



libertyvictoria.org.au

Victorian Council for Civil Liberties Inc
Reg No : A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

PRESIDENT
Professor Spencer Zifcak

SENIOR VICE-PRESIDENT
Jane Dixon SC

VICE-PRESIDENTS
Jamie Gardiner
Anne O'Rourke
Rachel Ball

IMMEDIATE PAST PRESIDENT
Michael Pearce SC

Submission by **Liberty** Victoria
to the
Attorney-General's Department
Consolidation of Commonwealth anti-discrimination laws
Discussion Paper

Contact persons:

Jamie Gardiner
Vice-President
m: [removed]
e: [removed]

Dr Diane Sisely
Policy Committee
e: [removed]

Introduction

1. The Victorian Council for Civil Liberties Inc – Liberty Victoria – is an independent non-government organization which traces its history back to Australia's first civil liberties body, established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the human rights and freedoms recognised by international law.
2. The human right to equality and freedom from discrimination is fundamental to human rights.
3. Australia, as a party to the main human rights treaties, has freely undertaken international legal obligations to respect the right to equality, to guarantee its protection and to pursue its fulfilment.
4. Liberty welcomes the Consolidation Project, which is a vital part of the Australian Human Rights Framework, as an important opportunity to bring greater coherence and completeness to the current somewhat *ad hoc* implementation of Australia's obligations to respect, protect and fulfil the human right to equality.
5. Liberty notes that the obligation to fulfil involves promoting and enabling equality. In the context of anti-discrimination law this necessitates a

substantial focus on new powers and resources for the Commission to enable it to deal proactively with systemic discrimination.

6. This submission refers to the legislation that will result from this project as the *Equality Act*. This is also the name we recommend it should take.
7. This is a brief submission, concentrating on a few issues of particular concern. As to the rest, Liberty commends and endorses the submission of the Human Rights Law Centre.
8. The particular issues we treat here are:
 - (a) Systemic discrimination
 - (b) New attributes
 - (c) Religious exemptions
 - (d) Harassment and vilification
 - (e) Vicarious liability

Systemic discrimination

9. Liberty's short answer to **Question 27** of the *Discussion Paper* is Yes. It is essential that the consolidated *Equality Act* give the Commission the necessary powers and functions to deal with systemic discrimination. This is only briefly mentioned by name in the *Discussion Paper*, but it is a vital focus for the new Act.
10. The *Discussion Paper* does, however, canvas several additions to the Commission's powers which Liberty considers essential. Liberty strongly supports the introduction of powers to deal with systemic discrimination such as set out in the *Equal Opportunity Act 2010 (Vic)*, and indeed would urge the adoption of the further powers recommended by the Gardner Review¹ but not taken up in the Victorian Act.
11. The individual complaint model is inadequate and unable to achieve the goal of the *Equality Act*, namely fulfilment of the human right of equality. It is vital that individuals who suffer discrimination have the right to seek redress, of course, but this is not enough. No system depending on the initiative, strength and capacity of victims of unlawful conduct to withstand threats and intimidation, conduct which is inherently disempowering, can possibly address systemic problems that affect many more than the one individual. All experience shows that pursuing an individual complaint is emotionally and financially costly, and the barriers deter most who contemplate it.
12. This is why the *Equality Act* needs a positive duty that places responsibility on all people to respect the right to equality of others. It needs to be a responsibility placed not only on members of the public sector but on all

¹ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008

persons and bodies in all sectors of society: this is Liberty's answer to **Question 5**.

13. In addition to the positive duty, and enabled by it, the Commission needs powers to pursue discrimination (and breach of the positive duty) without an individual complainant being a party, and to have powers such as, to mention just a few, own-motion inquiry and investigation, formal inquiries with reports to be tabled in Parliament, guidelines, enforceable undertakings and both *amicus curiae* and intervention in court proceedings affecting human rights.
14. Two further elements are required to deal with systemic discrimination. The first is the provision of resources commensurate with the magnitude of the regulatory task.
15. The second is a commitment to, and powers and resources to enable, education. Education about the human right to equality and non-discrimination must target many disparate groups: public servants and statutory bodies, private employers and service providers, the education sector, the public at large. Education must be about much more than the wording of human rights and anti-discrimination law, but must extend to and succeed in changing attitudes and behaviour over time. Many different techniques and modes of communication will be required, and the Commission must have the resources and powers to use whatever modes work best.

New attributes

Sexual orientation and gender identity

16. Liberty welcomes the Government's commitment to extend anti-discrimination protection in the *Equality Act* to the attributes of sexual orientation and gender identity. In doing so it will be better implementing its obligations under the ICCPR and the other human rights treaties, as explained in some detail in the *Yogyakarta Principles*². As paragraph C of Principle 2 concludes, international law requires that "States shall ... adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity".
17. Liberty Victoria notes that the 2011 ALP National Conference adopted the commitment that internationally "Australia will support the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*." Domestically, the Conference resolved that "Labor recognises that the *Yogyakarta Principles* ... provide a substantial guide to understanding Australia's human rights obligations in relation to LGBTI Australians and their families."

² Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, www.yogyakartaprinciples.org

18. Liberty recommends therefore, in answer to **Question 7** of the *Discussion Paper*, that the *Equality Act* terminology for the new attributes should be based on the *Yogyakarta Principles*.

They explain that in them:³

“**Sexual orientation** is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

“**Gender identity** is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.”

19. This understanding of gender identity does not mention intersex people by name, but the statutory definition should do so, as an express inclusion, both for the avoidance of doubt and for transparency.
20. In using these definitions it is vital that the usual extensions are expressly stated: that an attribute includes an assumption (whether or not accurate) that a person has the attribute, that it includes that a person had or is thought to have had the attribute, that a person is associated with a person who has the attribute, or that a person has characteristics associated with the attribute.

In the formulation of the *Equal Opportunity Act 2010* (Vic), s. 7(2):

Discrimination on the basis of an attribute includes discrimination on the basis –

- (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
 - (b) of a characteristic that a person with that attribute generally has;
 - (c) of a characteristic that is generally imputed to a person with that attribute;
 - (d) that a person is presumed to have that attribute or to have had it at any time.
21. The Victorian Act also includes, as an attribute, in s. 6(q), “personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes”. The *Equality Act* should do likewise.
22. For the sake of transparency the *Equality Act* should state expressly that “a characteristic” etc includes its negative: discrimination on the basis of a characteristic includes discrimination because a person has, or fails to have, the characteristic.

³ *Yogyakarta Principles*, 6 (Introduction, footnotes 1 and 2)

23. This explication is particularly necessary in a field where the focus of prejudice is often about a person's failure to conform to a stereotype in some aspect, that is, not having one of the expected characteristics of, for example, the sex or gender or sexual orientation that the person identifies with.

Other new attributes

24. Liberty Victoria considers that the human right to equality is free-standing and is not limited to the set of attributes currently listed across federal, state and territory laws. All of the currently listed attributes, however, including the ILO 111 "extended attributes" set out in the regulations under the *AHRC Act*, should still be mentioned in an inclusive list, with an express reference, as in Article 26 of the ICCPR and in other treaties, to "other status."
25. One notionally new attribute, which is really just a renaming, that the *Equality Act* should contain is "Relationship status." This would replace and subsume "marital" status and end the peculiar situation where, for example, "Marital status" can be explicated in a long list, most of whose elements are non- or ex-marital, such as Victoria's definition:⁴

marital status means a person's status of being—

- (a) single; or
- (b) married; or
- (c) a domestic partner; or
- (d) married but living separately and apart from his or her spouse; or
- (e) divorced; or
- (f) widowed

Associates

26. Although not technically a "new attribute" Liberty notes the *Discussion Paper* reference to "associates" and answers **Question 8** here too. There should be a single provision covering discrimination against a person because of an attribute of a person with whom they are associated. This should apply to any attribute or combination of attributes, and should apply to any relationship which leads to such discrimination. It should not be limited to narrow categories of associate, although examples should be inclusively listed, as in the DDA list, or using the Victorian formulation noted above.

Intersectional discrimination

27. Liberty notes the *Discussion Paper* references to intersectional or multi-attribute discrimination. Our answer to **Question 10** is Yes. Discrimination on the basis of more than one attribute should be expressly covered in the *Equality Act*. This will prevent sterile argument over which attribute is relevant, or the possibility that a person's claim that should succeed may

⁴ *Equal Opportunity Act* 2010 (Vic), s. 4

fail because of the difficulty involved in establishing each attribute involved separately.

28. The subdivision of equality into discrete attributes is to a considerable extent arbitrary, albeit convenient, and erecting fences around each arbitrary attribute is antithetical to effective realisation of the right to equality. There are a number of different subdivisions of “sex” across Australian jurisdictions, for example, such as pregnancy, and breast-feeding, and perhaps even sexual orientation and gender identity: they have been spelt out for good reasons, but to isolate them from the other attributes and each other is artificial and contrary to the goal of promoting equality.
29. In Liberty’s view the recommended removal of the outmoded “comparator test” will diminish, but not eliminate, the problems of effectively dealing with intersectional discrimination, and so an express reference to “one or more attributes” along the lines of the Canadian Act referred to in the *Discussion Paper* is needed.

Religious exemptions

30. Liberty acknowledges, while firmly disagreeing with, the Government’s position, namely “to maintain existing religious exemptions to anti-discrimination laws.” While political rather than principled, this position does not, however, preclude bringing clarity and transparency to the law. We propose below a way to do this.
31. Equality and religion would be better reconciled through a general limitations clause than through blanket exemptions.
32. Blanket exemptions are wrong. The human right to freedom of religion is not a peremptory norm of international law; it has the same status as other human rights. Like the human right to equality, it may be limited for legitimate purposes, by proportionate measures likely (on evidence) to be effective, and to the least extent possible. A blanket exemption for religious bodies imposes an unjustifiable limitation on the human right to equality. It places them effectively above the law.
33. As Justices Mason and Brennan said, however, in the *Scientology Case*, a High Court decision⁵ on what “religion” means in Australian law, “canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” Discrimination does today, even if it did not fifty or even thirty years ago, “offend against the ordinary laws.”
34. Current laws give religious bodies, and “educational institutions established for religious purposes,” a licence to discriminate when to do so “conforms with” their “doctrines, tenets, beliefs or teachings,” or is

⁵ *Church of the New Faith v. Comm'r of Pay-Roll Tax*, (1983) 154 CLR 120, 136 per Mason A.C.J. and Brennan J

“necessary to avoid injury to the religious susceptibilities of adherents of”⁶ the religion. The latter test in particular is impossibly vague, subjective and of uncertain meaning. This “licence to discriminate” is not only broad and unprincipled, it is neither clear nor transparent. But it could be made so.

35. Many religious bodies, moreover, wish neither to discriminate nor to be tarred with the same brush of bigotry that the loudest lobby calls for.
36. Legal clarity and transparency, the reputations of fair-minded religious bodies, and the Government’s proclaimed intention can all be accommodated.

A new approach

37. The key is to provide religious bodies and educational institutions established for religious purposes the opportunity to claim and receive, as of right, a formal licence to discriminate, time-limited but renewable, conditional only on specifying precisely on what attributes and in which areas it is required, and in each case which specific “doctrines, tenets, beliefs or teachings” necessitate it. The limits of the licence would thus be clear and public, and outside them ordinary law would apply.
38. For example, the claim might be that the employment of unmarried mothers as primary teachers violates particular religious tenets. Or the provision of accommodation to divorced persons or unmarried couples (mixed sex or same-sex, perhaps with different doctrinal particulars for each) is contrary to specified teachings.
39. The claim would be lodged with the Commission in writing and be displayed on the claimant religious body’s website and in other promotional material so that any potential employee, recipient of services or other person interacting with the body can be duly alerted to the body’s intended discrimination practices.
40. To be consistent with the Government’s stated position on religious exemptions the Commission would not be required to vet or approve religious bodies’ claims for the licence to discriminate, nor to refuse them. It would merely record them and hold them; it would have the power, if it chose to, to make them available on its own website. It would also have the power to add its own assessment of the validity of a body’s claim, for the information of the public, and if it did so it would have to advise the body of its view.
41. Discriminatory conduct by a religious body or relevant institution would remain unlawful if it took place before the licence claim was received by the Commission, or if it was not covered within its terms. While respecting the freedom of religious belief, the Commission and any court dealing with a complaint of unlawful discrimination would have to make their own assessment of whether the doctrine cited in the licence did in fact necessitate the conduct complained of.

⁶ *Sex Discrimination Act 1984*, s.37(d)

42. The licence to discriminate would last for a definite term, which we propose should be three years, and certainly no longer than five. It would be renewable, but to insert some accountability into the system the body would be required to report on its use of the licence, how often, if at all, it had had to invoke it, and the general circumstances of such occasions, and the basis on which it considered the licence claim was still necessary and valid, or alternatively how it was to be varied.
43. This process would apply to all attributes where a religious exemption currently exists, namely the provisions of the *Sex Discrimination Act 1984* and *Age Discrimination Act 2004* and (if politically unavoidable) the new attributes. Consistent with the Government's commitment to preserve current protections against discrimination it would not extend to race and disability, as the *Racial Discrimination Act 1975* and *Disability Discrimination Act 1992* do not exempt religious bodies.

Justifiable discrimination

44. A licence under the provisions recommended here would not be needed, however, for conduct covered by the general limitations clause.
45. A general limitations clause setting out when limitations on the human right to equality are justified will handle ordinary situations where conduct that is *prima facie* discriminatory is in fact appropriate. Employment as a minister of religion, or involvement in religious ceremonies or observance, for example, would no doubt be justifiably confined to members of the religion.

Scope of licence

46. The licence to discriminate would (within its terms, and subject to the *bona fides* of the claimed justificatory doctrine) exempt the body from the operation of the *Equality Act* in relation to the specified conduct in its own activities with its own adult members and guests.
47. There are two circumstances, however, where the licence would not be applicable.

Outsourcing obligations

48. It will not apply to anything done by the body in carrying out any activity or providing services funded in whole or in part by Commonwealth, State or local government, directly or through statutory authorities or other government-funded entities.
49. Australia's first obligation under the ICCPR and other human rights treaties, which came into being when they were signed, and was strengthened and supplemented with the obligations to protect and fulfil when they were ratified, was and is to respect the human rights protected, in this case the right to equality and non-discrimination. The government is obligated not to discriminate.
50. It cannot absolve itself of this obligation by outsourcing to others, whether religious or not. If religious bodies wish to avail themselves of the licence to discriminate that is described above—a licence which implements the

government's stated position inconsistent with its international human rights law obligations—then they cannot at the same time be carrying out functions for or on behalf of government.

Children's rights to prevail

51. The licence to discriminate will also not apply to permit discrimination against minors. They do not have legal capacity to assess the conditions represented by the licence and cannot give informed consent to them.

Default position to be equality

52. Some have suggested that instead of the above licence the law could provide a formal procedure with legal force for rights-respecting religious bodies to renounce the exemption. While this may have some attractions, it puts the burden of action on the wrong party. The default position is and must be to respect, protect and fulfil the human right to equality. It is the departure from that principled position that is the exception requiring specific action.

Harassment and vilification

53. As the Discussion Paper acknowledges at paragraph 66 (page 18), in the limited areas of the anti-discrimination statutes “[h]arassment of a person based on their protected attribute is unlawful discrimination because it causes detriment to the person because of their protected attribute.” Outside those areas harassment is not adequately dealt with in current laws.
54. Liberty's answer to **Question 6** (and to this aspect of **Question 5**, again) is Yes, the prohibition against harassment should cover all protected attributes, the positive duty to eliminate discrimination and harassment should be included in the *Equality Act* and apply to all sectors, not just the public sector, and furthermore (in response to **Question 12**) the prohibition against harassment should not be confined to the limited “areas” of, for example, the SDA, but should be broader, as in the RDA, s.9, or in the Tasmanian Act (but with an inclusive rather than closed list).
55. The provisions in Part IIA—“Prohibition of offensive behaviour based on racial hatred” of the RDA, though using different language, do cover race-based harassment, but also limit their coverage by exemptions, as well as by not focussing on the harm or detriment that constitutes harassment.
56. Victoria and other jurisdictions have provisions which have some similarities to s18C of the RDA, with similar flaws, or worse. Victoria's equivalent is the *Racial and Religious Tolerance Act 2001* (“RRTA”), which uses the term “vilification” in an unhelpful and idiosyncratic way to seek to deal with harassment on the attributes of race and religion outside the usual “areas”, but very differently, and ineffectively, characterized.

Vilification

57. The *Discussion Paper* refers to “vilification” only once, at paragraph 139, but it is a term so confusingly used that it warrants a brief discussion here.

Some forms of harassment may also be characterized as “vilification” and it is important to clarify our usage and avoid confusion.

58. Liberty Victoria strongly recommends **against** provisions using the term “vilification” or emulating the substance of the Victorian *RRTA*.
59. In the first place the word “vilification” has a perfectly good and well understood dictionary meaning, derived from the verb “to vilify”, which is also the common meaning.

For example, the *New Oxford American Dictionary* gives for the verb “vilify”:
speak or write about in an abusively disparaging manner : *he has been vilified in the press.*

Similarly the *Encarta World English Dictionary* (1999) defines “vilify” as “to make malicious and abusive statements about somebody.”

60. Vilification, properly understood, is thus one form of harassment, and when based on a protected attribute is unlawful as harassment.
61. The *RRTA*, on the other hand, uses “vilification” as if it meant “incitement to hatred etc”. This causes endless confusion to members of the public, and is the very opposite of accessible legal drafting.
62. Quite apart from using the wrong word at its core, the *RRTA* is conceptually flawed. Its focus is on the words written or spoken, and the free speech rights of the speaker or writer, rather than on the harm that may be suffered by the person or group the object of the words used.
63. As a result of the political tussles over freedom of speech, the *RRTA* effectively exempts (subject admittedly to a useful “in good faith” claw-back) the four principal doers of harm by words, namely politicians, ministers of religion, academics and journalists, while abandoning the victims of harm (except perhaps in neighbourhood disputes between more-or-less equals) as a powerless afterthought.
64. This model does not protect ordinary victims of prejudice from the psychological harms caused by “malicious and abusive statements” or being spoken or written about “in an abusively disparaging manner,” as the ordinary person would expect its language to promise, nor does it function (as the Act probably was intended) to protect them against incitement to hatred, etc, by the powerful, as the barriers to making a complaint are so high, and the breadth of the exceptions so extensive.
65. Although the *RRTA* manifestly fails to do its job, it is nevertheless aimed at a real social problem, even if it focuses on the wrong aspect of it. The problem is that words can cause real harm, just as “sticks and stones” can; the old rhyme is wrong to assert that “names can never hurt me.”

Homophobic harassment

66. A particular example of this harm is that suffered, especially by young people, as a result of harassment on account of sexual orientation or gender identity.

67. Research clearly shows that the climate of homophobic prejudice in which most same-sex-attracted young people grow up, created and maintained by hurtful words written and spoken, casually or deliberately, leads to a significantly higher rate of mental illness—depression and anxiety disorders in particular—in this group. The casually homophobic pronouncements of opinion leaders each cause harm, and add up to the high rates of illness and attempted and completed suicide among young same-sex-attracted boys and girls, in particular, and adults too.

68. In an open letter to ALP National Conference delegates, in November 2011, Paul Martin gave one example, as

a psychologist with 25 years experience working with same-sex attracted Australians—who are twice as likely to have a high or very high level of psychological distress and four times more likely to have attempted suicide.

We can no longer pretend that institutionalised discrimination against same-sex attracted individuals does not contribute to this tragic problem. As such, I am asking you to use your power to end this discrimination.

I'm asking on behalf of individuals like Robert*, 17, a young man who came to see me for counseling recently.

After a courageous and difficult decision to come out to his family and father (who called gay people "bloody poofers"), he talked about feelings of gay relationships, and therefore gay people, being seen as unworthy. Hearing the message from our politicians that gay people "aren't good enough to marry," led him into even deeper depression, as he personally dreams of being with someone for his entire life.

69. In any of the areas covered by equal opportunity law, such as employment or education, the sorts of homophobic writings and speech referred to above would be characterized as "harassment" and would constitute the sort of detriment, in employment or education, that would give rise to a complaint of unlawful discrimination on the ground of sexual orientation in the relevant area. The employer, or school, that permitted, or failed to clean up or put a stop to, such harassment would be vicariously liable, even if the individual harassers could not be identified.

70. In Liberty's submission the unlawfulness of such harassment should not be restricted to the named areas. The substantive harm that such harassment does, each time, and cumulatively, to lesbians and gay men and bisexual people should be the issue, not where or when it happens. In the defined relationship areas, admittedly, the threshold for the actionable quantum of harm is fairly low. Harassment at large, with no prior relationship between the harasser and the persons harmed, would need to be qualified in some systematic way. By analogy with the law of negligence, it is recommended that the unlawfulness of attribute-based harassment should be based on the reasonable foreseeability of harm.

71. It may be necessary to qualify what is reasonable here by requiring the decision-maker to take into account the history of discrimination suffered by the class of persons of the relevant attribute. For it is precisely this history of prejudice that makes members of the class more susceptible to harm by the harassment in question, and distinguishes their situation from that of those from groups not subject to a history of prejudice, for him apparently similar insulting or contemptuous words, for example, would have no relevant salience.
72. While an actionable instance of harassment in this formulation might also have been able to be described as “speech” in the RDA or RRTA formulations, when viewed as harassment causing harm the “free speech” and “religious freedom” objections and exemptions have little or no force. By focussing on demonstrable (research-validated) harm, the issues of legitimacy, proportionality and least restrictiveness have mostly been resolved.
73. Harassment in this formulation will be available to individual complaint, but in its most egregious forms, such as with young victims driven to depression, self-harm or suicide, the issue is much more one of systemic discrimination, and requiring pro-active measures by relevant authorities to prevent harassment in the future by education, social marketing and other appropriate social change mechanisms.
74. Wherever the evidence shows that similar harassment on the basis of other attributes causes harm it should be subject to the same considerations. The above discussion related to sexual orientation, but it applies to attributes such as race, gender identity and disability very obviously, and all attributes should be covered.
75. Liberty Victoria addressed these issues of harassment and vilification in greater detail in its April 2010 submission to the Eames Review (A review of identity motivated hate crime for the Victorian Department of Justice, by the Hon Geoffrey M Eames AM QC), and refers the Attorney-General’s Department to that submission, which is available at
<http://libertyvictoria.org/sites/default/files/Submission%20to%20the%20Eames%20Review%20from%20Liberty%20Victoria-1.pdf>

Vicarious liability

76. In answer to **Question 19**, Liberty Victoria submits that the vicarious liability provisions should and could be clarified. Rather than merely taking the common law notions of vicarious liability and extending them a little, the provisions ought to be drafted as an express part of the elaboration of the positive duty to prevent discrimination and harassment, and to promote equality.
77. The question is not whether the employee (in the term’s most general sense, including volunteer) or other agent was acting in the scope of their duties, or conversely acting on a frolic of their own, but whether the employer or

principal could have prevented the discriminatory (or harassing) conduct, which under the positive duty they are required to do.

78. It is also important that the liability should extend not merely to unlawful conduct by employees and agents, but to conduct that would be unlawful if the employer or principal engaged in it.

Specified relationships

79. All the relationships currently covered in the RDA, SDA, ADA and DDA should be included in the provisions. In addition (especially in the context of the positive duty to eliminate discrimination and promote equality) any relationship where a person has the capacity or right to control or direct the conduct of others should also be included. A school, for example, should be liable for discriminatory bullying (or other harassment) by students on other students, or indeed on teachers or other members of the public.

Connection between act and relationship

80. The current RDA and SDA tests of “in connexion with” are clearly to be preferred over the ADA and DDA tests of “within scope of ... authority”.
81. The critical test, however, must be whether the employer or principal had the capacity or power to influence the conduct, including by training, directions, guidelines, supervision, etc.
82. If the terminology of taking “all reasonable steps” to prevent discrimination is used, it needs to be clarified that what is reasonable must consider the harm done to the person or persons who suffer the discrimination (harassment), and the positive duty, as well as the practical issues of cost etc. The onus should be on the principal to establish that they have discharged their duty to prevent discrimination and promote equality. This would include evidence of how well the principal responded to other complaints of discrimination, and whether it had a robust and well-known and well understood process for doing so.
83. Mere words on a policy more honoured in the breach than the observance would clearly not satisfy the correct test.

Conclusion

A consolidated *Equality Act* will improve Australia’s compliance with its obligations under the human rights treaties it has ratified, and so improve everyone’s enjoyment of human rights in Australia.

Liberty Victoria thanks the Attorney-General’s Department for the opportunity to make this submission on its Discussion Paper, and looks forward to the forthcoming exposure draft legislation, and to participating in consultations on it.

[signature removed]

Jamie Gardiner
Vice President
February 2012