SUBMISSION TO THE REVIEW INTO THE CHARTER OF RIGHTS AND RESPONSIBILITIES ACT

1. I am a barrister who practices in the area of employment, industrial as well as anti discrimination law. What follows is a personal submission to the Review of the *Charter of Rights and Responsibilities Act* (the **Charter**) that reflects my views only. In this submission I argue for reform of s. 8(3) of the Charter, in particular the desirability and efficacy of continuing to link the protection against discrimination conferred by in s. 8(3) of the Charter to the *Equal Opportunity Act* 2010. I also argue for reform to s. 39(2), which in my view is the concomitant of "effective protection" from discrimination.

2. Implicit in a right to effective protection from discrimination is a right to live free from it. Unlike most other Charter rights,[1] s. 8(3) has no common law equivalent. It is a modern human right that, like the freedom of association in s. 16(2), is the product of and has evolved through legislative action. It is (also like the freedom of association) a social right; one that permits a person to participate in society upon a presumption that he or she is inherently worthy and possesses a humanity that is equal to that of anyone else. What is conferred by s. 8(3) is thus properly recognised by the Charter as "essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom".[2]

3. Section 8(3) confers equal protection of the law without discrimination and also "to effective protection against discrimination". However, the concept of discrimination in the Charter is defined by reference to the *Equal Opportunity Act 2010*: "discrimination, in relation to a person, means discrimination (within

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[1] As French CJ observed in *Momcilovic v The Queen* (2011) 245 CLR 1 at [51] French CJ most Charter rights derive from the common law. This observation was critical to the point his Honour made about the operation of the principle of legality, a principle that results in statutory construction occurring against the background of common law rights and freedoms, regardless of the Charter (albeit, as his Honour pointed out, s. 32(1) confers a wider field of application). This may suggest that there is little additional utility. That criticism does not apply to s. 8(3) or s. 16(2).

[2] The Preamble to the Charter.

the meaning of the Equal Opportunity Act 2010) on the basis of an attribute set out in s. 6 of that Act".[3]

4. The Charter does not speak of unlawful discrimination.[4] Rather it draws on the meaning of discrimination as defined by the *Equal Opportunity Act.* That meaning is contained in s. 7(1). Discrimination occurs if it is either direct discrimination or indirect (as defined) or involves a contravention of specifically named sections of the Act that require reasonable accommodation of disabled persons or parents with parental responsibilities. These discriminations are unlawful under the *Equal Opportunity Act* on the basis of an attribute where they occur in a stated area of social activity (such as employment or the provision of services) and are not caught by a stated exception or exemption (which the alleged discriminator has the burden of proving).[5] The Charter does not import the exceptions and exemptions from the *Equal Opportunity Act*. That being so, the Charter already states a standard for "effective protection against discrimination" that is wider than the *Equal Opportunity Act*. That it should do so in an instrument intended to protect fundamental human rights is, in my view, desirable. What is not obvious is why it must do so by reference only to the technical conceptions stated in the *Equal Opportunity Act*.

5. Brennan CJ and McHugh J observed in *IW* v *City of Perth* (1997) 146 ALR 696 at 702 that discrimination as it had traditionally been defined in Australian anti discrimination law did not give full effect to the ordinary conception of discrimination. In speaking of the Western Australian *Equal Opportunity Act* 1984 at 702:

> "The Act, like many anti-discrimination statutes, defines discrimination and the activities, which cannot be the subject of discrimination in a rigid and often highly complex and artificial manner. As a result, conduct that would be regarded as

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3 S. 3 of the Charter.

4 As does for instance s. 46PO(4) of the *Australian Human Rights Commission Act* 1986

5 s. 13(2) of the *Equal Opportunity Act*

> discriminatory in its ordinary meaning may fall outside the *[Equal Opportunity Act* 1984 (WA)]"

6. Their Honours went on to say that the Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom, has, they said, avoided use of general definitions of discrimination. Their Honours opined that anti-discrimination statutes reflect legislative compromises:

> "resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go."

7. The Western Australian Act resembled the predecessor to the *Equal Opportunity Act* 2010. As Brennan CJ and McHugh J predicted, the scope of Victorian anti-discrimination law has broadened. The 2010 Act expresses the concepts of direct and indirect discrimination more expansively that did its predecessor, and states positive duties. The current Act also focuses attention on the achievement of substantive equality. This appears responsive to the joint reasons of Gummow, Hayne and Heydon JJ in *Purvis v State of New South Wales* (2003) 217 CLR 92. In that case, their Honours held that equivalent NSW legislation was concerned only with formal equality.[6] Substantive equality has different concerns. In reference to s. 15(1) of the Canadian *Charter of Rights,* Iacobucci J explained in *Laws v Minister of Human Resources Development* [1999] 1 SCR 497 on behalf of the Supreme Court of Canada at [251] that:

> "Hence, equality in s. 15 must be viewed as a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal distinction, or by a failure to take into account the underlying differences between individuals in society"

8. Earlier, Iacobucci J said about the concept of discrimination at [52]- [53] that:

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[6] At [204]

> "It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society".
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> As noted above, one of the difficulties in defining the concepts of "equality" and "discrimination" is the abstract nature of the words and the similarly abstract nature of words used to explain them. No single word or phrase can fully describe the content and purpose of s. 15(1). However, in the articulation of the purpose of s. 15(1) just provided on the basis of past cases, a focus is quite properly placed upon the goal of assuring human dignity by the remedying of discriminatory treatment".

9. His Honour's focus on the preservation and promotion of human dignity is consistent with the Charter, as stated in the Preamble. So is the emphasis on remedying treatment that is discriminatory. These concepts ought in my view to be the touchstones for the content of the protection the Charter confers in s. 8(3).[7] The protection should be broad enough to capture action taken to deny equality, but also inaction that overlooks differences that if not brought into account impairs dignity and participation in the free and democratic society

[7] If there be limitations to it, these should be found by application of s. 7(2), which posits a social test intended to limit Charter rights only insofar as is necessary in a society founded on the precepts of human dignity, equality and freedom.

that the Charter presumes, which also denies equality. Effective protection against discrimination of the latter kind usually requires positive action to remedy the difference, often something that is greater than and different from what is or would be done for a person without any or that attribute. This is because the person with a disability or a parental responsibility or who identifies themselves with a particular gender identity, to take some examples, already stands in a different position to the person without these attributes due to their effects. In this situation, the same treatment results in inequality. Yet the dignity of a disabled person denied an education due to an absence of action to bring into account his or her disability or its effects is no less impaired than is the dignity of a black person refused entry to a public building by the taking into account of his or her skin colour. Whilst the latter reflects irrational and irrelevant prejudice, the former is, as explained by Sopinka J in *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at [67], a failure "to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation".

10. Recently, in *Fair Work Ombudsman v Maritime Union of Australia* [2014] FCA 440 Siopis J held that certain employees were subject to a prejudicial alteration in employment (which is a form of adverse action within the meaning of the *Fair Work Act*) due to a poster that reviled them as 'scabs' because it invited the "reader to treat each of the named employees as devoid of human dignity."[8] Whilst his Honour was of the view that the poster held other adverse affects for the individuals involved, his focus on the preservation of human dignity as an end in itself is consistent with the purposes of the Charter. His Honour cited from the observations of Heydon J in *Monis v The Queen* (2013) 295 ALR 259 concluding that "respect for human dignity as a value [is] entrenched in Australian law".

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8 at [247]

11. Respect for human dignity, beyond its status as a value, requires, in my view, adoption in the Charter of the full concept of discrimination. For that purpose, the *Equal Opportunity Act* 2010 in my view falls short.

12. The *Equal Opportunity Act* 2010 focuses the general meaning of the discriminations it defines on detriment. Direct discrimination occurs when one persons treats another unfavourably because of an attribute. Indirect discrimination requires the existence of a requirement, condition or practice that will or has the effect of disadvantaging a person with an attribute that is not reasonable. This is consistent with the remedial purpose of the statute, which creates a statutory cause of action available to Victorians in a range of fields and activities, whether private or public, who can show they have suffered or will suffer an adversity. The purpose of the Charter however is different. [9] It is intended to entrench universal standards subject only to derogation as necessary according to the precepts stated in the Preamble and s. 7(2).

13. It is not an essential element of discrimination on the basis of a personal attribute that those affected suffer detriment. It is likely, but not inevitable. It may not be suffered at all. In some contexts, it has been held to be necessary for the purposes for which the concept is utilised.[10] But there is authority that indicates that detriment is not inherent to the concept itself.

14. Gaudron J observed in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 670-71 that:

> "Although in its primary sense "discrimination" refers to the process of differentiating between persons or things possessing different

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[9] Further, the Charter divorces these concepts from their context in the *Equal Opportunity Act* and potentially limits them by reference to another set of criteria in s. 7(2) of the Charter. For example, if it is alleged that s. 8(3) has been contravened due to indirect discrimination assessed as "not reasonable", the not reasonable discrimination may still, potentially, fall outside the protection because it is "reasonably necessary" according to s. 7(2). The same could be true of action or inaction that constitutes a failure to make "reasonable accommodation" of a disabled person.

[10] For an example see *ABCC v McConnell Dowell Constructors Pty Ltd* [2012] FCAFC 93

> properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is "discrimination between"; the legal sense is "discrimination against".

15. Later, in *Waters v Public Transport Corporation* (1991) 173 CLR 349 (the leading High Court authority on indirect discrimination) at page 363 her Honour, jointly with Mason CJ, stated that "discrimination against" involved differentiating by reason of an irrelevant or impermissible consideration. McHugh J similarly focused on relevance, observing in doing so that discrimination also occurs where there is a relevant difference due to an attribute (a conclusion not dissimilar from Iacobucco J who spoke in *Laws* of "a failure to take into account the underlying differences between individuals in society". His Honour drew on what he and Gaudron J had said in *Castlemaine Tooheys Ltd v South Australia* 169 CLR 436 at 478 about a discriminatory law. At 408-409 he said that:

> "A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal - unless, perhaps, there is no practical basis for differentiation."

16. His Honour characterised the above remarks as the general considerations "which, *statute aside*, result in particular treatment being identified as discriminatory" (emphasis original).[11]

17. For the purposes of the Charter, protection against discrimination conceived of as different treatment based on the drawing of irrelevant distinctions due to a

[11] So did Brennan CJ and McHugh J in *IW* v *City of Perth*.

person's sex, race, sexual preference and so on or a failure to recognise and take account of a relevant difference (and/or its effects)[12] would focus the Charter protection squarely on the objective of achieving equality by protecting against administrative acts and decisions found to have diminished it. Notably, in the Charter the protection stated in 8(3) falls as a duty on public authorities not to act in way that is incompatible with a human right or in making a decision to fail to give proper consideration to a relevant human right: see section 38(1). [13] The way this duty is framed is compatible with the approach to discrimination posited by McHugh J.[14] It obliges the decision maker to act in conformity with the standards the Charter prescribes and requires an assessment of what that decision maker has done (or not done) against those standards.

18. A Charter right with an inbuilt discrimination standard framed in the terms suggested may well be engaged by persons who perceive the impugned act or decision to be detrimental to them. Whether this is so however adds nothing to the question of whether in the circumstances it was relevant to distinguish between that person and others, or fail to do so, based on an attribute personal to them. [15] If irrelevant, equality has been harmed regardless. The same is true if a relevant difference is ignored. In a statute like the Charter it is this harm that affronts human dignity and is the harm that in my view s. 8(3) ought to target by means of an appropriate definition residing within the Charter itself. To that end, consideration ought to be given to the adoption of a standard that gives effect to the full concept of discrimination. If there is a need to more specifically

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12 Disability and parental responsibility are two examples where there is usually a need to take positive action to adjust for the effects of the disability or the effect of the parental responsibility in order to bring about an equal outcome. That this is so is reflected in the *Equal Opportunity Act* itself. In relation to these attributes the Act also imposes a positive duty to act in the ways its specifies. However, these attributes are not the only examples where positive action may be required to bring about equal outcomes. Two others in the list in s. 6 are breast feeding and gender identity.

13 A duty that is repeated in s. 15(5) of the *Equal Opportunity Act*

14 There is complexity in framing a duty that depends, as does the discriminations captured by the *Equal Opportunity Act,* on a large number of objective elements and factual assessments; see for example the lists in ss. 9(3), 15(6), 17(2), 20(3) of the *Equal Opportunity Act*.

15 This is not to say that detriment is entirely irrelevant. In appropriate cases, the fact there is detriment may assist in assessing how equality has been harmed or how it is to be remedied.

target the provision, consideration ought to be given to a criterion that proscribes discrimination, on the basis of an attribute, that denies or impairs human dignity or participation, or has that effect.[16]

There is a need to also reform s. 39(2) of the Charter

19. A reform of equivalent importance is the need to provide an effective means to vindicate the human right that s. 8(3) confers. In 2011, the Victorian Bar[17] drew attention at [68] of its submission to the absence of a direct, stand-alone remedy. Currently, s. 39(2) requires Charter proceedings to "piggyback" on another cause of action. It was observed that this requirement had been criticised as unnecessarily complex and unworkable. What was true then remains true now. The current provision diminishes the value of the Charter.

20. The Victorian Bar has in its submission to this Review renewed its call for a direct method of vindicating Charter rights. I share that view. It is contradictory to speak, as does s. 8(3), of "***effective*** protection against discrimination" (emphasis added) when there is no practical means available to invoke the protection itself. In the absence thereof s. 8(3) and other Charter rights, such as the freedom of association contained in s. 16(2), are rendered uncertain, aspirational and ineffective.

21. In my view, a power to declare and to enforce the Charter ought to be available that at least extends to declarations and injunctions (final, interim and interlocutory). However, the purposes of the Charter would in my view be better served by a power of the kind stated in s. 545(1) of the *Fair Work Act* 2009 and s. 46PO(4) of the *Australian Human Rights Commission Act* 1986. A remedial power of these kinds would enable a court to mould relief[18] to the nature and

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16 This may also more closely align the protection with limitations assessed to be reasonably necessary for s. 7(2) purposes.

17 Victorian Bar's Submission to the Review of the Charter dated 11 June 2011.

18 Which in an appropriate case might include declarations and/or injunctions, or orders to the same effect (there is no obvious need for the remedies to be expressed or take the forms recognised at law or in equity).

circumstances of Charter contraventions according to the nature of the rights that it confers.

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