

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

Nos. A123/2011 and A296/2011

SOPHIE AITKEN & ORS
Complainants

AND

State of Victoria – Department of Education and Early Childhood Development
First Respondent

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

Introduction and overview

1. The Commission intervenes as of right under section 40 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) in the proceedings.
2. The Commission intervenes to make submissions on the following Charter issues:
 - how the Charter affects the interpretation of section 2.2.11 of the *Education Training and Reform Act 2006* (**Education Act**);
 - the scope and nature of the Charter rights that are engaged in the proceedings;
 - how the Charter affects the interpretation of section 69 of the *Equal Opportunity Act 1995* (**EOA 1995**) and section 75 of the *Equal Opportunity Act 2010* (**EOA 2010**); and
 - addressing the EOA as required throughout the submissions.

3. In summary, the Commission submits:

- 3.1. the Tribunal's primary task is to determine whether there has been a contravention of the EOA 1995 and EOA 2010 in the form of direct discrimination against the Complainants and their children on the basis of either religious belief or activity (the parents of the named children), or personal association with someone who has the attribute of a religious belief or activity (the named children). Establishing this contravention of the EOA 1995 and EOA 2010 requires an assessment of the evidence to determine whether the Respondents have acted contrary to s 37(2)(a) or (c) of the EO Act 1995 or s 38(2)(a) or (c) of the EOA 2010. If this contravention can be proved on the balance of probabilities, then the Respondents must then seek to establish that their conduct is (relevantly) protected by the exceptions in s 69(1) of the EOA 1995 or s 75(1) of the EOA 2010 and is therefore lawful discrimination;
- 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. Section 32 of the Charter requires the Tribunal to interpret the relevant provisions of the EOA 1995 and EOA 2010 in a way that is compatible with human rights;
- 3.3. the Commission submits that two important sets of human rights arise in this proceeding. The children represented by the Complainants invoke the right to equality and freedom from discrimination (ss 8(2) and 8(3) of the Charter) and their right to freedom of religion (s 14 of the Charter). These rights are not absolute and may be limited in accordance with section 7(2) of the Charter. 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 EOA 1995 and EOA 2010;
- 3.4. the EOA embodies and expands upon aspects of the right to equality and the right to freedom from discrimination provided by ss 8(2) and 8(3) of the Charter. The Tribunal can construe s 37(2)(a) or (c) of the EOA 1995 or s 38(2)(a) or (c) of the EOA 2010 consistently with these human rights;

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

3.5. the rights provided by s 37(2)(a) or (c) of the EO Act 1995 or s 38(2)(a) or (c) of the EOA 2010, are not absolute and may be subject to a range of exceptions in the EOA. The relevant exception in the present matter is provided by s 69(1) of the EOA 1995 and s 75(1) of the EOA 2010. The key issue is how the Charter affects the construction of this exception 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 EOA is beneficial legislation, with the overarching purpose of eliminating and addressing discrimination where it occurs in an area of public life. The prohibition against discrimination in the EOA should therefore be interpreted broadly and beneficially;
 - (c) the exceptions in the EOA 1995 and EOA 2010 should be construed narrowly and applied only where there is clear evidence to support the application of the exception;
 - (d) the right to freedom of religion and belief is not an absolute right and it too may be limited.
- 3.6. the Commission submits that the relevant provision of the Education Act can be interpreted in a manner compatible with human rights in the Charter and that accordingly, the statutory provision exception in the EOA does not apply in this case.

The Legislation

- 4. The Education Act confers responsibility on the Respondent for the administration of education and training in Victoria.
- 5. The Education Act makes provision for instruction in Government schools in Division 2 of Part 2.2.
- 6. Relevantly, Section 2.2.10, entitled "Education in governments schools to be secular", provides:

- (a) Subsection (1) provides that except as provided in section 2.2.11, education in government schools must be secular and not promote any religious practice, denomination or sect.
 - (b) Subsection (2) provides that subsection (1) does not prevent the inclusion of general religious education in the curriculum of a Government school.
- 7. Subsection 2.2.11(1) provides that religious instruction may be given in a Government school in accordance with that section.
 - 8. Subsection 2.2.11(5) defines special religious instruction (**SRI**) to mean instruction provided by churches and other religious groups based on distinctive religious tenets and beliefs.
 - 9. Relevantly, subsection 2.2.11(2)(c) provides that attendance for the SRI is not to be compulsory for any student whose parents desire that he or she be excused from attending.

The Policy

- 10. The respondent has issued a policy for Victorian Government Schools in relation to the provision of SRI in Government Schools. From September 1996 until June 2007, this relevant policy was contained in the policy guide entitled "Schools of the Future Reference Guide". Between June 2007 and July 2011, the policy in relation to the provision of SRI was called "Victorian Government Schools Reference Guide" (**old policy**).
- 11. On 18 July 2011, the old policy was decommissioned and replaced with the "School Policy and Advisory Guide", which also contained a policy in relation to the provision of SRI in Government schools (**current SRI policy**).
- 12. The current SRI policy was amended on 24 August 2011 and provides:
 - 12.1. principals must obtain parental advice via the prescribed GC 566 form for their child to participate or not participate in SRI;
 - 12.2. principals must ensure that attendance at SRI classes is not compulsory for any student whose parents request that he/she be excused from attending;
 - 12.3. principles must ensure that students who do not attend SRI are appropriately supervised by teachers, and engaged in positive, independent learning such as self-study, including revision or other activities, for example, community service, peer mentoring, participation in clubs or instruction in areas outside the core curriculum; and

- 12.4. principals must ensure core curriculum is not delivered to non-attendees during the period of SRI².
13. Accordingly, in the period of time that relates to the Complainants' allegations of discrimination, the SRI policy has seen a number of iterations. As it currently stands, to the Commission's knowledge, the following is a summary of the SRI policy in relation to the Complainants:
- 13.1. SRI is not compulsory for students to attend and principals must obtain parental advice about whether or not a child is to participate in SRI;
- 13.2. students are no longer required to receive SRI unless or until parents request that their children do not receive such instruction – that is, the default position is no longer that students will receive SRI unless or until parents positively "opt-out" of it on their children's behalf;
- 13.3. core curriculum is not to be given to children who do not attend SRI during periods when SRI is delivered;
- 13.4. guidance has been provided on the range of activities that children who do not attend SRI are able to undertake during the period that SRI is delivered.

Unlawful discrimination – Section 37 of the EOA 1995 and Section 38 EOA 2010

14. The Complainants make allegations of unlawful discrimination against the Respondents in respect of conduct occurring pursuant to the EOA 1995, and with respect to continuing conduct pursuant to the EOA 2010, which commenced on 1 August 2011. The relevant unlawful discrimination provisions at issue in this case are similar in terms, however for ease of reference, we have referred to the relevant provisions under each respective statute throughout these submissions.
15. Section 37 of the EOA 1995 prohibits specific forms of discrimination by educational authorities. In light of section 4(1) of the EOA 1995, the Respondent is an educational authority.³
16. Relevantly, section 37(2) prohibits an educational authority from discriminating against a student:
- 16.1. by denying or limiting access to any *benefit* provided by the authority;
- 16.2. by expelling the student;

² Please refer to Respondent's witness statement of Kris Arcaro at [14] and Exhibit KA-6.

³ Section 4(1) relevantly provides that an "educational authority" is a person or body administering an "educational institution", which in turn is defined in section 4(1) to mean, relevantly, a school. That the respondent is an educational authority for the purposes of the EOA is not in dispute in this matter.

- 16.3. by subjecting the student to any other *detriment* (our emphasis).
17. Section 38 of the EOA 2010 is set out in identical terms.

Direct Discrimination

18. Pursuant to section 8(1) of the EOA 1995, direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, in the same or similar circumstances.
19. Section 8(2) of the EOA 1995 provides that in determining whether a person directly discriminated it is irrelevant whether or not the person was aware of the discrimination or considered the treatment less favourable; or whether or not the attribute was the only or dominant reason for the treatment, as long as it was a substantial reason.
20. Accordingly, to establish direct discrimination, the Tribunal must be satisfied that:
- 20.1.1. The Complainants were treated less favourably by the Respondent than the way in which the Respondent treated or proposed to treat, a person without the attribute of religious belief or activity, in the same or similar circumstances; and
- 20.1.2. A substantial reason for the less favourable treatment was that the Complainants had the attribute of religious belief or activity.

Less Favourable Treatment

21. In order to test whether there has been less favourable treatment, it is necessary to make a comparison between the Complainants and another person without the Complainants' attribute, and be satisfied that there has been detriment to the Complainant.
22. After an appropriate comparator has been identified, it is necessary then to consider the treatment that would have been given to the person without the attribute in the same or similar actual circumstances⁴.
23. In this case, the comparator has been identified as children at the Complainants' schools without the attribute of religious belief or activity, or a different attribute, who do not opt out of SRI and therefore attend the SRI classes. The parties are agreed as to the appropriate comparator in this case subject to a few conditions set out by the Respondent. The Commission agrees with the Respondent's elaborated characterisation of the appropriate comparator in this case⁵.

⁴ *Purvis v New South Wales* (2003) 217 CLR 92.

⁵ See the Respondent's Legal Contentions at [79].

Substantial Reason

24. In considering whether the Complainants' attribute was a substantial reason for the less favourable treatment, the Tribunal has indicated that it must be "of substance" and is "not trivial or insignificant"⁶. The Court of Appeal has further elaborated on this point and said that the relevant attribute must be the "true basis" upon which the conduct was undertaken or pursued⁷.
25. Having regard to section 8(2) of the EOA 1995, differential treatment is determined objectively. Further, pursuant to section 10 of the EOA 1995, in determining whether or not a person discriminates, their motive is irrelevant.
26. On the evidence in this case it appears that a substantial reason for treating the Complainants differently to the other children attending SRI is their religious belief or activity, or their personal association with their parents' religious belief or activity.

Detriment

27. Section 37(2)(a) of the EOA 1995 requires that the Complainants are denied or their access is limited to, any benefit provided by the Respondent.
28. Section 37(2)(c) of the EOA 1995 requires that the Complainants are subjected to a detriment. A detriment can be the denial of a benefit and is defined in the EOA 1995 to include "humiliation and denigration". The Tribunal has held that 'benefit' and 'detriment' have broad meanings, and can include any kind of advantage or disadvantage which is not illusory or trivial⁸. It is accepted that a 'detriment' must be some real, rather than trivial, disadvantage. An alleged 'detriment' must be objectively assessed.⁹ The Commission submits that a person may experience a detriment if the impugned discriminatory conduct impairs the enjoyment of one or more human rights.
29. In this case, the Complainants allege that the detriment to which the children were subjected is that by requiring them to opt out of SRI, the children are identified as different and segregated from their peers during normal school hours on the basis of their parents' religious belief or activity¹⁰.

⁶ See *Oyekanmi v National Forge Operations Pty Ltd* [1996] EOA 92-797.

⁷ See *Kapoor v Monash University and Anor* (2001) 4 VR 483.

⁸ *Leonard v Youth Hostels Association* [1995] EOC 92-763.

⁹ *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)

¹⁰ See Complainants' Legal Contentions at [26].

30. In addition, the Commission submits that subjecting the Complainants' children to spending time at school during ordinary school hours where no new instruction is received, whereas the children attending SRI are receiving new instruction, is also a detriment for the purposes of direct discrimination. Further, the children are being denied the benefit of instruction during ordinary school hours during which time the children attending SRI are benefiting from new instruction.
31. The substantial reason for both the detriment and the denial of a benefit, which are suffered by the children as identified above, is because of the children's religious belief or activity, or their personal association with their parents' religious belief or activity.

Attribute

32. Under section 7 of the EOA 1995, 'discrimination' is defined to mean direct or indirect discrimination on the basis of an attribute.
33. Each of the complainants' children has the attribute of religious belief or activity¹¹, which, pursuant to the definition in section 4(1) of the EOA 1995, includes "holding or not holding a lawful religious belief or view or engaging in, not engaging in or refusing to engage in a lawful religious activity". There is no dispute between the parties that atheism or not believing in a religion or in God is a "religious belief or activity" for the purposes of the EOA 1995.

Unlawful discrimination – Section 38 EOA 2010

34. Section 38(2) of the EOA 2010 is set out in the same terms as section 37(2) of the EOA 1995.
35. The definition of direct discrimination has changed in the EOA 2010. Section 8(2) of the EOA 2010 provides:
- 35.1. Direct Discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably *because of* that attribute (our emphasis).
- 35.2. In determining whether a person directly discriminates it is irrelevant whether or not that person is aware of discrimination or considers the treatment to be unfavourable; or whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

¹¹ Section 6(j) of the EOA 1995.

36. The new term “because of” in section 8(2) of the EOA 2010 is intended to be less technical than the old term and is designed to set a lower threshold for establishing the causal connection¹².
37. Moreover, under the EOA 2010, the ‘comparator test’ has been removed and now all that need be established is that the treatment was unfavourable, and that unfavourable treatment is because of the person’s attribute.
38. A detriment under section 38(2) of the EOA 2010 must be determined objectively, and has a broad meaning. The same test for detriment that applied under the EOA 1995 continues to apply.
39. In this case, the Commission submits that the Complainants’ children have suffered a detriment for the purposes of the EOA 2010 by being segregated from their peers and identified as different during ordinary school hours, on the basis of their religious belief or activity, or by personal association with their parents’ religious belief or activity.
40. Further, another detriment can be identified as the fact that the Complainants’ children are being denied the benefit of new educational instruction during ordinary school hours whereas those children attending SRI classes are receiving new instruction.
41. The Respondent argues that the children who are not attending SRI are not being subjected to a detriment because neither those children not attending and the children who do attend SRI, are receiving instruction in the *core curriculum*.
42. Whilst this may be the case, the children attending SRI are in fact undertaking new learning, or new instruction, whereas those children who do not attend SRI are not allowed to undertake new learning and instead must undertake activities such as silent reading, or listening to an audio book, writing activities, illustration, educational games, computer activities, and revision of class work¹³.
43. The Commission submits that the Complainants’ children are subjected to a detriment or denied a benefit on the basis of their religious belief or activity, or their personal association with their parents’ religious belief or activity. Accordingly, pursuant to both the EOA 1995 and the EOA 2010, the Complainants’ children have been directly discriminated against.

Exceptions – Section 69 EOA 1995 and Section 75 EOA 2010

44. If the Tribunal is satisfied that the Respondent has discriminated against the Complainants’ children, the Tribunal must then consider whether the exception for acts done with statutory

¹² Explanatory Memorandum to the *Equal Opportunity Bill 2010*, pp 12-13.

¹³ See Respondent’s Legal Contentions at [75].

authority applies (see section 69(1) of the EOA 1995 and section 75(1) of the EOA 2010). These exceptions are set out in the same terms as follows:

44.1. A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of an Act, other than this Act.

44.2. It is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

45. In construing the exceptions in sections 69(1) EOA 1995 and 75(1) of the EOA 2010, 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 the exception is cast in general terms, the Respondent bears the onus of establishing that the exception applies based on the evidence. They must demonstrate that all of the elements of the exceptions are clearly satisfied and the exceptions operate to limit the complainants' rights in a manner consistent with the Charter.

46. The scope of the exception in section 69(1) of the EOA 1995 was considered by the Tribunal in *Wojcik v Roads Corporation*¹⁴. In this case, the Tribunal found that the exception does not only cover the case where it can be said that the relevant conduct was strictly necessary to comply with the relevant statutory provision. It extends to cover a case where the relevant statutory provision can be said to authorise relevant conduct. A statutory provision can be said to do this if it requires the relevant conduct, or expressly or by necessary implication, permits it.

47. The Commission acknowledges that this statutory exception will apply so as to limit the right to equality in some circumstances by allowing discrimination in circumstances where it would otherwise be prohibited. However, this exception must be read in light of the Charter.

48. In the Second Reading Speech for the *Equal Opportunity Bill 2010*, with respect to clause 75 (which is in the same terms as section 69 of the EOA 1995), it was said that in enacting the exception, Parliament was recognizing that in limited circumstances, certain conduct will be considered to be a reasonable limitation on the right to equality. It further states:

Prior to the commencement of the Charter, the exception in section 69 of the Equal Opportunity Act was very far reaching. However, since the commencement of the Charter, there are a number of processes ensuring human rights are taken into consideration in the development of new policy and legislation. These processes are

¹⁴ [1997] VADT 75 (10 September 1997).

designed to ensure new acts or enactments are Charter-compatible, or that the decision to enact legislation that is not compatible is intended and explained.

49. In light of the Second Reading Speech, it is clear that Parliament intended that the scope of the statutory exception in section 69(1) of the EOA 1995 and section 75(1) of the EOA 2010 is to be read compatibly with the Charter, which means that any limitation on human rights that it requires or authorises, must be “reasonable” in accordance with section 7(2) of the Charter.

Application of the Charter

50. The Education Act commenced prior to the introduction of the Charter. Accordingly, the relevant provisions of the Education Act must now be interpreted in accordance with section 32 of the Charter and where it is possible to do so, consistent with the purpose of the provision, a Charter compatible meaning must be given to the relevant provision.
51. Section 32 gives effect to the purpose set out in section 1(2) of the Charter. It provides:

(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.

52. The Commission notes that in *Kracke v Mental Health Review Board & Anor (No 2) (General)* [2009] VCAT 1548 at [334] – [358], Bell J considered whether the Charter had retrospective operation. The central issue was the application of the Charter to the conduct of a public authority, as is the case in this instance. At [338], Bell J accepted the

proposition that section 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 section 32. He accepted that when interpreting the *Mental Health Act* (enacted in 1986), he must apply section 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 section 32(1) coming into force: see [339]. In this context, he appeared to conclude that section 32 had no retrospective operation.

53. The Commission's submissions proceed on the basis that section 32 of the Charter applies to the interpretation of section 69(1) of the EOA 1995 insofar as it applies to acts done after 1 January 2008, and to the interpretation of section 75(1) of the EOA 2010.
54. The interpretive exercise in section 32 of the Charter is part of the "the body of rules governing the interpretative task, not a separate special rule". It must be applied by Courts and Tribunals whenever interpreting legislation. The Court of Appeal in *Momcilovic v The Queen*¹⁵ held:

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.

55. Further, a majority of the High Court has found that when determining what is compatible with the human rights in Part 2 of the Charter, one must assess against the reasonable limitations analysis in section 7(2) of the Charter¹⁶.
56. In this matter, the Tribunal's task is to consider all possible interpretations of the EOA and prefer an interpretation that least limits the Charter rights in issue. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.
57. 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]:

¹⁵ [2010] VSCA 50.

¹⁶ *Momcilovic v The Queen* (2011) 280 ALR 221, see Gummow J at [168] (with whom Hayne J agreed at [280]), Bell J at [683] and Heydon J at [415]-[427].

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.

58. 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.¹⁷ The Commission submits that the Tribunal will be assisted by international sources which have considered the content and scope of the relevant rights.

59. When exploring possible interpretations which are compatible with the Charter rights, it is generally accepted that section 32 does not permit the Tribunal to 'rewrite' the text of the EOA.

Section 32 does not permit the Tribunal to adopt a meaning inconsistent with a 'fundamental feature' or the 'underlying thrust' of the EOA.¹⁸ The Tribunal is not required to 'play with [the] words' of the EOA.¹⁹ The task remains in determining what Parliament would reasonably be understood to have meant by using the actual language of the EOA.²⁰

60. 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 EOA, the preferred interpretation is one that gives effect to the rights protected in the Charter.

61. The Charter has been considered in a number of matters concerning the interpretation of the EOA. 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 section 83 of the EOA 1995. He said:

¹⁷ see *Kracke v Mental Health Review Board* [2009] VCAT 646, [201]-[202].

¹⁸ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] (per Nicholls LJ) and see discussion by Gummow J in the High Court in *Momcilovic v The Queen* [2011] HCA 34 at [146].

¹⁹ *Wilkinson v Inland Revenue Commissioners* [2006] 1 WLR 1718.

²⁰ See Gummow J in *Momcilovic v The Queen* [2011] HCA 34 at [146].

[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.

Section 8: Equality and Freedom from Discrimination

62. The Complainants' children correctly invoke sections 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.

...

63. The subject matter of the complaint and the terms of the EOA are all concerned with protecting the rights of equality before the law and freedom from discrimination.
64. Section 3 of the Charter defines 'discrimination' for the purpose of section 8(3) by reference to the EOA. As Justice Bell observed in *Lifestyle Communities* at [10], the Charter operates to strengthen Victoria's anti-discrimination legislative framework.

65. 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.

66. In *Lifestyle Communities*, Justice Bell considered sections 8(2) and 8(3) in detail.²¹ 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 section 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 section 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

²¹ See [105] – [303].

of the Charter.²² The focus in section 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)*.²³ The animating values of s 8(3) are equal 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.

- 67. For the purpose of section 8(2) of the Charter, the Complainants contend that their children's rights to freedom of thought, conscience, religion and belief (section 14) have been impaired by the alleged discrimination. The Commission agrees that these rights are also relevantly engaged by the subject matter of the complaint.
- 68. For the purpose of s 8(3), it is accepted that discrimination on the ground of religious belief and activity is proscribed by the EOA (s 6).

²² See the definition of "human rights" in s 3(1).

²³ [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.

Section 14: Freedom of religion and belief

69. The complainants 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.

70. 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 section 14 of the Charter.

71. 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.*

72. There are a number of different aspects of the right. The UN Human Rights Committee's General Comment No. 22²⁴ explains the scope of the Article 18 rights.²⁵ 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 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;

²⁴ 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>

²⁵ 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/instatee/d4deidrb.htm>

- (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).

73. 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', ²⁶ 'corporal punishment for children'²⁷ and a belief that 'the appropriate framework for sexual relations is within marriage'.²⁸
74. In *R (Williamson) v SS Education and Employment*,²⁹ (**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*, 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:

...

²⁶ *Arrowsmith v United Kingdom* 19 DR 5 (1980); [1975] 3 EHRR 218

²⁷ *R (Williamson) v SS Education and Employment* [2005] 2 AC 246

²⁸ *Playfoot v Governors Millais School* [2007] EWHC 1698 (Admin)

²⁹ [2005] 2 AC 246

- (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."*
75. This approach is consistent with the approach taken by the Canadian Supreme Court considering the scope of religious freedoms.³⁰
76. Relevant to the Tribunal's task is the need to consider how the right to freedom of religion is engaged in the present matter and then consider what aspects of the right are relevant to the interpretation of the EOA.
77. In the Commission's view, the evidence supports a finding that the Complainants' children's non-belief in a religion or in God by virtue of their parents' beliefs meets the requirements of a 'religion' for the purpose of section 14 of the Charter. Accordingly, the Commission submits that the right to freedom of religion as held by the Complainants' children is engaged in these proceedings.

The Commission's suggested approach

78. In the present matter, the Commission submits that a possible construction of section 69(1) of the EOA 1995 and section 75(1) of the EOA 2010 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.³¹ 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.
79. 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*³² as the "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.
80. However, having regard to the specific circumstances of this case, the Commission is of the view that the statutory provision exception in section 69(1) of the EOA 1995 and s 75(2) of the EOA 2010 is not enlivened. This is because the Commission contends that it

³⁰ *R v Big M Drug Mart* [1985] 1 SCR 295 at 336 – 337.

³¹ *R v Oakes* [1986] 1 SCR 103.

³² [2009] VCAT 646, [157]-[158].

is possible to interpret the relevant provision of the Education Act in a manner that is compatible with the Charter and the rights of the Complainants' children, so that the provision does not require or authorise discrimination.

Education Act

81. In order to rely on the statutory exception, the onus is on the Respondent to establish that section 2.2.11 of the Education Act either necessitates or authorises direct discrimination on the ground of religious belief or activity or personal association with a person with that attribute against the Complainants' children.
82. The Commission contends that nothing in section 2.2.11 of the Education Act requires or compels the Respondent to conduct SRI classes during ordinary school hours; nor does it require or compel the Respondent to prohibit new instruction to students who do not attend SRI. Prima facie, section 2.2.11 simply states that SRI may be given in a Government school; and attendance is not to be compulsory.
83. Section 2.2.11 of the Education Act confers a discretion on the Respondent to provide SRI in Government schools. As noted above, there is nothing in the Education Act which compels the Respondent to provide SRI, and there is nothing in the Education Act which mandates that SRI be given during ordinary school hours.
84. The Commission submits that the Respondent is a public authority in accordance with section 4 of the Charter. Accordingly, the Respondent has obligations under section 38 of the Charter, which provides:

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

85. The Commission submits that when exercising its discretion to provide SRI in Government schools, the Respondent must therefore act in a way that is compatible with the human rights of the Complainants' children, specifically their rights to freedom from discrimination, equality and freedom of religion. In particular, when the Respondent is taking a decision

to provide SRI in Government schools, and implementing this decision through policy, such as the SRI policy, this policy must be Charter compatible.

86. Whether the Respondent acted in accordance with its Charter obligations and compatibly with sections 8 and 14 of the Charter when exercising its powers under section 2.2.11 of the Education Act in this case is to be determined by examining whether its conduct limited or interfered with the rights in a manner that was not demonstrably justifiable having regard to section 7(2) of the Charter.
87. As Warren CJ said in *Re Application under the Major Crime (Investigative Powers) Act 2004*, the rights set out in Part 2 of the Charter are “*guaranteed unless the party invoking s 7(2) can bring him or herself within the exception criteria which justify the rights being limited*”³³.
88. The Respondent bears the onus of establishing that any limitations on rights are consistent with s 7(2) of the Charter³⁴. That onus should ordinarily be discharged by reference to evidence³⁵. As Warren CJ explained³⁶:

“[T]he issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

The party seeking to justify the limitation must satisfy each of the factors in paragraphs (a)-(e), which broadly correspond to the proportionality test identified in Oakes. The notion of proportionality is a key principle embraced by the Charter and reflects the human rights jurisprudence of most comparable jurisdictions.”

³³ *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [115].

³⁴ *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147]; *Kracke* [2009] VCAT 646 at [108]; *R v Oakes* [1986] 1 SCR 103, 136-137.

³⁵ *Kracke* [2009] VCAT 646, [148]; *R v Oakes* [1986] 1 SCR 103, 138; *Hansen v The Queen* [2007] 3 NZLR 1, [9], [50], [132]-[133], [229]-[232]; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 61 [30].

³⁶ *Re an Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147]-[148]. See also *R v Oakes* [1986] 1 SCR 103, [65]; Evans and Evans, *Australian Bills of Rights* (2008) 5.51-5.52.

89. In the present case, the Commission submits that the Respondent should exercise its powers under the Education Act and pursuant to the relevant SRI policy compatibly with the rights to equality and freedom of religion.
90. The Commission submits that this requires the Respondent to exercise its discretion to provide SRI in a manner that least infringes the rights of the Complainants' children to enjoy their right to freedom from discrimination and exercise their religious freedom without any unreasonable limitation (having regard to section 7(2) of the Charter).
91. The Commission notes that from 1 August 2011, the Respondent has obligations under section 15(2) of the EOA 2010 to "take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible". This positive duty is in addition to the Respondent's obligations as a public authority under the Charter³⁷.
92. In accordance with the interpretive obligation in the Charter, the Commission contends that it is possible to interpret section 2.2.11 in a way that is compatible with the human rights of the Complainants' children, without frustrating the purpose of section 2.2.11 of the Education Act.
93. The Commission contends that section 2.2.11 can be interpreted so as not to *require* Government schools to teach SRI during ordinary school hours; or alternatively, in the event that SRI is taught during ordinary school hours, the section can be interpreted so as not to prohibit those students who do not attend from receiving new educational instruction, in the same way that students attending SRI receive new instruction that is outside the core curriculum.
94. Accordingly, if, as the Commission submits, it is possible to interpret the Education Act compatibly with the Charter rights engaged and not in a discriminatory way, then the statutory provision exception in section 69(1) of the EOA 1995 or section 75(1) of the EOA 2010 will not apply. It follows that the Tribunal does not need to determine the scope or interpretation of the statutory provision exception in light of the Charter in this particular case.

Conclusion

95. The Commission submits that it is possible to interpret section 2.2.11 of the Education Act in a manner that is compatible with the Charter and the rights of the complainants' children.

³⁷ See section 15(5)(b) of the EOA 2010.

96. Accordingly, the Commission is of the view that the statutory exception in section 69(1) of the EOA 1995 and section 75(1) of the EOA 2010 does not apply in the circumstances of this case and the discrimination by the respondents against the complainants' children is unlawful in the circumstances.

A handwritten signature in black ink, appearing to read 'Tessa van Duyn', with a stylized, cursive script.

Tessa van Duyn

Solicitor for the Victorian Equal

Opportunity and Human Rights Commission

12 December 2011