SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

55th Parliament

Discrimination in the Law

Inquiry under section 207 of the Equal Opportunity Act 1995

Interim Report

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Scrutiny of Acts and Regulations Committee

Discrimination in the Law: Inquiry under Section 207 of the *Equal Opportunity Act 1995*

Interim Report

Bibliography
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Functions of the Committee

The statutory functions of the Scrutiny of Acts and Regulations Committee as set out in section 17 of the *Parliamentary Committees Act 2003* are —

17. Scrutiny of Acts and Regulations Committee

The functions of the Scrutiny of Acts and Regulations Committee are –

(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly–

   (i) trespasses unduly upon rights or freedoms;

   (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;

   (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;

   (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;

   (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;

   (vi) inappropriately delegates legislative power;

   (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;

(b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –

   (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;

   (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;

   (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but where an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;

(c) to consider any Act that was not considered under paragraph (a) or (b) within 30 days immediately after the first appointment of members of the current Committee and to report to the Parliament with respect to that Act on any matter referred to in those paragraphs;

(d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;

(e) the functions conferred on the Committee by the *Environment Protection Act 1970*;

(f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;

(g) to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act.

Terms of Reference

The Lieutenant-Governor as the Governor's deputy, with the advice of the Executive Council, under section 4F of the *Parliamentary Committees Act 1968*, requests that the:

Scrutiny of Acts and Regulations Committee of Parliament inquire into, consider and report to Parliament on:

Provisions which discriminate, or may lead to discrimination, against any person as provided in section 207 of the *Equal Opportunity Act 1995*. In particular the Committee is requested to:

1) identify provisions in Victorian Acts and enactments that operate to discriminate, or may lead to discrimination, against any person;

2) consider policy considerations for the retention, amendment or repeal of the provisions; and

3) make recommendations as to whether the provisions should be retained, amended or repealed.

In considering this reference the Committee should note the objectives of the *Equal Opportunity Act 1995* which include:

1) to promote recognition and acceptance of everyone's right to equality; and

2) to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes.

The Committee is required to report to Parliament by 31 March 2004.

Dated 3 June 2003

Responsible Minister:
STEVE BRACKS
Premier

BRIAN TUKE
Acting Clerk of the Executive Council

Victoria Government Gazette, S 108 Thursday 5 June 2003

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Chairperson's Introduction

The Scrutiny of Acts and Regulations Committee is conducting an Inquiry into Discrimination in the Law. The focus of the Inquiry concerns provisions in legislation that discriminate or may lead to discrimination against any person. The alleged discrimination must be relevant to one of the sixteen attributes, such as age, sex or race, prescribed in section 6 of the *Equal Opportunity Act 1995* (Vic) ('EOA').

In December 2003, the Committee released a Discussion Paper that described discrimination law, including the attributes prescribed in the EOA, the different types of discrimination and explanations of how the different exceptions in the EOA and the exemptions regime operated. The Discussion Paper was published by the Committee to assist people and organisations in focusing on the issues and then making a comment or a submission.

The Committee advertised the Inquiry and the Discussion Paper in metropolitan, regional and local newspapers, and in community languages. The Committee was pleased to receive over 400 submissions.

In December 2004, the Committee released a 'Progress Report', which summarised the submissions received by the Committee, except for a small number that did not fall within the Terms of Reference of the Inquiry. The Progress Report also looked at the issue of statutory compliance in other jurisdictions and described human rights protections models in New Zealand and the Australian Capital Territory. In the Progress Report, the Committee also examined the operation of section 69 of the EOA.

The Committee is now pleased to release its Interim Report. This report includes interim recommendations in respect to a number of identified Acts, whereby the Committee has made a preliminary examination of provisions in those Acts that are alleged to discriminate or lead to discrimination against any person.

The next phase of the Inquiry will be to hold public hearings and to take evidence from expert witnesses, interested persons and organisations. The evidence taken at these public hearings will assist the Committee in the final deliberative phase of the Inquiry before tabling its final report in September 2005.

Lily D'Ambrosio MP
Chairperson

June 2005

Chapter 1
Introduction

The Terms of Reference of the Inquiry

The Scrutiny of Acts and Regulations Committee (the 'Committee') received terms of reference[1] requesting it to:

- identify provisions in Victorian Acts and enactments[2] that operate to discriminate, or may lead to discrimination, against any person;
- consider policy considerations for the retention, amendment or repeal of the provisions; and
- make recommendations as to whether the provisions should be retained, amended or repealed.

In considering the reference the Committee was also asked to note the objectives of the *Equal Opportunity Act 1995* ('EOA'), which include:

- to promote, recognise and accept everyone's right to equality; and
- to eliminate, as far as possible, discrimination against people, by prohibiting discrimination on the basis of various attributes.

The Inquiry is pursuant to section 207 of the EOA, which imposes an obligation on the Attorney-General as the Minister responsible for the EOA to undertake a review of Victorian legislation. Section 207 provides that:

> *The Minister must cause a review of all Acts and enactments (other than municipal council by-laws or local laws) to be undertaken for the purpose of identifying provisions which discriminate, or may lead to discrimination, against any person.*

---

1 The Committee originally received the reference pursuant to section 4D of the *Parliamentary Committees Act 1968*. However, that Act has now been repealed and its successor, the *Parliamentary Committees Act 2003,* came into operation on 10 December 2003. The relevant section in the new Act is section 17(g), which provides that the functions of the Committee are '*to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under the Act*'.

2 The term 'enactments' is defined in section 4 of the *Equal Opportunity Act 1995* to mean '*a rule, regulation, by-law, local law, order, Order in Council, proclamation or other instrument of a legislative character*'. However, section 207 specifically excludes municipal by-laws and local laws.

The Scrutiny of Acts and Regulations Committee

The Committee is a joint parliamentary committee of the Parliament of Victoria, established pursuant to the *Parliamentary Committees Act 2003*.[3]

A key function of the Committee is to consider all Bills introduced into Parliament and to report to the Parliament as to whether the Bill, directly or indirectly:

(i) trespasses unduly upon rights or freedoms; or

(ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or

(iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions.

An additional function of the Committee is to review 'statutory rules' (regulations) against the terms of reference specified in the *Subordinate Legislation Act 1994*, including an examination of 'rights and freedoms' issues that may be raised by those regulations.

The Committee also has responsibility to review any Act where required to do so pursuant to the *Parliamentary Committees Act 2003,*[4] in accordance with the terms of reference under which the Act is referred to the Committee. The Discrimination in the Law Inquiry is being conducted under this responsibility.

Methodology of the Inquiry

Section 207 of the EOA is cast in very broad terms. It requires a 'review of *all*[5] Acts and enactments for the purpose of identifying provisions which discriminate or lead to discrimination against any person'.

The Committee considered that the most effective method to conduct the Inquiry, given its limited resources, was to request submissions from agencies and the public that identified provisions that may discriminate. The advantage of this approach is that it provides the Committee with an understanding of how laws may discriminate in practice. The Committee considers this an invaluable insight that is only available through the public submission process.

However, a disadvantage of this approach is that it is not exhaustive, as it relies on submissions for the identification of discriminatory provisions. This means that there may be Acts which discriminate, but which were not the subject of a submission.

The Committee has categorised the submissions it did receive according to certain features, such as whether the provisions discriminate on their face, or are neutral on their face but may discriminate when applied. These categories are discussed in detail in Chapter 2 of this report. Issues relating to the review of Acts and possible alternative mechanisms are also discussed in Chapter 3 of this report.

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3 *Parliamentary Committees Act 2003,* s 17.

4 Section 17(g).

5 Emphasis added.

Past conduct of the Inquiry

Discussion Paper

In December 2003, the Committee published a Discussion Paper, *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995*.[6] The Discussion Paper explained key concepts in the Terms of Reference and raised questions relevant to the Inquiry. The purpose of the Discussion Paper was to assist persons and organisations in making submissions relevant to the Terms of Reference of the Inquiry.

Public consultation phase

The Committee advertised the Inquiry in metropolitan, local and regional newspapers, in English and a number of community languages, and invited people to make submissions identifying discriminatory Acts and enactments. A period in excess of 6 months was allowed for acceptance of written submissions, ending in June 2004. The Committee however accepted a number of submissions as late as December 2004.

The Committee received more than 400 submissions.[7] Most of the submissions identified Acts or Regulations that contain discriminatory provisions.

A number of submissions concerned the operation of the EOA itself. These submissions focused on the exceptions contained in the Act and alternatives to the defence of statutory compliance provided by section 69.

Section 69 of the EOA provides that a person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of another Act or enactment. The operation of s 69 and how it interacts with s 207, the provision in the EOA under which this review is conducted, is discussed in Chapter 3 of this report.

The Committee considered that submissions on the exceptions and attributes of the EOA fall outside the terms of reference of this Inquiry. See below **Submissions outside the scope of this Inquiry**.

A list of written submissions received is included in this report as **Appendix 1.**

Progress report – summary of submissions

A summary of the submissions and an update on recent legal developments was published in a Progress Report in December 2004.[8] The Progress Report also describes human rights protection models in New Zealand and the Australian Capital Territory. These models provide useful examples of how those jurisdictions accommodate laws that are inconsistent with anti-discrimination principles. The Committee had the opportunity to visit these jurisdictions in order to consult with

6 An electronic version of the Discussion Paper is available on the Committee's website at: http://www.parliament.vic.gov.au/sarc.

7 See Appendix 1.

8 Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under section 207 of the Equal Opportunity Act 1995,* December 2004. Available at: http://www.parliament.vic.gov.au/sarc.

experts in anti-discrimination and human rights law as part of an examination of alternative ways of ensuring other laws comply with anti-discrimination principles.

Submissions outside the scope of this Inquiry

The Terms of Reference of the Inquiry are very broadly framed. The Committee was initially expansive in its interpretation of those terms. The writing of this Interim Report has provided the Committee with the opportunity to conduct a more detailed analysis of submissions against the Terms of Reference. All the submissions that were included in the Progress Report were considered in the analysis. As a result of this process, the Committee has concluded that the Terms of Reference require a narrower focus than originally envisaged. Submissions that the Committee considers now fall outside the Terms of Reference of this Inquiry are listed below.

Submissions on the Racial and Religious Tolerance Act 2001

The Committee received more than 250 submissions on this Act. The majority of the submissions argued that the Act restricts the rights of religious groups to express their opinions. The Committee notes that the *Racial and Religious Tolerance Act 2001* applies equally to all races and religions. The Committee considers that these submissions raise issues that can be characterised as concerns about 'freedom of speech'. The Committee considers that such concerns do not raise issues of discrimination relevant to this Inquiry.

Submissions on special-needs laws

The Committee received a number of submissions concerning Acts that are aimed solely at people with certain types of disabilities; for example, the *Mental Health Act 1986* and the *Disabilities Services Act 1991*. These Acts are referred to as 'special-needs laws' for the purposes of discussion in this report. The submissions in relation to special-needs laws generally alleged discrimination on the basis of differential treatment of the group subject to the law, as compared with treatment of other people.

The Committee considers that the purpose of special-needs laws is to regulate the provision of services (broadly defined) for the special needs of particular groups. The Committee recognises that it could be argued that the very existence of such laws is discriminatory in the sense that people who do not have the attribute are not subject to the regulatory regime. However, the Terms of Reference of the Inquiry restrict the Committee to the identification of provisions in Victorian Acts that operate to discriminate, or may lead to discrimination. As special-needs laws do not regulate groups *without* the particular special need, the Committee considers that there is no comparator in these Acts for the purposes of identifying discrimination under the Terms of Reference of this Inquiry.

Submissions relating to Acts that may have a discriminatory impact because of the absence of provisions requiring non-discrimination

The Committee received a number of submissions arguing that the absence of provisions requiring non-discrimination in the making of a policy decision under a discretionary power may lead to discrimination. The Committee acknowledges that, in some circumstances, the absence of such provisions may lead to discrimination.

However, the Committee considers that the consideration of the *absence* of provisions leading to discrimination falls outside the Terms of Reference of the Inquiry. The Inquiry is limited to dealing with provisions in Acts which discriminate, or which may lead to discrimination.

Submissions on exceptions and attributes in the EOA

The Committee received a number of submissions on the EOA itself. Many of these submissions concerned the exceptions provided in the EOA. Other submissions related to new attributes that could be added to the existing attributes prescribed by s 6 of the EOA.[9] Some persons and organisations made submissions concerning the operation of the statutory compliance exemption in s 69 of the EOA.

Other than the submissions concerning the operation of s 69 of the EOA, the Committee considers that these submissions fall outside the Terms of Reference of this Inquiry. The Committee considers that the reference to 'all Victorian Acts' in s 207 of the EOA (the section under which this Inquiry is being conducted) was not intended to include the EOA itself. The Committee is of the opinion that, had a review of the EOA been intended, the ambit of the Inquiry would have included such a review within the Terms of Reference given to the Committee.[10]

The Committee considers that submissions on s 69 of the EOA are properly the subject of this Inquiry, as s 69 is integrally connected to s 207. These submissions and discussion on the statutory compliance exemption are set out in Chapter 3 of this report.

The content of this Interim Report

Chapter 1 provides background to the Inquiry, describes the functions of the Committee undertaking the Inquiry and provides an overview of the methodology used in the conduct of the Inquiry. The chapter also outlines the future conduct of the Inquiry.

Chapter 2 reviews the submissions received by the Committee and makes interim recommendations as to whether certain provisions identified by relevant submissions should be retained, amended or repealed. In some instances, the Committee has refrained from making interim recommendations. The Committee has done this either because it does not consider it has adequate information to make a recommendation, or because the relevant Act or issue in question is the subject of a review currently being conducted by another public body.

There are two reasons the Committee has refrained from making interim recommendations in relation to Acts or issues being reviewed by another public body.

Firstly the Committee considers that, as the Terms of Reference for the review of these Acts by the other bodies are broader than the scope of the current Inquiry, those bodies may be better placed to make recommendations in conformity with broader considerations contained within their own terms of reference.

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[9] The attributes covered by the EOA are contained in s 6.

[10] The Committee notes that a review of the *Equal Opportunity Act 1984* was specifically referred to the Scrutiny of Acts and Regulations Committee on 22 December 1992.

Secondly, the Committee considers that other bodies may have more time and resources to explore some of the complex social and policy debates on contentious laws.

However, the Committee notes in passing that any legislation or legislative amendment that may be proposed from these specific-purpose inquiries will, in the normal course, come before the Committee for review and comment in respect to any issue of rights and freedoms. The Committee is of the opinion that its broader function in relation to the scrutiny of Acts and Regulations will present a further opportunity for Parliament to reflect on any proposed legislative amendments concerning equal rights.

The Committee will seek further information in relation to a number of Acts or issues identified by inviting organisations and individuals to give evidence at public hearings. This information will then be considered by the Committee in the formulation of its final recommendations.

Chapter 3 examines the statutory compliance exemption contained in s 69 of the EOA. The defence operates to allow discrimination when it is necessary to comply with, or is authorised by, another Act.

The chapter discusses the link between ss 69 and 207 and looks at options for addressing discrimination in other Acts, using models in other jurisdictions as examples.

The future phases of the Inquiry

Public hearings

The Committee will hold public hearings on **11–12 July 2005**, in Melbourne. At these public hearings the Committee will invite relevant Departments, agencies and persons to give evidence concerning the Acts identified in the interim recommendations that may discriminate, or may lead to discrimination.

Final Report

The evidence obtained at the public hearings in July 2005 and any further written submissions received by the Committee in respect to the interim recommendations will assist the Committee in preparing its final report, and may influence the final recommendations the Committee makes concerning the retention, amendment or repeal of the identified legislative provisions.

The Committee will table its **Final Report** in **September 2005.**

Chapter 2
Discrimination in Acts

In this chapter the Committee reviews the submissions received during the public consultation phase of the Inquiry, and makes interim recommendations as to whether the identified discriminatory provisions should be retained, amended or repealed.

The Committee advises that it will hold public hearings in July 2005, in order to gather further information from relevant bodies and individuals before it makes final recommendations. Therefore, the recommendations in the Final Report may be at variance with, or may confirm, the interim recommendations made in this report.

The submissions that are not included in this Interim Report either fell outside the terms of reference,[11] concern an Act that has since been repealed, or raise issues that have been addressed by an amending Act[12] or Bill,[13] that if passed will address the concerns raised in the submissions. The Acts that have been affected by the amending Acts and Bill and the substance of the amendment as relevant to this Inquiry are included as an Appendix to this report.

Submissions on Acts

The submissions received by the Committee were broad ranging, but may be divided into two distinct categories:

1. **Submissions relating to discriminatory provisions in Acts where different groups of people are treated differently on the basis of an attribute protected under the EOA.**

   An example of this is the *Adoption Act 1984*, which specifies that only heterosexual couples who have been in a relationship for at least 2 years[14] and single people in 'special circumstances'[15] are able to apply to adopt. This provision discriminates on the grounds of sexual orientation, as same-sex couples are not able to apply to adopt.

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11 The Committee notes that it has further refined the scope of the Inquiry since the Progress Report published in December 2004, and that therefore some submissions included in that report have been excluded in this report. See Chapter 1 for further explanation of this process.

12 *Children and Young Persons (Age Jurisdiction) Act 2004; Energy Legislation (Amendment) Act 2004.*

13 *Courts Legislation (Judicial Pensions) Bill 2005; Long Service Leave (Amendment) Bill 2005.*

14 *Adoption Act 1984*, ss 11(1)(a) and (c).

15 *Adoption Act 1984,* s 11(1A)(c).

2. **Submissions relating to provisions in Acts that may have a discriminatory impact on some groups because of the way in which they operate in practice.**

   An example of this is the offence of begging in s 6(1)(d) of the *Vagrancy Act 1966*. It is more likely that this provision will impact more on people with a mental illness than other groups, as there is evidence that people with a mental illness are more likely than other groups to be homeless and therefore they are more likely to beg.

These categories form the basis for the structure of the chapter. Within each of the categories, the submissions are organised according to the type of interim recommendation the Committee considers appropriate. For ease of reference, the Acts under consideration are set out alphabetically under each subheading.

The Committee's approach

In considering the submissions and making interim recommendations, the Committee has started from the standpoint that all people should be treated equally, unless there are sound policy reasons for doing otherwise. This position is supported by Australia's obligations under international law, as well as recent state law and policy reforms.

The *International Covenant on Civil and Political Rights*, which was ratified by Australia on 13 November 1980, states that all persons 'are entitled without any discrimination to the protection of the law'.[16]

At the state level, the *Statute Law Amendment (Relationships) Act 2001* and the *Statute Law Further Amendment (Relationships) Act 2001* (the 'Relationship Acts'), amended a number of laws to recognise the rights and liabilities of partners in domestic relationships. Before the changes were introduced, under various laws only heterosexual couples, and in some instances only married couples, were recognised as recipients of certain entitlements and responsibilities such as property rights, compensation and superannuation entitlements. The Relationship Acts changed these laws to ensure that all couples are treated equally, regardless of sexual orientation or marital status.

In light of this context, the Committee considers that discriminatory provisions should only be retained in circumstances in which there appear to be sound policy reasons for their retention. Where there does not appear to be good reasons for their retention, the Committee has recommended as an interim recommendation that the discriminatory provisions be amended or repealed.

The Committee has refrained from making substantive interim recommendations in relation to a number of Acts. The reasons for this are explained at 1.3 and 2.3 below.

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[16] *International Covenant on Civil and Political Rights,* Article 26.

1. Submissions relating to discriminatory provisions in Acts where different groups of people are treated differently on the basis of an attribute protected under the EOA

The submissions covered in this section relate to provisions in Acts that treat different groups of people differently on the basis of an attribute protected under the EOA. Such discrimination would be unlawful, were it not for s 69 of the EOA.[17]

Section 1 also includes submissions relating to definitions in Acts that are not clearly defined, or that use gender-specific language and, as a result, may be construed to be discriminatory. In making recommendations in relation to such definitions or terms, the Committee has considered the interpretative guidelines contained in s 35 of the *Interpretation of Legislation Acts 1984*.[18]

The submissions in this section have been further categorised according to the type of interim recommendation made.

Category:

1.1 discriminatory provisions identified in submissions which the Committee considers may reasonably be amended

1.2 discriminatory provisions identified in submissions which the Committee considers do not require amendment

1.3 discriminatory provisions identified in submissions in relation to which the Committee has refrained from making substantive recommendations in this Interim Report. This is because:

  a) the submissions are in relation to Acts which are currently being reviewed by another body. The Committee has decided that, as the Terms of Reference for the review of these Acts by the other bodies are broader than the scope of the current Inquiry, it will not duplicate the review process.

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17 The relevant parts of s 69 of the EOA read:

69. Things done with statutory authority

(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of—

(a) an Act, other than this Act;

(b) an enactment, other than an enactment under this Act.

(2) For the purpose of sub-section (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

18 The relevant part of s 35 of the *Interpretation of Legislation Act 1984* reads:

In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.

As a result, the Committee has recommended that the discriminatory provisions be retained pending the outcome of the other review, or

b) the submissions are in relation to Acts about which the Committee considers it did not have enough information to make a substantive recommendation. The Committee will seek further information at public hearings in relation to these submissions before making a substantive recommendation.

1.1 Discriminatory provisions identified in submissions which the Committee considers may reasonably be amended

Anzac Day Act 1958

The Committee received a submission asserting that the *Anzac Day Act 1958*[19] ('Act') may discriminate on the grounds of sexual orientation or marital status because the term 'dependant' in s 4A(3) is not defined in the Act.[20] Section 4A(3) of the Act provides for the distribution of the Anzac Day proceeds funds to organisations assisting ex-service men and women or their dependants.

The Committee notes that the term 'dependant' may be construed to refer only to the heterosexual partner of an ex-service man or woman, or could be limited to a child under a particular age. If the term 'dependant' is construed in this way, it could discriminate against same-sex couples and older children.

It does not appear to the Committee that there is good reason to retain unclear wording in an Act that may be construed in a way that discriminates against particular groups.

The *State Superannuation Act 1988* contains an up-to-date definition of the term 'dependant' that does not exclude dependants because of their sexual orientation, marital status or age. A 'dependant' in the *State Superannuation Act* is defined as:

> *'dependant', in relation to a deceased person, means—*
>
> *(a) his or her partner; or*
>
> *(b) a child of the person; or*
>
> *(c) any other person who in the opinion of the Board was at the date of the death of the person wholly or partially dependent on the person or who at that date had a legal right to look to him or her for financial support*

The term 'partner' in the *State Superannuation Act* is defined so as to include de facto and same-sex domestic partners.

The Committee considers that uniformity in the definition of provisions is highly desirable unless there are sound policy reasons to depart from that uniformity.

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[19] Section 4A.

[20] Submission 412.

The Committee also notes that the Scrutiny of Acts and Regulations Committee in the previous Parliament tabled a report concerning a review of the *Anzac Day Act 1958*[21] and recommended that, where practicable, all laws regulating or affecting Anzac Day be consolidated into a single new Act. However, the Committee notes that the recommendation was solely in relation to the commemoration of Anzac Day and did not refer to the distribution of Anzac Day proceeds funds. The Committee therefore considers it has no bearing on this Inquiry.

Interim recommendation

That a definition of 'dependant' be inserted into the *Anzac Day Act 1958.*

That the definition read:

'dependant', in relation to a deceased person, means—

(a) his or her domestic partner; or

(b) a child of the person; or

(c) any other person who in the opinion of the Patriotic Funds Council of Victoria was at the date of the death of the person wholly or partially dependent on the person or who at that date had a legal right to look to him or her for financial support.

1.2 Discriminatory provisions identified in submissions which the Committee considers do not require amendment

Births, Deaths and Marriages Registration Act 1996

Change of record of birth sex and issue of new birth certificate

The Act provides for the registration of births, deaths, marriages and changes of name in Victoria.[22] The Act was amended in 2004[23] to allow transsexual people who have undergone sex affirmation surgery to apply to change the sex originally recorded on their birth certificate, apply for a new birth certificate and apply for other documents acknowledging their gender.[24] The Committee notes that, while the Victorian Law Reform Commission (VLRC) has been asked to review the Act as part of its Inquiry into the Assisted Reproductive Technology and Adoption,[25] it is unlikely that, as part

21 Scrutiny of Acts and Regulations Committee, *Review of Anzac Day Laws*, October 2002.

22 Section 1.

23 *Births Deaths and Marriages Registration (Amendment) Act 2004.*

24 *Births Deaths and Marriages Registration Act 2004,* Part 4A.

25 1. The Victorian Law Reform Commission is to enquire and report on the desirability and feasibility of changes to the *Infertility Treatment Act 1995* and the *Adoption Act 1984* to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption; and make the recommendations for any consequential amendments which should be made to the:

Status of Children Act 1974
Births, Deaths and Marriages Registration Act 1996
Human Tissue Act 1982
Equal Opportunity Act 1995
and any other relevant Victorian legislation.

of that Inquiry, the VLRC will consider Part 4A of the Act, as that Part does not have any bearing on the issues of infertility treatment or adoption.

Discrimination on the grounds of gender identity is unlawful under the EOA. The definition of 'gender identity'[26] includes persons who have undergone sex affirmation surgery and people who have not undergone sex affirmation surgery but who identify on a bona fide basis as a member of the opposite sex to their biological sex and live, or seek to live, as a member of that sex. It also includes people who were born of indeterminate sex but identify on a bona fide basis with a particular sex and live, or seek to live, as a member of that sex.

The Committee received a submission[27] arguing that not allowing transgender people who have not had sex affirmation surgery to change their record of gender is discriminatory, as it distinguishes between transgender people based on whether or not they have undergone sex affirmation surgery.

The Committee also received a submission arguing that the distinction is justified on the grounds that 'people with transsexualism' are not the same as transgender people.[28] The submission defines 'people with transsexualism' as people who affirm their gender in physical terms by undergoing sex affirmation surgery. According to the submission, 'transgender people' do not have an overwhelming urge to have sex affirmation surgery and therefore are not certain about their gender identity. The submission argues that this distinction justifies the distinction in the Act.

The Committee considers that there is a gap between protections afforded to transgender people under the Act and under the EOA. The Committee further notes that in other State jurisdictions with similar provisions to Part 4A of the Act, the

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2. In making its enquiry and report, the Commission should take into account, to the extent it decides is necessary or desirable:

(i) social, ethical and legal issues related to assisted reproduction and adoption, with particular regard to the rights and best interests of children;

(ii) the public interest and the interests of, parents, single people and people in same-sex relationships, infertile people and donors of gametes;

(iii) the nature of, and issues raised by arrangements and agreements relating to methods of conception other than sexual intercourse and other assisted reproduction in places licensed under the *Infertility Treatment Act 1995* ('the Act');

(iv) the penalties applicable to persons, including medical and other personnel, involved in the provision of assisted reproduction (whether through a licensed clinic or otherwise); and

(v) the laws relating to eligibility criteria for assisted reproduction and adoption and other related matters which apply in other states or countries and any evidence on the impact of such laws on the rights and best interests of children and the interests of parents, single people, people in same sex relationships, infertile people and donors of gametes.

3. In addition, the Commission should consider whether changes should be made to the Act to reflect rapidly changing technology in the area of assisted reproduction.

4. The Commission is also requested to consider the meaning and efficacy of ss 8, 20 and 59 in relation to altruistic surrogacy, and clarification of the legal status of any child born of such an arrangement.

26 EOA, s 4.

27 Submission 394.

28 Submission 211.

entitlement to amend the register is also limited to people who have undergone sex affirmation surgery.[29]

The Committee considers that, given the legislative amendments to the Act are very recent and given that the Attorney General had the opportunity to consult with stakeholders through the Advisory Committee on Gay, Lesbian, Intersex and Transgender Issues, there was a considered policy determination made at that time to limit the operation of the amendment. The Committee therefore does not intend to make a recommendation for further amendment.

Interim recommendation

That Part 4A of the *Births, Deaths and Marriages Registration Act 1996* be retained.

Credit Act 1984

The Committee received submissions asserting that the definition of 'guarantor'[30] in the *Credit Act 1984* is discriminatory, as de facto and same-sex partners of debtors are treated differently from married partners.[31] The Committee notes that, while the *Credit Act 1984* is still operative in respect of contracts entered into prior to the commencement of the *Consumer Credit (Victoria) Act 1995,* it does not apply to contracts made after the commencement of the new Act. The *Consumer Credit (Victoria) Act 1995* does not provide any limitation on spouses acting as guarantors.

The Committee considers that there is no need to amend an Act that is still operative, but only in relation to contracts made prior to a certain date.

Interim recommendation

That section 5 of the *Credit Act 1984* be retained.

Juries Act 2000

One of the principle objectives of the *Juries Act 2000* ('Act') is to ensure that jury members are representative of the community at large, and therefore to ensure an accused person's right to be tried by a jury of their peers.[32] The Committee received a submission[33] arguing that eligibility for jury duty is a right that should be extended to all people who can perform the task, unless they are otherwise disqualified.[34]

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[29] See: *Sexual Reassignment Act 1988* (SA), *Births, Deaths and Marriages Registration Act 1996* (NT), *Births, Deaths and Marriages Registration Act 1997* (ACT), *Gender Reassignment Act 2000* (WA), *Births, Deaths and Marriages Registration Act 1995* (NSW).

[30] Section 5.

[31] Submissions 394 and 412.

[32] Section 1.

[33] Submission 370.

[34] For example, by reason of their profession.

The Act prescribes that certain persons are ineligible to serve as jurors.[35] One such group is involuntary patients as defined under the *Mental Health Act 1986.* The submission argued that excluding all involuntary patients from eligibility for jury selection discriminates against people in this category.[36] It was argued that the exclusion is based on an assumption that all members of this group do not have capacity to perform jury service. The submission recommended that the blanket ineligibility be replaced with an alternative provision that a person is only ineligible to serve as a juror if the person has a disability or condition that renders them incapable of performing jury duty.

The Committee notes that the Victorian Parliament Law Reform Committee made a similar recommendation in its report on Jury Duty in Victoria in December 1996. Recommendation 33 of the Final Report of the Law Reform Committee states:

> *The current specific categories of ineligibility from jury service relating to persons with mental, intellectual and physical disabilities should be repealed in favour of a general category which renders ineligible a person who has a physical, intellectual or mental disability that makes the person incapable of effectively performing the functions of a juror.*[37]

However, the Committee notes that the Law Reform Committee did not discuss the jury selection process in the context of the discussion on ineligibility.[38] In the Committee's view, the exclusion of categories of people may be related to the process by which jurors are selected. Potential jurors may be challenged by the parties involved in the trial. Courts and Tribunals Victoria state that 'questioning of prospective jurors is almost never allowed' and that 'challenges may simply be made on the basis of the person's age, gender or type of occupation'.[39]

It appears to the Committee from these statements that there is no rigorous assessment as to a person's actual capacity to act as a juror as part of the jury selection process, nor is there capacity within the existing selection process for such assessment to be made.

The Committee considers that, while in theory excluding people on the basis of the impact of the disability on the individual, rather than simply by the fact that the person has the disability, may be desirable, the existing jury selection process in Victoria may not have the capacity to assess a person's actual ability to act as a juror.

Interim recommendation

That the exclusion of 'patients', as defined under the *Mental Health Act 1986* in Schedule 2 of the *Juries Act 2000,* be retained.

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[35] Schedule 2 of the *Juries Act 2000* identifies persons who are ineligible to serve as jurors.

[36] Submission 370.

[37] Victorian Parliament, Law Reform Committee, *Jury Duty in Victoria, Final Report, Volume 1*, December 1996, Recommendation 33, See: http://www.parliament.vic.gov.au/lawreform/default.htm.

[38] Ibid, 3.132–3.140.

[39] See: http://www.courts.vic.gov.au/CA256EBD007FC352/page/Jury+Service-Selection?OpenDocument&1=50-Jury+Service~&2=50-Selection~&3=~.

Occupational Health and Safety (Lead) Regulations 2000

The objective of the *Occupational Health and Safety (Lead) Regulations 2000* ('Regulations') is to protect people against risks to their health associated with the use of lead at workplaces.[40] The Regulations adopt the *Exposure Standards for Atmospheric Contaminants in the Occupational Environment*, published by the National Occupational Health and Safety Commission in 1995.[41]

The Regulations provide for the removal of an employee from a lead-risk job if the results of monitoring reveal that the level of lead in an employee's blood is at or above a certain level.[42] The threshold level is lower for women of reproductive capacity and lower again for women who are pregnant or breast feeding.

The Committee received a submission contending that the Regulations discriminate against women on the basis of pregnancy.[43] It was submitted that this discrimination may not be reasonable as it regulates the target of the risk, rather than the source of the risk.

It is clear that the Regulations do treat women of reproductive capacity and those who are pregnant or breast feeding differently from women not of reproductive capacity and men. However, the Committee considers that this is for the protection of any child who is or may be born to women who are exposed to the prescribed levels of lead. The Committee does not dispute the contention that the source of the risk should also be addressed. However, it considers that such action and protection from the risks associated with lead exposure are not mutually exclusive.

Interim recommendation

That section 158 of the *Occupational Health and Safety (Lead) Regulations 2000,* which adopts the national *Exposure Standards for Atmospheric Contaminants in the Occupational Environment*, be retained.

Wrongs Act 1958

The Committee received a submission[44] that asserted that recent amendments made to the *Wrongs Act 1958* ('Act'),[45] may discriminate against people with psychiatric disabilities. The Act, as amended, defines, among other things, the threshold of impairment before a person is entitled to compensation for personal injuries for non-economic loss (pain and suffering) arising from negligence. The threshold level for psychiatric impairment is 10 per cent, while the threshold for other types of impairment is 5 per cent. This means that a person who has received a psychiatric injury must be 10 per cent impaired before they can claim compensation under the Act, whereas a person who has received any other type of injury need only

[40] These Regulations are provided for under s 158 of the *Occupational Health and Safety Act 2004.*

[41] Regulation 104.

[42] Regulation 226.

[43] Submission 401.

[44] Submission 370.

[45] Section 28LB.

demonstrate a threshold of 5 per cent impairment before an entitlement to compensation arises under the Act.

The threshold levels were introduced by amendment to the *Wrongs Act 1958* in May 2003[46] and were part of the tort law reform package introduced in all Australian jurisdictions. The Committee accepts that a principle objective of the introduction of these respective impairment thresholds was an attempt to balance, on the one hand, the needs of injured persons and, on the other, the need to keep insurance viable for business by eliminating 'trivial claims'. The Committee notes that there is no reference to the reason for the differential treatment of different types of injury in the Second Reading Speech.[47]

The Committee notes that there are also different threshold requirements for non-economic loss between psychiatric and physical injuries in the *Accident Compensation Act 1985*,[48] but that there is no distinction in the *Transport Accident Act 1986*.[49] There are also different thresholds for non-economic loss resulting in permanent psychiatric and non-psychiatric impairment in the tort laws of other States, for example NSW.[50] The Committee further notes that the NSW tort laws are currently under review.[51]

The Committee considers that given the legislative amendments to the Act are recent and that the legislature would have had the benefit of considering the operation of similar provisions in other states, there was a considered policy determination made at that time to differentiate between the thresholds for psychiatric and physical injuries in relation to non-economic loss. The Committee therefore does not intend to make a recommendation for further amendment.

Interim recommendation

That section 28LB of the *Wrongs Act 1958* be retained.

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46 *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003.*

47 Premier Steve Bracks, 'Second Reading Speech', *Hansard*, 21 May 2003, p. 1781.

48 The thresholds under the *Accident Compensation Act 1985* for physical injuries is 10 per cent (s 98C (2)(a)) and 30 per cent (s 98C (3)(a))for psychiatric injuries .

49 Section 47 of the *Transport Accident Act 1986* sets out the calculations based on percentage of impairment. No distinction is made between physical and psychiatric impairment.

50 These were introduced through the *Workers Compensation Legislation (Further Amendments) Act 2001 (NSW)*. See: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/643feaa31cf01297ca256f64000688e6/$FILE/Information%20Sheet%20on%20Terms%20of%20Reference.pdf.

51 These laws are being reviewed by the NSW Parliament General Standing Committee No. 1. For the terms of reference and timetable of this Inquiry, see: http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/643FEAA31CF01297CA256F64000688E6.

1.3 Discriminatory provisions identified in submissions in relation to which the Committee has refrained from making substantive recommendations in this interim report.

a) Acts that are currently being reviewed by another body

Adoption Act 1984

The *Adoption Act 1984* ('Act') regulates adoption of both Australian-born children and children who were not born in Australia. Section 11 of the Act provides that an adoption order may be made in favour of a man and a woman who have been married or have lived in a de facto relationship for not less than two years,[52] a traditional marriage recognised by an Aboriginal community,[53] or a single person in 'special circumstances'.[54] The Act does not allow for adoption by same sex-couples.

The Committee received a number of submissions arguing that not allowing same-sex couples to apply to adopt discriminates on the grounds of sexual orientation.[55] The Committee also received a number of submissions supporting the exclusion of same-sex couples from eligibility as adoptive parents. The underlying rationale expressed in the submissions that opposed same-sex adoption was the belief that homosexuality is wrong and that placing children with same-sex couples is not in the best interests of the child or in the interests of society as a whole.

The Committee acknowledges that the *Adoption Act*[56] discriminates against same sex couples.

The Committee notes the VLRC has been asked to inquire into the laws relating to Assisted Reproductive Technology and Adoption.[57] The Committee notes that the question of allowing same-sex couples to apply to adopt was specifically raised in the VLRC's consultation paper.[58] As noted above, the Committee considers that, as the terms of reference for the VLRC's review are broader than the scope of the current inquiry, it will not duplicate the review process.

Therefore, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That s 11 of the *Adoption Act 1984* be retained pending review by the Victorian Law Reform Commission.

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[52] Sections 11(1)(a) and (c).

[53] Section 11(1)(b).

[54] Section 11(3).

[55] Submissions 305, 394 and 412.

[56] Section 11.

[57] See footnote 25 for the terms of reference of this inquiry.

[58] Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Consultation Paper,* 20 January 2004, Question 41, p. xxviii.

Births, Deaths and Marriages Registration Act 1996

Recording of parents details on birth certificate

The main purpose of the *Births, Deaths and Marriages Registration Act 1996* ('Act') is to provide for the registration of births, deaths and marriages and changes of names in Victoria. The birth of a child is registered by application by both parents or in some cases one parent only.[59] "Parent" is not defined in the Act.

The Committee received a submission that argued that in its present form the Act would appear to entitle only biological or adoptive parents to be registered on a birth certificate as the parents of a child.[60] The submission argued that this may discriminate against a person who has a parent-like role in relation to the child, but who is not the biological parent of the child, such as the same-sex partner of the biological parent of the child.[61]

The Committee recognises that the inability of a non-biological parent of a child who has not adopted the child to be registered as a parent on that child's birth certificate may prevent that parent establishing an enforceable legal relationship with that child.[62]

The Committee notes that the VLRC has been asked to enquire into the laws relating to Assisted Reproductive Technology and Adoption.[63] The Committee notes that the issue of registration on the birth certificate of the same-sex partner of the birth mother has been identified in the VLRC's discussion paper.[64] As noted above, the Committee considers that, as the terms of reference for the VLRC's review are broader than the scope of the current Inquiry, it will not duplicate the review process.

Therefore, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 15(1) of the *Births, Deaths and Marriages Registration Act 1996* be retained pending review by the Victorian Law Reform Commission.

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59 Section 15(1) allows the birth to be registered by one parent if the Registrar is satisfied that it is not practicable to obtain the signatures of both parents on the birth registration statement.

60 This has been confirmed as the practice of the Births, Deaths and Marriages Registry. Discussion with the Acting Manager, Policy and Legislation, Births, Deaths and Marriages Registry, 19 May 2005.

61 Submission 394.

62 See Victorian Law Reform Commission, 'Assisted Reproductive Technology & Adoption: Consultation Paper', 20 January 2004, 5.5–5.8.

63 See footnote 25 for the terms of reference of this inquiry.

64 Victorian Law Reform Commission, 'Assisted Reproductive Technology & Adoption: Consultation Paper', p. xix.

Evidence Act 1958

Marital privilege in civil cases

The *Evidence Act 1958* ('Act')[65] states that husbands and wives do not have to disclose to a court any communication between them while they were married, other than in criminal proceedings or bail proceedings.[66] The Committee received a submission contending that this discriminates against de facto and same-sex couples.[67]

The Committee considers that the aim of the provision is to protect the privacy of the relationship between husband and wife. There does not appear to the Committee to be any cogent reasons for not extending the same privilege to marriage-like relationships such as de facto and same-sex couples.

The Committee notes that the VLRC is currently conducting a review of the Act.[68] The Committee has been advised that this issue will be covered by the VLRC's review.[69] As noted above, the Committee considers that, as the terms of reference for the VLRC's review are broader than the scope of this Inquiry, it will not duplicate the review process.

Therefore, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 27 of the *Evidence Act 1958* be retained pending review by the Victorian Law Reform Commission.

Religious confessions privilege – the use of gender-specific language

The Act also provides that a 'clergyman' cannot be compelled to disclose a confession made to him in his professional capacity according to the usage of the church or religious denomination to which he belongs without the consent of the person concerned.[70] It was submitted that the term 'clergyman' is gender-specific and should be amended to be gender-neutral.[71] The Committee notes that the provision also refers to 'medical men', which is a similarly gender-specific term.[72]

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65 Section 27.

66 Refer also to discussion under the *Crimes Act 1958*.

67 Submission 364.

68 Victorian Law Reform Commission, *Review of the Laws of Evidence*, referred 22 November 2004. The terms of reference of the Inquiry may be accessed at: http://www.lawreform.vic.gov.au/CA256A25002C7735/All/CE68BBABABC16988CA256F570077F41F?OpenDocument&1=30-Current+projects~&2=85-Evidence~&3=10-Terms+of+Reference~.

69 Phone conversation with VLRC, 25 May 2005.

70 Section 28(1).

71 Submission 364.

72 Section 28.

The Committee further notes that the Scrutiny of Acts and Regulations Committee recommended in its 1996 inquiry into the Act that the medical practitioner privilege be abolished.[73]

The Committee notes that the Act is currently under review by the VLRC.[74] The aim of that review is to bring Victoria's evidence laws in line with the uniform Evidence Act (based on the *Evidence Act 1995* (Cth)). The Committee notes that the language in the Commonwealth *Evidence Act* in relation to the religious confession privilege is gender-neutral.[75] The Committee also notes that the Commonwealth *Evidence Act* does not contain a medical privilege.

Given this, the Committee considers it likely that the issues raised in the submission will be remedied by the recommendations arising from the VLRC's review.

Therefore, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 28 of the *Evidence Act 1958* be retained, pending review by the Victorian Law Reform Commission.

Infertility Treatment Act 1995

The main purpose of this Act is to regulate the use of in-vitro and other fertilisation procedures and donor insemination procedures, and to make provisions with respect to surrogacy agreements.[76]

Most submissions received by the Committee on this Act[77] argued that it discriminates on the basis of sexual orientation and marital status, as it restricts access to infertility treatment to married women and women in heterosexual de facto relationships.[78] The Act requires a woman's husband to consent to the treatment, and refers to the determination of 'infertility' by a doctor as a prerequisite for eligibility to receive assisted reproductive treatment.[79]

The Committee also received a number of submissions arguing that access to assisted reproduction services should be limited to heterosexual, married couples. The arguments are based on the belief that only traditional nuclear families should have the benefit of government funding to assist them to have children.[80]

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73 Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, October 1996.

74 Victorian Law Reform Commission, *Review of the Laws of Evidence*, referred 22 November 2004.

75 Section 127.

76 Section 1.

77 Submissions 75, 394 and 399.

78 Section 8(1).

79 Ss. 8(2) and (3).

80 Submission 346 is an example of such a view.

The Committee acknowledges that the Act discriminates against women on the basis of sexual orientation and marital status. The Committee also notes the Federal Court decision in *Mc Bain v State of Victoria*,[81] in which it was held that the Act breached s 22 of the *Sex Discrimination Act 1984* (Cth), which prohibits discrimination on the grounds of marital status. The court held that the Act is inoperative to the extent that it restricts access to assisted reproductive technology to married and de facto couples.

The Committee notes that the Act is included in the VLRC's Inquiry into Assisted Reproductive Technology and Adoption.[82] The Committee further notes that the VLRC has made an interim recommendation that the marital status requirement be removed.[83]

In light of the specificity of the VLRC's review on this issue, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 8 of the *Infertility Treatment Act 1995* be retained, pending review by the Victorian Law Reform Commission.

b) Acts in relation to which the Committee considers it did not have enough information to make a substantive recommendation

Accident Compensation Act 1985

The Committee received submissions that argued that ss 93E and 93F of the *Accident Compensation Act 1985* ('Act') discriminate on the grounds of age.[84]

One of the objects of the *Accident Compensation Act 1985* is to provide for compensation to injured workers. Section 93E limits the amount of weekly compensation payable to workers injured two years before 'retirement age' to 104 weeks of compensation.[85] 'Retirement age' is defined as the normal retiring age, if there is a normal retiring age for workers in the particular occupation, or the age of 65 years, whichever is the earlier.[86] Section 93F provides that a worker is not entitled to weekly compensation if they are injured after retirement age.

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81 (2000) 117 ALR 320.

82 See footnote 25 for the terms of reference of this inquiry.

83 Victorian Law Reform Commission, *Assisted Reproduction and Adoption Paper One: Access*, 11 May 2005, 2.24.

84 Submissions 410, 412 and 398. Submission 410 also made a further point concerning the provision of WorkCover payments to injured workers. It argued that the *Accident Compensation (Occupational Health & Safety) Act 1996* provides that payments should cease at the age of 65, or the normal retiring age of the worker's occupation, and as such is discriminatory.

85 This entitlement was extended from 52 weeks to 104 weeks in 2004 through the *Accident Compensation Legislation (Amendment) Act 2004.*

86 Section 5.

In introducing the amendment altering section 93E, the Minister for WorkCover stated:

> *Currently, a worker who is injured within 52 weeks of retirement age (generally at age 65), or after retirement age, is only entitled to receive up to 52 weeks of compensation.*
>
> *To address this issue and create greater equity for older workers, the bill proposes to extend the period of entitlement from 52 weeks to 104 weeks for older workers who are injured when they are over 63 years of age.*[87] *This initiative recognises the crucial role older workers play in the work force and that they will continue to play in the future. It signifies the government's respect and recognition of the ongoing contribution of older workers to the Victorian economy.*[88]

The Committee considers that the policy consideration underlying the limitation of entitlements is the extent to which employers should be liable for payment to injured workers. In this regard, the Committee also recognises that there may be higher insurance premiums associated with older workers.

The Committee accepts that the recent amendment sought to put in place a reasonable policy balance by expanding entitlements from 52 to 104 weeks of entitlement. However, the amendment still relies on age (65 years) as the criteria for determining eligibility.

Compulsory retirement was abolished on 1 January 1997.[89] This means that workers do not have to retire at 65 years of age. The abolition of compulsory retirement reflects the community expectation that workers in many industries continue to work beyond the age of 65.

Given the competing policy issues, the Committee considers that further evidence should be sought concerning the economic impact of expanding entitlements to compensation for older workers.

Interim recommendation

That the Committee seek further information through public hearings concerning the reference to the age of 65 in the definition of 'retirement age' in section 5 of the *Accident Compensation Act 1985*.

Crimes Act 1958

The *Crimes Act 1958* ('Act') prescribes offences and sets out the procedure for the conduct of criminal proceedings. The Committee notes that review of the Act by 2007 is a key initiative under the Attorney-General's Justice Statement.[90] However, as this

87 The Committee notes, that although the *Hansard* record refers to '63 years of age', the definition of 'retirement age' in s 5 refers to 65 years of age.

88 *Hansard*, Legislative Assembly, 18 November 2004, p. 1730.

89 On the commencement of the EOA.

90 *Attorney-General's Justice Statement*, 2004, 3.1.01, p. 24.

initiative has not yet been referred to a body, the Committee considers it appropriate to make recommendations in relation to the Act.

The exclusion of same-sex partners for the purposes of the scope of particular crimes

The Committee received a submission arguing that the failure to include same-sex partners for the purposes of the scope of particular crimes under the Act was discriminatory.[91] The identified sections use the terms 'spouse' and 'de facto spouse' to define subjects of the crime, or to exclude spouses from the scope of the crime.[92]

The identified sections encompass the crimes of incest,[93] sexual offences against people with impaired mental functioning[94] and sexual offences against residents of residential facilities.[95]

The definition of the crime of incest uses the term 'de facto spouse'[96] to identify children against whom the crime of incest can be committed.[97]

The Committee considers that the amendment made to the Act to include the children and step-children of a person's de facto spouse for the purposes of defining the crime of incest was to protect children who have child-parent-like relationships from abuse, regardless of whether the parents were married or not. There does not appear to the Committee to be good reason for not extending similar protection to the children and step-children of same-sex couples.

Respectively, ss 51 and 52 of the *Crimes Act 1958* provide for sexual offences against people with impaired mental functioning and against residents of residential facilities.[98] In both sections a 'spouse' or 'de facto spouse' is excluded from the offence. The Committee considers that the policy objective of defining these crimes was to protect vulnerable people from abuse committed by service providers. The exception recognises that certain services may also be provided by spouses. In light of the amendments made by the Relationship Acts, the Committee considers that the extension of the spousal exclusion to same-sex spouses should be examined.

The Committee is of the opinion that it would be useful to hear from legal experts in this area, to ensure that its recommendation does not have any unintended

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91 Submission 412.

92 The Committee notes that the provisions proscribing sexual offences against children (ss 45–49) provide a defense to certain crimes if the act was committed by the child's married spouse. However, these provisions were not identified in the submission.

93 Section 44.

94 Section 51.

95 Section 52.

96 'De facto spouse' is defined in s 35(1) as a person who is living with a person of the opposite sex as though they were married although they are not.

97 Section 44(2).

98 'Residential facility' is defined by s 50 of the *Crimes Act 1958* as meaning 'an approved mental health service defined by section 3 of *Mental Health Act 1986* or premises operated by any person or body (government or non-government) for the purpose of providing residential services to intellectually disabled people'.

consequences. Therefore, the Committee will seek further information on these issues at public hearings.

Interim recommendation

That the Committee seek further information on the potential impact of replacing the definition of de facto spouse in section 35(1) of the *Crimes Act 1958* with a new section defining the term 'domestic partner' as defined in the *Statute Law Amendment (Relationships) Act 2001* and of replacing the term 'de facto spouse' with 'domestic partner' in sections 44(2), 51 and 52 of the *Crimes Act 1958.*

The criminal liability of married persons

The submission also identified sections in the Act relating to the delineation of criminal liability of married persons as discriminating against de facto and same-sex couples.[99] In some of these sections, liability is limited or excepted because of the person's marital status.[100] In one section, liability attaches regardless of marital status.[101]

The Committee considers that the reason behind the definition of such liability in relation to married persons is to protect the marriage relationship. In light of the amendments made by the Relationship Acts, the Committee considers that the extension of such protections to marriage-type relationships, such as de facto and same-sex couples, should be examined.

The Committee is of the opinion that it would be useful to hear from legal experts in this area, in order to ensure that its recommendation does not have any unintended consequences. Therefore, the Committee will seek further information on these issues at public hearings.

Interim recommendation

That the Committee seek further information at public hearings on the potential impact of extending the delineation of criminal liability of married persons in sections 337, 338 and 339 of the *Crimes Act 1958* to de facto and same-sex spouses.

Discretion to grant exemption to spouses as witnesses

The Committee received two submissions that argued that the discretionary provisions enabling husbands and wives to be exempt from acting as witnesses against their spouses[102] were discriminatory, in that the discretion did not extend to enable de facto or same-sex partners to be similarly exempt.[103]

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99 The submission refers to ss 337, 338 and 339.

100 Sections 337, 338 and 339(2).

101 Section 339(1).

102 Subsections 400(3)–(6).

103 Submission 394 and 412.

The Committee considers the purpose of the discretion to exempt certain witnesses from giving evidence is the protection of spousal and familial relationships.[104] The Committee notes that there is a discretion to exempt such witnesses and that courts need to consider a number of criteria to determine whether a particular exemption is to be permitted.[105] In light of the amendments made by the Relationship Acts, the Committee considers that the extension of the discretion to marriage-type relationships, such as de facto and same-sex couples, should be examined.

The Committee is of the opinion that it would be useful to hear from legal experts in this area, to ensure that its recommendation does not have any unintended consequences. Therefore, the Committee will seek further information on these issues at public hearings.

Interim recommendation

That the Committee seek further information at public hearings on the potential impact of extending the discretion to exempt married spouses as witnesses in section 400 of the *Crimes Act 1958* to include de facto and same-sex spouses.

Guardianship and Administration Act 1986 and *Children and Young Persons Act 1989*

The *Children and Young Persons Act 1989* ('CYPA'), among other things, allows protection orders to be made for children who are under the age of 17 years.[106] A young person subject to a protection order obtained before they turn 17 is covered by the CYPA until they turn 18.[107] However, because of the way in which 'child' is defined under the CYPA, an application for a protection order cannot be made for a young person after they turn 17.

The *Guardianship and Administration Act 1986* provides for the care and protection of people with a disability that affects their decision-making capacity. The Act enables a guardian or administrator to be appointed for a person who is 18 years or older.[108]

The Committee received a submission arguing that the interaction of these two Acts leaves a gap in coverage in relation to a young person who has turned 17 years, but who is not yet 18 years of age. It was contended that this gap may discriminate against 17-year-olds with a disability in relation to whom no protection order had been made prior to them attaining 17 years of age, but who are in need of a guardian or administrator.[109]

104 Subsection 400(3) also enables the court to exempt a parent or child of the accused from giving evidence for the prosecution in certain circumstances.

105 Section 401(4).

106 Section 84.

107 Section 3 defining the term 'child'.

108 Section 19(1).

109 Submission 161.

In view of the objectives of these two Acts, the Committee considers that there may be an unintended lacuna, or gap in the statutory protections for a person who has turned 17 but is under 18 years of age.

The Committee notes that the CYPA is currently under review by the Department of Human Services, and understands that the protection needs of a 17-year-old person with a disability may be under consideration in the review.[110]

The Committee considers that the legislative gap may be remedied by either amending the definition of 'child' in the CYPA for the purposes of the application for protection orders, or by lowering the minimum age in relation to which an application for guardianship or administration under the *Guardianship and Administration Act 1986* may be made from 18 to 17 years old.

The Committee considers it would be useful to have the benefit of expert advice in relation to which solution may be more appropriate. It will therefore seek further information at public hearings.

Interim recommendation

That the Committee seek further information at public hearings about the most suitable way to address the legislative gap in relation to the provision of protection, guardianship or administration orders, in relation to young people who are 17 but under 18 years of age.

Liquor Control Reform Act 1998

The Committee received submissions relating to provisions of the *Liquor Control Reform Act 1998* ('Act') that restrict the circumstances in which alcohol may be supplied to a person under the age of 18,[111] limit access to licensed premises[112]and create offences for the purchase and consumption of alcohol to persons under the age of 18 years.[113] The Act provides exceptions where the person under the age of 18 years is in the company of their parent or guardian, or their married spouse who is over the age of 18 years and where the alcohol is being consumed as part of a meal.[114]

The Committee received submissions[115] asserting that the limitation of this exception to people who have married spouses discriminates against de facto and same-sex couples. The Committee notes that an amendment to the Act in 2004 inserted a definition of 'spouse' in the Act as meaning 'a person to whom the person is married'.[116] The Committee received advice from the Minister of Consumer Affairs[117]

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110 Protecting children: ten priorities for children's wellbeing and safety in Victoria – technical options paper, August 2004, see: http://hnb.dhs.vic.gov.au/commcare/ccdnav.nsf/fid/-95C11ECF83AD6050CA256F080010CFDA/$file/pc_tech_options.pdf.

111 Section 119(5).

112 Section 120.

113 Section 123.

114 Sections 119(5) and 123(2)(a).

115 Submission 394 and 412.

116 *Liquor Control Reform (Underage Drinking and Enhanced Enforcement) Act 2004,* s 9.

that the definition of 'spouse' was deliberately narrowly defined as a measure to limit under-age drinking.

The Committee considers that the purpose of the exception in the Act is to allow people under the age of 18 to consume liquor with a meal in the context of a family gathering.

Given that the amendment was recent and in light of the advice received from the Minister, the Committee considers it would be useful to receive further evidence as to the implications of extending the under-age drinking exception to include adult de facto and same-sex partners.

Interim recommendation

That the Committee seek further information at public hearings as to the implications of extending the under-age alcohol exceptions to persons under 18 years who are in the company of their adult spouse, to include adult de facto and same-sex partners.

Property Law Act 1958

The Committee received a submission that concerned Part V of the *Property Law Act 1958* ('Act'),[118] which provides a process for identifying lineage in property law proceedings that concern inheritance.[119] It was argued that inheritance of property as regulated under Part V of the Act is discriminatory in that it is based on the 'male line' and therefore discriminates against women.

Part V of the *Property Law Act* concerns the identification of the common law 'heir-at-law'. These provisions identified inheritors before the introduction of the statutory next-of-kin. The identification of the common law heir-at-law has become less and less relevant as time has gone on. In NSW, subject to an express contrary intention,[120] the term 'heir' is considered to be the same as statutory next-of-kin for the purposes of identifying inheritors in cases of intestacy.[121] In Victoria, the equivalent provision in the *Administration and Probate Act (Vic) 1958*[122] makes no reference to the term 'heir'. This is possibly because the term 'heir' has now lost all relevance in Victoria.[123]

However, the Committee acknowledges that provisions relating to old ways of defining inheritors may need to be retained for the purposes of the preservation of particular titles to real property.

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117 Correspondence from the Minister for Consumer Affairs, 17 May 2005.

118 Sections 241–246.

119 Submission 394.

120 Section 33(2).

121 *Conveyancing Act 1919* (NSW), s 33.

122 Section 56.

123 Email correspondence with Legal Officer for the Uniform Succession Law project, NSW Law Reform Commission, 5 May 2005.

Interim recommendation

That the Committee seek further information through public hearings as to whether it is necessary to retain Part V of the *Property Law Act 1958*.

2. Submissions relating to provisions in Acts that may have a discriminatory impact on some groups because of the way in which they operate in practice

The Committee received a number of submissions concerning Acts that did not contain discriminatory provisions, but which may have a discriminatory impact on some groups because of the way in which they operate in practice. For example, people with particular types of disabilities and indigenous peoples suffer systemic disadvantage in a range of areas including economic, social and health. Therefore laws criminalising drinking in public places or the use of drugs are likely to impact more on these groups than other groups.

Where this is the case, the Committee has attempted to examine how these laws impact on particular groups, in order to determine whether amending the law could address the problem and, if so, whether it is reasonable to amend the law in light of the purpose of the law. In some instances the Committee recognises the discriminatory impact, but considers that this impact cannot be adequately addressed through law reform. Rather, the Committee considers broader social and other reforms may be appropriate to ameliorate the discriminatory impact.

The submissions in this section have been further categorised according to the type of recommendation made.

Category:

2.1 provisions identified in submissions that have a discriminatory impact and which the Committee considers may reasonably be amended

2.2 provisions identified in submissions that have a discriminatory impact, but which the Committee considers do not require amendment

2.3 submissions in relation to provisions in Acts that appear to have a discriminatory impact, but in relation to which the Committee has refrained from making substantive recommendations in this report. This is because

a) the submissions are in relation to Acts which are currently being reviewed by another body. The Committee has decided that, as the Terms of Reference for the review of these Acts by the other bodies are broader than the scope of the current Inquiry, it will not duplicate the review process.

As a result, the Committee has recommended that the discriminatory provisions be retained pending the outcome of the other review, or

b) the submissions are in relation to Acts about which the Committee considers it did not have enough information to make a substantive

recommendation. The recommendation in relation to these submissions is that further information be sought at the public hearings.

2.1 Provisions identified in submissions that have a discriminatory impact and which the Committee considers may reasonably be amended

Summary Offences Act 1966

The Committee received a submission asserting that the public drunkenness offences in the *Summary Offences Act 1966*[124] indirectly discriminate against people on the grounds of mental illness, as public drunkenness is often closely bound to mental illness and homelessness. They argued that such offences should be abolished.[125] The Committee received a separate submission contending that the public drunkenness provisions of the *Summary Offences Act 1966* may indirectly discriminate against Indigenous Australians.[126] The submission argued that public order laws, and the manner in which they are enforced, lead to indirect discrimination against Indigenous Australians. It was submitted that Aboriginal people are more likely to be poor, more likely to congregate in public places due to lack of alternatives and therefore are more likely to be over-policed.

The Committee notes that, in 2001, the Scrutiny of Acts and Regulations Committee reported on its review of the *Summary Offences Act 1966.*[127] The Drugs and Crime Prevention Committee also conducted a report into public drunkenness and issued its final report in June 2001.[128] Both Committees recommended decriminalisation of public drunkenness offences, by repealing ss 13, 14 and 16 of the *Summary Offences Act 1966* and the enactment of new laws that would enable intoxicated persons to be detained on a civil rather than criminal basis. Both committees also proposed that such legislation should form only one part of a wider program to manage intoxicated people and that programs such as 'sobering up centres' to detain and treat people found intoxicated in public places should be established before any move to decriminalise public drunkenness took effect.

The Committee supports such reforms.

Interim recommendation

That sections 13, 14 and 16 of the *Summary Offences Act 1966* be retained until a new regime for management of public drunkenness has been enacted, at which point the sections should be repealed.

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124 Sections 13, 14 and 16.

125 Submission 370.

126 Submission 391.

127 Victorian Parliament Scrutiny of Acts and Regulations Committee, *Review of Redundant and Unclear Legislation, Inquiry into the Summary Offences Act 1966*, November 2001, accessed at: http://www.parliament.vic.gov.au/sarc/Summary%20Offences/soafintoc.htm.

128 Victorian Parliament Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness, Final Report*, June 2001.

2.2 Provisions identified in submissions that have a discriminatory impact, but which the Committee considers do not require amendment

Magistrates' Court Act 1989

The Committee received submissions arguing that the ways in which infringement penalties are enforced through the Procedure for Enforcement of Infringement Penalties (PERIN) system under Schedule 7 of the *Magistrates' Court Act 1989* ('Act') indirectly discriminates against people with a mental impairment[129] and Indigenous Australians.[130] The submissions noted the over-representation of people with mental illness and Indigenous Australians, respectively among those incurring large numbers of fines for petty infringements. The submissions identify low socio-economic backgrounds and homelessness as the reasons for the over representation.

The submission in relation Indigenous Australians contends that the infringements system contributes to the over representation of indigenous people in prison as a result of inability to pay fines.

The Committee notes that once a person fails to pay an infringement fine after the issuing of a courtesy letter, the infringement is registered at the PERIN court. If the person still fails to pay, a warrant is issued which allows a Sheriff to seize property to sell to pay for the outstanding fine. If the person does not have enough property to cover the amount of the fine, the person will have to perform community service as ordered by the court. If they are unwilling to perform community service, they are taken before a magistrate who decides on a sentence, unless the person has a mental disorder, intellectual impairment, brain injury, dementia, or is experiencing other exceptional circumstances.

The PERIN system is automated, so that once the infringement is registered a warrant is automatically issued. However, section 10A of Schedule 7 of the Act which was added in 2000, provides that a registrar may revoke an enforcement order on his or her own initiative, or refer the matter for hearing by a magistrate of the PERIN court.

In addition to revocation by a registrar or by a magistrate, since 2002, the Magistrate's Court has run a diversion program called the Enforcement Review Program (ERP) that aims to assist the court by identifying people with PERIN orders with a severe physical or intellectual disability, or those with a diagnosed mental illness. The ERP refers the PERIN orders of eligible persons to the Registrar to be revoked and refers the matters to a magistrate's court Special Circumstances List for more appropriate disposition.[131]

The Committee notes that the ERP currently covers people with a diagnosed mental illness, but does not cover Indigenous Australians. However, the Department of Justice's *Annual Report for 2003–04* refers to an initiative looking at broadening the (ERP) to cover people experiencing homelessness and drug addiction. The Report

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129 Submission 370.

130 Submission 391.

131 Magistrate's Court of Victoria, *Annual Report 2003–04*, p. 49.

states that 'the project is also taking a whole-of-government, whole-of-community approach to determine how the infringement notices system could operate more effectively, consistently and fairly across the community'.[132] The Department of Justice's submission to the Victorian Parliament Law Reform Committee's Inquiry into Warrants has further information on the review program.[133] It explains that the purpose of the review of the ERP is to 'establish common principles to guide infringement policy, ensure the protection of the disadvantaged (primarily by ensuring alternatives to their entering the infringements system in the first place), improve infringement processes, expand the system where appropriate and establish overarching legislation (such as an Infringements Act).'[134]

The Committee considers that there are important policy reasons supporting the retention of an infringements regime.

The Committee considers that the consideration being given to the broadening and improvement of the ERP is likely to address the issues raised in the submissions.

Interim recommendation

That Schedule 7 of the *Magistrates' Court Act 1989* be retained.

Police Regulations 2003

The *Police Regulations 2003* ('Regulations') are made pursuant to the *Police Regulation Act 1958*.[135] The objective of these Regulations is to provide for the employment of members of the police force, protective services officers and police reservists, and to provide for the operation of the Police Appeals Board.[136]

Transfer of police members

The Committee received a submission arguing that the regulation providing that a member of the police force is liable to immediate transfer to any part of the State[137] may discriminate against people with an impairment, or because of marital status, parental status or status as a carer.[138] The submission explains that this provision is often relied upon by the police force to compulsorily transfer newly confirmed recruits to 'difficult-to-fill' positions usually in remote rural areas.

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132 Department of Justice, *Annual Report 2003–04,* p. 48.

133 Department of Justice, *Submission to the Law Reform Committee's Inquiry into Warrants Powers and Procedures*, 31 December 2004 accessed at: http://www.parliament.vic.gov.au/lawreform/Warrant/Submissions/Submissions%20in%20PDF%20format/38%20department%20of%20justice.pdf.

134 Department of Justice, *Submission to the Law Reform Committee's Inquiry into Warrants Powers and Procedures*, 31 December 2004, p. 6.

135 The Regulations are made under sections 118, 118K, 120 and 130 of the *Police Regulation Act 1958*.

136 Regulation 1.

137 Regulation 21(1).

138 Submission 56.

The Committee recognises that it may be more difficult for a person with a particular type of disability or people with caring responsibilities to move to remote areas than people who are not in such positions. However, the Committee considers that the policy reason behind this regulation is to ensure that the police force is adequately staffed, and thus considers it reasonable in the circumstances.

Interim recommendation

That Regulation 21(1) of the *Police Regulations 2003* be retained.

2.3 Submissions in relation to provisions in Acts that appear to have a discriminatory impact, but in relation to which the Committee has refrained from making recommendations in this interim report

a) Submissions in relation to Acts which are currently being reviewed by another body

Bail Act 1977

The Committee received a submission that argued that the operation of the *Bail Act 1977* ('Act')[139] may lead to discrimination against indigenous peoples.[140] The provisions of the Act outline factors to be assessed in considerating of whether there is an 'unacceptable risk' that the accused would not show up at court, would commit an offence while on bail, endanger the safety or welfare of members of the public, interfere with witnesses, or otherwise obstruct the course of justice. Where a judge or magistrate considers there is an 'unacceptable risk', they may refuse bail.[141]

It was submitted that the Act[142] allows for very broad discretion and that this fact is likely to disadvantage people who do not have legal representation. It was submitted that a lack of legal representation combined with the over-representation of indigenous people charged with lower-order offences in the criminal justice system may lead to discrimination against indigenous peoples.

The Committee acknowledges the over-representation of indigenous peoples in the criminal justice system.

The Committee notes that the VLRC has received terms of reference from the Attorney-General to review the *Bail Act 1977.*[143] The terms of reference include a

[139] Section 4(3).

[140] Submission 364.

[141] Section 4(2)(d)(i).

[142] Section 4(3).

[143] For the terms of reference of the VLRC Inquiry see: http://www.lawreform.vic.gov.au/CA256A25002C7735/All/B5C69AF21DF55C03CA256F570077F483?OpenDocument&1=30-Current+projects~&2=86-Bail~&3=10-Terms+of+Reference~. The review of the *Bail Act 1977* forms part of the review of criminal law and procedure under the *Attorney-General's Justice Statement* 2004, 3.1.01, p. 24. The other Acts to be reviewed as part of criminal law and procedure reforms are the *Crimes Act 1958* and the *Evidence Act 1958*

review of the way in which the current bail system operates in practice to ensure that it is consistent with the overall objectives of the criminal justice system, including the presumption that a person accused of an offence should normally be granted bail, except in circumstances specified in the Act.[144] In conducting the review, the Commission is asked to have regard to the fact of over representation of indigenous peoples on remand and the needs of marginalised and disadvantaged groups, including Indigenous Australians and the impact of the bail system on people in those groups.

In light of the specificity of the VLRC's review on this issue, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 4(3) of the *Bail Act 1977* be retained, pending review by the Victorian Law Reform Commission.

Coroners Act 1985

The purpose of the *Coroner's Act 1985* ('Act') is, among other things, to establish the office of the State Coroner and require the reporting of certain deaths.[145]

The Committee received a submission that argued that the Act discriminates against members of the Indigenous community in that it excludes people, other than 'senior next of kin', from objecting to an autopsy. 'Senior next of kin' is defined in the Act to mean the domestic partner, son or daughter, parent, brother or sister, or a personal representative of the deceased.[146] It was argued that the Act should be amended to allow Aboriginal elders and respected persons to object to the performance of an autopsy, in recognition of the relevance of cultural objections to autopsy.[147]

The Committee notes that the relevant Acts in Tasmania, ACT, Northern Territory and Queensland recognise indigenous familial relationships within their definitions of 'senior next of kin' for the purposes of objecting to autopsy.[148] The NSW Act allows people other than the senior next of kin to object to an autopsy.[149]

The Committee notes that allowing objection to autopsy does not necessarily mean that an autopsy will not be carried out. If the coroner decides that an autopsy should be carried out, the 'senior next of kin' can make an application to the Supreme Court for an order preventing the autopsy. The Supreme Court may make an order preventing the autopsy if it is satisfied that it is desirable in the circumstances.[150]

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144 The circumstances are contained in s 4.

145 Section 1.

146 Section 29(5).

147 Submission 391.

148 *Coroners Act 1995* (Tas), s 3: Definition of senior next of kin, *Coroners Act 1997* (ACT), s 3: Definition of 'immediate family member', *Coroners Act 1993* (NT), s 3: Definition of senior next of kin, *Coroners Act 2003* (Qld), schedule 2: Definition of 'ATSI family member'.

149 *Coroners Act 1980* (NSW), s 48B.

150 *Coroners Act 1985*, s 29(4).

However, the Supreme Court may not make such an order, in which case, the autopsy will be conducted.

The Committee notes that the VLRC is currently conducting an inquiry into the *Coroners Act 1985* and that similar questions have been identified in the discussion paper.[151] In light of the specificity of the VLRC's review in relation to this issue, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That section 29(3) of the *Coroners Act 1985* be retained, pending review by the Victorian Parliament Law Reform Committee.

Evidence Act 1958

The swearing of oaths

The Committee received a submission that argued that the provisions relating to the swearing of oaths in ss 100 and 101 of the *Evidence Act 1958* (the 'Act') discriminate against people other than Christians.[152]

The submission suggested that the Act be amended to provide for a standard affirmation or solemn promise to be administered to all persons, regardless of their religious beliefs.

The Committee notes that the Act also allows the oath to be administered in a manner appropriate to the religious beliefs of the person swearing it. The source of law for such alternative forms of oath appears as: 'Any oath may be administered in any manner which is now lawful'.[153] However, the Committee notes that not all religions approve of oath taking, and attempts to translate the oath in some cultures is inappropriate.[154]

The Committee notes the issue of oaths and affirmations was reviewed by the Victorian Parliament Law Reform Committee in 2002.[155] The Law Reform Committee noted that 'the risk of the witness's choice of oath or affirmation being viewed with unjustified suspicion by the court has long been one of the central objections to retaining a religious oath'.[156] The Committee notes that, after reviewing the options for reform, the Law Reform Committee's preferred option was to keep both the religious oath and the affirmation, but to remove the precedence of the religious oath to ensure the religious oath and the affirmation are equal.[157] This is the

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[151] Victorian Parliament, Law Reform Committee, *Coroner Act 1985: Discussion Paper*, April 2005, Question 37(c).

[152] Submission 394.

[153] Section 100(4).

[154] Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community, Final Report,* October 2002, pp. 79-83.

[155] Ibid. .

[156] ibid, p. 205.

[157] ibid, p. 228.

model used in the Commonwealth *Evidence Act 1995*,[158] the NSW *Evidence Act 1995*, the Tasmanian *Evidence Act 2001* and the South Australian *Evidence Act 1929*.[159]

The Law Reform Committee also recommended that the Act be amended to remove the requirement to swear on a religious text, as is provided in the *Evidence Act 1995* (Cth).[160] The Committee notes that this reform was also recommended by the Australian Law Reform Commission in a review of the *Evidence Act 1929* (Cth) conducted in 1985.[161]

The Committee notes that the VLRC is currently conducting an inquiry into the Act, and similar questions have been identified in the discussion paper.[162] The Committee also notes that the VLRC inquiry follows on from a review of the Act by the Scrutiny of Acts and Regulations Committee in 1996, with a view to considering whether the *Evidence Act 1995* (Cth), as a model for uniform legislation, was appropriate for enactment in Victoria.[163] The Committee notes that the Scrutiny of Acts and Regulations Committee recommended that Part IV of the Act, which includes ss 100 and 101, be retained and moved to another Act where appropriate.[164] However, the Committee notes that the Scrutiny of Acts and Regulations Committee's Inquiry focused on 'a consideration of the suitability for adoption in Victoria of the *Evidence Act 1995* (Cth), rather than independent consideration of the *Evidence Act 1958* (Vic)'.[165] The Committee therefore considers that any consequent recommendation for amendment is not at cross-purposes with the 1996 inquiry recommendation in relation to Part IV of the Act.

In light of the specificity of the VLRC's review in relation to this issue, the Committee will refrain from making a substantive recommendation in this report.

Interim recommendation

That sections 100 and 101 of the *Evidence Act 1958* be retained, pending review by the Victorian Law Reform Commission.

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158 *Evidence Act 1995* (Cth), s 23.

159 Parliamentary Law Reform Committee*, Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, Final Report, October 2002, p. 58.

160 *Evidence Act 1995 (Cth)*, Section 24(1). See also Victorian Parliament, Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, *Final Report*, October 2002, Recommendation 19, 230.

161 Parliamentary Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community, Final Report*, October 2002.

162 The terms of reference of the VLRC inquiry can be found at: http://www.lawreform.vic.gov.au/CA256A25002C7735/All/CE68BBABABC16988CA256F570077F41F?OpenDocument&1=30-Current+projects~&2=85-Evidence~&3=10-Terms+of+Reference~.

163 For the terms of reference of the Scrutiny of Acts and Regulations Committee Inquiry, see: http://www.parliament.vic.gov.au/sarc/Evidence%20Report/evidence_act.htm.

164 Scrutiny of Acts and Regulations Committee, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, October 1996, Recommendation 2(l).

165 Ibid, Introduction.

Vagrancy Act 1966

The Committee received a submission asserting that the offence of begging[166] indirectly discriminates against people on the grounds of mental illness, as begging is often closely bound with mental illness and homelessness. The submission argued that such offences should be abolished.[167] The Committee notes its report on the *Vagrancy Act 1966* (the 'Act'), recommending the Act be repealed in its entirety, as many of the offences had been subsumed by other Acts.[168]

The Committee noted that at the time there had been relatively little research conducted into the issue of begging in Victoria, and recommended that further research be conducted before a just and comprehensive solution to the problem of begging can be formulated that deals with the complex relationship between begging and homelessness, drug and alcohol dependence, long-term unemployment, gambling, crime and psychiatric and physical disability.[169]

The Committee notes that Homeless Person's Legal Clinic has recently completed detailed research into the policy options for effectively reducing begging in Melbourne.[170] The research provides clear evidence of the link between begging and mental illness.[171] The report also notes the reigniting of interest in the issue of begging in Melbourne in early 2005 and the Government's apparent response to that interest.[172] The report notes that –

> *On 17 February 2005, seemingly responding to public pressure, the Victorian Government announced that it had no intention of decriminalising begging but would instead re-enact it as a criminal offence punishable by imprisonment in the Summary Offences Act 1966 (Vic) following the repeal of the Vagrancy Act.*[173]

The Committee also notes that Crime Prevention Victoria has canvassed the option of 'dispersal legislation' to enable police to direct people engaged in anti-social behaviour (including begging) to 'move on'.[174]

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[166] Section 6(1)(d).

[167] Submission 370.

[168] Scrutiny of Acts and Regulations Committee, *Review of Redundant and Unclear Legislation, Inquiry into the Vagrancy Act 1966, Final Report*, September 2002. The report can be accessed at http://www.parliament.vic.gov.au/sarc/Vagrancy/Final_report.htm.

[169] Ibid., pp. 14–16.

[170] Public Interest Law Clearinghouse Homeless Person's Legal Clinic, *We Want Change: Joining up Public Policy and Management to Respond to Begging in Melbourne*, April 2005. This document is due to be released publicly in June 2005. A copy was advanced to the Committee by the author.

[171] Ibid., p. 5; '71 per cent of people who beg have a mental illness, including 12 per cent who have an intellectual disability and 12 per cent who have a physical disability'.

[172] Ibid., p. 11.

[173] Ibid. citing Farrah Tomazin and Jewel Topsfield, 'Doyle Wants Beggars Off Streets in Time for Games' *The Age* (Melbourne) 17 February 2005.

[174] Crime Prevention Victoria, Inner City Entertainment Precincts Taskforce *A Good Night for All*, p. 41.

The Committee considers that, given a number of policy and law reform options are currently being considered in relation to the issue of begging, it will refrain from making a substantive recommendation on this submission in this report.

Interim recommendation

That section 6(1)(d) of the *Vagrancy Act 1966* be retained, pending the outcome of further policy and law-reform developments on the issue.

b) Submissions in relation to which the Committee considers it did not have enough information to make a substantive recommendation

Residential Tenancies Act 1997

The *Residential Tenancies Act 1997* ('Act') regulates the legal relationship between tenants and landlords by setting out their rights and duties and providing a mechanism for resolving disputes between these parties through the Victorian Civil and Administrative Tribunal.[175] The Act's coverage does not extend to 'health and residential services'.[176] This means that special accommodation services for people with physical, mental or intellectual disabilities, as well as some other groups, are not covered by the Act. In some of these types of accommodation, including community residential units, residents pay rent and, apart from the support they receive, reside under the same conditions as any other tenant. The Committee notes that there are approximately 4,400 people with a disability living in community residential units.[177] The Committee notes that people with a disability who live in private rental accommodation or public housing have their rights protected by the *Residential Tenancies Act 1997*.

The Committee received submissions[178] arguing that excluding certain types of accommodation, for example, community residential units or community care units, discriminates against people with a disability since people living in such accommodation have no clear mechanism by which they can pursue their tenancy rights.

The Committee notes a recent review undertaken by the Department of Human Services recommended that the current legislation be amended to bring health and community residential units within the protection of the Act.[179] However, the Committee also considers that there may be unintended and arguably onerous burdens that could flow from such a legislative change. Such consequences may include

175 *Residential Tenancies Act 1997*, s 1.

176 Section 23 excludes 'health or residential services' as defined under s 3 of the *Residential Tenancies Act 1997*.

177 Department of Human Services, *Annual Report 2002–2003*, Melbourne, p. 84.

178 Submissions 370 and 404,

179 *Review of Disability Legislation: Report of Recommendations,* October 2004. See: http://hnb.dhs.vic.gov.au/ds/disabilityimages.nsf/Downloads/review_of_disability_legislation/$File/review_of_disability_legislation.pdf.

burdens placed on care provided and a restriction on services and access to services for people with a disability and high care needs.

The Committee will therefore seek further evidence at public hearings.

Interim recommendation

That the Committee seek further information through public hearings concerning the operation of section 23 of the *Residential Tenancies Act 1997* that excludes health and residential services.

Chapter 3
Section 69

The Committee received a number of submissions regarding section 69 of the *Equal Opportunity Act 1995* (EOA). This section allows discrimination in other Acts if the discrimination is necessary to comply with the other Act, or is authorised by another Act. This chapter discusses the link between ss 69 and 207 and outlines some of the ways in which required or intended discrimination in other Acts is accommodated in other jurisdictions. Against the background of these other models and a consideration of the efficacy of the current provisions in the EOA, the Chapter looks at the options of retaining, amending or repealing ss 69 and 207 of the EOA.

The link between sections 69 and 207 of the *Equal Opportunity Act 1995*

The sections provide –

> ***69. Things done with statutory authority***
>
> *(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of –*
>
> *(a) an Act, other than this Act;*
>
> *(b) an enactment,*[180] *other than an enactment under this Act.*
>
> *(2) For the purposes of sub-section (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.*
>
> ***207. Review of Victorian legislation***
>
> *The Minister must cause a review of all Acts and enactments (other than municipal council by-laws or local laws) to be undertaken for the purposes of identifying provisions which discriminate, or may lead to discrimination, against any person.*

Section 69 effectively places the EOA at the base of the legislative hierarchy in the sense that any other Act that discriminates, or that authorises discrimination, will override the EOA.

[180] 'Enactment' is defined in s 4 of the EOA to mean 'a rule, regulation, by-law, local law, Order in Council, proclamation or other instrument of a legislative character'.

The Committee recognises that in some cases it is necessary for provisions in other Acts to over ride anti-discrimination laws. The Committee considers that these cases should be limited to provisions that are based on sound policy.

The Committee notes that similar provisions to both ss 69 and 207 existed in the repealed *Equal Opportunity Act 1984* (the 'repealed Act'), which the current EOA replaced.[181] The reasons for the existence of those provisions were examined in the Scrutiny of Acts and Regulations Committee's 1993 review of the repealed Act.[182]

In its final report on the review of the repealed Act, the Committee noted that the intention of the then section 39(e) was for it to operate while a thorough review of legislation was conducted (pursuant to section 16(2)) to identify discriminating provisions.[183] The influence of that review on the form and content of the current EOA is evident, and the Committee considers that the inclusion of ss 69 and 207 in the EOA effectively re-enact the same or similar provisions found in the repealed Act.

The Committee received submissions that argued that s 69 should now be amended or repealed.

The Committee has decided to consider these submissions and alternative models to the statutory compliance exemption provided by s 69.

Options for reviewing Acts that discriminate

The current section 207 of the EOA is one mechanism for reviewing Acts that discriminate. Other jurisdictions have adopted different ways of dealing with Acts that are inconsistent with anti-discrimination principles.

This section sets out the various options:

1.1 Retain ss 69 and 207.

1.2 Narrow the scope of s 69.

1.3 Repeal or 'sunset' s 69 and rely on the normal rules of statutory interpretation.

1.4 Repeal or sunset section 69 and provide a front-end review mechanism.

1.1 Retain sections 69 and 207

The Committee's 1993 report on the *Equal Opportunity Act 1984* concluded that there was no reason to retain the statutory compliance exemption, and that once a review was completed the exemption should be partially or wholly repealed.[184] The Committee recommended that the new EOA should require the Department of Justice

[181] In the *Equal Opportunity Act 1984*, s 39(e) provided a statutory compliance exemption similar to s 69 of the current EOA and s 16(2) provided a review mechanism similar to s 207 of the current EOA.

[182] Scrutiny of Acts and Regulations Committee, *Review of the Equal Opportunity Act 1984, Final Report*, November 1993 ('1993 report').

[183] Scrutiny of Acts and Regulations Committee, *1993 report*, p. 38.

[184] Ibid.

to undertake a review of all Victorian Acts and Regulations within 18 months and identify discriminatory provisions that should either be repealed or exempted.[185]

In light of the Committee's 1993 report and recommendations, it could be argued that s 69 was only intended to operate in its current form until such time as a review was conducted under s 207.

The onerous nature of the s 207 review mechanism may support the conclusion that it was not intended as a permanent measure. In the methodology section in Chapter 1 of this Report, the Committee provided reasons for relying on public submissions as a way of conducting the review. The Committee acknowledged that such a methodology did not allow for an exhaustive review of all Victorian Acts. However, the Committee considered that an Act by Act review was beyond its capacity, given the limited time and resources available to conduct the current review. In its 1993 report, the Committee noted that in the 9 years since the enactment of the *Equal Opportunity Act 1984,* no review had taken place due to constraints on the Commissioner's[186] time and resources.[187]

The Committee also considers that the experience of the New Zealand Human Rights Commission in attempting to conduct a similar review (although in a very different manner) supports the conclusion that a review mechanism such as s 207 is not the most effective way to ensure compliance with anti-discrimination laws.

The *Human Rights Act 1993* (NZ) contained a statutory compliance exemption,[188] which expired on 31 December 2001.[189] The purpose of this exemption was to allow for a review of all Acts, regulations, policies or administrative practices of the Government of New Zealand.[190] The review, called the Consistency 2000 project, commenced in 1996, but was abandoned, incomplete, in 1997. The Consistency 2000 project involved many public sector staff who were first trained in human rights principles, and then directed to self-audit or examine their department's legislation, policies and administrative practices. Their 'batches' of self-audit information were then passed on to the Human Rights Commission.[191] The reason cited by the Government for abandoning the review was that it was too onerous.[192]

185 Scrutiny of Acts and Regulations Committee, Ibid, Recommendation 15, p. 38.

186 Section 16(2) of the EOA 1984 required that the Equal Opportunity Commissioner undertake the review.

187 Scrutiny of Acts and Regulations Committee, *1993 report*, p. 37.

188 Section 151 which was repealed by s 49 of the *Human Rights Amendment Act 2001*.

189 The initial expiry date was December 1998. This was extended to December 1999 and extended again to December 2001.

190 Subsections 5(i)–(k).

191 Department of Justice, *The Human Rights Act 1993: Guidelines for Government Policy Advisers*, March 2002, accessed at: http://www.justice.govt.nz/pubs/reports/2000/hr_act/background.html#Consistency%202000%20project.

192 Churches Agency on Social Issues, *Broadsheet Issue 60: New Zealand's Human Rights and International Reputation at Risk*, October 1997 accessed at: http://www.casi.org.nz/broadsheet/con2000.html.

In December 2001, after the expiry of the statutory compliance exemption, the New Zealand Cabinet agreed to a new auditing process for improving the compliance of legislation and Government policies and practices with the HRA. The process, known as Compliance 2001, was managed by the Ministry of Justice, but was not intended to be a revival of the previous Consistency 2000 process. Significantly, there is no reporting requirement and the decision as to how to deal with issues of inconsistency are determined by each government department.[193]

Based on both legislative intent and the onerous nature of a review under s 207, the Committee will seek further information through public hearings as to whether it is appropriate to retain ss 69 and 207 in their current form.

1.2 Narrow the scope of section 69

The Committee notes that other State and Federal anti-discrimination laws also provide statutory compliance exemptions.

Northern Territory[194] and Queensland[195] laws allow for discrimination 'that is necessary to comply with, or is specifically authorised by' another Act. The New South Wales[196] and Australian Capital Territory[197] laws allow for discrimination that is 'necessary to comply with' any other Act. The Tasmanian law allows discrimination that is 'reasonably necessary' to comply with another law.[198] The *Disability Discrimination Act 1992* (Cth)[199] and *Age Discrimination Act 2004* (Cth)[200] allow for discrimination in 'direct compliance' with another Act.[201]

The Committee also notes that s 39(e) of the *Equal Opportunity Act 1984* (Vic) (the repealed Act) allowed for discrimination 'necessary to comply with' any other Act.

The Committee notes that the scope of the statutory compliance exemption in other State and Federal anti-discrimination laws and in the repealed Act is narrower than in s 69. A number of submissions received by the Committee[202] argued that the breadth of s 69 undermines the educational function of the EOA by subordinating it to all other legislation.

[193] See: http://www.hrc.co.nz/index.php?p=412&format=text.

[194] *Anti-Discrimination Act 1992* (NT), s 53.

[195] *Anti-Discrimination Act 1991*) (Qld), s 106.

[196] *Anti-Discrimination Act 1977* (NSW), s 54.

[197] *Discrimination Act 1991* (ACT), s 30. However, the Committee received correspondence from the ACT Anti-Discrimination Commissioner (dated 28 May 2004) stating that s 30 should be repealed as it may now be inconsistent with the *Human Rights Act 2004* (ACT), which became operational from 1 July 2004.

[198] *Anti-Discrimination Act 1998* (Tas), s 24.

[199] Section 47(2).

[200] Section 39.

[201] The Committee notes that the general exemptions under the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) are time limited, after which any Acts to be excluded from the operation of those laws are to be listed in a Schedule.

[202] Submissions 361, 377 and 398.

The Committee notes that scope of the exemption in these jurisdictions[203] is more in line with the narrow definition of the exemption given to s 39(e) of the repealed Act by the High Court decision in *Public Transport Commission v. Waters.*[204] In that case, the court held that the provision should be narrowly construed so as to only allow something done in order to comply with a specific obligation directly imposed by the actual provision of another Act.

The Committee considers that s 69 is out of step with other Australian jurisdictions in that the section applies to conduct necessitated and authorised by another law, even if the discrimination is not specifically referred to in the law that purportedly authorises it.

The Committee considers that there are two ways to narrow the scope of s 69. The first is to amend the wording to limit the operation of the exemption to discrimination that is necessary to comply with other laws, as is the case in the Northern Territory, Queensland and New South Wales.

The second option is to allow for prescribed Acts to be temporarily or permanently excluded from the operation of the EOA, as is the case under the *Sex Discrimination Act 1984* (Cth),[205] *Disability Discrimination Act 1992* (Cth)[206] and *Age Discrimination Act 2004* (Cth).[207] This option would require the identification of provisions in Acts which are excluded from the EOA.

An advantage of the second option is that it provides clear guidance as to which laws are excluded. Because of this, no complaint or finding would be required in order to identify whether the provision comes within the scope of the exemption or not.

1.3 Repeal or 'sunset' section 69 and rely on the normal rules of statutory interpretation

The Committee notes that the South Australian[208] and Western Australian[209] anti-discrimination laws and the *Racial Discrimination Act 1975* (Cth) do not contain a statutory compliance exemption. Where no exemption exists, the normal rules of statutory interpretation apply. In relation to anti-discrimination laws, the application of statutory rules of interpretation would operate so as to enable a provision in an Act that clearly intends to allow discrimination to override the anti-discrimination law.

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[203] With the possible exception of Tasmania, where the exemption appears to be broader than in the other states.

[204] EOC (1991) 92–390.

[205] Section 40.

[206] Section 47(2).

[207] Section 39(1).

[208] *Equal Opportunity Act 1984* (SA).

[209] *Equal Opportunity Act 1984* (WA). The Committee notes that the exemption provided by s 69(2) of the Western Australian Act expired two years after the Act commenced.

The Commissioner for Equal Opportunity of South Australia advised the Committee that there had not been any issues raised in relation to the lack of a statutory compliance exemption in the South Australian Act.[210]

The Committee notes that some human rights laws contain a provision ensuring that other Acts must be construed in accordance with the standards in the human rights law (or other human rights standards) unless the contrary is specifically provided for.[211] The Committee considers such provisions to be an additional safeguard to the normal rules of statutory interpretation.

The Committee considers that such an approach would require the legislature to consider whether there are sound policy reasons for allowing discrimination in new Acts or amendments to Acts and to ensure that such provisions are clearly worded. However, the Committee also notes that, under such an approach, if there were to be a disagreement as to whether a provision overrode the anti-discrimination law, a complaint would have to be made under the anti-discrimination law, and if no solution could be negotiated, it would ultimately have to be tested in court.

1.4 Repeal or 'sunset' section 69 and provide a front-end review mechanism

The Committee considers that another alternative to a statutory compliance exemption is a mechanism through which all new Acts and amendments to Acts can be scrutinised against anti-discrimination principles prior to enactment. Such a mechanism is referred to as a 'front-end review' for the purposes of this discussion.

Front-end review mechanisms consist of a set of standards against which new and existing laws are scrutinised. They may also provide for primacy of the standards in statutory interpretation, unless otherwise indicated.

The Australian Capital Territory, New Zealand and the United Kingdom have all adopted versions of a front-end review in respect of their broader human rights responsibilities under international law.[212] While the Committee considers the standards in the Acts discussed below are broader than those which it is able to consider under the scope of this Inquiry, the model of a set of standards provides a useful example.

1.4.1 The standards against which Acts are to be reviewed

In the Australian Capital Territory and New Zealand, the standards against which other laws are to be scrutinised are contained in other Acts.[213] In the United Kingdom, the standard is contained in the European Convention on Human Rights.

The Committee considers that the anti-discrimination principles contained in the EOA itself may be an appropriate set of standards against which to scrutinise Acts for

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[210] Correspondence dated 10 June 2004.

[211] Some examples are the *Human Rights Act 1998*, (UK), s 3, the *Human Rights Act 2004* (ACT), s 30 and the *Bill of Rights Act 1993* (NZ), s 6.

[212] The standards in each of these front-end review mechanisms are based on the International Convention on Civil and Political Rights.

[213] The *Bill of Rights Act 2004* (ACT) and the *Bill of Rights Act 1990* (NZ).

compliance. The Committee considers that if this option were to be adopted it would be prudent to first comprehensively review the EOA to ensure that it contains appropriate standards against which other Acts are to be scrutinised.

1.4.2 Review of all new Acts and amendments

A front-end review mechanism would require the Minister responsible for any new Bill to ensure that it does not breach the identified anti-discrimination standards.

The Committee considers that there are a number of ways in which front-end reviews could take place. It notes, for example, that under the *Human Rights Act 2004* (ACT) ('the HRA'), the Attorney-General must make a 'compatibility statement' in relation to any new law introduced to Parliament.[214] If the law is not consistent with the rights set out in the Act, the compatibility statement must inform the Legislative Assembly of the policy reasons for the inconsistency in the Bill.

The HRA also establishes a Standing Committee of the Legislative Assembly to scrutinise all Bills introduced into the Assembly against the human rights standards. The Standing Committee is required to table a report in the Legislative Assembly, and the Assembly must then deliberate and determine the issue of any human rights incompatibility in the Bill. [215]

The Committee also notes that a similar model exists under s 85 of the *Constitution Act 1975* (Vic) in respect to an abridgment of the jurisdiction of the Supreme Court.[216]

The Committee notes that the advantage of such a reporting and scrutinising requirement is that it provides for the proper identification of incompatible provisions in new Acts and allows for full debate on such legislation at an early stage. The Committee considers that such a process provides useful guidance to those responsible for both applying and interpreting the new law.

1.4.3 Audit of existing Acts

Given the non-exhaustive nature of this review, the reasons for which are set out in the methodology section of Chapter 1, the Committee considers that any new review mechanism would also have to contain provision for audit of existing Acts and enactments against the identified standards.

In the Committee's view, a comprehensive audit of this nature is best conducted by the government departments responsible for administering the laws, although it recognises that such an approach has significant resource implications. This approach was taken by the New Zealand Government's Compliance 2001 project described above.

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[214] Section 37.

[215] Section 38.

[216] Section 85 of the *Constitution Act 1975* provides that where legislation may directly or indirectly repeal, alter or vary the jurisdiction of the Supreme Court, the Bill must declare that it intends to do so and the Minister must make a statement to that effect either in the Second Reading Speech or before the Bill is read a third time. In addition the Scrutiny of Acts and Regulations Committee must make a report to the Parliament whether the section 85 provision is appropriate and desirable in all the circumstances.

Conclusion

The Committee considers that the sunset of s 69 and the provision of a front-end review mechanism in conjunction with a mechanism for auditing existing Acts is the option most likely to achieve comprehensive conformity of legislation to anti-discrimination principles. The Committee considers that the main advantage of such a review mechanism is that it is proactive rather than reactive. The Committee further considers that a proactive model is more likely to perform an educative function in relation to the identified standards than a reactive model. The Committee notes that the educative function of both the Australian Capital Territory's *Human Rights Act*, and New Zealand's *Bill of Rights Act* was emphasised as noteworthy and important by the expert witnesses interviewed by the Committee in both those jurisdictions.

The Committee is aware that the implementation of a front-end review mechanism to replace the current s 69 may have significant planning and resource implications for the appropriate body or bodies responsible for such reviews. Considering the implications of the various options outlined in this Chapter, the Committee will seek further information at public hearings.

Interim recommendation

The Committee will seek further information at public hearings in respect to the options of retaining, amending or repealing sections 69 and 207 of the *Equal Opportunity Act 1995.*

Appendix 1
List of Submissions

1	Dr Michael Burke, Victoria University of Technology
2	Ms SA Lock
3	Mr Michael Donnelly, Distinctive Options
4	Melville Miranda
5	Confidential
6	Confidential
7	Confidential
8	Confidential
9	Marguerita Stephens
10	Confidential
11	Confidential
12	Confidential
13	Confidential
14	Confidential
15	Confidential
16	Judy Burns
17	F. Lagerwey
18	Confidential
19	Confidential
20	Carole Ann
21	Anah Holland-Moore
22	Jonathan Leckie, Victorian Civil and Administrative Tribunal
23	Peter Graham AM MMBS
24	Confidential
25	Confidential
26	Confidential
27	Confidential
28	Sharon Follett
29	P.L. LePlastrier
30	Confidential
31	Robyn Plaister
32	Confidential

33 Tom Byrnes
34 Confidential
35 Confidential
36 D. Hughes
37 Adam Hair
38 Edward John Scotten
39 Confidential
40 Cathy Wheel
41 Stacey McCaig
42 Robyn Jeanne Delmege
43 Confidential
44 Peter Antoniadis
45 Confidential
46 Confidential
47 Mrs Sharon Suggate
48 David Bernard
49 Linda Starick
50 Chistine England
51 Karen Price
52 Mrs Rosalie Huf
53 Vida Roberts
54 Vickie Janson
55 Philip Hammond, Word Family Church
56 Paul Mullett, The Police Association – Victoria
57 Annie Goldflam
58 Steve Gundry
59 Michelle Stevens
60 K.L. and S.E. Jeans
61 Glen Huf
62 Mr F and Mrs C Barillaro
63 Piera Cerantola
64 Peter Blades
65 Patricia Hunt
66 Mr Russell Bell
67 Malcolm Dowell
68 Josie Venema
69 Colin M Brown
70 Mr P D Milligan
71 Elizabeth Milligan
72 Carol J Mahieu
73 Elma Wallage

74 Pastor Ray Morel, Grace Community Church
75 Dr Helen Szoke, Infertility Treatment Authority
76 RBK Hungerford
77 Raymond Butrimavicius
78 Gaynor Butrimavicius
79 George Hansford
80 Neville & Lyn Hunter
81 Jud Field
82 Pastor Julie Bailey, Eaglenet Ministries International
83 John F McCormack
84 Paul Zadunajsky
85 Gail Murphy
86 Joyce Amery
87 P Shannon
88 R W Wade
89 John & Joyce Freeman
90 D S Anderson
91 Serena Moore
92 Lynn Scott
93 Noel Portwine, Living Waters Assembly of God
94 Mrs Jenny Turner
95 Anthony O'Neill
96 Ken & Maurene Pearce
97 Terry Shannon
98 Barbara Tregonning
99 Mr J. Knight
100 Betty Wood
101 Barry Gregor
102 Dale Stephenson, Mornington Baptist Church
103 Bernard Nicholls
104 Bill Muehlenberg, Australian Family Association
105 Marliese Wahl
106 Lyn Sheppard
107 Shaun Kelly
108 Brenda Peralta
109 Anthony Lococo
110 Ram Gopal
111 Raelle Smit
112 Bruce Stewart
113 Ian Dennert
114 Daniel Thomas & Lauren McDonald

115 Patricia M Pavey
116 Kerry Matthews
117 Laurel Leaney
118 Susan Park
119 Brent Zito
120 Darren Breeden
121 Jamie Morgan
122 Mrs Lydia Pearce
123 Gary & Dawn King
124 Mrs E M Moore
125 Jennifer Mioni
126 Ivy Dennert
127 Laurie Winth
128 Peter M E Pavey
129 Julian Manole
130 Mrs Carina Rondo
131 Paul Richardson
132 Anna McGookin
133 Cherie Freeman
134 Mrs Laura Wheatland
135 Brad Simcoe
136 David Amery
137 Judy Dwyer
138 Trevor Pollard
139 Helen Jacobson
140 Gregory D Grist
141 Stephen & Deanne Cooke
142 Debra Nespar
143 Ms I Wilson
144 Russell C Doty
145 Dr D Clarnette
146 Mrs Helena Vanderkaay
147 Stephen Vanderkaay
148 Babette Francis, Endeavour Forum Inc
149 Catherine & David Smith
150 Gwenda Allan
151 E N Harvey
152 Mrs Leonie Cuthbertson
153 Michaael Janson
154 Dr Jason Smitheringale
155 Margaret Clark

156 Neil E Ryan
157 Mrs Belen Balmer
158 Madge Fahy, CWL Victoria & Wagga Wagga Inc
159 Hazel Berry
160 Belinda West
161 Natalie Tomas, Office of the Public Advocate
162 Maureen McQuillan
163 Doreen F Lees
164 Mr N T Moore
165 Jennifer Erasmus
166 Mrs I E Pearce
167 Des Kranz
168 Kerry Lee Glasheen
169 Brian Desmond Wheatley
170 Laurie & Sandra Morley
171 Mrs Lyn Bishop
172 Mrs Marcia N Aitken
173 Mrs Susan Bassett
174 Mr Mark Bassett
175 Ronald & Margaret Gillie
176 Lorraine Kotsanis
177 James Kotsanis
178 Arthur Cherrie
179 Matthew Hartwich
180 Donald Stanley
181 Mr David Owen
182 Patricia Cheesley
183 Rev Andrew M Clarke, Presbyterian Church of Victoria
184 Mrs M S Sidwell
185 Hilda Webb
186 Jenny Wake
187 Mark Hayward
188 Simone Moore
189 R G White
190 Elizabeth Stevens
191 Jim Stevens
192 Monika Attard-Nortje
193 Trevor Starick
194 Geoff & Helen Wells
195 Mrs Debbie Treiguts
196 Rudalf Treiguts

197 Sylvia Ford
198 Laurie Ford
199 Dr W Robert McQuillan CMACA
200 Don & Joanne Cameron
201 Kerry Kyriakou
202 Dr John McBain, Melbourne IVF
203 John Hosking
204 Ray & Therese Green
205 Dr Helen Watchirs, Australian Capital Territory Human Rights Office
206 Confidential
207 Confidential
208 Confidential
209 Russell Pike
210 Lloyd Thomas
211 Kate Clarke, Australia Woman Network
212 Mattew Doty
213 Jill Hyatt
214 Kerry Wilson
215 Barney Tomasich
216 Ian Nott
217 Mark Bachelor
218 Geraldine Murray
219 Elizabeth Mostard
220 Brian Fitzgerald
221 Desmond John
222 Lesley Tran
223 Cecelia Conwaye-Wright
224 J & D Eddy
225 David Armstrong
226 Dorcas Price
227 S & T Rando
228 R & M Hunter
229 Elaine M. Clark
230 J & W Roche
231 Robert Vale
232 Michael Christie
233 Carey Cox
234 N & R Uebergang
235 Nicholas Lock
236 D & D Payne
237 Lyn Douglass

238 C Miller
239 Beryl MacGlashan
240 Neil Bartsch
241 Jeffrey Kraak
242 Carol Cooper
243 Gavin Elliot-Robynson
244 David McBain
245 Alice McBain
246 D & W West
247 J & G Palmer
248 Patricia Whiffin
249 W & L Ball
250 J Allpress & P Grace
251 Sue Owen
252 Carol Ferrier
253 Lorra Ruwoldt
254 Eileen Whittingham
255 Donald Whittingham
256 K Wilkie
257 B & D Wallace
258 John Hunter
259 G Chandler
260 Patricia White
261 Darren Worland
262 K Lovett & M De Saxe, Lesbian and Gay Solidarity (Melbourne)
263 Alan Harrison
264 Gwen Whittingham
265 Roger Coombe
266 Heather Chapple
267 Dorothy Anne Bell
268 Jeannette Couch
269 Felicity Reid
270 Neville Curtis
271 Ian Nicholson
272 Joan Smart
273 David Jackson
274 Frances Ann Scotten
275 Henryk Kay
276 Paul Dettmann
277 Sandra Sumner
278 T Sumner

279 Steve Ross, Door & Window Repair Technicians
280 Geoff Pittaway
281 Phil Spencer, Property Owners' Association of Victoria
282 Desmond John
283 Graeme Jackel
284 Peter Whiffin
285 Christine Grey
286 S & L Bell
287 Nigel Hoare
288 SM Rowe
289 Keith Rowe
290 I & G Hunter
291 B J van der Merwe
292 Denis Moriarty
293 Annette Whiffin
294 C & H Hipwell
295 Glyceria Jansz
296 Anne Green
297 Susannah Green
298 Phillip Wilson
299 Paul Manser
300 John Pelchen
301 Jenny Smith
302 David Butler
303 Neil Benfell, King's College
304 Michael Poke
305 Tamara Wood
306 Anna Diment
307 Barbara Thompson
308 M Monson
309 D & A Clapp
310 Thelma Andrew
311 C Bramley
312 Chris Whiting, Open Door Christian Church
313 J Owen
314 Rev Trevor Cox, Chalmers Presbyterian Church
315 D & R Madill
316 R Jackson
317 Cathie Curtis
318 E & T Delaney
319 B Fitzgerald

320 J Bertram
321 Gerard Arthur
322 H Harrison
323 Monica Joske
324 Charles Pham, Pham Corp
325 K & M Smith
326 Evelyn Jago
327 Bryan Broome
328 W & L Towers
329 Clint Chambers
330 Mesha Sojourn
331 Leanne Miller
332 Olaf Rutgrink
333 Valerie Stewart
334 Steven Birch
335 Richard Parker
336 Bernard Stocks
337 Laurie Tooher, Department of Infrastructure
338 Amanda Fairweather
339 Sarah Champness, Baptist Union of Victoria
340 Andrew Taylor
341 Paul Macknamara
342 John Modra
343 Anne Whitehead
344 Roslyn Clark
345 Faith Damm
346 Jenny Stokes, Salt Shakers
347 Beryl Hardham
348 Linda Jon
349 Jane Hunter
350 Ron Mostard
351 Yada Mani
352 Wally Connolly, Taxi Drivers' Association of Victoria
353 Dr Graeme Batley
354 Peter Broadbent
355 Andrew Zuiddam
356 Gae Phillips
357 Dori Wisniewski
358 David Lee
359 Connie Burn
360 Dr Daphne Hennelly, National Party of Australia

361 Stewart Sherriff
362 Prof. Margaret Thornton, La Trobe University
363 Martin Botros
364 Rumiko Commons
365 Joanna Nikopoulos
366 Gillian McKenzie
367 ZedQun Niu
368 D Mouriot and B Maillet
369 David Burnell
370 Vivienne Topp, Mental Health Legal Centre Inc.
371 Gwenda Hay
372 Aroha Marino, Origin Energy Electricity
373 Robert Arnold, Camberwell Baptist Church
374 Rhiannon Wheeler
375 Don Balmer
376 Linda Matthews, Office of the Commissioner for Equal Opportunity
377 Diane Sisely, Equal Opportunity Commission of Victoria
378 Joyce Stowers
379 Don Aitken
380 Mr V Fisher
381 D M Herde
382 Pastor Rodney A Samuels
383 Jacky Shannon
384 Rebekah Shannon
385 Ethre Stainer
386 Rosemary Young
387 Confidential
388 Catherine Johns
389 Wendy Bhouine
390 Mandy McKenzie, PLP Vic C/-o Victorian Aids Council
391 Greta Jubb, Victorian Aboriginal Legal Service Co-operative Lt
392 Ray Jones
393 Nola Richter
394 Tony Parsons, Victoria Legal Aid
395 Rachel Morgan
396 Alison Paul
397 Mr Vio Pomochaci
398 Louisa Dickinson, Jobwatch Inc
399 Dr Susie Allanson/Rebecca Dean, Fertility Control Clinic
400 Greg Taylor
401 Dru Marsh

402 Roland de Sielvie
403 Kevin Parker
404 Barnd Bartl, Disability Support and Housing Alliance
405 Jonathon Goodfellow, Disability Discrimination Legal Service
406 Jennifer Batrouney S.C, Australian Women Lawyers
407 Anna Hacker
408 Mrs Margaret Bee
409 Lisa Pryles
410 Mr John Waters
411 John D Nelson
412 Christopher Dale, Law Institute of Victoria
413 David O'Callaghan, President, Autism Behavioural Intervention Association (Inc.)

Appendix 2 List of Witnesses – Australian Capital Territory and New Zealand

Australian Capital Territory

Monday, 28 February 2005

- Dr Helen Watchirs, Human Rights and Discrimination Commissioner
  Victoria Coakley, Human Rights Legal Officer
  ACT Human Rights Office

Tuesday, 1 March 2005

- Tim Keady, Chief Executive
  Elizabeth Kelly, Deputy Chief Executive
  Jane Hearn, Principal Legal Officer, Bill of Rights Unit
  Department of Justice and Community Safety
- Professor Hilary Charlesworth, Chair
  ACT Bill of Rights Consultative Committee Human Rights

New Zealand, July 2004

- Richard Handley, General Manager,
  Pamela Jefferies, Former Chief Commissioner
  Dr Judy McGregor, Equal Employment Opportunity Commissioner
  David Peirse, Lawyer and Policy Analyst
  Victoria Gregory, Educator
  Mervyn Singh, Chief Mediator
  Human Rights Commission
- Catherine Rodgers-Smith, Assistant Director of Human Rights Proceedings
  The Office of Human Rights Proceedings
- Royden Hindle, Chairperson
  Human Rights Review Tribunal
- Margaret Dugdale, Policy Manager, Bill of Rights/Human Rights
  Stuart Beresford, Senior Legal Adviser
  Boris van Beusekom, Senior Legal Adviser
  Ministry of Justice

- Malcolm Luey, Assistant Crown Counsel
  Cheryl Gwyn, Deputy Solicitor-General
  Crown Law Office

Appendix 3
Discriminatory Provisions amended since the Progress Report

Act	Amending Act/Bill	Discriminatory provisions in old Act identified in submissions	New non-discriminatory provisions
Attorney General and Solicitor General Act 1972 *Constitution Act 1975* *County Court Act 1958* *Magistrates' Court Act 1989* *Public Prosecutions Act 1994* *Supreme Court Act 1986*	*Courts Legislation (Judicial Pensions) Bill 2005*	It was submitted that the sections in these Acts referring to "spouse" for the purposes of identifying the recipients of pension payments discriminates against de facto and same-sex partners	Replaces the term "spouse" with the term "partner" to ensure payments are available to de facto and same sex partners
Children and Young Persons Act 1989	*Children and Young Persons (Age Jurisdiction) Act 2004*	s 3 defines "child" as a person under the age of 17 or 18 for different purposes of the Act. It was submitted that this definition of child is out of step with the definition in other states. Sections 130(1), 240(1), 246, 248(1)(b) authorise the detention of children in remand centres and adult prisons. It was submitted that this has a disparate impact on young Aboriginal people who are overrepresented in the criminal justice system.	s 3 changes the definition of "child" to a person under the age of "18" or "19" to bring the definition in line with other states.

Act	Amending Act/Bill	Discriminatory provisions in old Act identified in submissions	New non-discriminatory provisions
Long Service Leave Act 1992	*Long Service Leave (Amendment) Bill 2005*	s 59 does not specifically refer to casual workers. It was submitted that it is unclear whether the Act covers casuals, most of whom are women.	s 59 defines "employee" so as to include casual and seasonal employees
		s 56, which provides for long service leave to be paid at the rate of "ordinary pay" together with s 64(1), which defines "ordinary pay" as the pay the employee is entitled to receive at the time he or she takes leave. It was submitted that this may discriminate against women and people with disabilities who may have worked full time, but who work reduced hours when returning to the workforce.	s 64(4) provides that where the employee's average weekly hours are not fixed, or are fixed but change in the 12 months prior to leave, the employee's normal weekly number of hours is the greater of the average weekly number of hours in the 12 months immediately before leave is taken, or the average weekly number of hours in the 5 years immediately before leave is taken.