:
- (a) conduct investigations into breaches of the EO Act;
 - (b) monitor compliance with anti-discrimination norms; and
 - (c) initiate 'own motion' proceedings absent a complaint.

⁴⁴ Nowak, above n 3, 38.

⁴⁵ UN Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2004), [15].

81. The HRLRC submits that expanding the VEOHRC's powers will ensure compliance with Australia's international human rights obligation and the requirement of all Victorian legislation to be compatible with the Victorian Charter.

7.3 The 'Paris Principles'

82. The principal source of normative standards for national human rights institutions are the 'Paris Principles', endorsed by both the UN Commission on Human Rights (now the UN Human Rights Council) and the General Assembly. Of the various norms it sets out, the Paris Principles state, importantly, that a human rights institution's roles, powers and mandate should be as broad as possible.⁴⁶ Specifically, and relevantly to the review of VEOHRC's powers under the EO Act, human rights institutions are more effective in protecting and promoting rights when they, among other things:

- (a) treat human rights issues systematically;
- (b) handle individual complaints speedily and effectively;
- (c) have a broad and non-restrictive mandate;
- (d) have an all-encompassing jurisdiction; and
- (e) have power to monitor compliance with their recommendations and advice.⁴⁷

83. In accordance with the Paris Principles, the mandate of national human rights institutions should include the following:

- (a) authority to review any law which is relevant to human rights and recommend amendments where appropriate;
- (b) powers to gather the information and evidence needed to monitor the national human rights situation (including where applicable, compelling attendance of witnesses and obtaining access to premises);
- (c) authority to monitor the activities of all public and private bodies that may have an impact on the enjoyment of human rights;
- (d) powers to monitor the performance of any public entity including relevant authorities such as law enforcement agencies;

⁴⁶ Paris Principles, UN DOC A/RES/48/134 (20 December 1993), principle 2.

⁴⁷ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005), 7.

- (e) ability to receive complaints against public bodies and have broad powers to deal with them;
 - (f) ability to receive complaints relating to private bodies that carry out public functions;
 - (g) ability to receive complaints from parties not directly affected (such as from civil society organisations on behalf of individuals);
 - (h) power to act on individual or collective issues at their own initiative without a complaint having been lodged;
 - (i) exemption from statutes of limitation - ie, power to investigate serious violations without being prevented by time limits;
 - (j) power to recommend reparation for victims of human rights violations (such as restitution or compensation);
 - (k) authority to take findings or recommendations to the appropriate judicial authority for enforcement (if upheld) and to appear before a court when their decisions are challenged; and
 - (l) power to monitor government departments' compliance with their advice and recommendations.⁴⁸
84. Similar activities to the above have been highlighted in an indicative list of activities by the United Nations Committee on Economic, Social and Cultural Rights in respect of how national human rights institutions can undertake to promote and protect economic, social and cultural rights.⁴⁹

⁴⁸ Ibid, 18-22.

⁴⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 10: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights* (14 December 1998).

7.4 Examples of Regulatory Powers in other Jurisdictions

85. Examples of regulatory powers in other jurisdictions are instructive and illustrate various ways in which VEOHRC's powers could be expanded so that they accord with internationally accepted norms relating to the powers of human rights bodies.

(a) Canada

86. The Canadian Human Rights Commission administers the Canadian *Human Rights Act*. It is empowered to investigate and settle complaints of discrimination in the fields of employment and the provision of goods, services and accommodation within the federal jurisdiction. In addition, it is vested with the following powers which are not currently held by the VEOHRC:

(i) Investigative powers

87. The Canadian Human Rights Commission may designate a person as an 'investigator' to investigate a complaint.⁵⁰ With a warrant, the investigator may at any reasonable time enter and search any premises in order to carry out inquiries.⁵¹ An investigator may require any individual found in any premises entered to produce material that may be relevant to the investigation being conducted by the investigator.⁵² In addition, under the *Employment Equity Act*, SC 1995, c 44, the Canadian Human Rights Commission's compliance officers may conduct compliance audits on an employer. Compliance officers also are vested with powers to enter premises and to require production of material.⁵³

(ii) Compliance powers

88. If a compliance officer believes that an employer is in breach of an obligation under the *Employment Equity Act*, the compliance officer can attempt to negotiate a written undertaking with an employer to take specified measures to remedy the non-compliance.⁵⁴ If a written undertaking is obtained and the compliance officer is of the opinion that the employer has breached the undertaking, the compliance officer must then notify the Canadian Human Rights Commission of the non-compliance and the Canadian Human

⁵⁰ Canadian *Human Rights Act*, section 43(1).

⁵¹ Canadian *Human Rights Act*, section 43(2.1).

⁵² Canadian *Human Rights Act*, section 43(2.4)

⁵³ *Employment Equity Act*, SC 1995, clause 44, section 23(1).

⁵⁴ Canadian *Human Rights Act*, section 15(1).

Rights Commission may issue a direction to the employer requiring the employer to take such actions as are specified in the direction to remedy the non-compliance.⁵⁵

(iii) *Powers to address Systemic Discrimination*

89. The Canadian Human Rights Commission may issue guidelines setting out the extent and manner in which any provision of the Canadian *Human Rights Act* applies in a *class of cases* described in the guideline.⁵⁶ Such guidelines are binding on the Canadian Human Rights Commission and any member or panel assigned under the Canadian *Human Rights Act* with respect to the resolution of a complaint under the Canadian *Human Rights Act* in respect of a case falling within the description contained in the guideline.⁵⁷
90. The powers of the Canadian Human Rights Commission are instructive in considering the powers that should be accorded to the VEOHRC to investigate systemic discrimination. Under section 40 of the Canadian *Human Rights Act*, the Canadian Human Rights Commission has the power to initiate complaints for breaches of the Canadian *Human Rights Act*. In addition, the Canadian Human Rights Commission may appoint an investigator to investigate a complaint. These investigators are equipped with extensive powers (for example, they may apply to the Federal Court to obtain *ex parte* warrants to search premises and they may require the production of documents).⁵⁸

(b) **United Kingdom**

91. The UK has established various public bodies that are empowered to deal with discrimination issues. These bodies have, however, recently been replaced by a single body — the Equality and Human Rights Commission (**EHRC**) (established on 1 October 2007 under the *Equality Act 2006* (UK) (**UK Equality Act**)).⁵⁹ The EHRC has a mandate to promote understanding under the UK Human Rights Act and has a directorate of expert lawyers who are able to take on case work or join in legal proceedings taken by others to promote human rights. The EHRC also has responsibility under section 44 of the *Race Relations Act 2000* (UK) to contribute funds to external organisations that can give legal advice or help.

⁵⁵ Canadian *Human Rights Act*, section 15(3).

⁵⁶ Canadian *Human Rights Act*, section 27(2).

⁵⁷ Canadian *Human Rights Act*, section 27(3).

⁵⁸ Canadian *Human Rights Act*, section 43.

⁵⁹ The EHRC took over the role of three previous commissions- the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission: Equality and Human Rights Commission: <http://www.equalityhumanrights.com/en/aboutus/pages/aboutus.aspx>.

92. Like the Canadian Human Rights Commission, the EHRC has been granted extensive investigative powers. Section 20 of the UK Equality Act empowers the EHRC to investigate whether a person has:
- (a) committed an unlawful act;
 - (b) complied with requirements imposed by an unlawful act notice under the section 21 of the UK Equality Act; or
 - (c) complied with an undertaking given under section 23 of the UK Equality Act.
93. In addition, the EHRC is empowered to:
- (a) issue unlawful act notices to persons under investigation or has committed an unlawful act. Such notice may, for example, require a person to prepare an action plan to avoid continuation of an unlawful act. Action plans can be enforced by court order;⁶⁰
 - (b) enter into an agreement with a person under which the person undertakes not to commit an unlawful act of a specified kind and take, or refrain from taking, other specified action. Again, the EHRC is empowered to enforce such undertakings in the courts;⁶¹
 - (c) make an application to a county court for an injunction restraining (or interdict prohibiting) a person from committing an unlawful act;⁶²
 - (d) assist an individual who is a party to equality legal proceedings.⁶³ The EHRC may provide legal advice, legal representation, facilities for settlement of a dispute, or any other form of assistance;⁶⁴
 - (e) institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the ECHR that the proceedings are relevant to a matter in connection with its function.⁶⁵

⁶⁰ UK *Equality Act*, section 22(6).

⁶¹ UK *Equality Act*, section 23(1).

⁶² UK *Equality Act*, section 24(1).

⁶³ UK *Equality Act*, section 28(1).

⁶⁴ UK *Equality Act*, section 28(4).

⁶⁵ UK *Equality Act*, section 30.

94. Although the UK Equality Act does not expressly mention systemic discrimination, the EHRC nevertheless has significant powers to address it. For example, the EHRC may:

- (a) publish reports (after seeking public input) regarding discrimination in society,⁶⁶
- (b) provide education or training and give advice or guidance,⁶⁷ and
- (c) issue codes of practices in connection with an equality matter.⁶⁸

(c) European Union Directives

95. In 2000, the European Community enacted two laws that define a set of principles that offer everyone in the European Union a common minimum level of legal protection against discrimination. Article 13 of the *Racial Equality Directive* requires Member States to designate a national body or bodies for the promotion of equal treatment of all persons without discrimination. Under this provision, one of the competencies the body or bodies must have is the provision of independent assistance to victims in pursuing their complaints about discrimination.⁶⁹ This may take a variety of forms including, legal advice, an opinion or a recommendation. Some of the other powers and competencies of existing equality bodies in Member States include:

- (a) support in taking cases to court;
- (b) arrangements for mediation or conciliation between parties;
- (c) reviewing and commenting on legislative proposals and the reform of existing laws;
- (d) investigating complaints of discrimination;
- (e) forcing compliance with their investigations by all persons involved;
- (f) concluding an investigation by issuing its conclusions and recommendations to the parties who will have a certain time to comply;
- (g) calling public attention to its recommendations;
- (h) alerting relevant authorities in cases that require disciplinary sanctions;

⁶⁶ UK *Equality Act*, section 12.

⁶⁷ UK *Equality Act*, section 13.

⁶⁸ UK *Equality Act*, section 14.

⁶⁹ European Commission, *Equality and Non-Discrimination Annual Report 2006* (September 2006), 21.

- (i) serving a non-discrimination notice following an investigation setting out the conduct that gave rise to the notice and what steps should be taken in order to prevent further discrimination (it is a criminal offence not to comply with a notice for a designated period of time after its issue);
- (j) issuing sanctions in cases in which they have found discrimination;
- (k) imposing limited fines including fines for non-compliance with recommendations within a specified time; and
- (l) issuing orders, published in the official gazette, for the elimination within a specified time limit and in a specified way.⁷⁰

(d) New Zealand

96. New Zealand has established an independent human rights body known as the Human Rights Commission. One of its key functions is to resolve disputes arising under the *Human Rights Act 1993 (NZ)* (***NZ Human Rights Act***). Apart from powers similar to those already available to the VEOHRC, the Commission may issue proceedings under the NZ Human Rights Act to obtain a declaratory judgment or order from the High Court to facilitate the performance of its functions under the NZ Human Rights Act.⁷¹
97. The Human Rights Commission is also provided with additional functions and powers that are not shared by the VEOHRC. These powers provide a more substantial basis for the Human Rights Commission to address systemic discrimination in New Zealand. These include:
- (a) preparing and publishing guidelines and voluntary codes of practice for the avoidance of acts or practices that may be inconsistent with, or contrary to, the NZ Human Rights Act;
 - (b) appearing in or bringing proceedings;⁷² and
 - (c) applying to a court or tribunal to be appointed as an intervener or as counsel assisting a court or tribunal, or to take part in proceedings before the court or tribunal in another way permitted by their rules or regulations.

⁷⁰ Ibid, 27-28.

⁷¹ NZ *Human Rights Act*, section 6.

⁷² NZ *Human Rights Act*, sections 6, 92B, 92E, 92H and 97.

98. A complainant may also take a dispute to the Director of the Office of Human Rights Proceedings. The Director's Office is independent of the Human Rights Commission. The Director may investigate disputes, attempt settlements and/or decide whether to take disputes to the Human Rights Review Tribunal. The Director also may on request provide representation for a complainant or aggrieved person or group of persons or the Human Rights Commission in proceedings before the Tribunal or related proceedings (eg., seeking to enforce a settlement reached on a previous occasion, and appeals to High Court, Court of Appeal and Supreme Court).⁷³

(e) Ireland

99. These issues are the concern of the Equality Authority, Director of Equality Investigations and relevant courts. Similarly to the human rights and anti-discrimination bodies discussed above, each of the Irish bodies have significant powers to investigate complaints, including powers to enter premises and to require the production of material in relation to an investigation.⁷⁴

(f) New South Wales

100. In NSW, the Anti-discrimination Board has general powers under section 119(1) of the *Anti-discrimination Act 1977* (NSW) to investigate and conduct inquiries into the existence of systemic discrimination.

7.5 Summary of Key Points and Recommendations

(a) Investigative Powers

101. The VEOHRC's investigative powers currently fall short of those required by the ICCPR and the Paris Principles. The HRLRC submits that in undertaking investigations, VEOHRC officers should be empowered with broader powers of investigation, such as to enter premises and to compel the production of information and evidence.

102. As has been outlined above, such powers are available in at least Canada, UK, Ireland and other European countries (pursuant to the requirements of the relevant European Union Directives). Further, the availability and use of such powers in other areas of law in Australia has at least partly contributed to a far greater 'compliance culture' in those areas. To the extent that a similar culture could be fostered in relation to the prevention of

⁷³ NZ *Human Rights Act*, sections 90(1)(a),(c)&(3).

⁷⁴ See, for example, the powers of: the Director of Equality Investigations and the Director's designated officers (s.33, 34); equality officers (ss.94, 95).

discrimination and promotion of anti-discrimination through investigative powers, such amendments to the EO Act are encouraged by the HRLRC.

(b) Compliance

103. The ICCPR and the Paris Principles require bodies such as the VEOHRC to be empowered to investigate and to be able to ascertain compliance with such orders as they issue. It is submitted that VEOHRC should be vested with the power to, on its own motion, ascertain compliance with their orders and/or conciliation agreements that are made in relation to proceedings brought under the EO Act. In particular, such powers may be particularly useful where a complaint has been resolved in the context of a continuing relationship between the parties (eg., employment or tenancy arrangements).
104. As has been identified above, such powers are already exercised in jurisdictions such as Canada, the UK and other EU countries. It is submitted that, in meeting its international obligations, Victoria should draw inspiration from these countries.

(c) 'Own Motion' Proceedings

105. It is submitted that the powers under Part 8 of the EO Act for the VEOHRC to investigate and refer matters in the absence of a complaint are too restrictive. The ICCPR and the Paris Principles require that such powers should be exercisable on individual or collective issues. The current restrictions imposed by section 157 of the EO Act on matters that may be investigated clearly fail to meet this requirement of the ICCPR.
106. Again, as has been highlighted above, the EO Act falls behind other countries on this issue. Further, the VEOHRC is out of step with bodies that administer laws relating to OHS, corporate misconduct and trade practices. Anti-discrimination compliance and the encouragement of equality would be enhanced by the introduction of such powers.

(d) Codes of Conduct

107. It is submitted that anti-discrimination compliance in Victoria would be greatly assisted by introducing the power for VEOHRC to make binding codes of conduct or guidelines regarding the requirements of the EO Act. Inspiration for such measures could, for example, be drawn from Canada, the UK or New Zealand. The availability of guidelines would, it is submitted, go some way to removing 'legalese' involved in the administration of anti-discrimination laws and would provide the community with greater clarity regarding their rights and responsibilities under the EO Act.

Recommendation 4:

In accordance with the obligation on State parties to provide an effective remedy of violations of the right to non-discrimination, the EO Act should be amended to provide the VEOHRC with broader powers to:

- investigate potential breaches of the EO Act, including powers to enter premises and to require the production of material;
- take proactive steps to investigate and enforce compliance with orders or agreements arising from proceedings under the EO Act;
- commence proceedings (whether in relation to collective or individual issues) on its own motion without the need for a complaint; and
- develop enforceable codes of conduct and guidelines to encourage a culture of compliance.

8. Representative Proceedings and Class Actions

8.1 Introduction

108. A key factor in enabling persons to access their rights under the EO Act is ensuring that persons have access to justice. Access to justice is a fundamental aspect of the judicial process and is indispensable for the protection of human rights. Indeed, access to justice is a basic element of the right to a fair hearing, which is a norm of international human rights law and is enshrined in the Victorian Charter.⁷⁵

109. Access to justice can be achieved in a number of ways. In this section, we focus on three procedural mechanisms that help to facilitate access to justice under the EO Act:

- (a) lowering standing requirements for representative bodies;
- (b) introducing class action mechanisms; and
- (c) introducing representative proceeding mechanisms.

110. Broadly speaking, the above mechanisms may facilitate the protection of group rights of non-discrimination. As discussed above in relation to systemic discrimination, the human right to freedom from discrimination extends beyond the protection of individuals to an obligation of government to ensure the protection of marginalised and disadvantaged groups from discrimination.

8.2 Standing of Representative Bodies

111. Currently, the EO Act allows a representative body to make a complaint to the VEOHRC on behalf of persons subjected to discrimination if the VEOHRC is satisfied that the matter is of genuine concern to the representative body because of the way that the conduct affects or has the potential to adversely affect the interests of the body or the interests or welfare of the persons it represents.

⁷⁵ The right to a fair hearing is protected in section 24 of the Victorian Charter. For a discussion on the content of the right, including the fundamental aspect of ensuring access to the justice system in the first place, see the Human Rights Law Resource Centre's submission to the Victorian Law Reform Commission's Civil Justice Review, entitled *The Right to a Fair Hearing: The Relevance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) to Civil Justice*, available at: <http://www.hrlrc.org.au/files/8O25PH17P8/Final%20Submission.pdf>.

112. As discussed in section 7.2 of this submission, the normative standards for human rights institutions are set out in the Paris Principles. The International Council on Human Rights Policy has recommended that, to be effective, human rights institutions should be able to receive complaints from parties not directly affected by discrimination (such as from civil society organisations on behalf of individuals).⁷⁶
113. Similar provisions to those contained in the EO Act currently exist in New South Wales, Tasmania, Queensland and Commonwealth anti-discrimination legislation. The *Age Discrimination Act 2004 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)* and *Disability Discrimination Act 1992 (Cth)* do not contain specific provisions relating to who can make a complaint. However, a claim alleging a breach of any of these Acts can be lodged with the Human Rights and Equal Opportunity Commission. Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (**HREOC Act**) provides that a 'person aggrieved' by alleged unlawful discrimination can lodge a complaint. However, the term 'person aggrieved' is not defined in the Act and courts have defined its meaning narrowly.⁷⁷
114. While the EO Act already contains powers for representative bodies to bring complaints, the HRLRC submits that the power for such bodies to do so is too restrictive. The requirements of section 104 of the EO Act that need to be satisfied before a representative body may bring a complaint do not reflect the internationally recognised best practice of generally ensuring that such bodies can bring complaints even if they (or their members) are not directly affected by the impugned conduct. In essence, the currently restrictive standing requirements may act as an effective bar to people seeking to access their rights to non-discrimination.

⁷⁶ International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights, *Assessing the Effectiveness of National Human Rights Institutions* (2005), 18-22.

⁷⁷ In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, the Federal Court held that to be a 'person aggrieved', the complainant must have more than an intellectual or emotional concern in the subject matter of the proceedings. In other words, the complainant must be able to show that the grievance suffered by the complainant goes beyond that of an ordinary member of the public. It is not sufficient that a person voices a particular concern and regards the actions of another as injurious to the object of that concern.

8.3 Class Actions

115. The HRLRC submits that a class action mechanism may provide an effective means of not only providing greater access to justice but also to addressing issues of systemic discrimination. It is well understood that class actions can provide access to justice to large numbers of litigants who would otherwise be unable to litigate their claims and thereby achieve a meaningful remedy.⁷⁸
116. The cost-effectiveness of class actions is an additional way of increasing access to justice. The high cost of traditional methods of litigation is perhaps the greatest barrier to accessing courts and also often leads to a lack of equality of arms in the courtroom due to imbalances in legal resources.⁷⁹
117. Despite certain limitations, class actions provide a greater level of access to courts and can enable plaintiffs to have more than merely unaffordable theoretical rights. The HRLRC therefore submits that a class action mechanism would contribute to ensuring that the remedies available under the EO Act accord with Australia's international human rights obligations, in particular:
- (a) ensuring the right to an effective remedy;
 - (b) ensuring the right to a fair trial for some plaintiffs who may have been otherwise unable to access the justice system; and
 - (c) contribute to reducing the causes of systemic discrimination.

8.4 Representative Proceedings

118. Representative proceedings would also provide another remedy to any alleged violations of the right to non-discrimination, thereby further contributing to the fulfilment of international obligations to provide an effective remedy.

⁷⁸ For example, in 1988 the Australian Law Reform Commission recommended that a mechanism for class actions be provided at the federal level in order to increase access to justice. See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988). The ALRC's proposals were largely implemented with the insertion of Pt IVA into the *Federal Court of Australia Act 1976 (Cth)*.

⁷⁹ See, generally: Lord Woolf MR, *Access to Justice*, Final Report to the Lord Chancellor of the Civil Justice System in England and Wales (1996); R W Fox, *Justice in the Twenty-First Century* (2000); and Morabito, Vince, 'Taxpayers and Class Actions' (1997) 20 *University of New South Wales Law Review* 372.

119. The HRLRC notes that Rule 18.02 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* provides for 'representative' proceedings to be brought in the Supreme Court where the group of persons bringing the proceedings have 'the same interest'. The test of 'same interest' has been interpreted broadly by the High Court.⁸⁰ The High Court referred to such rules as being flexible rules of convenience which should not be interpreted restrictively.
120. The HRLRC considers that the EO Act should be amended to provide for representative proceedings to be brought for discrimination claims. In particular, the availability of such proceedings would:
- (a) remove the individualised nature of discrimination complaints;
 - (b) allow more flexible 'cost sharing' between persons affected by discriminatory conduct in seeking redress; and
 - (c) provide a further avenue through which applicants aggrieved by systemic discrimination might be able to seek redress.
121. In providing for representative proceedings to be brought it is also submitted that, in accordance with the High Court's comments, the 'same interest' should be treated broadly. The HRLRC's view is that it would be sufficient if complainants were exposed to the same discriminatory act (or other source) in relation to the same attribute of discrimination. Given the inherently personal nature of the effects of discrimination, applicants in representative proceedings should not be required demonstrate the same type of damage, or to seek the same type of relief, before being entitled to bring a class action. Rather, it may be appropriate to model the requirements for bringing representative proceedings on those provided for in relation to class actions. That is, it may be preferable that representative applicants in representative proceedings be required to demonstrate that the group have the same, similar or related circumstances.

⁸⁰ *Carnie and anor v Esanda Finance Corporation Ltd* (1994) 182 CLR 398. Brennan and McHugh JJ held that the test for whether there is the 'same interest' was whether the plaintiff and the members of the represented class have a community of interest in the determination of some substantial issue of law or fact.

8.5 Recommendations

Recommendation 5:

In accordance with the right to an effective remedy and the human right to a fair trial, the requirements in the EO Act for standing of representative bodies should be broadened so that:

- a representative body is not required to seek consent from each person named in the complaint; and
- a representative body need not be directly affected by the complaint.

Recommendation 6:

In accordance with the right to an effective remedy and the human right to a fair trial, the EO Act should be amended to introduce a class action mechanism for complaints of discrimination.

Recommendation 7:

In accordance with the right to an effective remedy and the human right to a fair trial, the EO Act should be amended to allow for representative proceedings where complainants are exposed to the same discriminatory act.