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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Committee Secretary

Rachel Ball and Melanie Schleiger of the Human Rights Law Resource Centre (**HRLRC**) appeared before the Senate Legal and Constitutional Affairs Committee's public hearing in relation to the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (**SDA**) in Melbourne at 9:00 am on Wednesday, 10 September 2008.

In the course of the public hearing two questions were taken on notice and these questions are addressed below.

1. Human rights legislation does not increase the volume, length or cost of litigation

1. Senator Kroger questioned whether the adoption of a human rights approach, particularly in the context of the removal of the permanent exemptions, would increase litigiousness.
2. Our response was that the experience of other jurisdictions has shown that human rights legislation has not had the effect of increasing the volume, length or costs of litigation. We referred to the Administrative Court of England and Wales, Report for the Period April 2001 to March 2002 which reports that: "[t]here is no evidence that the 1998 [Human Rights] Act has

increased the numbers of cases lodged, nor that hearing times have lengthened since the implementation of the Act.”¹ This report is attached.

3. Similarly, reviews of the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter**) noted that these pieces of legislation have not created a ‘flood of litigation’.²

2. Limitations Analysis in International Jurisdictions

4. Senator Barnett requested examples of the judicial application of the human rights limitations principles proposed by the HRLRC.
5. The HRLRC proposes that the SDA be amended to incorporate limitation principles similar to those contained in section 7 of the Victorian Charter. For the convenience of the Committee, these principles are briefly restated below at paragraphs 0 to 8. These limitation principles reflect international human rights principles as well as limitation clauses adopted in the human rights acts and jurisprudence of other common law jurisdictions, including South Africa, Canada and New Zealand. To demonstrate the practical application of the limitation principles in these jurisdictions, the following cases are summarised below in section 5 at paragraphs 21 to 28:

- (a) *Multani v Commission scolair Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada);
- (b) *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381 (Canada);
- (c) *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757 (South Africa); and
- (d) *Hansen v R* [2007] NZSC 6 (New Zealand).

3. Limitations Principles in the Victorian Charter

6. Section 7(2) of the Victorian Charter provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society³ based on human dignity, equality and freedom and taking into account all relevant factors.
7. Section 7(2) also sets out the following inclusive list of these relevant factors:
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

¹ Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002*.

² ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report*; P. Lynch, ‘Victorian Charter on the Right Path - An Assessment of the First 18 Months’ (available at www.hrlrc.org.au).

³ According to the Supreme Court of Canada, the values of a ‘free and democratic society’ include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

- (d) the relationship between the limitation and its purpose; and
- (e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

8. Section 7(3) provides that the Victorian Charter should not be interpreted as giving a person, entity or public authority a right to limit the human rights of any person. For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged. The Human Rights Consultative Committee which investigated and recommended the adoption of the Victorian Charter recognised that rights need to be balanced against one another and against competing public interests. This view is consistent with the case law of comparative jurisdictions, such as the UK and New Zealand, and international jurisprudence.

4. Limitations principles in organisational policy and front-end advocacy

9. We note that the limitations analysis is not intended to be performed and implemented exclusively by the judiciary. A limitations analysis is a common sense exercise that can assist organisations with human rights-friendly policy development and can contribute to effective front end advocacy. Where a limitations analysis is used in these contexts, disputes can be avoided and the practical effect may even be a decrease in litigation.

10. One example of the use of a limitations analysis in front end advocacy was reported by the British Institute of Human Rights (**BIHR**) in their 2007 publication, *The Human Rights Act – Changing Lives*.⁴ BIHR reported that a mental health hospital had a practice of sectioning asylum seeker patients, who spoke little or no English, without using interpreters. An advocacy group successfully challenged this practice using human rights language. The group argued that assessing the asylum seekers without using an interpreter breached the asylum seekers' right not to be discriminated against on the basis of language and their right to liberty.

11. In this case the question of whether the treatment of the asylum seekers was reasonable, necessary and proportionate in the circumstances was considered. The hospital then altered its practice to avoid potential human rights breaches and subsequent disputes.

12. Examples of policy development and community-based advocacy are not generally reported. Consequently, judicial rulings remain the most accessible source of practical examples of limitations analysis. A number of illustrative cases are outlined below in section 5.

5. Comparative cases

Christian Education South Africa v Minister of Education, 2000 (4) SA 757 (South Africa)

13. The South African Parliament passed the Schools Act, which prohibited corporal punishment in schools. Christian Education South Africa (**CESA**), an umbrella body of 196 independent Christian schools in South Africa, argued that this ban violated the rights of parents of children

⁴ Available at <http://www.bihar.co.uk/policy-and-public-affairs/the-human-rights-act-changing-lives>.

in independent schools who, based on their religious convictions, had consented to corporal punishment.

14. The Constitutional Court of South Africa assumed, without deciding, that CESA's religious rights were limited by the prohibition of corporal punishment in schools. The Court then considered whether the limitation was reasonable and justifiable under section 36 of the South African Bill of Rights, the limitations clause. In its limitations analysis, the Court came to the following conclusions.

(a) *The nature of the rights and the scope of their limitation*

- (i) The impact of the legislation on the right to religious and parental practices was, in the view of CESA, far from trivial. However, the *Schools Act* did not deprive parents from the right and capacity to bring up their children according to their Christian beliefs, it merely prevented them from empowering schools to administer corporal punishment.

(b) *The purpose, importance and effect of the limitation, and the availability of less restrictive means*

- (i) The South African government has an obligation to protect pupils from degradation and indignity, and to take all appropriate measures to protect children from violence, injury or abuse in accordance with the United Nations Convention on the Rights of the Child. Taking this into account, as well as South Africa's painful past history, involving violence against protesting youth, and the prevalence of child abuse, the Court held that the government has a powerful obligation to act to reduce violence in public and private life.

(c) *Proportionality analysis*

- (i) The Court held that the total ban of corporal punishment was necessary and proportionate to the aim of reducing violence because the ban:

was part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.⁵

Anything less than a total ban would potentially undermine '[t]he whole symbolic, moral and pedagogical purpose of the measure.'⁶ The Court also noted the inherent difficulty of monitoring corporal punishment.

⁵ *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757, [50].

⁶ *Ibid.*

15. The Court concluded that, weighing the different factors together, any limitation imposed by the *Schools Act* on the right of parents to freedom of religion was reasonable and proportionate.

Newfoundland (Treasury Board) v NAPE [2004] 3 SCR 381 (Canada)

16. In 1988, the provincial Newfoundland and Labrador government agreed to adjust the wages for hospital positions typically staffed by women so that the pay for those positions would be comparable to the higher salaries earned in male-dominated positions. The provincial government signed a Pay Equity Agreement with the Newfoundland Association of Public Employees to this effect, specifying that the wage increase would occur over a five year period.
17. However, in 1991 the government had a \$120 million deficit and faced a financial crisis. As a result, the government legislated to cancel the Pay Equity Agreement.
18. The Supreme Court of Canada confirmed that the legislation disproportionately harmed women and violated section 15(1) of the Charter, which protects the right to equality before the law regardless of gender. However, the Court unanimously held that the limitation on the right to equality imposed by the legislation was reasonable, in accordance with the limitation principles in section 1 of the Charter. In particular, the Court concluded as follows.

(a) *Was there a pressing and substantial legislative objective?*

- (i) Due to the fiscal crisis, cost cutting was a pressing and substantial legislative objective. The severity of the fiscal crisis was evidenced by numerous other cost cutting measures, including the closure of 360 acute care hospital beds, the retrenchment of 2000 employees and the termination of medicare coverage for certain medical procedures.

(b) *Was there a rational connection between the legislative measure and the pressing and substantial objective?*

- (i) There was a rational connection between the cost cutting objective and the cancellation of the Pay Equity Agreement. This is because postponing the high cost of the Agreement would preserve a significant portion of the government budget and avert a fiscal crisis.

(c) *Minimal impairment*

- (i) Considered among the range of measures the government could have adopted in response to the crisis, the impairment of the Charter rights of female hospital workers was appropriate. The government tailored the legislative response to minimally impair rights in the context of the problem it encountered.

(d) *Proportionality of means to objective*

- (i) The Court held that the legislative freeze of the Pay Equity Agreement was a proportionate response to the temporary but serious financial crisis, 'despite the adverse effects on the women hospital workers, serious and deeply regrettable though such adverse effects were.'⁷

19. The Supreme Court emphasised that budgetary considerations will only justify the infringement of Charter rights in exceptional circumstances. In this instance the Court found that the government

“was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society...”⁸

20. It was in this context that the government's limitation of the right to non-discrimination was considered reasonable and proportionate.

Multani v Commission scolair Marguerite-Bourgeoys [2006] 1 SCR 256 (Canada)

21. In 2001, a 12 year old child was playing at school when he accidentally dropped his kirpan. A kirpan is made of metal and resembles a dagger and must be worn at all times by devout Sikh males. Following the incident, the school board allowed the child to wear the dagger if safely sealed inside his clothing. However the governing board revoked the compromise on safety grounds and forbade the child from wearing a kirpan at school. The child's parents then withdrew him from the public school system because the ban was irreconcilable with the tenets of their faith.

22. The Supreme Court of Canada struck down the order of the school board and held that the blanket prohibition of the kirpan infringed the child's freedom of religion protected by section 2(a) of the Canadian *Charter of Rights and Freedoms* (**Canadian Charter**) and that this infringement cannot be justified in a free and democratic society, as is required under section 1 of the Charter.

23. In arriving at this decision, the Supreme Court first considered whether the child believed that the practise of wearing the kirpan was connected to a religious belief. It held that this was the case, as Orthodox Sikhism considers the carrying of a kirpan to be necessary and the child sincerely believed that he must carry a metal kirpan at all times. The Supreme Court held that the interference with the child's freedom of religion was considerable because he was forced to leave the public school.

24. Having identified a significant Charter infringement, the Court then turned to a limitations analysis, according to section 1 of the Charter, as summarised below.

⁷ *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381, [98].

⁸ *Ibid*, [75].

(a) *Importance of the objective*

24.2 The school board's main concern was school safety and eliminating weapons at schools. The Court held that the standard of safety required at a school is not the highest degree of safety, which would require the banning of scissors and other objects and would be unreasonable. The Court held that schools require a reasonable degree of safety and that the objective of achieving this is undeniably pressing, substantial and important.

(b) *Proportionality*

24.3 The Supreme Court then considered whether the total ban on carrying the kirpan was a proportionate response to the aim of ensuring a reasonable standard of school safety. In determining the proportionality of the limitation, the Court considered the following issues.

(1) Whether there was a rational connection between the ban of the kirpan and the aim of ensuring school safety.

(i) Evidence was given that there had never been a school incident involving kirpan-related violence, and there was no proven link between children wearing the kirpan to school and decreased school safety.

(ii) Evidence was also submitted about the claimant's non-violent nature and his religious belief that the kirpan must not be used to harm others.

(2) Whether the total ban is the least intrusive way of achieving the aim, or whether there are reasonable alternative solutions.

(i) The claimant was prepared to comply with various conditions if allowed to wear the kirpan, such as wearing the kirpan sealed beneath his clothing. If the claimant complied with these conditions, it was considered unlikely that the kirpan could be stolen.

(ii) The Court held that the school board could deal with many of its concerns – including concerns about school safety, a proliferation of weapons in schools and the potentially negative impact of kirpans on the school environment – through education about the importance of freedom of religion, which would be beneficial in any event.

(c) *Effects of the measure*

24.4 The Court held that '[a]n absolute prohibition [on wearing the kirpan] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others'.⁹

⁹ *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, [78].

25. Following a detailed human rights limitation analysis, the Supreme Court concluded that the school board's total ban of the kirpan was not a proportionate response, and that the student should be allowed to wear the kirpan to school subject to certain conditions.

Hansen v R [2007] NZSC 6 (New Zealand)

26. This case related to a claim that section 6(6) of the *Misuse of Drugs Act* breached the right to be presumed innocent until proved guilty, which is protected by section 25(c) of the New Zealand *Bill of Rights Act*. Section 6(6) of the *Misuse of Drugs Act* provides that if someone is in possession of more than a specified quantity of a controlled drug, they will be deemed to possess the drugs for the purpose of supply or sale 'until the contrary is proved'. This placed the onus on the plaintiff to produce evidence proving that he did not possess the drugs (in this case cannabis) for the purpose of sale or supply.
27. The Supreme Court held that section 6(6) of the *Misuse of Drugs Act* is contrary to the right to presumption of innocence and that this limitation was disproportionate. Applying a human rights limitation analysis, Justice Tipping concluded as follows.
- (a) *Importance of objective and rational connection*
 - (i) Illegal drugs are a major social concern and the objective of reducing drug dealing is sufficiently important to justify some limitation on the presumption of innocence.
 - (b) *Is the impairment greater than reasonably necessary?*
 - (i) It is possible that the accused could be required to point to evidence that raises a reasonable doubt ('evidential onus'), rather than placing on the accused the burden of rebutting the presumption of guilt on the balance of probabilities, as section 6(6) requires. Justice Tipping then considered the proportionality of the response in order determine whether this less restrictive approach would sufficiently achieve the objective of reducing drug dealing.
 - (c) *Is the limit in due proportion to the importance of the objective*
 - (i) Where the level of possession set for each drug suggests only the probability of supply rather than a high likelihood of supply or a likelihood of supply beyond reasonable doubt, then the risk of wrongly convicting people is significant. While the successful prosecution of drug dealers is an important social objective, section 6(6) is a disproportionate response. Justice Tipping quoted Blackstone's famous comment that '[i]t is better that 10 guilty persons escape than one innocent suffer'.¹⁰ Justice Tipping found that the imposition of an evidential onus would sufficiently serve the purpose of the legislative scheme without the same risk of convicting innocent persons.

¹⁰ Blackstone, *Commentaries on the Laws of England* (1965-1769), Volume 4, 27.

28. While the Supreme Court concluded that section 6(6) of the *Misuse of Drugs Act* was not compatible with the right to presumption of innocence, this finding did not invalidate the legislation. As a result, the defendant's appeal was dismissed.

The HRLRC thanks the Committee for the opportunity to give evidence in relation to its inquiry and provide this supplementary response. We would be happy to provide the Committee with any further information if this would be of assistance.

Yours sincerely

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