

**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
STATEMENT OF CONTENTIONS**

I. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes as of right under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).
2. The parties have raised the following issues in relation to the Charter and its relevance to the proceeding before the Tribunal:

Complainant

The Complainant contends that:

- 2.1. The Respondents have acted in a way incompatible with the human rights of the Named Persons – those human rights provided by the Charter include their right to recognition and equality before the law and equal protection against

discrimination (s 8(3)), freedom of thought, conscience, religion and belief (s 14), freedom of expression (s 15), freedom of association (s 16) and the right to recognition and equality to enjoy these rights without discrimination (s 8(2) (see *Complainant's Particulars of Complaint paragraph 41*);

- 2.2. the interpretation of ss 7, 42(1)(a) and (c), 49(a), 75 and 77 of the *Equal Opportunity Act 1995 (the EO Act)* is affected by s 32(1) of the Charter (see *Complainant's Particulars of Complaint paragraph 43*);
- 2.3. ss 12, 75 and 77 of the EO Act should be construed compatibly with human rights for the purpose of s 32 of the Charter. The human rights in issue are said to be the right to equality (s 8) and freedom of religion (s 14) (*Complainant's submission paragraphs 3.7, 8.1, 8.3*);
- 2.4. an interpretation which is compatible with the Charter requires ss 75(2) and 77 of the EO Act to be confined to aspects of religious doctrine which are core and fundamental to adherence to a particular religion and which compel only one course of conduct (*Complainant's submission paragraph 8.2*); and
- 2.5. s 32 of the Charter has retrospective effect (*Complainant's submission paragraph 8.5*).

Respondents

The Respondents contend that:

- 2.6. s 32 has no retrospective effect with respect to conduct alleged to have occurred on 7 June 2007 (*Respondents' submission paragraphs 14.3 and 14.4*);
- 2.7. the Second Respondent was entitled to freedom of thought, conscience, religion and belief provided by s 14 of the Charter (*Respondents' submission paragraph 14.5*);

- 2.8. the effect of s 5 of the Charter means that the Second Respondent enjoys additional rights provided by ss 75(2) and 77 of the EO Act (*Respondents' submission paragraph 14.7*);
- 2.9. the Second Respondent was entitled to freedom of expression provided by s 15 of the Charter (*Respondents' submission paragraphs 14.8, 14.9*); and
- 2.10. the equality of persons before the law and the right to enjoy human rights are not in issue. The issue is the interpretation of ss 75(2) and 77 of the EO Act in a manner consistent with s 14 of the Charter (*Respondents' submission paragraph 14.14*).
3. Having regard to the parties' submissions and the nature of the claim, the Commission contends that the following issues arise in relation to the application of the Charter and the interpretation of EO Act:
- 3.1. **Issue One:** the manner in which the Charter applies to the proceeding when the substantive rights in Part 2 applied at 7 June 2007 but s 32 of the Charter was not operative. There is an issue as to whether s 32 has retrospective operation;
- 3.2. **Issue Two:** what Charter rights are engaged and how these should be interpreted and balanced;
- 3.3. **Issue Three:** the relevance of the Charter rights to the Complainant and First Respondent as incorporated bodies;
- 3.4. **Issue Four:** if s 32 of the Charter applies, how the Charter affects the interpretation of ss 104(1B) and 104(1C) of the EO Act; and
- 3.5. **Issue Five:** if s 32 of the Charter applies, how the Charter affects the interpretation of ss 75(2) and 77 of the EO Act.
4. The Commission does not seek to adduce any evidence, take an active role in the hearing, or make any submissions on the merits of the complaint. The Commission will file

written submissions addressing the matters raised in the Statement of Contentions and will supplement these submissions orally at the Tribunal's request.

5. In summary, the Commission contends:

5.1. **Issue One**

On 1 January 2007, the Charter (except Divisions 3 and 4 of Part 3) commenced: see s 2(1). On 1 January 2008, Divisions 3 and 4 of Part 3 (ss32 – 39) commenced: see s 2(2) of the Charter.

The Commission will submit that because the proceeding in the Tribunal commenced after 1 January 2008, the Charter applies. The combined effect of ss 2 and 49(1) means that the Charter applies to the interpretation of the EO Act notwithstanding that the EO Act was passed before 1 January 2007.

In contrast to the circumstances in *Kracke v Mental Health Review Board & Anor (No 2) (General)* [2009] VCAT 1548, this matter does not involve a decision by a public authority. Section 49(3) of the Charter is not relevant. The Tribunal's decision in *Kracke* can be distinguished.

Section 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, to the extent that these provisions concern a relevant human right.

As to the approach to take in applying s 32 of the Charter, the Commission contends that the correct approach is that taken by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50 (**Momcilovic**).

5.2. **Issue Two**

The complaint raises a number of human rights issues. The Commission's submission will address how the human rights issues may be characterised and the interaction between the EO Act and the Charter generally.

This is not a case where either party contends that a provision of the EO Act infringes a Charter right.¹ 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 which are directly protected by the EO Act (namely the right to recognition and equality before the law and equal protection against discrimination (ss 8(2) and (3) of the Charter) and human rights indirectly protected by the EO Act. 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 Respondents contend that ss 75(2) and 77 of the EO Act are intended to protect the right of freedom of religion (s 14) and freedom of expression (s 15). The Respondents contend that ss 75(2) and 77 of the EO Act operate as a limitation on the Named Persons' rights.

The Commission will make submissions as to the scope and nature of the human rights raised by the parties by reference to the Charter and, in accordance with s 32(2), to relevant international jurisprudence. The Commission agrees that all of these rights may be relevantly engaged but may be subject to the evidence as to the manner in which the rights apply and their relevance to the questions of interpretation.

The Commission will contend that the central issue before the Tribunal is the balancing exercise to be undertaken where there is a competing set of rights. The Tribunal should not be asked to find that one set of human rights trumps another. The Charter (in the context of s 7) prescribes that none of the human rights in question are absolute. Given that the human rights may be limited, the task before the Tribunal is to construe the provisions of the EO Act in a manner that, so far as possible consistent with their purpose, is compatible with human rights: which includes, in accordance with section 7(2) of the Charter, an analysis as to whether the rights are reasonably limited. The question is whether the terms of the EO Act, which incorporate the exceptions in ss 75(2) and 77 strike

¹ Compare *R v Momcilovic* [2010] VSCA 50. The issue was whether s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) was incompatible with s 25 of the Charter.

the appropriate balance or whether the Charter requires something more. The Commission will contend that the EO Act itself recognises the balance between competing sets of rights. However, the Charter requires the Tribunal to consider the scope of the exceptions closely and construe them in a manner consistent with s 7(2) of the Charter which sets up a helpful method of determining the limits of rights

5.3. Issue Three

Both the Complainant and First Respondent are incorporated entities. The Commission will submit that Charter rights invoked by them are the human rights of a person. For the purpose of ss 3 and 6(1) of the Charter, 'person' means 'human being'. While members of their respective groups may invoke the Charter rights, the incorporated entities are not the beneficiaries of the rights.

5.4. Issue Four

The Commission will submit that the Charter is 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.

5.5. Issue Five

The Commission will submit that the exceptions in ss 75(2) and 77 of the EO Act have the effect of limiting the rights of the Named Persons represented by the Complainant.

The Commission will submit that the Tribunal should construe ss 75(2) and 77 strictly and in a manner consistent with the objects of the EO Act and the Charter. When interpreting ss 75(2) and 77, the Tribunal should also have regard to the rights which underpin the exception, namely the freedom of religion.

The Commission will submit that, in accordance with the interpretative obligation in s 32 of the Charter, the Tribunal may construe ss 75(2) and 77 of the EO Act in a manner compatible with human rights and the manner in which those rights may be limited. The task does not require a finding that one set of rights trumps another. Rather, the Tribunal should construe the exception in a manner consistent with all relevant rights and the manner in which those rights may be limited.

6. The Commission reserves its rights to make submissions on any additional matters that the parties might raise during the course of the hearing.

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5 July 2010