

**IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ANTI-DISCRIMINATION LIST**

No A 208/2008

COBAW COMMUNITY HEALTH SERVICE INCORPORATED
Complainant

AND

CHRISTIAN YOUTH CAMPS LIMITED (ACN 095 681 342)
First Respondent

AND

MARK ROWE
Second Respondent

**VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION INTERVENING
OUTLINE OF SUBMISSIONS**

Introduction and overview

1. On 5 July 2010, the Commission filed a Statement of Contentions in which it identified five issues concerning the application of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) to the proceeding. The issues are:
 - **Issue One:** whether s 32 of the Charter applies to a proceeding commenced after 1 January 2008 but concerning alleged conduct in June 2007;
 - **Issue Two:** what Charter rights are engaged and how the rights should be interpreted;
 - **Issue Three:** whether the Charter rights apply to the Complainant and First Respondent as incorporated bodies;
 - **Issue Four:** how the Charter affects the interpretation of ss 104(1B) and 104(1C) of the EO Act ; and

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- **Issue Five:** how the Charter affects the interpretation of ss 75(2) and 77 of the EO Act which involves balancing two sets of competing rights.
2. These submissions address the issues raised in the Commission's Statement of Contentions having regard to the parties' submissions, opening addresses and the evidence presented to the Tribunal.
 3. In summary, the Commission submits:
 - 3.1. the Tribunal's primary task is to determine whether there has been a contravention of the EO Act. This requires an assessment of the evidence to determine whether the Respondents have acted contrary to ss 42(1)(a), 42(1)(c), or 49(a) of the EO Act. If so, then the Respondents must establish their conduct is protected by the exceptions in either or both ss 75(2) and 77 of the EO Act;
 - 3.2. because it forms part of the body of interpretive rules to be applied when interpreting Victorian legislation, and because the subject matter of the complaint touches upon human rights, the Charter is engaged. The Charter requires the Tribunal to interpret the relevant provisions of the EO Act in a way that is compatible with human rights (see s 32(1) of the Charter);
 - 3.3. with respect to **Issue One** the Commission submits that on a proper construction of the Charter, no issue of retrospectivity arises and s 32 of the Charter applies;
 - 3.4. with respect to **Issue Two**, the Commission submits that two important sets of human rights arise in this proceeding. The persons represented by the Complainant ('the **Named Persons**') invoke the right to equality and freedom from discrimination (ss 8(2) and 8(3) of the Charter). The Respondents invoke the right to freedom of religion (s 14 of the Charter). The Charter requires both rights to co-exist. Both sets of rights may be limited for the purpose of protecting the rights of another person. The Tribunal's task is to examine the content of the respective rights¹ and to determine the relevance of the rights in the task of interpreting the EO Act;

¹ Note the approach in *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 at [29].

- 3.5. the EO Act embodies and expands upon aspects of the right to equality and the freedom from discrimination provided by ss 8(2) and 8(3) of the Charter. The Tribunal may construe ss 42(1)(a), 42(1)(c), 49(a), and 104(1B)(a) of the EO Act consistently with these human rights;
- 3.6. the rights provided by ss 42(1)(a), 42(1)(c), and 49(a) of the EO Act are not absolute and may be subject to a range of exceptions in the EO Act. The relevant exceptions in the present matter are provided by s 75(2) and 77 of the EO Act. The key issue is how the Charter affects the construction of ss 75(2) and 77 of the EO Act in the context that:
- (a) the right to equality and freedom from discrimination provided by ss 8(2) and 8(3) are not absolute rights and may be limited in accordance with s 7(2) of the Charter;
 - (b) the exceptions should be construed narrowly and apply only where there is clear evidence to support the application of the exception;
 - (c) the relevant exceptions have the effect of protecting the right provided by s 14 of the Charter namely that every person has the right to freedom of religion and belief; and
 - (d) the right to freedom of religion and belief is not an absolute right and it too may be limited.
- 3.7. the interpretative obligation in s 32 of the Charter is relevant notwithstanding that the parties (save for Mr Rowe) are incorporated entities. With respect to **Issue Three**, the Commission submits that while corporate entities are not the beneficiaries of the human rights provided by the Charter, the question here is not whether the corporate entities have these rights. Rather, the Charter is relevant because s 32 requires the EO Act to be construed compatibly with the Charter rights, as far as that is possible. This obligation applies when the terms of the relevant legislation engage the Charter rights, regardless of who the parties are. The terms of the EO Act touch upon human

rights regardless of whether the parties are natural persons or corporations, and whether they are individuals, corporations or public authorities;

- 3.8. with respect to **Issue Four**, the Commission submits that consistent with the purposes of the EO Act reinforced by the Charter, these provisions should be construed broadly and in a manner which ensures that the persons represented by the Complainant have access to an effective remedy in relation to the rights which have been allegedly breached by the Respondents;
- 3.9. with respect to **Issue Five**, the Commission submits that the proper interpretation of ss 75(2) and 77 of the EO Act requires the Tribunal to examine the intersection of the human rights which appear to be in conflict. The task is to construe s 75(2) and/or 77 of the EO Act in a manner which least limits the Named Persons' rights in question. This task does not change or alter the rights of the parties under the EO Act. It does not change the text or meaning of the relevant provisions of the EO Act. It does not necessarily lead to a different outcome because the Charter applies. For the reasons advanced in these submissions, the Commission submits that the application of the Charter means that the Tribunal will need to construe ss 75(2) and 77 in a manner which reasonably limits the Named Persons' rights under ss 8(2) and 8(3) of the Charter.
- 3.10. the Tribunal is not required to reconcile the apparently conflicting sets of human rights. The Charter does not call for the Tribunal to determine whether one right trumps another. When the Charter is applied, the Tribunal may be satisfied that ss 75(2) and 77 of the EO Act are intended to limit the right to equality and freedom from discrimination for the purpose of respecting the rights of the Respondents under s 14 of the Charter. In construing ss 75(2) and 77 of the EO Act, the Tribunal should start from the generally accepted principle that exceptions should be construed narrowly and in a manner that least restricts the rights protected by the legislative scheme from which they exempt. While s 75(2) and 77 are cast in general terms, the Respondents bear the onus of establishing that either or both exceptions apply based on the evidence. It is not enough simply to assert that the Respondents have religious beliefs. They must demonstrate that all of the elements of ss 75(2) and/or 77 are clearly satisfied and the exceptions operate to limit the Named Persons' rights in a manner consistent with the Charter.

Issue One: Application of s 32 of the Charter and the question of retrospectivity

4. Any concern in this matter about the retrospective operation of s 32 of the Charter is misplaced.
5. Section 1(2) sets out the main purpose of the Charter, which includes in sub-section 1(2)(b):
(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; ...
6. Section 1(2)(b) had effect from 1 January 2007.
7. Section 32 gives effect to the purpose set out in s1(2). It provides:

Interpretation

- (1) *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*
- (2) *International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.*
- (3) *This section does not affect the validity of—*
 - (a) *an Act or provision of an Act that is incompatible with a human right; or*
 - (b) *a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.*

8. Section 32 had effect from 1 January 2008, but it is clear that s 32 applies to the task of interpreting Victorian legislation *whenever enacted*. Section 32 is not limited to legislation enacted since 1 January 2008. Section 49(1) of the Charter, which is concerned with transitional arrangements, also makes this plain. Section 49 provides:

Transitional provisions

- (1) *This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.*
- (2) *This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.*
- (3) *Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.*

9. Recent decisions of the Court of Appeal and Supreme Court also confirm that s 32 of the Charter applies to conduct and Victorian legislation enacted prior to 1 January 2008. In the following matters there was no issue of the retrospective operation of s 32 of the Charter:

- *R J E v Secretary to the Department of Justice* (2008) 21 VR 526; [2008] VSCA 265, - the Court considered the interpretation of s 11(1) of the *Serious Sex Offenders Monitoring Act 2005* (Vic) in relation to an application for an order against RJE on 15 November 2007. The Court referred to s 32 of the Charter and considered it applied to the task of interpreting the provision in issue: see [55];
- *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 (**Momcilovic**) – the issue concerned Ms Momcilovic's conduct in January 2006 and the operation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The Court of Appeal applied s 32 of the Charter when interpreting the Act passed in 1981;
- *Mastwyk v DPP* [2010] VSCA 111 - the issue concerned the interpretation of s 55(1) of the *Road Safety Act 1996* and its application to Ms Mastwyk's conduct on 10 June 2005.² Maxwell P referred to general principles of construction and s 32(1) of the Charter in relation to the task of interpreting the particular provision: see [10] and [11].
- *WBM v Chief Commissioner of Police* [2010] VSC 219 – the issue concerned whether the Charter applied to the interpretation of the *Sex Offenders Registration Act 2004* (Vic) and conduct in August 2007. Justice Kaye applied s 32 of the Charter to the task of construing a provision of the *Sex Offenders Registration Act 2004* : see [28] and [29].
- *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 - the Supreme Court considered the application of s 32 of the Charter to the proper interpretation of s 47(1)(f) of the *Corrections Act 1986* (Vic). The conduct in issue occurred in May 2010.

² See also *DPP v Mastwyk* [2008] VSC 192 at [5].

10. The only relevant limitation is that the interpretative obligation in s 32 does not apply to proceedings commenced prior to 1 January 2007.³ The limitation is not relevant to the present matter because the proceedings were commenced in 2008.
11. For completeness, the Commission notes that in *Kracke v Mental Health Review Board & Anor (No 2) (General)* [2009] VCAT 1548 at [334] – [358] (**Kracke**), Bell J also considered whether the Charter had retrospective operation. The central issue was the application of the Charter to the conduct of a public authority. At [338], Bell J accepted the proposition that s 32(1) applied to the interpretation of all Victorian statutory provisions whenever made. He noted at [339], that the Parliament had not divided up Victorian statutes into pre and post Charter for the purpose of s 32. He accepted that when interpreting the *Mental Health Act* (enacted in 1986), he must apply s 32. However, Bell J was not prepared to take what he described as the further step - the application of the Charter to conduct done by a public authority in 2007, prior to s 32(1) coming into force: see [339]. In this context he appeared to conclude that s 32 had no retrospective operation.
12. The Commission submits that, unlike *Kracke*, the present matter does not involve the conduct or a decision of a public authority or a claim that a public authority contravened any Charter right. Section 49(3) of the Charter makes it plain that the Charter has no retrospective operation to the conduct of public authorities prior to 1 January 2008. For this reason, the 'second step' discussed by Bell J in *Kracke* does not apply here, as this matter does not involve a decision by a public authority. On this basis, section 49(3) of the Charter is not relevant. The Tribunal's decision in *Kracke* can be distinguished.
13. The following submissions proceed on the basis that s 32 of the Charter applies to the interpretation of ss 42(1)(a), 42(1)(c), 49(a), 75(2), 77 and 104(1B)(a) of the EO Act.

³ *State of Victoria v Turner* [2009] VSC 66

Issue Two: Relevance of the Charter to characterising the human rights issues arising in the proceeding

General observations about s 32 of the Charter

14. Section 32(1) of the Charter applies to the interpretation of *all* Victorian statutes. Section 32(1) directs that all statutory provisions *must* be interpreted in a way that is *compatible* with human rights. Section 32 will apply in a range of circumstances. The interpretative obligation applies regardless of whether the Court or Tribunal is called on to determine whether Charter rights have been infringed by a statute or a public authority. The Commission submits that its application will depend upon the circumstances in which s 32 is applied.
15. In *Momcilovic* the Court of Appeal considered s32 of the Charter in some detail. The Court of Appeal rejected the "stepped approach" adopted in *Kracke* (and adapted from *Hansen v The Queen*⁴), where the ordinary interpretation of a provision is ascertained first, without recourse to the Charter. The Court viewed section 32 as part of "the body of rules governing the interpretative task, not a separate special rule".
16. The Court observed at [103]:

Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption, as Gleeson CJ made clear in Plaintiff S157/2002 v The Commonwealth.

17. The Court of Appeal referred to the way other jurisdictions had applied similar interpretative obligations. Notwithstanding some similarity in the language of the Charter to that of the *Human Rights Act 1998* (UK), the Court of Appeal rejected an approach which simply follows the UK jurisprudence. In particular, the Court of Appeal referred to the Attorney-General's second reading speech and comments made about the intended purpose of s 32 of the Charter.⁵ The Court concluded that the Attorney-General's

⁴ [2007] 3 NZLR 1.

⁵ *Momcilovic* [81].

comments supported a conclusion that s 32 was not intended to give Victorian courts a role under the Charter which was '*fundamentally different [from] their role under the standard principles of interpretation*'.⁶ The Court noted that the Victorian Parliament's intentions were in '*marked contrast to the United Kingdom Parliament's approach to s 3 of the Human Rights Act 1998 (UK)*'.⁷ The Court concluded that s 32 was not intended to create a special rule of statutory interpretation.⁸ Rather, it is simply part of the body of rules governing the interpretive task.

18. The application of s 32 of the Charter to the present matter differs to the way in which the issues arose for determination in *Momcilovic*. Unlike *Momcilovic*, this matter does not involve a claim that certain provisions of the EO Act infringe human rights. Rather, both parties seek to rely on the Charter rights to advance an interpretation of the EO Act in a manner which best protects their respective human rights. In this matter, the Tribunal's task is to consider all possible interpretations of the EO Act and prefer an interpretation that least limits the Charter rights in issue. As the Court of Appeal noted, what is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.
19. In undertaking an interpretative exercise pursuant to section 32 of the Charter, there are a number of principles that the Tribunal needs to apply. These can be summarised as:
 - First – what Charter rights are relevant to the interpretation of the EO Act;
 - Second – how do the Charter rights apply to the EO Act which itself gives effect to human rights; and
 - Thirdly – what possible of interpretations of the EO Act are open and which interpretation results in the EO Act being compatible with the Charter, as far as that is possible.
20. With regard to the first component, it is clear that the rights identified by the parties touch upon the subject matter of the complaint and the application of the EO Act to those rights.

⁶ *Momcilovic* [83]

⁷ *Momcilovic* [91]

⁸ *Momcilovic* [101].

21. With regard to the second component, the Charter describes the rights in general terms. How the Charter rights are engaged practically must be subject to the proper interpretation of the rights. It is generally accepted that the human rights in issue should be construed in a broad way. As Warren CJ said in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 at [80]:

As already observed, human rights should be construed in the broadest possible way...

The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.

22. Section 32(2) of the Charter allows reference to international sources relevant to a human right when interpreting a statutory provision, which includes the Charter.⁹ The Commission submits that the Tribunal will be assisted by international sources which have considered the content and scope of the relevant rights.
23. With regard to the third component, the task of considering possible interpretations of the EO Act by reference to the Charter rights is not always straightforward. When exploring possible interpretations which are compatible with the Charter rights, it is generally accepted that s 32 does not permit the Tribunal to 'rewrite' the text of the EO Act. Section 32 does not permit the Tribunal to adopt a meaning inconsistent with a 'fundamental feature' or the 'underlying thrust' of the EO Act.¹⁰ The Tribunal is not required to 'play with [the] words' of the EO Act.¹¹ The task remains in determining what Parliament would reasonably be understood to have meant by using the actual language of the EO Act.¹²
24. Further, the Commission notes that the expression 'compatible' is not defined in the Charter. However, substantial guidance as to the meaning of this term is provided in the

⁹ see *Kracke v Mental Health Review Board* [2009] VCAT 646, [201]-[202].

¹⁰ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] (per Nicholls LJ) and see discussion by the Court of Appeal in *Momcilovic* at [52] – [53]

¹¹ *Wilkinson v Inland Revenue Commissioners* [2006] 1 WLR 1718 discussed in *Momcilovic* at [55].

¹² *ibid*

Explanatory Memorandum for the Charter. When discussing clause 32(1), the Memorandum notes that:

*"The object of this subclause is to ensure that courts and tribunals interpret legislation to give effect to human rights."*¹³

25. Further, the Report of the Human Rights Consultation Committee stated that:

*"[B]y making this plain, the courts would be provided with clear guidance to interpret legislation to give effect to a right, so long as that interpretation is not so strained as to disturb the purpose of the legislation in question."*¹⁴

26. Therefore, the Commission submits that the term "compatible" means an interpretation that gives effect, as far as possible consistent with the purpose of the legislation, to the realisation of human rights. When considering possible interpretations of the relevant provisions of the EO Act, the preferred interpretation is one which gives effect to the rights protected in the Charter.
27. The Charter has been considered in a number of matters concerning the interpretation of the EO Act. In *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (*Lifestyle Communities*) at [96] – [97], Justice Bell considered how the Charter affected the Tribunal's powers to grant exemptions under s 83 of the EO Act. He said:

[96] When it comes to applying s 32(1) of the Charter to the interpretation of s 83(1) of the Equal Opportunity Act, the purpose of the Equal Opportunity Act is to promote equal opportunity and prevent discrimination. That purpose is not diluted by the provisions with respect to exceptions and exemptions. It can be discerned from the purposes in s 1, the objectives in s 3 and the general scheme for the prohibition of discrimination (direct and indirect) in Part 3.

[97] True, the scope of the prohibition of discrimination in the Equal Opportunity Act is limited by the prescription of the attributes in s 6, the various exceptions which operate according to their own terms and the possibility of exemptions being granted under s 83. Although limited, the list of prohibited attributes is substantial. It covers protected attributes which have become long-accepted by the community and others which have become newly-accepted as social mores have changed. The exceptions are overwhelmingly beneficial and positive in human rights terms. The discretion to grant exemptions does not operate to change the essential remedial character of the legislation.

¹³ Explanatory Memorandum to Charter of Human Rights and Responsibilities Bill (Vic) 2006, 23
¹⁴ Human Rights Consultation Committee, Department of Justice, Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), 82

Section 8(2) and (3) of the Charter: Right of equality and freedom from discrimination

28. The Named Persons correctly invoke ss 8(2) and (3) of the Charter, which relevantly provide:

8. Recognition and equality before the law

..

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

...

29. The Commission submits that the Tribunal should reject the Respondents' submission that 'equality of persons before the law and the right to enjoy human rights are not in issue'.¹⁵ The subject matter of the complaint and the terms of the EO Act are all concerned with protecting the rights of equality before the law and freedom from discrimination.
30. Section 3 of the Charter defines 'discrimination' for the purpose of s 8(3) by reference to the EO Act. As Justice Bell observed in *Lifestyle Communities* at [10], the Charter operates to strengthen Victoria's anti-discrimination legislative framework.
31. The principle of non-discrimination is described as a 'basic and general' principle in the protection of human rights common to all UN treaties. The key non-discrimination provisions in the ICCPR are found in articles 2 and 26.

Article 2 (1)

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

Article 26

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

¹⁵ Respondents' submission paragraph 14.14

32. In *Lifestyle Communities*, Justice Bell considered s 8(2) and 8(3) in detail.¹⁶ The Commission refers to his Honour's consideration of these rights and the international human rights law jurisprudence referred to in the reasons. In summary, Justice Bell observed that the scope and purpose of the equality rights in s 8 of the Charter could be described as follows:

- (a) The fundamental value of the equality rights in s 8 of the Charter is the equal dignity of every person.
- (b) Equality and non-discrimination are the foundation of the rule of law and democratic society in which everybody knows they are recognised in law as human beings of equal worth and potential, and equally deserving of concern, respect and consideration.
- (c) The equality rights in s 8 are the keystone in the protective arch of the Charter.
- (d) Section 8(2) stipulates everybody's right to enjoy their human rights without discrimination. The human rights are the civil and political rights specified in Part 2 of the Charter.¹⁷ The focus in s 8(2) is on those human rights, not the law generally. The discrimination is that which is within the meaning of the EO Act.
- (e) If there is unequal enjoyment of human rights, the body of the Charter is poisoned. The interest protected by this right is the positive right to enjoy human rights without discrimination.
- (f) Section 8(3) is the centrepiece of the right to equality. The right is here differentiated, using concepts derived from article 26 of the *International Covenant on Civil and Political Rights (ICCPR)*.¹⁸ The animating values of s 8(3) are equal

¹⁶ See [105] – [303].

¹⁷ See the definition of "human rights" in s 3(1).

¹⁸ [1980] ATS 23. Entry into force generally (except Article 41) on 23 March 1976. Entry into force for Australia (except Article 41) on 13 November 1980.

dignity and the social and democratic importance of everybody being treated and protected by the law equally and without discrimination. The interest it protects is the right to equal treatment and protection of the law without and against discrimination.

- (g) Section 8(3) has two components which have distinct but overlapping meanings: equality before the law, and equal protection of the law without discrimination and equal and effective protection against discrimination.
- (h) Equality before the law proscribes arbitrary treatment, ie treatment devoid of objective justification, in the application and administration of the law.
- (i) The principle negatively prohibits making discriminatory laws, for they subject people to, rather than protect people from, discrimination; it also positively requires people to be equally protected from discrimination in law or fact, for the principle goes further than mere formal equality to encompass substantive equality in the content, application and operation of the law in all respects.

33. For the purpose of s 8(2) of the Charter, the Complainant contends that the Named Persons' rights to freedom of thought, conscience, religion and belief (s 14), freedom of expression (s 15) and freedom of association (s 16) have been impaired by the alleged discrimination. The Commission agrees that these rights are also relevantly engaged by the subject matter of the complaint. The Complainant alleges that the Named Persons were subject to a detriment for the purpose of s 42(1)(c) of the EO Act. It is accepted that a 'detriment' must be some real, rather than trivial, disadvantage. An alleged 'detriment' must be objectively assessed.¹⁹ The Commission submits that a person may experience a detriment if the impugned discriminatory conduct impairs the enjoyment of one or more human rights.

34. For the purpose of s 8(3), it is accepted that discrimination on the ground of sexual orientation is proscribed by the EO Act (s 6). The EO Act reflects accepted international

¹⁹ *Varas v Fairfield City Council* [2009] FCA 689 at [32] – [36]. Special leave to appeal this decision was refused see [2010] HCATrans 18 (12 February 2010)

standards which also recognise that discrimination on the ground of sexual orientation is contrary to human rights.²⁰

35. As the English High Court observed in *R (Amicus) & Others v Secretary of State for Trade and Industry* [2004] EWHC 860; [2007] ICR 1176 (*Amicus*), discrimination on the ground of sexual orientation is recognised as an impermissible ground of discrimination and subject to the protection of the right to privacy and freedom from discrimination. The issue in *Amicus* was the validity of regulations which limited the freedom from discrimination on the ground of sexual preference and homosexuality. The applicants argued *inter-alia* that the regulations were inconsistent with the human rights protected by the *Human Rights Act* 1998 (UK) and the *European Convention on Human Rights (ECHR)*. At [28], the Court said:

Sexual orientation is a most intimate aspect of private life and personal identity. It is protected under the Convention, in particular under articles 8 and 14 the application of which is considered later in this judgment. Such protection extends to the employment context. The Convention case-law also shows that weighty reasons are required to justify any interference with an individual's Convention rights not to be discriminated against on grounds of sexual orientation.

36. In addition to the international sources identified by Justice Bell in *Lifestyle Communities*, the Commission also notes that on 21 May 2010, the European Parliament adopted a resolution concerning *Discrimination on the basis of sexual orientation and gender identity*.²¹ The resolution provides *inter-alia*:

8. Homophobia and transphobia have particularly serious consequences for young LGBT [Lesbian, Gay, Bisexual and Transgender] people. They face widespread bullying, sometimes unhelpful or hostile teachers, and curricula which either ignore LGBT issues or propagate homophobic or transphobic attitudes. A combination of discriminatory attitudes in society and

²⁰ *Toonen v. Australia* UN Doc CCPR/C/50/D/488/1992 (4 April 1994), (*Dudgeon v UK* 45 Eur. Ct. H.R. (ser. A) at 14 (1981). *Norris v Ireland*, Application No. 10581/83) 26 October 1998, *Modinos v Cyprus* (Application no. 15070/89) 23 April 1993, *Sutherland v United Kingdom* 25186/94 [2001] Eur Court HR 234 (27 March 2001), *Lustig-Preen and Beckett v United Kingdom* (2000) 29 ECHR 548, *A. D. T v United Kingdom* (Application no. 35765/97) (31 July 2000), *Salgueiro da Silva Mouta v Portugal* [1999] 1999-IX Eur. Ct. H.R. 309. See contra *Laskey, Jaggard, and Brown v United Kingdom* (1997) 24 EHHR 39.

See also *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 and the authorities cited there in and recently *Christian Legal Society v. Martinez*, 561 U.S. ____ (2010),

²¹ <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>

rejection by the family can be very damaging for the mental health of young LGBT people, as evidenced by suicide rates which are much higher than those in the wider youth population.

9. It is important not to criticise the perceived or declared sexual orientation of young people, particularly of those attending school aged under 18, and to recognise that any exploitation of their perceived or declared sexual identity, or any humiliation or degrading treatment on that basis, can be both wrong in itself and potentially harmful to their wellbeing and personal growth both at that stage and later in life.

17. Member states may grant exemptions to religious institutions and organisations when such institutions and organisations are either engaging in religious activities or when legal requirements conflict with tenets of religious belief and doctrine, or would require such institutions and organisations to forfeit any portion of their religious autonomy, and if such exemptions are compatible with the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

37. The Commission submits that ss 6, 42 and 49 should be construed in a manner that provides the fullest protections against discrimination on the ground of sexual orientation.

Section 14: Freedom of religion and belief

38. The Respondents contend that ss 75(2) and 77 of the EO Act protect the right of freedom of religion (s 14) and freedom of expression (s 15). The Respondents appear to contend that ss 75(2) and 77 of the EO Act operate as a limitation on the Named Persons' rights under the EO Act and ss 8(2) and 8(3) of the Charter.
39. Both Respondents rely on s 14 of the Charter. It provides:

14. Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including-

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

40. The expressions 'thought', 'conscience', 'religion' and 'belief' are not defined in the Charter. The Tribunal will be assisted by considering international human rights material to determine the scope of the rights provided by s 14 of the Charter.

41. The right to freedom of religion is recognised by Article 18 of the ICCPR. Article 18 provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

42. There are a number of different aspects of the right. The UN Human Rights Committee's General Comment No. 22²² explains the scope of the Article 18 rights.²³ The Committee has observed:

- (a) article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief;
- (b) the terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions;
- (c) article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. No one can be compelled to reveal his

²² Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994). <http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>

Deleted: ,1993

²³ see also *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981). <http://www1.umn.edu/humanrts/instrree/d4deidrb.htm>

thoughts or adherence to a religion or belief. The Commission notes that this is referred to as the *internal freedom - forum internum*;

- (d) the freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts;
- (e) the *concept of worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts;
- (f) the *observance and practice of religion* or belief include ceremonial acts and customs;
- (g) the *practice and teaching of religion* or belief includes acts integral to the conduct by religious groups of their basic affairs. The Commission notes that these latter matters are referred to as the *external freedoms - forum externum*; and
- (h) the external freedoms are subject to limitations as provided by Article 18(3).

43. In international law, there is no generally accepted definition for the terms 'religion' or 'belief'. For the purpose of international law, beliefs that have been protected by this right include traditional religions, as well as 'pacifism', ²⁴ "corporal punishment for children"²⁵ and a belief that 'the appropriate framework for sexual relations is within marriage'.²⁶
44. In *R (Williamson) v SS Education and Employment*,²⁷ (**Williamson**) the House of Lords discussed the importance of giving the benefit of the doubt to the person who claims the religious belief. This avoids the problem of subjective interpretation. In *Williamson*,

²⁴ *Arrowsmith v United Kingdom* 19 DR 5 (1980); [1975] 3 EHRR 218

²⁵ *R (Williamson) v SS Education and Employment* [2005] 2 AC 246

²⁶ *Playfoot v Governors Millais School* [2007] EWHC 1698 (Admin)

²⁷ [2005] 2 AC 246

Christian parents challenged UK legislation banning corporal punishment in independent schools. They claimed that there were certain biblical prescriptions concerning corporal punishment of children and that the ban violated their rights under article 9 of the ECHR (which is in similar terms to article 18 of the ICCPR). Lord Nicholls at [22] - [24] set out the requirements for a belief to come within article 9:

- (a) the belief must not be trivial;
- (b) the belief must be consistent with basic standards of human dignity or integrity;
- (c) he said *"The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision."*;
- (d) The belief does not have to be religious. *"The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist."*

- 45. This approach is consistent with the approach taken by the Canadian Supreme Court considering the scope of religious freedoms.²⁸
- 46. However, it is clear that not all assertions of religious beliefs will be accepted as such. In *AYT v Canada*,²⁹ the UN Human Rights Committee rejected a claim that a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug engaged article 18 of the ICCPR.
- 47. In *Countryside Alliance and Anor (R on the application of) v Her Majesty's Attorney General & Anor*³⁰, the UK Court of Appeal rejected a challenge to the ban on hunting on the ground that it was an unjustified interference with the manifestation of the hunters'

²⁸ *R v Big M Drug Mart* [1985] 1 SCR 295 at 336 – 337.

²⁹ *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, Communication No. 570/1993, U.N. Doc. CCPR/C/50/D/570/1993 (1994) at [4.2]

³⁰ [2006] EWCA Civ 817

beliefs. The claim that hunting constituted a belief was considered to be 'ingenious' but misconceived.

48. As to the right to manifest religion or belief, the international jurisprudence confirms that:

- (a) not all acts *motivated* by a religion or belief are 'manifestations' of that belief. For example, a claim by a Quaker that paying a tax that financed weapons research infringed his religious beliefs was rejected. The European Commission on Human Rights said the article 9 "*does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief*".³¹ The freedom to hold beliefs is broader than the freedom to act upon them;³²
- (b) the right does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs;³³
- (c) the 'manifestation' must be clearly connected to the belief. Consideration must be given to what the person believes he or she is obliged to do as a consequence of their belief.³⁴ For a non-religious belief, it must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs;
- (d) the context in which the religion or belief is exercised is relevant.³⁵ In *Pichon and Sajous v France*,³⁶ the European Commission on Human Rights upheld the approach that it is mainly personal convictions and religious beliefs which are protected by Article 9, although closely linked acts "of worship or devotion forming

³¹ *C v United Kingdom* App. No. 10358/83, 37 ECHR Dec & Rep 142 at 147 referred to with approval in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch)

³² *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 at [36] and [37]. See also *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 at [22] – [25] and *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch).

³³ *R (SB) v Denbigh High School* [2007] 1 AC 100 at [86] referring to *Kalaç v Turkey* (1997) 27 EHRR, 552, para 27.

³⁴ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358, para 60 and referred to in *Williamson* at [63]

³⁵ *Ahmad v United Kingdom* (1981) 4 EHRR 126, para 11

³⁶ App. No. 49853/99 (2 October 2001).

part of the practice of a religion or a belief" are also protected. In this case, religious beliefs did not justify a refusal by pharmacists to sell contraceptives as '*the sale of contraceptives is legal and occurs nowhere other than in a pharmacy*', and the pharmacists could '*manifest [their] beliefs in many ways outside the professional sphere.*';

- (e) the right does not extend to members of any religion imposing their beliefs on secular society;³⁷
- (f) the right does not impose a positive obligation on the State to shield those holding beliefs from criticism of the beliefs. For example, there is no obligation on the State to introduce legislation to proscribe blasphemy or, where blasphemy laws are present, there is no duty on public authorities to bring proceedings against publishers of works that offend the sensitivities of any individual or group;³⁸
- (g) the manifestations consistent with basic standards of human dignity are to be protected.

49. International law also recognises the collective nature of the right. In *Hasan v Bulgaria*³⁹ the European Court of Human Rights described the right in the following terms:

Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members"

50. Relevant to the Tribunal's task is the need to consider how the freedom of religion is engaged in the present matter and then consider what aspects of the right are relevant to the interpretation of the EO Act. The Commission notes paragraphs 14.5 and 14.6 of the Respondents' submission.

³⁷ See observations of Laws LJ in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 at [22] – [25].

³⁸ *Choudhury v United Kingdom* Application No.00017439/90 (1991) and In *Wingrove v United Kingdom* App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1997), ¶ 52–53 the Commission that while religious believers could not expect to be exempt from all criticism and must tolerate the denial by others of their beliefs.

³⁹ (2002) 34 EHRR 55 at para 62

51. In the Commission's view, the evidence supports a finding that the Christian Brethren movement meets the requirements of a 'religion' for the purpose of s 14 of the Charter and that Mr Rowe holds religious beliefs. Consistently with the international human rights jurisprudence, the Tribunal may accept the Respondents' evidence without needing to inquire into the validity of the beliefs. The Respondents are also correct to observe that prima-facie Mr Rowe enjoys the protections afforded by s 14 of the Charter. This is not in dispute.
52. However, it is not clear how the Respondents seek to rely on the right beyond asserting that the First Respondent is a religious body and that Mr Rowe holds religious beliefs. The subject matter of the complaint does not suggest any interpretation of the EO Act which prevents Mr Rowe holding his beliefs or any rights in the class of *forum internum*.
53. The Respondents submit that Mr Rowe was 'entitled to demonstrate his religion or belief in observance, practice and teaching, either individually or as part of a community, in private or public' (s 14(2)).⁴⁰ Again, there is no dispute that Mr Rowe has a freedom to demonstrate his religion or beliefs in observance, practice and teaching, either individually or as part of a community, in private or public has such a right. The Respondents add the word 'entitled' to the language of s 14(2). For the reasons discussed above, some care must be taken when casting the right as an entitlement, as the Respondents seem to suggest. As noted above (in paragraph 50 above), the scope of the right provided by s 14 of the Charter does not mean that an act *motivated* by religion will engage the right. The Respondents do not identify how the interpretation of the EO Act prevents or impairs Mr Rowe's freedom to observe or practice his beliefs with others or individually.
54. Finally, the Respondents also claim that Mr Rowe is entitled to freedom from coercion or restraint that limits his freedom to *have* or *adopt his* religion in observance, practice and teaching.⁴¹ Again, the Respondents alter the language of the Charter right in their submissions. Section 14(2) refers to *a religion* not any particular religion as suggested by the Respondents. Again, beyond stating the right, the Respondents do not identify how

⁴⁰ Respondents' submissions para 14.5

⁴¹ Respondents' submissions para 14.6

the EO Act coerces Mr Rowe in a way which limits his freedom to have a religion. As noted above, Mr Rowe's right to have a religion is accepted and there is nothing in the terms of the EO Act which impair such a right. There is no issue in the present matter about a right to adopt religion.

55. The Respondents appear to contend that the prohibition on discrimination against a person on the ground of sexual orientation limits Mr Rowe's freedom to have a religion in observance, practice or teaching. It is not clear what evidence the Respondents rely on to point to any provision of the EO Act which in fact (as opposed to in theory or hypothetically) limits Mr Rowe's freedom of observe or practice his religion.

Section 15 of the Charter

56. The Commission notes that the Second Respondent also invokes a right to freedom of expression provided by s 15 of the Charter.⁴² On the material available, it is not clear how the right to freedom of expression is relevant to the task of interpreting the EO Act. The Respondents do not point to any provision of the EO Act which impairs Mr Rowe's rights to speak or express his opinion.
57. Further, ss 75(2) and 77 are not intended to protect the right of freedom of expression. While expression of religious beliefs may involve the exercise of expression, there is no indication in the extrinsic materials that Parliament intended ss 75(2) or 77 of the EO Act to have the purpose of protecting the types of rights contemplated by s 15 of the Charter.⁴³
58. The Commission submits that reliance on s 15 of the Charter is misplaced in the present matter.

Issue Three: Application of the Charter to incorporated entities

59. Section 4 of the EO Act defines 'person' to include '*an unincorporated association and, in relation to a natural person, means a person of any age*'. The EO Act covers a broader

⁴² See paragraphs 14.8 – 14.9 of the Respondents' submissions.

⁴³ Second Reading Speech (at Appendix A): Victoria, *Hansard*, Legislative Assembly, 4 May 1995, 1250-1

range of 'persons' than the Charter. The EO Act applies to corporate entities and creates both rights and responsibilities for the entities. In this respect the EO Act goes further than the Charter.

60. In the present matter, the Complainant and the First Respondent cannot invoke the rights in Part 2 of the Charter as their rights. Section 6(1) of the Charter provides:

(1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note

Corporations do not have human rights.

61. Section 3 of the Charter defines person to mean 'human being'.⁴⁴
62. The Complainant appears to accept that by itself it does not have any relevant human right; rather the right to equality and recognition before the law are the rights of the Named Persons it represents.⁴⁵ Both Respondents claim they are 'entitled' to freedom of religion under s 14 of the Charter.⁴⁶ However, the Respondents' submissions do not address the basis upon which the First Respondent is entitled to the right. Paragraphs 14.5 and 14.6 of the Respondents' submissions address the Second Respondent's right under s 14.
63. As noted above, the parties do not seek a finding that their respective Charter rights have been infringed.⁴⁷ Rather, they point to the Charter rights in advancing their respective arguments about the interpretation of the EO Act. The Commission submits that s 32 remains relevant notwithstanding that the Complainant and First Respondent are incorporated entities. Section 32 applies where a Court or the Tribunal is required to

⁴⁴ *Bank of Cyprus Australia Limited v The Registrar of Titles & Ors* [2008] VSC 327 at [33], *Geelong Community for Good Life Inc v Environment Protection Authority & Anor (General)* [2009] VCAT 2429 at [140].

⁴⁵ Complainant's submissions at paragraph 3.7.

⁴⁶ Respondents' submission at paragraph 1.3(d)

⁴⁷ This was clarified by the parties in opening submissions on day 1 of hearing, 7 July 2010 (transcript).

interpret legislation regardless of whether the parties are individuals or corporations. Even where the legislation arises in a dispute between private parties, s 32 applies.⁴⁸

Issue Four: Relevance of the Charter to the standing provisions

64. The Commission submits that the Charter is also relevant to the interpretation of ss 104(1B) and 104(1C) of the EO Act. These provisions should be interpreted in a manner which gives effect to the rights of the persons represented by the Complainant to seek and obtain an effective remedy: see for example Article 2(3) of the ICCPR.
65. The Complainant relies on ss 104(1B) and 104(1C) of the EO Act. In summary, it must satisfy the Tribunal that it is:
- (a) a representative body;
 - (b) each of the named persons represented is entitled to make a complaint and has consented to the complaint being made;
 - (c) it has a sufficient interest in the complaint because conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to affect adversely the interests of the body or the interests or welfare of the persons it represents; and
 - (d) the alleged contravention arises out of the same conduct.
66. Whether the Complainant satisfies these elements is a factual inquiry. The Complainant says that it is entitled and able to make a representative complaint.⁴⁹ The Respondents say the Complainant has no standing because:
- it is not authorised to represent the Named Persons;
 - the Complainant's constitution does not authorise it taking this action; and
 - it does not have sufficient interest in the complaint.

⁴⁸ *Wilson v First County Trust (No.2)* [2004] 1 AC 816 at [94] – [95], *X v Y* [2004] EWCA Civ 662 at [65]– [66] and *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [177].

⁴⁹ see paragraphs 2.1(a) and 3(a) of the Complainant's submission.

67. The Commission makes no submissions about the evidence and the parties' submissions directed to this issue.⁵⁰
68. The Commission submits that when interpreting ss 104(1B) and 104(1C), the Tribunal must apply s 32 of the Charter and explore all 'possible' interpretations of the standing provisions and adopt an interpretation which promotes the Charter rights.
69. Section 104 of the EO Act sets out how a person may invoke his/her rights under the EO Act by making a complaint. The complaints process is the means by which a person/s may pursue a remedy for alleged contraventions of the EO Act which *inter-alia* is a means to securing a remedy for a breach of human rights.
70. Consistent with s 32(2) of the Charter, the Tribunal may have regard to international human rights law sources. International human rights law recognises a right to an effective remedy in relation to the rights of the kind contained in the Charter. Article 2(3) of the ICCPR provides:
3. *Each State Party to the present Covenant undertakes:*
- (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) *To ensure that the competent authorities shall enforce such remedies when granted.*
71. Article 2(3) of the ICCPR is concerned with substantive and procedural aspects of accessing an effective remedy.⁵¹ The UN Human Rights Committee has stated that the States parties' obligations are to ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The international law principles are consistent with the long standing common law principle. As Holt LCJ said in *Ashby v*

⁵⁰ Complainant's submissions at paragraphs 3.1 – 3.6 and Respondents' submissions at paragraphs 2.1 – 2.10.

⁵¹ *Faure v Australia* CCPR/C/85/D/1036/2001 (31 October 2005). See discussion in *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 at 719.

White (1702) 2 Ld Rayd 938 at 953:

'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.'

72. In the present matter, some of the Named Persons were under the age of 18 years. As the Respondents note in their submission at paragraph 5.3, at least one Named Person was under the age of 16 years. The Commission submits that where the interests of children and young people are concerned, the Tribunal should construe the standing provisions of the EO Act in a manner which provides a child or young person the opportunity to seek a remedy, notwithstanding that they are minors. A representative complaint is a vehicle which enables a minor to seek a remedy for his or her rights. Article 12 of the *Convention on the Rights of the Child*⁵² provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or **through a representative or an appropriate body**, in a manner consistent with the procedural rules of national law.*

(emphasis added)

73. The Commission submits that application of the Charter and relevant international law provisions do not alter the standing requirements under the EO Act. The Commission submits that ss 104(1B) and 104(1C) should be interpreted in a manner that facilitates the making of a complaint. The provisions should not be construed narrowly, or given an overly technical meaning.
74. Further, s 104(1C) of the EO Act contemplates that a representative party has an interest beyond an ordinary member of the general public.⁵³ However, where a complaint under the EO Act is made by a representative body, the representative or derivative interests

⁵² [1991] ATS 4. Entry into force generally on 2 September 1990. Entry into force for Australia on 16 January 1991.

⁵³ *Tooheys Ltd v Minster for Business and Consumer Affairs* (1981) 54 FLR 421 at 438.

should also be recognised.⁵⁴ The Commission submits that ss 104(1B)(b) and 104(1C) of the EO Act may be satisfied if the representative body's interest is to protect the rights of the persons represented.

Issue Five: Relevance of the Charter to the interpretation of the EO Act, in particular ss 75(2) and 77

75. This issue arises if the Tribunal finds that the Respondents have discriminated against the Named Persons and seek to rely on the general exceptions in ss 75(2) and/or 77 of the EO Act.
76. This issue concerns the approach to take when the Tribunal is required to interpret legislation which involves the intersection between different rights. There is no doubt that striking a balance between competing rights is difficult. The terms of the EO Act seek to do this by way of specific and general exceptions to conduct which would otherwise be discriminatory. In this way, the structure of the EO Act expressly provides that the freedom from discrimination is not an absolute right and may be limited. The approach to construing exceptions in discrimination law is a well traversed and discussed area.
77. In the present matter, the issue is how the Charter affects the interpretation of the exceptions and in particular, ss 75(2) and 77 of the EO Act. These provisions limit a person's right to be free from discrimination on the ground of sexual orientation. They impair the full enjoyment of the rights afforded by ss 42 and 49 of the EO Act and ss 8(2) and 8(3) of the Charter.
78. The Tribunal's task is to construe ss 75(2) and 77 of the EO Act to be compatible with s 8 of the Charter, as far as it is possible to do so but also having regard to purpose of ss 75(2) and 77, which is to protect religious freedoms.⁵⁵ The Charter must be read as a whole, so that one right is not 'privileged at the expense of another.'⁵⁶ The rights co-exist and an

⁵⁴ see *Cameron* at 519, per French J; *AIMPE v Secretary, Department of Transport* (1986) 13 FCR 124 at 133 per Gummow J) and *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 at 538 per Wilcox J.

⁵⁵ Refer to Appendix A.

⁵⁶ *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 at [31]

interpretation which is compatible with the Charter is one which recognizes that these rights co-exist.⁵⁷ This task starts with some basic principles. They are as follows.

79. First, that the right to equality and freedom from discrimination is not an absolute right and may be subject to limitations.
80. The EO Act provides a range of exceptions or defences. Some exceptions are specific to a particular area (for example discrimination in insurance s 43) or for a particular attribute (for example where a person's sex is a genuine occupational qualification s 17(1)). Other exceptions apply generally to all areas where discrimination would otherwise be prohibited (see Part 4, ss 69 – 82, 84). There is also provision for specific exemptions to be granted by the Tribunal for particular circumstances or conduct (see s 83 of the EO Act).⁵⁸

81. As Justice Bell observed in *Lifestyle Communities* at [29]:

The scheme of the provisions for exceptions and exemptions is that the legislation nominates what Parliament wants specifically excluded from the net of prohibited discrimination, but incorporates a general discretion to cover other cases deserving of exemption, although only on a temporary basis (subject to renewal).

82. Secondly, ss 75(2) and 77 of the EO Act recognise another important right, freedom of religion. These provisions should be construed in a manner which also respects this human right, provided by s 14 of the Charter, to the extent that it applies to both Respondents (as discussed in paragraphs 59 and 63 above). The Commission notes that ss 75(2) and 77 of the EO Act do not confer a positive right to exercise a person's religious beliefs at the expense of another person's rights.⁵⁹ These provisions are a shield rather than sword. The freedom of religion is not an absolute right and it may be limited. Whilst it is acknowledged that actions taken to conform to religious doctrines are important and

⁵⁷ *ibid* [2001] 1 SCR 772 at [34].

⁵⁸ See for example the discussion about the nature of the Tribunal's powers to grant exemption in *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116 at [2] and [3] and *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869.

⁵⁹ Compare *Burke v Tralagga & Anor* [1986] EOC 92-161 in relation to s 56(d) of NSW Anti-Discrimination Act 1977 (NSW).

protected by the freedom of religion, these must be balanced against competing rights in the circumstances. See Second Reading Speech (**Appendix A**).

83. The enactment of the EO Act predates the Charter but it is instructive to note that the Parliament specifically acknowledged that the religious bodies exceptions recognised the right of freedom of religion. While the EO Act provides a comprehensive scheme for the protection of the right to be free from discrimination, it does not create a stand-alone right to freedom of religion, rather it recognises that aspects of the human rights concerning religion may operate to limit the right to be free from discrimination. However, the Parliament considered that the purpose of the exceptions was to 'strike a balance' between two equally important rights. There is no suggestion that one set of rights trumps the other in the operation of the EO Act, rather both sets of rights may co-exist.
84. Thirdly, in accordance with the Charter, the rights in ss 8(2) and 8(3) and s 14 may be limited by the operation of s 7(2) of the Charter. It provides:

7(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

85. In following step one of *Momcilovic*, the Tribunal's task in determining whether the EO Act may be construed compatibly with the Charter, means that the Tribunal has to construe the relevant provisions of the EO Act, so far as it is possible to do so consistently with its purpose, in a Charter compatible way. This step necessarily includes consideration of the scope of the Charter rights but also any inherent limitations in the right – for example s 13(1)(a) of the Charter provides a right not to have one's privacy 'unlawfully' or 'arbitrarily' interfered with. The right is inherently qualified by the expressions unlawful and arbitrarily.

The Tribunal may also have regard to the general limitations which apply to the Charter rights as set out in s 7(2).

86. Fourthly, consistently, with general principles of construction, exceptions or defence should be construed narrowly. It is well accepted that courts and tribunals should not impute an intention to abrogate or curtail fundamental rights. This must be "*clearly manifested by unmistakable and unambiguous language before rights are curtailed.*"⁶⁰
87. Like the present matter, one of the issues in *Amicus* (supra) was the tension between the right of non discrimination on the ground of sexual orientation and the rights of religious bodies. In *Amicus*,⁶¹ the Court observed at [44] that '*religion is an area where the principle of non-discrimination on grounds of sexual orientation may conflict very obviously with other important rights which are themselves recognised by the Convention ...*'. Further that '*the weight to be given to religious rights may depend upon how close the subject-matter is to the core of the religion's values or organisation*'.⁶²

Parties' submissions on the limitation of the rights

88. The Commission submits that neither party has addressed the issue of how the exceptions should be construed where there are competing sets of rights by reference to the Charter.
89. The Complainant implicitly accepts that the Named Persons' rights are not absolute and suggests that the limits of those rights are to be determined by reference to s 75(2) and/or s 77 of the EO Act. The Complainant does not rely on s 7(2) of the Charter. The

⁶⁰ *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 at [47] (French CJ) and authorities cited herein.

⁶¹ [2004] EWHC 860; [2007] ICR 1176 at [186].

⁶² The Court noted at [41] that s 13 of the *Human Rights Act* 1998 (UK) provides that if a court's determination might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right. The Commission notes there is no comparable provision in the Charter but agrees that regard should be had to the right which is reflected in s 14 of the Charter.

Complainant accepts that ss 75(2) and 77 should be construed consistently with the rights to freedom of religion and belief.⁶³

90. The Complainant contends that s 14 of the Charter does not go so far as to allow the discrimination in the present matter. The Commission submits that this is not a question which the Tribunal need answer and respectfully submits that it mischaracterises the interpretative obligation in s 32 of the Charter. The present matter does not involve the Tribunal making an exemption, rather it is interpreting an exception determined by the Parliament. The only question for the Tribunal is to ask what interpretation of ss 75(2) and/or 77 is compatible with the relevant Charter rights in circumstances where those sections have the specific purpose of limiting rights of the kind provided by ss 8(2) and 8(3) and protecting the rights provided by s 14 of the Charter.
91. The Respondents' submissions do not address the fact that the freedom of religion is not an absolute right, how the right is affected by the terms of the EO Act and whether any limitations of the right affects the interpretation of ss 75(2) and/or 77 of the EO Act.

The Commission's suggested approach

92. In the present matter, the Commission submits that a possible construction of ss 75(2) and/or 77 of the EO Act compatible with the Charter rights is to ask whether these exceptions are reasonable, necessary, justified and proportionate to the objectives for which the alleged discriminatory actions are taken.⁶⁴ In effect, this is to test these provisions against the formula set out in s 7(2) of the Charter and by reference to relevant international sources.
93. Such an approach is consistent with the notion that the rights are not absolute and the balance is to be found by determining the limits on the enjoyment with both sets of rights. This approach is consistent with the concept described by Justice Bell in *Kracke*⁶⁵ as the

⁶³ Complainants' submissions at paragraphs 8.2 – 8.5.

⁶⁴ *R v Oakes* [1986] 1 SCR 103.

⁶⁵ [2009] VCAT 646, [157]-[158].

"minimum impairment principle" and the process contemplated by s 7(2) of the Charter to determine the manner in which Charter rights may be limited.

Section 75(2)

94. Section 75(2) of the EO Act provides:

75. Religious bodies

....

(2) Nothing in Part 3 applies to anything done by a body established for religious purposes that-

(a) conforms with the doctrines of the religion; or

(b) is necessary to avoid injury to the religious sensitivities of people of the religion.

95. The expressions 'religious purposes', 'religion', 'doctrines' and 'religious sensitivities' are not defined in the EO Act. The Commission submits that these expressions should be construed consistently with the Charter which means that the meaning of religion should not be unduly confined.

Section 75(2)(a)

96. The Commission submits that an interpretation which is compatible with human rights is one which permits s 75(2)(a) to operate when the discrimination is 'reasonably necessary' to conform to religious doctrines.⁶⁶ This does not require the Tribunal to read in words to s 75(2)(a), but rather take a strict approach to the meaning of 'conform'. The expression 'conform' should not be interpreted to mean anything that is done by a person holding religious beliefs or motivated by religious beliefs satisfies the exemption. A construction of s 75(2)(a) which is compatible with the Charter is one which requires the Respondents to demonstrate that their conduct is clearly connected to their religious belief. As noted above, consideration must be given to what the person believes he or she is obliged to do as a consequence of their belief.⁶⁷

⁶⁶ See also *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998), *Mornington Baptist Church Community Caring Inc* [2005] VCAT 2438 (10 November 2005),

⁶⁷ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358, para 60 and referred to in *Williamson* at [63]

97. This approach will enable a respondent's actions to be examined objectively in terms of whether they are reasonable, necessary, justified and proportionate and balanced in relation to competing rights. Consistently with the Charter, it will not involve the Tribunal making an assessment about the validity of the religious views but focuses on the conformance with the religious doctrines.

Section 75(2)(b)

98. Before s 75(2)(b) of the EO Act applies, the Respondent must establish on the evidence that the conduct of the religious body is necessary to avoid injury to 'religious sensitivities' of people of a particular religion. In international law, 'necessary' means more than convenient or reasonable.⁶⁸
99. The Commission submits that the 'sensitivities' must have some connection with the religion itself. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable.⁶⁹ This limitation on the right to equality in the context of religious bodies being permitted to discriminate where this is necessary to avoid injury to the adherents of their faith can be regarded as reasonable and demonstrably justifiable in that it recognises and promotes observance to religion. Section 75(2)(b) has an inbuilt constraint in that the discriminatory actions must be 'necessary'; and the sensitivities of adherents must have a causal nexus with a particular religion.

Section 77

100. Section 77 of the EO Act provides:

77. Religious beliefs or principles

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

⁶⁸ For example see discussion in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [132], *Matadeen v Pointu* [1999] AC 98 at 109, *R (o/a Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343, 93 BMLR 132 and *R (o/a Gentle and others) v Prime Minister and others* [2008] 2 All ER 1 at [9], [28], [29] and [74].

⁶⁹ *Jubber v Revival Centres International* [1998] VADT 62

101. The expression 'necessary to comply' is commonly used in discrimination legislation. The most authoritative consideration of the phrase is *Waters v Public Transport Corporation* (1991) 173 CLR 349. The High Court considered the operation of the then s 39 of the *Equal Opportunity Act 1984* (Vic). The question was whether the introduction of scratch tickets on trams was necessary for the PTC to comply with the requirements of s 31 of the *Transport Act 1983* (Vic). At 369, Mason CJ and Gaudron said that a wide construction of the exception in s 39 would be '*inconsistent with the general scheme of the [EO] Act*'. They concluded that the exception would only apply where the conduct in question was directly and specifically authorised by the statute in issue. At 413, Justice McHugh described the test as requiring the conduct in question to be mandatory and specific.
102. In *Hampson v Department of Education and Science* the House of Lords considered the application of a similar exception under the *Race Relations Act 1976*.⁷⁰ Lord Lowry observed at 180 D-E:
- "... acts done 'in pursuance of any instrument' were to be restricted to acts done in the necessary performance of an express obligation in the instrument and did not extend to acts done in the exercise of a power or discretion conferred by the instrument."*
103. Applying the reasons of Mason CJ and Gaudron J (with whom Deane J agreed), the exception applies if there is evidence that the religious belief or principle must directly and specifically authorise the conduct in question.
104. With respect to s 77 of the EO Act, the Commission submits that the purpose of this exception is to allow a person to discriminate if the discrimination is necessary to enable the person to comply with the person's genuinely held religious beliefs or principles. This exception gives rise to a significant limitation in that it may be relied upon by any person in relation to anything prohibited by the EO Act. The Commission submits that an interpretation which is compatible human rights is one which permits s 77 of the EO Act to operate only where a respondent's actions are again necessary to comply with subjectively held genuine religious beliefs or principles.


⁷⁰

[1991] 1 AC 171. See also a critique of *Hampson* in *Amnesty International v Ahmed* [2009] ICR 1450, [2009] IRLR 884 at [45]ff

Summary

105. In summary, ss 75(2) and 77 of the EO Act should be construed in a manner which requires the Respondents to establish their relevant religious doctrine or belief. Then the Respondents should demonstrate the nexus between adherence to those doctrines and/or beliefs and why it is necessary in the circumstances of this case to discriminate on the ground of sexual orientation. The Respondents must be able to demonstrate that the discrimination is more than convenient or reasonable. They must be able to establish that it is necessary in the particular circumstances.
106. In this respect, ss 75(2) and 77 can be construed in a manner which is compatible with the Charter and strikes a fair balance between the competing sets of rights. This construction will permit both sets of rights to be respected equally and it does not require the Tribunal to find that one set of rights prevails over another.

Emma Turner
Solicitor

A handwritten signature in black ink, appearing to be 'Kate Eastman', with a long horizontal flourish extending to the right.

Kate Eastman
Counsel for the Commission
22 July 2010

APPENDIX A

In the Second Reading Speech,⁷¹ the Minister said:

"Exceptions.

This Bill attempts to strike a balance between the rights and freedoms of individuals by providing for limited exceptions where discrimination in the circumstances specified in the Bill will not be unlawful. I mentioned some of the exceptions that will apply as a result of the introduction of age as a new ground of prohibited discrimination.

These exceptions balance the aims of equal opportunity and elimination of discrimination against a number of competing considerations such as the desire to infringe as little as possible on private spheres of activity. In attempting to strike a balance, the Government is also concerned to ensure the freedom, as far as possible, of Victorian business to regulate the conduct of its own affairs....

Religious bodies

Religious bodies are provided with an exemption in the Bill which already existed under the 1984 Act....

While being exempt from Part 3 of the Bill, religious bodies will be subject to the sexual harassment provisions of the Bill. The Equal Opportunity Act 1984 exempted religious bodies from the operation of the entire Act, including from the prohibition on sexual harassment. The Government sees no justification for the continuation of this total exemption...

Religious beliefs or principles

The Bill provides an exemption for discrimination which is necessary to comply with a person's genuine religious beliefs or principles. It aims to strike a balance between two very important and sometimes conflicting rights – the right of freedom of religion and the right to be free from discrimination.

Equal Opportunity legislation may sometimes compel individuals to change their conduct and practices in order to ensure that discrimination which may be harmful to others does not occur. However, the Government recognises that it is not acceptable to compel a person to act in such a way as would compromise their genuinely held religious beliefs. I wish to emphasise that religious beliefs must be absolutely genuine in order to qualify for the exemption and if a complaint is made that quality will have to be proven to the Commission and Tribunal."

(our emphasis).

⁷¹ Victoria, *Hansard*, Legislative Assembly, 4 May 1995, 1250-1