



2015 Review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

Submission by

Australian Association of Christian Schools (AACCS)

Adventist Schools Australia (ASA)

Christian Schools Australia (CSA)

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Introduction

Australian Association of Christian Schools (AACCS), Adventist Schools Australia (ASA) and Christian Schools Australia (CSA) are national bodies representing schools, or school systems in the case of ASA, educating around 130,000 students across more than 300 locations nationally. Our organisations provide leadership in policy, services and resources for members, and generally work to advance the cause of Christian schooling. Within Victoria our organisations speak on behalf of schools educating in excess of 20,000 students in around 50 different locations.

Our schools are geographically, culturally and educationally diverse, while serving predominantly middle to lower socio-economic communities. Schools range in size from around 50 students to more than 2,200 over three campuses. While mainly in the metropolitan or outer suburban fringe suburbs of Melbourne a number are location across both regional and more rural Victoria. The average socio-economic status (SES) score of these schools is around 97, below the non-government school average and reflecting the communities being served.

ASA schools operate on a systemic basis as part of the wider Adventist Church, which educates more than 1.6 million students globally. Member schools of AACCS and CSA operate as locally governed, community-based, not for profit religious organisations. Some member schools are closely aligned with one or more Christian churches in their communities, others have their heritage in a group of parents coming together to start a school.

In all cases as faith-based schools, our schools are overt and particular about the beliefs and values that underpin the schools' culture and practice. As a direct expression of Christian faith, our member schools have a strong culture of mission and service both at home and overseas. They educate students to be locally and globally active citizens, concerned about the welfare of others and about using their gifts to serve.

Christian schools represented by our organisations have attracted very strong community support as evidenced by their significant enrolment growth. In addition to serving Christian families, most schools also attract significant enrolments from families who, while not currently attending a Christian church, nonetheless deliberately choose the school because they desire for their children an education that is based upon Christian beliefs and values. This can be expected when the position is accepted that every parent has an inalienable right to choose the type of education they desire for their children.

We have set out below our initial submission to the 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter). In doing so we are willing to provide further analysis and comment either in response to other submissions or more generally. In particular we may wish to make a response to any proposed legislative change which may be recommended following the Review.

The nature of Christian Schools

Christian schools were established out of a desire by parents and others to see young people grow up in a Christian teaching/learning environment where they could be nurtured in their faith.

The Christian faith is the foundation upon which all aspects of a Christian school are based. Structures and practices, both formal and informal, work together to provide a faith-based community within which learning takes place. In our schools religion is not simply taught as a stand-alone subject, it permeates all that takes place and is lived out in the daily lives of the community of the school. Religious formation is an essential aspect of a Christian school.

Parents make a deliberate choice to place their children in a school which teaches, supports, nurtures and seeks to live out a value and belief system consistent with Christian faith of their home environment. Such an environment is a community in which faith is not only taught, but 'caught'; where the informal curriculum of lived values is as important as the formal teaching of the various beliefs and tenets of the faith.

The conduct and character of individuals, and the nature of their relationships with others in the school community, are key concerns in establishing such a Christian learning community. This includes all manner of conduct - the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality, and many other aspects of conduct within the community in general.

Staff members, including both administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose. Their work is to do with teaching - by modelling and instruction – the doctrines and values of the faith.

Like other religious workers, teachers in our schools are also called upon to be pastor/mentor to the students in their care. Likewise administrative staff are often called upon to pastorally care for school families in their many dealings with them. Parents have chosen Christian schools precisely for this reason – that the staff are known to have a pastoral concern from a distinctly Christian point of view.

Essential to the operation of such schools is therefore that they can make a deliberate determination that all staff members both adhere to and live by the beliefs and values of the Christian faith: in other words are practicing Christians.

Schools commonly require that staff are able to attest to a statement of faith, can demonstrate they are active and participating members of the Christian community (usually demonstrated through membership of a church) and can bring evidence of their commitment to live according to the doctrines and teachings of their faith.

Against this background, and consistent with the teaching of Christ that both men and women are created '*Imago Dei*' (in the image of God), Christian schools actively seek to model a community where the value of all people is upheld, and their rights respected and supported. This is reflected both in the practices of the schools and through the formal curriculum. Human rights are at the very heart of the Christian message and the beliefs upon which Christian schools are founded.

Ways to enhance the effectiveness of the Charter

The Terms of Reference for the Review propose a number of possible avenues to enhance the effectiveness of the Charter. Implicit in the Background Paper supporting the Review is the understanding that the development of a 'human rights culture' is the primary aim of the Charter and that the development of such a culture is the measure of effectiveness that is being adopted. At the

outset, therefore, it is important to provide an assessment of the prevailing ‘human rights culture’ and the role of the Charter in contributing to that culture.

On balance our organisation and our member schools are generally satisfied with the current protections afforded to fundamental human rights and most particularly the expression of religious freedom reflected in and through the operation of Christian schools. Our democratic systems and institutions and the underlying Australian belief in ‘a fair go’ have served our nation well over many years. Indeed the existence of such a large number of faith-based schools both in Victoria and across Australia more broadly is a powerful testimony to the effectiveness of the current mechanisms for the protection of human rights in this country.

The role of the Charter itself in the establishment and development of this culture is far more questionable. A Charter based approach, it is widely acknowledged, can result in a significant shift in power from parliamentarians to the judiciary. Consequently our robust, representative and relatively accessible democratic processes tend to play a lesser role in the development of public policy in the area of human rights as the judiciary’s role increases. This shift has been widely acknowledged in an analysis of overseas jurisdictions that have taken such an approach. While the sovereignty of Parliament may have been technically preserved in practice the Courts play a far greater role.

Christian schools and the important role that they play within Australian society is well recognised and understood by the vast majority of parliamentarians across the country. Any change to the framework for the protection of human rights that reduced their role would be a matter of significant concern. Our general view is that specific legislative responses, such as the *Equal Opportunity Act 2010 (Vic)*, to matters of human rights concern to the community are a far more important and effective tool than a broadly framed Charter.

Recommendations of the 2011 Review

In a similar vein we endorse, by and large, the recommendations of the 2011 Review. This wide ranging and comprehensive Review provided clear, cogent and considered recommendations for reform. It is disappointing that these recommendations have not been enacted whether in the broader form involving the repeal of considerable parts of the Charter or the alternative more moderate reform proposals.

We encourage the current Review to recommend to the Government that steps be taken to introduce legislative change to reflect these 2011 recommendations.

Functions of statutory bodies in relation to complaints

The Charter currently allocates the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) a largely educative and advisory role with complaints under the Charter largely falling within the remit of the Victorian Ombudsman (VO). This separation of roles has clear benefits with the VEOHRC able to provide advice and assistance to bodies subject to the Charter without any suggestion of conflict with a complaints handling role. Bodies and agencies, as well as the general public, can seek specialist advice on human rights matters without any concerns about the possibility of an investigation or complaint being raised as a result of these enquiries.

The expertise of the VO in dealing with complaints about public sector authorities is also effectively utilised within this distribution of roles. The broader complaint handling function of the VO also

ensures that the full range of any complaint can be addressed within a single process while complaints under the Charter are dealt with by the same body as other complaints. The public is not forced to try and determine the appropriate agency to deal with, in effect the VO provides a 'one stop shop' for bodies within its wide reach.

The current approach to complaints handling and the separation of roles between VEOHRC and the VO has clear benefits and should be retained.

Role of the Scrutiny of Acts and Regulations Committee

Consistent with the view outlined above in relation to the importance of the role played by Parliament we support the continued role of the Scrutiny of Acts and Regulations Committee (SARC) as the mechanism for the review of proposed legislation under the Charter. This scrutiny is, as outlined in the Background Paper, 'a cornerstone' of the model of protection within the Charter. The inclusion of human rights considerations within a broader legislative review provisions of SARC allows for a more holistic assessment of a Bill. Human rights considerations are on par with other factors and can be weighed and assessed within an established and structured process.

The role of SARC under the Charter should be retained in its current form.

Development of a 'human rights culture'

Doubts have been raised above in relation to the effectiveness of a broad Charter based approach in creating a 'human rights culture'. Similarly it may be questionable as to whether such a culture is already in place in Victoria, whether influenced by the Charter or other means. It was, however, a strong recommendation from the 2011 Review that the government develop a framework for assessing the benefits and costs of the Charter. Such an assessment would provide significant and highly valuable information critical to moving beyond merely describing 'what a good human rights culture looks like' to having an informed discussion on the contribution of the Charter to such a culture.

The development of a framework for assessing the benefits and costs of the Charter should be a critical element in any assessment of the development of a 'human rights culture'.

The development of a 'human rights culture' also needs to recognise the broad range of rights, including the rights of freedom of thought, conscience, religion and belief recognised in section 14, and importantly the need to balance sometimes competing rights. While addressed more fully below this issue needs to be borne in mind when seeking to describe any 'human rights culture' that may be aspired to within Victoria. Such balancing is implicit in the expression of all human rights.

The application of the Charter to non-state entities.

The application of the Charter to 'public authorities', or more particularly 'functional public authorities' was identified in the 2011 Review as being highly problematic. An alternative approach of developing an exhaustive list of bodies within the operation of the Charter was proposed by the majority of SARC at that time. Whether such an approach is taken or another legislative remedy proposed it is essential that there be certainty in relation to the coverage of the Charter. Bodies must be able to ascertain prospectively whether the Charter will apply to any part of their operations and on what basis.

Greater clarity in relation to the scope of application of the Charter, through the definition of public authorities, must be a high priority in any recommended changes.

In seeking such clarity it is equally important that there is not unintended widening of the scope of application of the Charter. In particular the Charter currently, by way of a note to section 4, makes it clear that a non-government schools is not a public authority for the purposes of the Charter. This should remain clearly and unambiguously in any proposed amendments.

The current clarity in relation to non-government schools must not be compromised in any recommended changes.

Desirable amendment to the Charter

The proportionality test in section 7(2)

The drafting of proportionality test in section 7(2) of the Charter has given rise to concerns for many in the community. The concerns that are the focus of this submission relate to the impact of such legislation upon the ability of Christian and other faith-based schools to continue to operate freely in accordance with our underlying values and beliefs. In particular the problem arises in relation to the limitations that may be placed upon the freedom of religion that lies at the heart of the operation of Christian schools.

The proportionality test in section 7(2) is drafted in a broad and expansive manner allowing for any 'demonstrably justified' and 'reasonable' limitation to be placed upon any human right, including the right to religious freedom. This results in far less protection that is provided for in international law which provides that:

'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.'

International Covenant on Civil and Political Rights Article 18(3)

Clearly the text of the Covenant itself provides a much narrower scope for limitation of religious freedom. This is further reinforced by the Siracusa Principles¹ relating to the conditions and grounds for permissible limitations and derogations enunciated in the International Covenant. Together the Covenant and the Siracusa Principles, provide a high level of protection for these rights and far beyond that contained in the Charter. This inconsistency and lack of constraint on potential limitations of religious freedom is a clear failing of the Charter that requires immediate attention.

In looking to improve the regime for protecting and upholding rights and responsibilities we recommend that the proportionality test in section 7(2) be amended to ensure that it incorporates the restrictions on the limitation of the freedom of religion consistent with international law.

¹ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4

Other desirable amendments

At present the Charter only captures aspects of the freedom of religion. The Charter, in section 14, outlines the rights to be protected in this area -

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.

As clearly indicated during the establishment of the Charter the intention is to protect, broadly, the rights protected under the International Covenant on Civil and Political Rights (ICCPR). The equivalent provision in the ICCPR, Article 18 provides more expansive protection as follows (emphasis added):

- 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.***

The omission of an equivalent provision to Article 18(4) creates a significant gap in the protections for human rights in Victoria. The ability of parents to ensure the religious and moral education of their children in conformity with their own convictions is an essential element of freedom of religion. It is recognised as such in the ICCPR and other international instruments. Without protection of these rights religious freedom is subject to considerable potential for constraint.

It is strongly recommended that section 14 of the Charter be expanded to include protection of the right for parents to ensure the religious and moral education of their children in conformity with their own convictions.

Further Review of the Charter

As noted in the Background paper the Charter itself sets out a timetable for statutory reviews in 2011 and 2015. Given the lack of legislative response to the 2011 Review serious doubts can legitimately be raised in relation to the efficacy of these Reviews and whether further statutory reviews, outside the scope of normally parliamentary inquiries, are required. Alternatively it may be considered that having been in place for eight years the anticipated need for statutory reviews was misplaced, as reflected in the lack of action in response to the 2011 Review, in which case, again, the need for future reviews might be questionable.

It is clear, however, as noted above, that a significant element omitted from the 2011 Review was the development of a framework for assessing the benefits and costs of the Charter. If it is determined that future statutory reviews are required the development of such a framework may provide a useful basis and objective for such a review.

It is suggested that the value of future reviews may be questionable, however, if undertaken the development of a framework for assessing the benefits and costs of the Charter may provide a value focus for such a review.