SHOULD DISCRIMINATION IN VICTORIA'S RELIGIOUS SCHOOLS BE PROTECTED?

USING THE VICTORIAN *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* TO ACHIEVE THE RIGHT BALANCE

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I INTRODUCTION

In 2007, a leading US academic, Professor Cass Sunstein, sought to explore what he referred to as the Asymmetry Thesis.[1] According to this thesis, 'it is unproblematic to apply ordinary civil and criminal law to religious institutions, but problematic to apply the law forbidding sex discrimination to those institutions'.[2] Sunstein came to the conclusion that there is no plausible rationale for this thesis in a liberal social order.[3] However he was not prepared to accept that religious organisations should be automatically subject to any non-discrimination law. On the contrary he argued that 'whether it is legitimate to do so depends on the extent of the interference with religious convictions and the strength of the state's justification'.[4] He recognised that '[r]easonable people can reach different conclusions about particular cases', but argued that 'at least in some cases … the religious practice would have to yield'.[5] The question left open by Sunstein was in which specific cases would the application of non-discrimination laws to religious organisations be justified?

It is this question which the Victorian Scrutiny of Acts and Regulations Committee ('SARC') was forced to consider when in late 2008, the then Victorian Attorney General, Rob Hulls, requested SARC to consider whether the exception from non-discrimination laws for religious organisations under the Victorian *Equal*

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1 Cass Sunstein, 'On the Tension Between Sex Equality and Religious Freedom' (Public Law Working Paper No 167, University of Chicago, 2007) 2.

2 Ibid.

3 Ibid 13.

4 Ibid.

5 Ibid 15–16.

Opportunity Act 1995 ('*1995 EO Act*') was justified.[6] Although the provisions of the *1995 EO Act* allowed for discrimination by religious organisations in a number of contexts,[7] it was the ability of religious schools to discriminate on the basis of an individual's sexual orientation and relationship status in their employment practices that attracted the greatest attention in the inquiry conducted by SARC.[8]

The level of anxiety with respect to this issue among religious groups was so great that rather than wait for the SARC to release its final report, the Victorian Attorney General pre-emptively declared in September 2009 that the power of religious bodies to discriminate on grounds of sexual orientation and marital status would be protected.[9] Archbishop Hart of the Catholic Church applauded the Attorney General and declared that the appropriate balance had been struck — religious organisations would be allowed to 'remain true to their faith and values'[10] — while in the opinion of the Attorney General 'the changes proved that exemptions to the *Equal Opportunity Act* could be narrowed without impinging on religious freedom'.[11] When the SARC released its final report in November 2009, it also took the view that the capacity of religious schools to discriminate on the narrower grounds of sexual orientation, parental or marital status should be maintained.[12] Furthermore, when the new version of the *Equal Opportunity Act* was finally adopted early in 2010 ('*2010 EO Act*'), there was no deviation from this position.[13]

6 'Terms of Reference: Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995' in Victoria, *Victorian Government Gazette,* No 15, 18 December 2008, 3053. For a discussion of the background to the inquiry see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Options Paper* No 195 Session (2009) 1–2 ('*SARC Options Paper*'). For a summary of the measures undertaken in the inquiry see Parliament of Victoria, *Scrutiny of Acts and Regulations* <http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/default.htm>. It is important to note that the Inquiry was not confined to a consideration of the exceptions for religious organisations under the *Equal Opportunity Act 1995* (Vic) ('*1995 EO Act*') and extended to a review of all the exceptions and exemptions under the Act which apply to areas such as single sex clubs; sporting competitions and general employment exceptions. For a full list of the exceptions and exemptions under the *1995 EO Act* see SARC, *SARC Options Paper*, above n 6, Appendix A, 167.

7 For example, the exceptions for religious bodies under the *1995 EO Act* extend to the selection, training and ordination of officials, members or people performing functions or participating in religious observance or practice and the delivery of social services in areas such as health and aged care.

8 SARC, *SARC Options Paper*, above n 6, 107. The website for the SARC Inquiry indicates that a total of 1252 submissions were received by SARC. Of these, 418 were pro forma or letter submissions and a further 60 submissions were forwarded from the Department of Justice which had commenced a review of the exceptions under the *1995 EO Act* in February 2008. Of these submissions, 450 brief submissions on the religious exceptions under the *1995 EO Act* were received from individuals, ministers and church officials and some congregations, in addition to 20 submissions from religious organisations including substantial submissions from the Catholic Church, the Anglican Church, the Uniting Church, and the Presbyterian Church as well as Australian Christian Lobby, Australian Evangelical Alliance, Christian Parent Controlled Schools Ltd, Salt Shakers and Christian Schools Australia as well as submissions from Festival of Light and Family Voice Australia': at 107. An analysis of these submissions indicates that the greatest cause for concern was in the context of discrimination in religious schools.

9 Rob Hulls, 'Religious Freedom to be Protected under Equal Opportunity Changes' (Media Release, 27 September 2009) ('*Attorney General Media Release*').

10 Denis Hart, 'Balancing Religion and Rights: The Case for Discrimination', *The Sunday Age* (Melbourne) 4 October 2009, 19.

11 *Attorney General Media Release,* above n 9.

12 SARC, Parliament of Victoria, *Inquiry into Exceptions and Exemptions to the Equal Opportunity Act 1995 Final Report* (2009) 64, recommendation 49 ('*SARC Final Report*').

13 See *Equal Opportunity Act 2010 (Vic)* ss 81–4.

The aim of this paper is to assess whether this approach represents the appropriate balance in relation to the capacity of religious schools to maintain discriminatory practices against staff (both existing and prospective) and students.[14] It seeks to answer the question: should a religious school be able to discriminate against an individual — whether an adult or child — on the basis of attributes such as their sexual orientation, parental status or marital status?[15] In responding to this dilemma, the process required for the balancing of human rights protected under the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('*Charter*') will be adopted.[16] Such an approach is followed because one of the rationales identified by the SARC for the Inquiry was the need to 'ensure that the *EO Act* is in harmony with the rights now protected by the Victorian *Charter of Human Rights and Responsibilities'*.[17] Moreover when the Attorney General read the second reading speech for the *Charter* in 2005 he declared that it 'will make sure that there is proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society'.[18] It was therefore anticipated that the *Charter* would provide the methodology by which to resolve hard and complex debates involving competing claims by individuals within a liberal democratic social order. As such the *Charter* is intended to replace the tendency for such debates to be characterised by rhetoric and unsubstantiated assertions with a balanced and rigorous consideration of the issues in light of the relevant human rights standards to decide whether religious schools in Victoria should be allowed to undertake discriminatory practices.[19]

Part II will outline the nature and scope of the exception for religious bodies in schools under the *1995 EO Act* and the various options for reform proposed in the *SARC Options Paper*. It will then summarise the approach ultimately preferred by the Attorney General, endorsed by SARC and adopted under the *2010 EO Act*.

14 The scope of this paper does not extend to a discussion of the exceptions under the *1995 EO Act* or *2010 EO Act*, which are provided to religious orders or religious bodies in the delivery of non-educational services.

15 The exception granted to religious schools under s 83(2) of the *2010 EO Act* actually extends to religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

16 It is acknowledged that the issues could be addressed from alternative perspectives. For example some parties emphasised the need to adopt an approach that was consistent with international human rights law (See Human Rights Law Resource Centre and Public Interest Legal Clearing House, Submission No 676 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* July 2009 [16] (*HRLRC and PILCH Submission*')). Section 32(2) of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) ('*Charter*') envisages a role for international law in developing an understanding of the rights under the *Charter*. However the primary focus of this analysis will involve the application of the domestic human rights regime relevant to the issues as set out under the *Charter*.

17 *SARC Options Paper*, above n 6, 8. The Attorney General was also required under s 28 of the *Charter* to provide a Statement of Compatibility with respect to the introduction of the new *2010 EO Act*: see Victoria, *Parliamentary Debates,* Legislative Assembly, 10 March 2010, 772–3 (Rob Hulls).

18 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1290 (Rob Hulls).

19 See Barney Zwartz, 'Learning to Talk Across the Trenches', *The Age* (Melbourne), 10 October 2009. The author stresses the need to avoid allegations of prejudice being directed at opposing parties in favour in a more balanced discussion.

Part III will assess this approach by reference to the provisions of the *Charter* and consider whether any ability for religious schools to discriminate on the basis of a person's sexual orientation or relationship status can be reasonably and demonstrably justified in a liberal democratic society such as Victoria. This will involve a careful consideration of the five factors listed in s 7(2) of the *Charter* which must to be taken into account when assessing the reasonableness of any limitation on a human right.[20] Particular attention will be given to the submissions and practices of the Catholic Church to examine and illustrate the arguments raised in defence of the current exception enjoyed by religious schools. Such an approach is adopted not simply because of the high profile and concerted campaign of the Catholic Church during the SARC inquiry[21] but also because the Catholic Church is the largest provider of education in religious schools in Victoria.[22]

As a result of this analysis the following conclusions will be drawn. First, by using the *Charter* to address the issue of discrimination in religious schools it is possible to identify the rights that correspond which the relevant interests of those parties with a stake in this puzzle. This process reveals that rather than being perceived as a simple conflict between the right to freedom of religion and the right to non-discrimination, a proper application of the *Charter* requires that the obligation to protect the best interests of children under s 17(2) must also be taken into account. Second, although most parties involved in the SARC inquiry made reference to the relevance of s 7(2) of the *Charter* as a critical factor in resolving the tension between the relevant rights, none actually undertook a detailed examination of the issues by reference to the five factors listed under

20 These factors are: (a) the nature of the right; (b) the importance and purpose of the limitation on the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that limitation seeks to achieve.

21 Multiple submissions were made on behalf of the Catholic Church to the SARC Inquiry. See, eg, Catholic Education Commission of Victoria Ltd, Submission No 472 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* 1 July 2009 ('*CEO Submission*'); Catholic Church of Victoria, Submission No 663 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* 8 July 2009 ('*Catholic Church Submission*'); Catholic Social Services Victoria, Submission No 471 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* July 2009 ('*Catholic Social Services Submission*'). See SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (13 May 2010) <http://www.parliament.vic.gov.au/sarc/article/922>. Several institutional representatives of the Church appeared before SARC at the public hearings. For a list of these witnesses and the transcript of their evidence at the SARC Public Hearing on Wednesday 5 August 2009 see SARC, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (1 June 2010) <http://www.parliament.vic.gov.au/sarc/article/913>. A booklet was widely distributed among students at all catholic schools and agencies warning of the potential threat to religious freedom should the exception be removed (Threat to Religious Freedoms: A Pastoral Letter of the Catholic Bishops of Victoria on the Threat to Religious Freedoms, 15 July 2009): see, eg, Hart, above n 10.

22 SARC *Options Paper*, above n 6, 121; Department of Education and Early Childhood Development, Parliament of Victoria, *Summary Statistics for Victorian Schools: Issue 2* (July 2009). See also Victorian Independent Education Union, Submission to the Victoria Government Department of Justice, *Review of Exceptions and Exemptions in the Equal Opportunity Act 1995,* April 2008 ('*VIEU Submission 2008*') 4–5, which also focused on the Catholic Church for several reasons, including the fact that most of its members are employed in Catholic schools and most complaints in relation to discrimination come from staff within the Catholic education system.

s 7(2).[23] Upon an application of these factors it will be revealed that the exception granted to religious schools under the *1995 EO Act* to discriminate on the basis of what would otherwise be protected attributes, and which has been maintained although modified under the *2010 EO Act*, cannot be justified under the *Charter*. It will be shown to represent an unreasonable limitation on the right to equality and non-discrimination that contributes to an educational environment that is inconsistent with the best interests of children.

II RELIGIOUS SCHOOLS AND DISCRIMINATION UNDER THE *EQUAL OPPORTUNITY ACT*: THE ORIGINAL, POSSIBLE AND FUTURE STATUS OF THE LAW

When the *1995 EO Act* was adopted in 1995, it included a wide range of exceptions and exemptions that protected discrimination in a range of contexts including religious schools. The intention of these exemptions was to protect 'religious activities'[24] and reflects a commitment to what Sunstein defined as the 'Asymmetry Thesis', that is, that religious organisations should not be subject to non-discrimination laws. The relevant provisions of the *1995 EO Act* for the purposes of this paper are principally ss 75 and 76. Section 75(2) stated that the prohibition against discrimination on any of the protected attributes listed under s 6 of the *1995 EO Act* did not apply:

> 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.

Subsection (3) of s 75 extended this exception to 'anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes'.

23 Of those submissions that did identify the relevance of s 7(2), the majority confined their analysis to a general claim that the removal of the exceptions would be an unreasonable limit on the right to freedom of religion (see, eg, *CEO Submission*, above n 21, 9–10; *Catholic Church Submission,* above n 21, 18–19; Anglican Diocese of Melbourne, Submission No 672 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* 10 July 2009, [5] ('*Anglican Church Submission*')) or, in the alternative, asserted that the exceptions were an unreasonable limitation on the right to equality (see, eg, Law Institute of Victoria, Submission No 750 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* 17 July 2009, 12 ('*Law Institute Victoria Submission*'); Victorian Independent Education Union, Submission No 763 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995*, 2009, [2.2]–[2.3] ('*VIEU Submission 2009*'); *HRLRC and PILCH Submission*, above n16, [69]). Some submissions did address each of the five elements in s 7(2) but not in any significant detail: see, eg, Christian Schools Australia, Submission No 690 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995,* July 2009, 9–12; cf Kristin Walker, 'Memorandum of Advice for the Victorian Independent Education Union', 16 April 2008, which was attached to the *VIEU Submission 2008*, above n 22 (copy on file with author).

24 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1254 (Jan Wade).

Section 76 of the *1995 EO Act* dealt with schools that were not run by a body established for religious purposes. It offered protection to a person or body that established, directed, controlled or administered an educational institution in accordance with religious beliefs or principles from all prohibitions on discrimination including employment discrimination that were 'in accordance with the relevant religious beliefs or principles'.[25] Although not specially concerned with religious schools, it is worth noting that s 77 of the *1995 EO Act* acted as a kind of blanket catch-all exception for religious bodies by protecting discrimination where it was necessary for a person to comply with their genuine religious beliefs or principles.

The adoption of this structure under the *1995 EO Act* to protect discrimination in religious schools was identified by SARC in its Options Paper as 'complex and confusing', with each of the sections being plagued with unresolved ambiguities.[26] For example, the *1995 EO Act* offered no definition of a 'body established for religious purposes'.[27] It provided no guidance with respect to the criteria required to establish a religious conviction or how a religious sensitivity was to be assessed.[28] Notwithstanding these limitations, the cumulative effect of these provisions was that religious schools enjoyed a blanket exception to discriminate on the basis of what would otherwise have been protected attributes. As SARC explained in its *Final Report*, the exceptions allowed 'freedom of religion to automatically prevail over any other rights involved'.[29] Significantly this deference to freedom of religion had not been tempered by any requirement to consider whether the discrimination was *reasonably necessary* to achieve the protection of religious beliefs or principles.[30] Indeed the Victorian Anti Discrimination Tribunal ('VADT') held in *Jubber v Revival Centres International*[31] that it was sufficient if the discrimination merely conformed with the doctrine of the religion and there was no requirement to establish that the conduct was reasonably necessary to conform with the doctrine in question.

The effective trumping by freedom of religion over the rights to non-discrimination and equality under the *1995 EO Act* created a dilemma in 2006 with the impending adoption of the *Charter* which requires that all limitations on a human right must be reasonably and demonstrably justified.[32] But rather than address this issue in 2006, the definition of discrimination under the *Charter* was tied to the definition and treatment of discrimination under the *1995 EO*

25 *1995 EO Act* s 76(2).

26 *SARC Options Paper*, above n 6, 111.

27 This position has been addressed under *2010 EO Act* s 81.

28 See Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 53, where it is suggested that the an exception based on the need to avoid injuring religious sensibilities is 'rather vague and provides little guidance to either religious schools or their potential employees'.

29 *SARC Final Report*, above n 12, 60.

30 *SARC Options Paper*, above n 6, 112; *Law Institute of Victoria Submission*, above n 23, 12. The requirement of reasonableness has now been included in the *2010 EO Act* s 83(2)(b).

31 [1998] VADT 62 (7 April 1998).

32 *Charter* s 7(2).

Act.[33] This approach effectively quarantined religious schools from any impact the *Charter* may have had on the *1995 EO Act*.[34]

The inquiry undertaken by SARC into the exceptions and exemptions under the *1995 EO Act* provided an opportunity to examine the legitimacy of this approach by asking the *policy* question that had been *legally* precluded: is the protection of discrimination in religious schools under the *1995 EO Act* against people on the basis of their otherwise protected attributes under s 6 of the Act[35] reasonably and demonstrably justified in light of the rights protected under the *Charter*? Instead of addressing this question directly, SARC elected to produce a detailed options paper that identified in broad terms the issues and views of key stakeholders with respect to the relevant provisions of the *1995 EO Act*. It then outlined the possible options for amending ss 75 to 77 of the *1995 EO Act*.[36]

Before SARC was able to express a view as to which of these options it preferred, the Attorney General announced in a media release on Sunday 27 September 2009 — the day after the AFL Grand Final — that the exception granted to religious schools under the *1995 EO Act* would be maintained but restricted to sexual orientation and marital status.[37] In a subsequent letter to the editor published in *The Sunday Age*, the Attorney General defended his position by adding that the onus would be on religious schools to justify why any discrimination was necessary to protect their freedom of religion.[38] When the SARC released its final report in November 2009, it also recommended 'that the exception in section 76

33 See *Charter* s 3(1): 'discrimination', in relation to a person, means discrimination (within the meaning of the *1995 EO Act*) on the basis of an attribute set out in s 6 of that Act.

34 The intention to ensure that religious schools were protected from any impact of the *Charter* can also be seen in s 38(4), which provides that the general obligation of a public authority under s 38(1) to consider and act consistently with human rights, does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself, in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

35 The protected attributes under s 6 of the *1995 EO Act* are: age, breastfeeding, gender identity, impairment, industrial activity, employment activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex and sexual orientation.

36 *SARC Options Paper*, above n 6, 106–31: 'Option 1: No change; Option 2: Amend s 76 to introduce conditions similar to those in s 75(2) to ensure that discriminatory actions are allowed under s 76 only on limited attributes and where they are reasonably necessary to conform with religious doctrines or necessary to avoid injury to the religious sensitivities or convictions of the adherents of a religion; Option 3: Redraft s 76 on the same basis as s 51(2) of the ADA (Tas) to permit discrimination where it is to enable or better enable the educational institution to be conducted in accordance with the doctrines etc of the religion; Option 4: Limit the attributes to which the exception applies to religious belief or activity alone or together with sexual orientation and gender identity. Allow the possibility of further attributes being excepted on the basis of an inherent requirements analysis; Option 5: Add provision for an inherent requirements analysis that can be used to extend protection where it is shown that the inherent requirements of a particular position justify this in respect of a particular position; Option 6: Amend to provide that the religious exception is only available as of right to institutions that are subject to the oversight of a religious body or order; Option 7: Include a provision listing the *Charter* s.7(2) factors as relevant to assessing the acceptability of any particular religious exception; Option 8: Expressly provide that the onus of proof of all matters relevant to the exception lies on the institution claiming it)': at 128–9.

37 *Attorney General Media Release*, above n 9.

38 Rob Hulls, 'A Crucial Balance' Letter to the Editor, *The Sunday Age* (Melbourne), 11 October 2009.

should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age'.[39]

The announcement by the Attorney General was not accompanied by any legal analysis as to why his position was consistent with the *Charter*.[40] In contrast, SARC made some reference to the *Charter* in its final report. It recognised that under the existing scheme the 'dominance of freedom of religion over all over rights *may* be inconsistent with the reasonable limitations test in *Charter* s 7(2) that require[s] a balancing of equality rights and freedom of religion'.[41] At a later stage in its report it again conceded that the blanket nature of the exception granted to religious bodies 'is *unlikely* to comply with the reasonable limitations test in *Charter* s 7(2)'.[42]

But rather than engage in a careful consideration of this test, it formed the view that it was unnecessary because of the availability of alternatives to religious schools.[43] It accepted that the test under s 7(2) of the *Charter* would require the 'balancing of the non-discrimination right against [the] right to freedom of religion in each specific case' but believed that there was 'a more compelling case for clarity in the law'.[44] Curiously this requirement for clarity in the law was invoked by SARC notwithstanding the possibility that the legislation is question was, on SARC's own admission, prima facie incompatible with the law under the *Charter*. The SARC's marginalisation of the *Charter* is further revealed in a comment that a requirement for religious bodies and schools to balance competing rights in every individual case 'would be unduly onerous if not unworkable'.[45] So while SARC was prepared to recognise that the nature of the exception granted to religious schools was probably unreasonable, its comments suggest that it ultimately found it too hard to apply the factors in s 7(2) to assess whether the exception for religious schools was a reasonable limitation on the rights to equality and non-discrimination.

Under the new *2010 EO Act*, which was adopted by the Victorian Parliament in April 2010 and will come into effect in August 2011, the exception enjoyed by religious schools under the *1995 EO Act* has been modified in at least three significant respects. First, the blanket exception to discriminate against a person on the basis of any protected attribute has been restricted to the following attributes: 'a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity';[46] second, discrimination on any of these attributes must not only be necessary but *reasonable* so as to avoid injury to the religious sensitivities of adherents of the religion;[47] and third, in the context

39 *SARC Final Report*, above n 12, 64.

40 Cf Victoria, *Parliamentary Debates,* Legislative Assembly, 10 March 2010, 772–3 (Rob Hulls).

41 *SARC Final Report*, above n 12, 60 (emphasis added).

42 Ibid 62 (emphasis added).

43 Ibid 61. The availability of alternatives is relevant to the requirement under s 7(2)(c) of the *Charter* to consider the nature and extent of any limitation on the rights to equality and non-discrimination; however this was but one factor among several that SARC was required to consider.

44 Ibid.

45 Ibid 62.

46 *2010 EO Act* s 83(2).

47 Ibid s 83(2)(b).

of employment by religious schools, discrimination on the basis of attributes such as sexual orientation and marital status will be lawful where:

> (a) conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position; and
>
> (b) the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement.[48]

Section 83(4) further provides that '[t]he nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement for the purposes of subsection (3)'.

The remainder of this paper seeks to examine the question of whether the capacity for religious schools to discriminate on the basis of attributes such as a person's sexual orientation, parental or marital status can be demonstrably justified in a liberal democratic society such as Victoria. It seeks to address this question by undertaking the legal analysis with respect to the exception under the *1995 EO Act* which the Attorney General did not address at the time he announced the government's approach to the issue and which SARC found too difficult.[49] It is recognised that the issues involved are complex but the conclusion to be reached is that, when properly applied, it remains possible to use s 7(2) of the *Charter* to ensure a careful and considered balancing of the competing rights. Moreover had such an approach been adopted, the *2010 EO Act* need not have included any provision to grant religious schools an exception from the general prohibition against discrimination on the basis of attributes such as sexual orientation and marital status.

III IS DISCRIMINATION IN RELIGIOUS SCHOOLS REASONABLY AND DEMONSTRABLY JUSTIFIED IN A DEMOCRATIC SOCIETY?

A *Identifying the Relevant Rights*

The Victorian *Charter*, which came into force on 1 January 2007,[50] creates a presumption that all legislation should be compatible with those human rights which are protected under Part II of the *Charter*.[51] With respect to the issue of discrimination in religious schools, the rights considered to be of principal

48 Ibid s 83(3).

49 It is important to acknowledge that the Statement of Compatibility read by the Attorney General to Parliament when the Bill for the *2010 EO Act* was introduced was couched in terms of the factors under s 7(2) of the *Charter*. But the analysis provided by the Attorney General under each of these factors is rudimentary: Victoria, *Parliamentary Debates,* Legislative Assembly, 10 March 2010, 772–3 (Rob Hulls).

50 See *Charter* s 3. The provisions which allow the Courts to perform their role under the *Charter* (pt 3 divs 3, 4) came into force on 1 January 2008.

51 Ibid s 28. However s 31 of the *Charter* does allow Parliament to issue an override declaration if it wishes to proceed with legislation that is incompatible with human rights.

relevance were indentified in the SARC inquiry as the right of parents and children attending religious schools to enjoy respect for their religious beliefs under s 14 of the *Charter* and the right of persons seeking employment in religious schools to enjoy equality before the law and protection against discrimination under s 8. No submissions made any significant reference to children's right to equality despite the fact that they too were subject to the exception under the *1995 EO Act*. Moreover it would seem that no references were made to the rights of children to receive the protection necessary to secure their best interests under s 17(2) of the *Charter*.[52] This relative invisibility of children is certainly troubling but it is perhaps not surprising given the general marginalisation of children within social and political debates within contemporary society which have a predominantly adult centric focus.[53] However, for reasons that will be explained below, this failure to address the rights of children was a critical oversight on the part of those involved in the review of the *1995 EO Act* given the potential effect (both direct and indirect) that a culture of discrimination in religious schools can have on students who are gay, lesbian or indeed single or unmarried parents themselves.

B *Undertaking the Balancing Exercise*

Under the *Charter*, all human rights remain subject to potential limitation provided the limitation in question can be shown to be reasonably and demonstrably justified in a free and democratic society. In assessing whether a limitation satisfies this test, s 7(2) of the *Charter* lists five factors which must be considered:

(a) the nature of the right;

(b) the importance and purpose of the limitation;

(c) the nature and extent of the limitation;

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

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[54]

52 A number of groups drew attention to the impact of discrimination in religious schools on same sex attracted students in their submissions to SARC: see *SARC Options Paper*, above n 6, 123–4. But none of these organisations appear to have relied upon s 17(2) of the *Charter* in the development of their arguments. Moreover SARC makes no mention of s 17(2) in its Options Paper and the Attorney General made no mention of this provision in the second reading speech for the *2010 EO Act*.

53 See generally Australian Law Reform Commission, 'Seen and Heard: Priority for Children in the Legal Process' (Report No 84, 1997); John Tobin, 'The Development of Children's Rights' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 23, 32–3.

54 The requirement that a limitation must be reasonably and demonstrably justified is taken from s 1 of the *Canada Act* 1982 (UK) c 11, sch B, pt 1 ('*Canadian Charter of Rights and Freedoms*'), while the five factors listed for consideration under s 7(2) of the *Charter* are taken from s 36 of the *Constitution of the Republic of South Africa Act 1996* (South Africa). As recognised by Julie Debeljak, 'the Explanatory Memorandum [for the *Charter*] notes that the general limitations clause is based on the *New Zealand Bill of Rights Act 1990* (NZ) s 5 and the *South African Bill of Rights* s 36: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9. However, it is more honest to acknowledge the influence of the *Canadian Charter*, which predates the New Zealand legislation by eight years and provided the basis for the New Zealand legislation': Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006'* (2008) 32 *Melbourne University Law Review* 422, 426 n 16.

Many submissions identified the critical role of s 7(2) in resolving the conflict between the various rights but very few actually sought to engage in a deep and sophisticated way with these considerations. Instead the preference was to make generalised assertions in support of a particular position.[55] This is understandable given that the *Charter* remains a relatively new development and experience in applying its balancing process is limited.[56] However, this paper will attempt to apply this process in a detailed way to examine whether religious schools should be entitled to an exception from discrimination laws.

This inquiry could be framed in several ways. For example, it could start by examining whether the interference with the right to equality and non-discrimination contemplated by an exception is reasonably justified? Alternatively it could take as its starting point the question of whether the removal of the exception would represent a reasonable limitation on the right to freedom of religion. Although the same issues must be addressed under either approach, the latter approach is adopted here largely because this was the focus of SARC's inquiry. The conclusion to be drawn after a consideration of the factors outlined in s 7(2) of the *Charter* is that the removal of the exception for religious schools under the *1995 EO Act* would be a reasonable limitation on the right to freedom of religion. Stated in the alternative, the exception enjoyed by religious schools under the *1995 EO Act* (and maintained but modified under the *2010 EO Act*) is an unreasonable limitation on the right to equality and non-discrimination under s 8 of the *Charter* and the requirement to protect a child's best interests under s 17.

1 *The Nature of the Right in Question*

(a) An Individual Not Institutional Entitlement

Although the concept of religious freedom is 'complex and controversial',[57] it is generally recognised as a fundamental human right.[58] The scope of this right under s 14(1) of the *Charter* extends to:

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

55 See above n 23.

56 To date very few cases have addressed s 7(2) in any detail. The major exception is the decision of Bell J in *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 (23 April 2009) [137]–[161], [748]–[786]. It is also recognised that in many cases the lack of careful consideration of the factors in s 7(2) of the *Charter* would have been the result of practical considerations. The SARC Inquiry covered a range of exceptions and exemptions under the *2010 EO Act* and to address each in the level of detail required for a proper application of s 7(2) would have imposed a significant time and resource burden on those parties that made a submission to the Inquiry.

57 Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) 18. See also Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000). Note that case law under the European Convention on Human Rights provides no comprehensive definition of the words 'thought, conscience and religion'.

58 See, eg, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,* GA Res 36/55, UN GAOR, 36th sess, Supp No 51 at 171, UN Doc A/36/684 (25 November 1981) Preamble; Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion,* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 1; *Şahin v Turkey* [2005] XI Eur Ct HR [104]; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

(b) the freedom to demonstrate religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.[59]

Under international law, it is generally accepted that the creation of an autonomous religious organisation, including a religious school, represents a manifestation of an individual's right to enjoy freedom of religion in community with other members of that religion.[60] However, this right remains the right of an individual under both international law and the *Charter.* As such it does not extend to an organisation and neither the Catholic Church nor any other religious group can claim a right to freedom of religion under the *Charter.*[61] Thus the issue of concern in this analysis is the right of parents *and their children* to practise and teach their religion in community with other members of their religion.

A threshold question exists as to the criteria by which the 'religion' or 'belief' of a parent or child are to be assessed. Should it be entirely subjective or is something additional required such as the existence of an established and recognised religion or belief system? Victorian courts are yet to address this issue and the approach adopted in other jurisdictions is varied.[62] In any event, it is clear that the majority of those religious organisations opposing any changes to the *1995 EO Act* were recognised as established religions. Thus the submissions of such organisations were expressed as being representative of the views of parents *and students* attending religious schools.

(b) Do Religious Institutions Necessarily Represent the Religious Beliefs of Individuals?

A question arises as to whether a representative claim by a religious body is necessarily representative of the interests of individuals that are members of that religion. With respect to this issue, the Catholic Church provided no evidence

59 This formulation is based on art 18 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) which states: 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.

60 See Evans above n 57, 104–5; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,* GA Res 36/55, UN GAOR, 36th sess, Supp No 51 at 171, UN Doc A/36/684 (25 November 1981) art 6(a), (b), (g), (i).

61 *Charter* s 6 (1): 'Only persons have human rights. All persons have the human rights set out in Part 2'. See *Geelong Community for Good Life Inc v Environment Protection Authority* [2009] VCAT 2429 (17 November 2009) [140], which held that an incorporated body does not enjoy human rights under s 6 of the *Charter* because it is not a human being.

62 For example in *R (Williamson) v Secretary of State, Education and Employment* [2005] 2 AC 246, [23] the UK House of Lords identified several requirements to be considered when determining the existence of a 'belief' for the purposes of the *Human Rights Act* (UK) c 42. For a general discussion of the definition of religion see Evans above n 57, 51–66.

to SARC to suggest that the Church had received any official authority from parents and students attending Catholic schools that it was authorised to make a submission on their behalf. Indeed there was no evidence that the Catholic Church had sought to consult with the individuals that it sought to represent.[63] Instead an implied authority was taken on behalf of organisations such as the Catholic Church to argue that because official church doctrine condemned certain kinds of 'lifestyle',[64] it must follow that parents who send their children to religious schools have implicitly approved this doctrine; this provided an authority for Church bodies to advocate for this position on their behalf.

There is an intuitive appeal to a line of reasoning that an organisational body has the capacity to speak on behalf of the interests of its members. However, it is an approach that is problematic with respect to a religious organisation such as the Catholic Church where official doctrine on many issues is highly contested.[65] For example, an Australian study in 2005 revealed that only 34 per cent of Catholics believed that homosexuality was immoral and led the authors of this study to conclude that there 'is a gap between the official teachings of the Church and the everyday beliefs and values of those people who share its faith'.[66] It is also important to note that '19% of students in Catholic schools are non-Catholics'.[67] Thus to assume that attendance at a Catholic school necessarily correlates with a deep and enduring commitment to all official Catholic values by parents and their children is to make an assumption that is unsupported by any evidence. Some Catholic parents will have strong religious beliefs with respect to homosexuality and marital status but these beliefs are not universal.

For its part, the Catholic Education Office ('CEO') in its submission to SARC referred to 'research into the reasons parents send their children to Catholic schools as part of the "Catholic Identity Project"' to support its claim that such schools 'are a value laden environment'.[68] It then made the assertion that '[p]

63 It is not being suggested that the Catholic Church must become a liberal democratic body in the sense that it must undertake genuine and effective consultation with respect to every policy position it adopts and advocates. The point being made here is that if the Church purports to represent the views of parents attending religious schools then it is incumbent on the Church to provide evidence as to the actual views of these individuals.

64 I am conscious that the term 'lifestyle' is derogatory to the extent that it implies that the sexual orientation of gays and lesbians is a choice that can be made and altered, as opposed to something that is a fundamental and constitutive element of an individual's identity.

65 See Evans and Ujvari, above n 28, 55, which notes that 'it does not logically and necessarily follow that because the official teaching of a religion holds that orthodoxy condemns a particular behaviour, all followers of the religion share the same viewpoint'.

66 Michael Flood and Clive Hamilton, 'Mapping Homophobia in Australia' (Report, Australia Institute, 2005) 2, which found that individuals affiliated with the Anglican and Uniting Churches had similar scores to the Catholic Church; the least tolerant were Baptists (of whom 68 per cent believe homosexuality is immoral) followed closely by evangelical Christians (62 per cent). See also *VIEU Submission 2009*, above n 23, [3.5]–[3.6], which notes diversity among parents who send their children to Catholic schools which dispelled the idea that this parent group is an homogenous, heterosexual body; *Anglican Church Submission*, above n 23, [47], which recognises that 'there are diverse opinions within the Anglican church … about what forms of sexual behaviour are appropriate and in what circumstances'.

67 *Catholic Church Submission*, above n 21, 8.

68 *CEO Submission*, above n 21, 9.

arents are drawn to Catholic schools' sense of community and unity, family values and moral fortitude…'[69] This claim appears to have be made in the absence of an awareness of the study referred to above and despite the fact that the CEO's own research project remained incomplete. Moreover the CEO provided no direct evidence that the project had specifically addressed the question of whether parents sent their children to Catholic schools on the basis that these schools would discriminate against potential or existing staff and students on the basis of their sexual orientation or marital status. Furthermore, the CEO provided no indication that it had sought the opinions of students themselves as to why they favoured a Catholic education. As such, the claim made by the Catholic Church that discrimination against gays, lesbians, single and unmarried parents is considered by parents and students attending Catholic schools as being central to their capacity to manifest their religion remains questionable.

Evidence was also provided to SARC from the Victorian Independent Education Union that on many occasions school employers and even priests do not adhere to the official policy of the Catholic Church because they 'view such a policy as uncaring, harmful, intolerant and in conflict with the social justice teachings of the Catholic Church'.[70]

This confirms that not all Catholic parents and children believe that their right to freedom of religion will be violated by the presence of a gay, lesbian, single or unmarried parent on the staff of a Catholic school. It also gives rise to another question that was put to SARC during the Inquiry, namely, whether religious opposition to certain relationships was a core belief of a religion or merely a reflection of social prejudices.[71] Commentators have certainly challenged the interpretation of religious texts adopted by religious groups to support the limited vision of sexuality and procreation advocated by such groups.[72] This theological debate is beyond the scope of this paper. Moreover from the perspective of human rights law, the reality is that the right to freedom of religion extends to

69 Ibid 9–10.

70 *VIEU Submission 2008*, above n 22, [5.1.3]. Interestingly, this practice led the Chair of SARC to reflect during the public hearings: 'I personally find it quite intriguing to understand how that occurs. I suppose the question really is: given that they employ people with those attributes [gays, lesbians and individuals in de facto relationships] whom they are prepared to discriminate against, why do they want the right to discriminate?': Evidence to SARC, Parliament of Victoria, Melbourne, 5 August 2009 (C Carli) 9. However, SARC failed to treat this observation as evidence that the claims of the Catholic Church were based on a false premise, namely that *all* parents who send their children will object to the delivery of education from staff who are gay, lesbian or in a non marital relationship.

71 See *SARC Final Report*, above n 12, 60–1, which notes that '[s]ome submissions expressed the concern that no clear criterion existed by which to distinguish discrimination justified by religious doctrine from that which resulted from prejudice', but then failed to address the question.

72 See Lorna Edwards, 'Kirby Urges Re-reading of Bible on Gays', *The Age* (Melbourne), 8 December 2009, 10; John McIntyre, 'A Betrayal of Faith', *The Age* (Melbourne), 29 September 2009, 13, where the Anglican Bishop of Gippsland argues that the insistence on maintaining the exceptions for religious schools under the EO Act is 'at odds with the essence of what the founder of the Christian faith lived, taught and died for'; Barney Zwartz, 'Learning to Talk across the Trenches', *Insight*, *The Age* (Melbourne), 10 October 2009, 9, which notes that 'if Christians truly followed their founder, perhaps they would not seek exemptions at all'; Margaret Thornton, 'Balancing Religion and Rights: The Case Against Discrimination', *The Sunday Age* (Melbourne), 4 October 2009, 19, which claims '[i] t is unlikely that there is a rational theological basis for the discrimination'.

beliefs which are held irrespective of their objective truth or falsity.[73] Critically, however, the right to manifest religion is not absolute and can be limited provided the limitation is assessed as being reasonable in light of the other considerations listed under s 7(2) of the *Charter*.[74]

2 *The Importance and Purpose of the Limitation*

Consideration of the importance and purpose of any limitation on the right to freedom of religion requires an assessment of the reasons for the removal of the protection under the *1995 EO Act* for religious schools to discriminate on the basis of what would otherwise be protected attributes.[75] There are at least two reasons to justify such a limitation: first, to promote equality and non-discrimination against individuals (adults and children alike) irrespective of their sexual orientation and marital status as required under s 8 of the *Charter*; and second to protect the best interests of children consistent with s 17 of the *Charter*.[76]

(a) *Securing Equality before the Law and Addressing Discrimination*

Section 8 of the *Charter* provides that:

> (1) Every person has the right to recognition as a person 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.[77]

73 See *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123 [3]. See also Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion,* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 2, which explains that 'the terms "belief" and "religion" are to be broadly construed' and imposes no condition as to their objective truth or falsity. However, the House of Lords has imposed some constraints around what will constitute a belief for the purpose of the *Human Rights Act* (UK) c 42: see *R (Williamson) v Secretary of State, Education and Employment* [2005] 2 AC 246, 258–9 [23] (Lord Nicholls).

74 This is consistent with the status of the right to freedom of religion under the International Covenant on Civil and Political Rights, which is also subject to limitation. See Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion,* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 8: 'Article 13.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'. See also Sunstein, above n 1, 13, which argues that it is 'correct to say that a liberal social order should disallow facially neutral laws if they (a) interfere in a significant way with religious practices, or impose a substantial burden on religious institutions, and (b) are not supported by a legitimate and sufficiently strong justification'.

75 See Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [144]: 'the focus [with respect to s 7(2)(b) of the *Charter*] is on the importance of the ends sought to be achieved by the means, not the means themselves'.

76 The Victorian Independent Education Union ('VIEU') also stressed that there would be economic and social benefits if the exception for religious schools was removed: *VIEU Submission 2008*, above n 22, 25.

77 *Charter* s 8.

It is difficult to overestimate the significance and importance of this provision within the scheme of the *Charter*. Indeed in *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)*,[78] Bell J, who at the time was President of VCAT, stated that 'the human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy'[79] and that s 8 is 'the keystone in the protective arch of the Charter'.[80]

The exemptions provided to religious schools under ss 75 and 76 of the *1995 EO Act* interfered with the right to non-discrimination and equality to the extent that they treated individuals (both adults and students) differently on the basis of a protected attribute. As a matter of law however, the definition of discrimination under the *Charter* is tied to the definition of discrimination under the Acts (originally the *1995 EO Act* and now the *2010 EO Act*).[81] So while the list of protected attributes under the *1995 EO Act* included sexual orientation and marital status, religious schools enjoyed an exemption in relation to these attributes. If this exception had been removed under the *2010 EO Act*, the purpose of such an amendment would have been to extend the right to equality before the law and non-discrimination to all persons in their dealings with religious schools. Importantly this protection would have extended not only to teachers and non-teaching staff but also students in religious schools who face the prospect — which according to a recent study is far from illusory — of discrimination on the basis of attributes such as their sexual orientation or status as a single parent.[82] Thus the removal of the exception would have constituted an important and significant purpose in the context of s 7(2) of the *Charter* given the fundamental status of the right to non-discrimination and equality before the law within human rights law[83] and

78 [2009] VCAT 1869 (22 September 2009) (Bell J).

79 Ibid [107].

80 Ibid [277].

81 See *Charter* s 3(1).

82 Much of the opposition to the exception for religious schools under the *1995 EO Act* came from groups advocating for adults such as the VIEU. But the exception applied equally to students, leaving them vulnerable to discriminatory action. Importantly, a recent study indicates a willingness among some principals of religious schools to take discriminatory action against students on the basis of their sexual orientation or status as a single parent: Carolyn Evans and Beth Gaze, 'Discrimination from Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 406–7.

83 See Human Rights Committee, *General Comment No 18: Non Discrimination,* 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) para 1: 'Non discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'; Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945) 115: 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man (sic). It occupies the first place in most written constitutions. It is the starting point of all other liberties'; Evans and Ujvari, above n 28, 42–3, which discusses the importance of promoting non-discrimination law and equality before the law.

the Victorian government's own stated commitment to eliminate all forms of discrimination.[84]

(b) Protecting the Best Interests of Children

The other purpose served by removing the exemption under the *1995 EO Act* for religious schools would have been to secure the right of every child under s 17(2) of the *Charter* to enjoy such protection as is in his or her best interests. The 'best interests principle' is often criticised for its indeterminacy and its potential to be misused as a proxy for the interests of adults.[85] Although the Victorian courts are yet to examine the meaning of this principle as it appears in the *Charter*, there is a growing awareness that empirical evidence rather than assumptions or assertions should inform an assessment of a child's best interests.[86] This position is particularly relevant in the context of the exception enjoyed by religious schools.

The CEO actually argued in its submission to SARC that the exception was necessary to protect children against the prospect of staff proselytising their views in the classroom.[87] This argument conjures up images of gay men, lesbians and single or unmarried parents actively disseminating and promoting their views on sexuality and marriage to their students. However, there is no evidence to suggest that teachers do this with respect to other contentious issues within the classroom such as birth control or premarital sex and thus no rational basis upon which to assert that gay, lesbian or single parent teachers would pursue such an

84 See, eg, Rob Hulls, 'Justice Statement 2' (Report, Victorian Government Department of Justice, 2008) 20–3, which outlines a commitment to 'eliminating discrimination' and addressing 'exceptions to equal opportunity legislation'; Rob Hulls, 'Justice Statement 1' (Report, Victorian Government Department of Justice, 2004) 52–7. See Victorian Government Department of Justice, *Our Vision* (23 July 2007) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Vision/>: 'The Department of Justice plays an important role in the delivery of *Growing Victoria Together 2* by helping to build ... a fairer society that reduces disadvantage and respects diversity... In line with *Growing Victoria Together 2* the department's vision is for a safe, just, innovative and thriving Victoria, where rights are protected and diversity embraced'. See also Rob Hulls, 'Hulls Announces Discrimination Review' (Media Release, 29 February 2008); Rob Hulls, 'Hulls Announces Review of Equal Opportunity Act' (Media Release, 23 August 2007): 'In line with our 2006 election commitment, we want to ensure that Victoria's equal opportunity laws are better placed to achieve the objective of eliminating discrimination … It is the Government's intention to ensure that systemic discrimination, if and where it exists, can be appropriately dealt with by the Commission'. See Victorian Government, *A Fairer Victoria 2009: Standing Together through Tough Times* (State Government of Victoria, 2009) 64–6: 'the principles enshrined in the Charter — freedom, equality, dignity and respect — underpin all government policy and action': at 64.

85 For a discussion of the best interests principle see John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) 159–62; Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford University Press, 1994).

86 John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Concerning Children?' (2009) 33 *Melbourne University Law Review* 579.

87 *CEO Submission*, above n 21, 9.

agenda.[88] Ultimately recourse to the fear of proselytisation implies an agenda of conversion[89] which plays on parental anxieties fuelled by societal intolerance of gay men and lesbians that 'my child will become gay'. It is an approach that has no evidential basis[90] and should not form a part of the debate about the place of gay, lesbian or single parent teachers in religious schools. The argument that an exception from discrimination laws for religious schools is necessary to protect children's best interests is simply without foundation.

Moreover a genuine evidence–based approach to the best interests of the child reveals the need to adopt a very different approach to that advocated by religious bodies and endorsed by both the *1995 EO Act* and the *2010 EO Act*, which tolerate discrimination against both children and the individuals who teach them on the basis of attributes such as their sexual orientation. Research typically indicates that between 5 and 10 per cent of adolescents will identify as gay or lesbian.[91] At present there are 486 Catholic schools in Victoria educating over 188 000 children — more than 20 per cent of all students in Victoria.[92] This means that even on a conservative estimate there will be approximately 9 000 students in Catholic secondary schools who are gay and lesbian[93] or 'same sex attracted

88 In fact the evidence that is available suggests that staff living lifestyles that are inconsistent with official Catholic principles often 'avoid confronting the Catholic Church' and 'choose to self regulate by maintaining secrecy': *VIEU Submission 2008*, above n 22, [5.2.1]. Research undertaken by Dr Greg Curran on teachers' perspectives with respect to homosexuality in the school environment led him to conclude that 'the Catholic Church had to do very little policing of its employees since teachers self regulate their behaviour and language in order to avoid what they presume will be censure and dismissal': at [5.2.5].

89 See *Kokkinakis v Greece* (1993) 260-A Eur Court HR (ser A), which discusses the difference between bearing Christian witness and improper proselytism.

90 See Fiona Tasker and Susan Golombok, 'Adults Raised as Children in Lesbian Families' (1995) 65 *American Journal of Orthopsychiatry* 203, which found that children with gay or lesbian parents were no more likely when they reached adulthood to identify as lesbian or gay relative to children whose parents were not gay or lesbian. See also American Academy of Child and Adolescent Psychiatry, 'Gay Lesbian and Bisexual Parents' (Policy Statement, 1999), which declared that '[t]here is no evidence to suggest or support that parents with a gay, lesbian or bisexual orientation are per se different from or deficient in parenting skills … when compared to parents with a heterosexual orientation … and there is no basis on which to assume that a parental homosexual orientation will increase likelihood of or induce a homosexual orientation in the child'. The American Academy of Pediatrics issued a similar statement in 2002 which was endorsed by the Australian Medical Association in the same year: Committee on Psychosocial Aspects of Child and Family Health, 'Co-parent or Second Parent Adoption by Same-Sex Parents' (2002) 109 *Pediatrics* 339; Australian Medical Association, *Sexual Diversity and Gender Identity —2002* (Position Statement, October 2002) < http://ama.com.au/node/552>.

91 See, eg, Flood and Hamilton, above n 66, 4, who estimate between 5 and 11 per cent; Rainbow Network Victoria, Submission to the Victoria Government Department of Justice, *Review of Exceptions and Exemptions in the Equal Opportunity Act 1995,* 10 April 2008, 1, which estimates approximately 10 per cent; Department of Education and Early Childhood Development (Vic), *Supporting Sexual Diversity in Schools* (2007) 4, which estimates approximately 10 per cent.

92 Department of Education and Early Childhood Development (Vic), 'Summary Statistics for Victorian Schools: July 2009' (Brochure, Department of Education and Early Childhood Development, 2009).

93 This figure is based on there being 87 964 students enrolled in secondary schools within the Catholic education system: ibid.

youth', the term preferred by some commentators.[94] The maintenance of a legal regime that sanctions discrimination against such students and the individuals who teach them on the basis of their sexual orientation contributes to a social and cultural environment in which their sexual orientation is devalued or forced to be concealed.[95] It certainly does nothing to affirm and support their sexual identity. Life is already hard enough for children and young people but to delegitimise their sexual orientation or home life, in the case of single or unmarried parents, creates an inconsistency with the positive obligation to provide children with an effective right to enjoy equality and the protection of their best interests as required under the *Charter*.

More importantly this approach ignores the research concerning the profound impact of discrimination on the health of gay and lesbian students.[96] For example, a recent study found that gay and lesbian students are twice as likely to have an eating disorder[97] while numerous studies have confirmed that they experience more bullying and sexual harassment relative to their heterosexual peers.[98] A major Australian study also indicates that these students are 'more likely to self harm, to report an STI and to use a range of legal and illegal drugs'[99] while the risk of suicide is much higher for same sex youth relative to opposite sex youth.[100] Significantly a common theme in these studies is that discrimination and social

94 See, eg, Peter Norden, *Not So Straight: A National Study Examining How Catholic Schools Can Respond to Same Sex Attracted Students* (Jesuit Social Services, 2006) 11 (Norden prefers this term because does not reduce the identity of a person to their sexual orientation); Lynne Hillier, Alina Turner and Anne Mitchell, 'Writing Themselves In Again: 6 Years On — The 2nd National Report on the Sexual Health and Well-Being of Same-Sex Attracted Young People in Australia' (Report, Latrobe University, 2005) 6: the authors prefer this term because adolescents experience sexual attraction long before they assign themselves a sexual identity and because this term is less confronting.

95 See Evans and Gaze, above n 82. Although research on the treatment by religious schools of students who identify as same sex attracted or who are single parents varies, some respondents indicated that such students would be asked to leave the school.

96 SARC was able to identify some of this research in its Options Paper: *SARC Options Paper*, above n 6, 123–5, but this information was not mentioned in SARC's Final Report, thereby implying that it played no role in shaping the final recommendations of SARC.

97 S Bryn Austin et al, 'Sexual Orientation Disparities in Purging and Binge Eating From Early to Late Adolescence' (2009) 45 *Journal of Adolescent Health* 238.

98 Faye Mishna et al, 'Bullying of Lesbian and Gay Youth: A Qualitative Investigation' (2009) 39 *The British Journal of Social Work* 1598 (the authors cite relevant studies); Ian Rivers and Nathalie Noret, 'Well Being Among Same-Sex and Opposite-Sex-Attracted Youth at School' (2008) 37 *School Psychology Review* 174, 185, who conclude that 'bullying on the grounds of sexual orientation continues to go unabated in many of our schools'.

99 Hillier, Turner and Mitchell, above n 94, viii.

100 *SARC Options paper*, above n 6, 124, referring to evidence from the Coordinator of Way Out, a Rural Victorian Youth and Sexual Diversity Project, that same sex attracted young people are four to six times more likely to attempt suicide than their heterosexual peers; Susan D Cochrane and Vickie M Mays, 'Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners: Results from NHANES III' (2000) 90 *American Journal of Public Health* 573, where the research indicates that same sex attracted youth are between two and seven times more likely to attempt suicide. See also Norden, above n 94, 28–9, for a review of the available literature.

hostility towards gay and lesbian students undermines their well-being[101] — an outcome that is contrary to their best interests.

Moreover the evidence indicates that religious schools play a crucial role in contributing to this hostile cultural and social environment. For example, a major Australian study on the sexual health and well being of same sex attracted youth in 2005 detailed the ways in which young people are forced to deal with their sexuality within religious schools often with tragic results.[102] The authors concluded that:

> In many cases the rejection of their sexuality and the embracing of their religion left young people hating themselves ... Leaving their faith for many was a painful but necessary road to recovery — a sad loss for the church and a survival choice for the young person.[103]

Despite such findings, religious groups such as the Catholic Church would appear to remain committed to a culture of institutional intolerance towards gays and lesbians, which by implication extends to children who experience same sex attraction.[104] Such an approach is difficult to reconcile with the submissions of the Catholic Church to SARC that it must teach everyone to acknowledge and accept their sexual identity[105] and the requirement that a Catholic '[e]ducation must pay regard to the formation of the whole person, so that all may attain their eternal destiny and at the same time promote the common good of society'.[106]

The fact that SARC and the Attorney General did not call upon the Catholic Church to address the impact of its position on the health and well being of children ignores both the right of children to equality under s 8 and the right to have their best interests protected under s 17(2) of the *Charter*. It also ignores the government's own policy which recognises that the approaches 'proven ... to combat homophobia in Victorian schools include: modelling exemplary

101 Hillier, Turner and Mitchell, above n 94, 43–54. See also Michael King et al, 'A Systematic Review of Mental Disorder, Suicide and Deliberate Self Harm in Lesbian, Gay and Bisexual People' (2008) 8 *BMC Psychiatry* 70 <http://www.biomedcentral.com/1471-244X/8/70>,which found that it was likely that social hostility, stigma and discrimination is at least part of the reason for the higher rates of psychological morbidity observed among LGB people; Norden, above n 94, 28–31, discusses the literature on the link between discrimination and harm to the health and same sex attracted youth; Mishna et al, above n 98, 1607–8, which found that the 'institutional context based on entrenched sexual prejudice — for example in schools, religious institutions … and enshrined in laws … is a crucial factor that may render victimisation of gay and lesbian youth distinct'.

102 Hillier, Turner and Mitchell, above n 94, 76–8.

103 Ibid 77–8.

104 It is important to acknowledge that this approach is far from universal within Catholic schools and the research indicates that some schools within Victoria are often compassionate to same sex attracted students: ibid. See also Norden, above n 94, 26, which notes that a number of Catholic secondary schools within Australia 'are already actively engaged in educating their students about the issues surrounding same sex education'. In its defence, the Catholic Church would argue that it does not condemn gay and lesbian students *per se*, but gay or lesbian sexual relationships. In other words, the doctrine of the Church is to love the sinner but hate the sin. The difficulty with this approach is that it fails to recognise that the sexual orientation of a person is an integral part of the identity of that person. As such it cannot be artificially amputated.

105 *Catholic Church Submission*, above n 21, 18.

106 *CEO Submission*, above n 21, 23, citing the relevant Canon Law.

behaviour by the school leadership team and the teaching and student support staff; fostering a culture of openness and a celebration of diversity, and a mutual understanding of expected behaviours in the total school community'.[107] It is therefore difficult, if not impossible to reconcile this model, which is based on the need for positive affirmation of sexual difference, with laws that allow and affirm institutional intolerance and discrimination against gay and lesbian students and the individuals who teach them.

It is not sufficient for the Attorney General to defend this position by saying that Church groups will have to prove why the discrimination is necessary. The fact remains that Victorian law will maintain a form of Sunstein's 'Asymmetry Thesis', and treat discrimination on the grounds of sexual orientation and marital status within religious schools differently to other grounds of potential discrimination, such as race, impairment, physical features or political belief. As such the message is quite clear — gays, lesbians and single or unmarried parents *whether as adults or children* do not deserve the same protection as other groups.[108] This is despite the fact that the *Charter* was intended to promise equality for all and secure the best interests of children.

Moreover the impact of maintaining the exception for religious schools under the *2010 EO Act* creates the potential for negative consequences beyond the direct impact on same sex attracted youth. The remaining 160 000 heterosexual students who are educated in Catholic schools face the prospect that they will be educated in the same culture of intolerance — a culture that runs contrary to broader state and federal efforts to address discrimination on the basis of sexual orientation and marital status and to promote substantive equality.[109] This is not to say that all children educated within Catholic schools will embrace the official Catholic teachings regarding sexuality and marriage for this is clearly not the case.[110] There is also evidence that many Catholic schools do not follow the official doctrine of the Catholic Church with respect to sexuality and marriage.[111] But if education is the key to addressing systemic discrimination and prejudice and promoting a

107 Department of Education and Early Childhood Development (Vic), *Supporting Sexual Diversity in Schools*, above n 91, 4. It is also incompatible with the approach develop by the Jesuit Priest, Father Peter Norden, in a program prepared for Catholic secondary schools, titled *Not So Straight*, in which he recommended that 'the solution lies in a commitment by the school management and teaching staff to working on the "whole school environment", so that students who are different do not have to conform or submerge their natural behaviour in order to be acceptable': Norden, above n 88, 44.

108 See Evans and Ujvari, above n 28, 42, which notes that '[l]aw has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value'. Such a law may also legitimise parental maltreatment of same sex attracted youth by their parents as research indicates that parental psychological and physical abuse is greater among same sex attracted youth: Kimberly Balsam and Esther Rothblum, 'Victimisation over the Life Span: A Comparison of Lesbian, Gay, Bisexual and Heterosexual Siblings' (2005) 73 *Journal of Consulting and Clinical Psychology* 477, 483.

109 See, eg, Australian Labor Party, *National Platform and Constitution 2009 — Chapter 7: Securing an Inclusive Future for All Australians* (2009) <http://www.alp.org.au/australian-labor/our-platform/>; *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth).

110 See above n 66.

111 See above n 70.

culture of tolerance and understanding — and for most commentators including the Victorian government, this is the case[112] — the maintenance of an educational environment that permits discrimination is difficult to reconcile with the objectives of promoting equality and tolerance.[113]

3 *The Nature and Extent of the Limitation*

It has been argued above that the removal of the exception for religious schools can be justified as being necessary to ensure a genuine commitment to the right to equality and non-discrimination under the *Charter* and the obligation to secure the best interests of children. If such an approach were adopted this would interfere with the right to freedom of religion as understood by *some* of those parents whose children attend religious schools. As a consequence, s 7(2)(c) of the *Charter* requires an examination of the nature and extent of this interference in order to form a view as to the proportionality of any measures taken to protect the rights to equality, non-discrimination and the best interests of the child at the expense of the right to freedom of religion. As Bell J explained in *Kracke* '[t]he greater the limitation of the right, the more compelling must be its justification'[114] — an approach which is consistent with the views of Sunstein that the legitimacy of any interference with religious beliefs by a state will be determined by the 'strength of the State's justification'.[115]

With respect to this issue, the Catholic Church argued that the removal of the exception under the *1995 EO Act* would have a profound and disproportionate impact on the ability of parents and children to enjoy their right to freedom of religion. The tenor of the submissions made on behalf of the Catholic Church implied that the delivery of Catholic education would be placed at risk if the

112 See, eg, Department of Education and Early Childhood Development (Vic), *Supporting Sexual Diversity in Schools*, above n 91, 7, which stresses the need to provide education for total school community to combat homophobia; Norden, above n 94, 26: 'Education is instrumental in reducing incidents of abuse on the basis of sexual preference'. See also 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (2006) <http://www.yogyakartaprinciples.org/principles_en.htm>. Adopted by a group of experts in Yogyakarta, Indonesia 2006, principle 1(c) requires that states shall '[u]ndertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity'; *United Nations Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 29(1)(b) and 29(1)(d) require that the education of a child shall be directed to, inter alia, 'the development of respect for human rights and fundamental freedoms, and the principles enshrined in the Charter of the United Nations', and 'the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'.

113 See Evans and Ujvari, above n 28, 41. The authors discuss the possibility that 'exempting religious schools from otherwise applicable non-discrimination principles may adversely impact the way their students view or engage with people of other faiths or beliefs, in contravention of the latter's rights to equality and non-discrimination': at 41. See also Mishna et al, above n 98, 1603, where the authors discuss how institutional factors in government and social policy including protection against discrimination on the grounds of sexual orientation can contribute to a more accepting climate for gay and lesbian youth.

114 *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [150] (Bell J).

115 Sunstein, above n 1, 13.

exception were removed.[116] If true, this is a serious consequence that would demand the strongest of justifications to remove the exception. However, this claim by the Catholic Church rests on a number of assumptions which, when examined carefully, are found to be without foundation. Indeed it will be shown that the nature and extent of the interference with the right to freedom of religion would be minimal in practice if religious schools were prohibited from discriminating against gays, lesbians and single or unmarried parents.

(a) The Fear of Proselytisation

The primary argument against the removal of the exemption under the *1995 EO Act* for religious schools was founded on two propositions. First, that school children must be protected against staff proselytising views that contradict Catholic beliefs; and second, that all staff in Catholic schools must act as role models for lifestyles that are consistent with Catholic beliefs and principles.[117] Although guarding against proselytisation is a relevant and legitimate concern for religious groups, the potential for this risk to materialise has been addressed above and dismissed as a fear based on assumptions rather than evidence. Moreover the Catholic Church would appear to have misunderstood and conflated the consequences of any removal of the current exception for religious schools. For example, in its submission to SARC, the CEO claimed that:

> If Catholic schools could not prevent or stop staff from contradicting Catholic beliefs and principles, this would infringe Catholic schools' ability to maintain the sense of community and unity, family values, moral fortitude and personalised and nurturing character, which is presently sought by parents, in exercise of their right to have their children educated ... in accordance with their religion.[118]

The removal of the exception would have no such consequence. A prohibition on discrimination against the employment of an individual on the basis of their sexual orientation or marital status does not provide that person with a licence to openly criticise and condemn Catholic principles within the classroom.

Indeed it would be a valid condition of employment for a religious school to require that all staff teach in a manner that is prima facie consistent with Catholic beliefs and principles. It would, in the language of the *Charter*, represent a legitimate reason for limiting a staff member's right to freedom of expression as it would be designed to protect the rights of others to enjoy their right to freedom

116 See *CEO Submission*, above n 21, 26, which argued that the removal of the exception 'could significantly impair the ability of Catholic Schools to effectively operate in Victoria'; Association of Independent Schools of Victoria Inc, Submission No 701 to SARC, *Exceptions and Exemptions in the Equal Opportunity Act 1995*, 10 July 2009, 21, which suggests that removal of exemption 'may mean that, in time, faith-based schools would close'.

117 *CEO Submission*, above n 21, 9, 23.

118 Ibid 10.

of religion.[119] The capacity for such an employment condition would also allay the concern expressed by Bishop Prowse in evidence before SARC that the Catholic Church 'would not want persons or communities undermining our well-known and well-founded teachings'.[120] However, such a provision could not be unlimited in scope. In the language of the *Charter*, the resultant interference with the right to freedom of expression would have to be reasonably justified.

In this instance, reasonableness would prohibit the Catholic Church from imposing a complete prohibition on staff in religious schools from discussing the fact there are individuals and other religions within society that hold beliefs or principles that may not always be consistent with the principles of the Catholic faith. Although this would represent an interference with the right to freedom of religion as understood by some parents, it would be a reasonable interference. This is because the Victorian government has a positive obligation under the *Charter* to promote the right to equality and non-discrimination and secure the best interests of children.[121] It therefore has a legitimate interest in regulating the activities of Catholic schools to ensure they act consistently with these rights and do not operate in a way that undermines respect for pluralism and diversity in a liberal democratic state. To allow religious schools to give preference to their own religious beliefs is consistent with the right to freedom of religion. But to allow religious schools to operate as zones of intolerance is incompatible with the vision for Victorians offered under the *Charter*.[122]

Although the need to ensure respect for pluralism and diversity within religious schools will always be controversial, as McLachlin CJ of the Canadian Supreme Court explained in *Chamberlain v Surrey School District No 36*:[123]

> Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves … the demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not

119 See *Charter* s 15(3), which provides that '[s]pecial duties and responsibilities are attached to the right to freedom of expression and the right may be subject to lawful restrictions reasonably necessary —(a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality'.

120 Evidence to SARC, Parliament of Victoria, Melbourne, 5 August 2009, 4 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

121 It is generally accepted under international law that human rights impose not only negative duties to refrain from interfering with a right but also positive duties to ensure the effective enjoyment of rights. This is sometimes referred to as the principle of effectiveness. See Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 6: the legal obligations on States Parties to the Covenant is both negative and positive in nature; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 272 [6.28]–[6.30]. See also *Public Administration Act 2004* (Vic) s 7(1)(g): 'human rights—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—(i) making decisions and providing advice consistent with human rights; and (ii) actively implementing, promoting and supporting human rights'.

122 Walker, above n 22, [30]: 'The State's interest in non- discrimination is such that it can justifiably override manifestations of sincerely held but intolerant religious beliefs where those manifestations harm others, including both teachers and their students'.

123 [2002] 4 SCR 710.

> ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being who may not share those convictions.[124]

This idea of exposure to cognitive dissonance requires that religious schools must be prohibited from becoming enclaves of discrimination with respect to individuals on the basis of their sexual orientation, parental or marital status.

This does not mean that staff within Catholic schools should be able to openly advocate or preference their personal views over the principles of the Catholic faith as this may amount to proselytisation. However, under international human rights law if information is provided to students in relation to sensitive matters such as alternative faiths and lifestyles in a neutral and objective manner, this will be compatible with the right to freedom of religion.[125] Although this will interfere with the religious beliefs of some parents, it does not amount to the complete secularisation of religious education or denial of a right to educate a child in one's own faith, as suggested by the Catholic Church.[126] It simply anticipates an educational context in which students will be presented with an education that preferences their religious beliefs but also alerts them to reality that there are other legitimate systems of belief and lifestyle which are recognised and protected in a contemporary democracy.

No submissions were made to SARC during the Inquiry that a teacher in a Catholic school should be prohibited from discussing with his or her students the fact that there are religions other than Catholicism. Indeed in the public hearings before SARC, Bishop Prowse of the Catholic Church affirmed the existence of 'robust discussions on all sorts of things' within Catholicism and acknowledged that inter religious dialogue is at 'the centre of a healthy society'.[127] It therefore follows that staff within such schools should not be prevented from advising students in the appropriate pedagogical setting that although the Catholic Church may have certain views with respect to sexuality and marriage, these views are not universally held. A question remains however as to when the 'appropriate pedagogical setting' for this conversation will arise?

In relation to this question, a discussion about the diversity of belief systems could not take place within a religious school upon the initiative of a staff member at any time. The submissions of the Catholic Church tried to create the impression

124 Ibid [66].

125 Ironically the Catholic Church actually conceded in its submissions to SARC that 'it is important that pluralism in education be respected'. This concession, however, was made in an attempt to reject what it perceived, albeit wrongly, as an attempt to impose a secular vision of education on Catholic schools: *Catholic Church Submission*, above n 21, 8. See also Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18),* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 6, which permits school instruction in areas that may be contrary to the religious beliefs of parents and children provided it is given in a neutral and objective way; *Kjeldsen v Denmark* (1976) 23 Eur Court HR (ser A) 1, 26 [53], where, provided that sensitive subjects such as sex education are taught in an 'objective, pluralistic and critical manner', there will be no violation of a parent's rights.

126 *Catholic Church Submission*, above n 21, 8..

127 Evidence to SARC, Parliament of Victoria, Melbourne, 5 August 2009, 5–6 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

that the risk of proselytisation was an ever present fear that could materialise at any point. However, as discussed above, this risk has been debunked and the reality is that the opportunity for an objective discussion about pluralism and diversity in belief systems would be limited to appropriate pedagogical settings. In practice there are very few subjects that would offer such a setting especially in primary schools. It would certainly not arise in any of the key learning areas such as Maths or English — unless the texts being studied gave rise to issues of sexual orientation and marriage. The other educational context where this discussion could occur is religious education.

The research from Australia actually indicates that 'where homosexuality is discussed in the curriculum, it is generally in the context of the sexual health risks'.[128] However in 2002, the then Archbishop of Melbourne, George Pell, issued a directive that no Catholic school was to deliver sex education classes to its students.[129] Thus under the present policy it would appear that no Catholic student is allowed to receive information in relation to matters such as contraception and sexual relationships. If these matters are completely removed from the curriculum of Catholic schools this raises a question as to precisely when the fears of the Catholic Church with respect to gay, lesbian and single or unmarried parents would have an opportunity to be realised within the classroom. At present there would appear to be no legitimate space within Catholic schools to raise or discuss these issues.

(b) The Requirement that Staff in Religious Schools Bear Witness to Faith

Beyond the fear of proselytisation, the other separate but related concern of religious bodies such as the Catholic Church if the exception under the *1995 EO Act* were removed, is the perceived potential for gay, lesbian, single parent and unmarried staff to act as role models within schools for lifestyles that are inconsistent with Catholic beliefs. This argument is based on the concept of witness to faith in education, which, according to the CEO in its submission to SARC, is derived from the Catholic Canon Law 804 which states:

> The local Ordinary is to be careful that those who are appointed as *teachers of religion in schools,* even non Catholic ones, are outstanding in true doctrine in the witness of their Christian life, and in their teaching ability.[130]

128 Norden, above n 94, 31.

129 Catholic Education Office, 'Directives for Christian Education in Sexuality' (Directive, Catholic Education Office, Archdiocese of Melbourne, 2002).

130 Cited in *CEO Submission*, above n 21, 23 (emphasis added).

Although this law is restricted to teachers of religion only, the official submission of the Catholic Church to SARC argued that the requirement of witness to faith in education extended to all those employed in a Catholic school.[131]

Whereas SARC had initially assumed that a receptionist would not be a person to whom the exemption should have any relevance[132] and the Attorney General had formed the same view with respect to gardeners in religious schools,[133] the Catholic Church took a different view. It declared:

> The Options Paper is quite mistaken when it gives as an example the unacceptability for a church to refuse to employ a receptionist on the basis that he or she is in a de facto relationship. A receptionist in a religious school is in a position to influence the formation of students and if he or she were to make known to the students a lifestyle matter such as that … then the religious identity of the school may be compromised …[134]

Although the need to ensure that *all* staff in religious schools bear witness to faith may be justified, this particular submission of the Catholic Church makes a number of assertions about the impact of staff on children which when examined closely are unable to be substantiated.[135]

In the first instance no empirical evidence was provided by the Catholic Church to establish that a receptionist can, as a matter of fact, influence the formation of a child with respect to the kind of marital (or sexual) relationship that a child will ultimately choose to enter. Second, it assumes that staff members will be active in promoting their marital status and sexual orientation to students. Again no empirical evidence is provided to support this claim. Indeed the evidence that is available suggests that staff conceal their sexual identity or marital status from school communities because of the fear of censure or dismissal.[136] Moreover, intuitively it is difficult to envisage staff adopting such an approach given that

131 Ibid 23–4. It is acknowledged that it could be argued that Canon Law 803 applies to all staff in a religious school ('Instruction and education in a Catholic School must be based on the principles of Catholic doctrine and the teachers must be outstanding in true doctrine and uprightness of life'). However this argument was not raised in the submission of the CEO.

132 *SARC Options Paper*, above n 6, 127.

133 Rob Hulls, 'A Crucial Balance', *The Sunday Age* (Melbourne), 11 October 2009, 14.

134 *Catholic Church Submission*, above n 21, 5. See also *Anglican Church Submission*, above n 23, 7–10 [28]–[41].

135 Under the *Charter*, the party which alleges an interference with his or her right carries the evidential burden of establishing on the balance of probabilities that such an interference has occurred: see, eg, *R v Oakes* [1986] 1 SCR 103, 136–7; *Samaroo v Secretary of State, Home Department* [2001] EWCA Civ 1139 (17 July 2001) [29] (Dyson LJ) quoting *R v Secretary of State, Home Department (Ex parte Samaroo)* [2000] EWHC Admin 435 (20 December 2000) [44]–[45] (Thomas J). Mere assertions are not sufficient and evidence must be provided to support a claim that an inference with another right or rights (in this case non-discrimination, equality and a child's best interests) is necessary to achieve the protection of a legitimate purpose (in this case freedom of religion).

136 'Dr Curran concluded from his research that due to the strong stance on homosexuality, the Catholic Church had to do very little policing of its employees since teachers self regulate their behaviour and language in order to avoid what they presume will be censure and dismissal': cited in *VIEU Submission 2008*, above n 22, 16 [5.2.5]. It is acknowledged that if the exception under the *2010 EO Act* were removed, gay, lesbian, single parents and unmarried staff would no longer be required to conceal their identity because of a fear of dismissal.

a person's marital status and sexual orientation are not matters which are likely to arise in the day to day operation of a school. Third, it implies that the very existence of a staff member who is in a de facto relationship — or for that matter, is gay, lesbian or a single parent — will somehow contaminate the religious identity of the school. This is despite evidence that there are many Catholic schools within Victoria where the employment of such individuals as a member of staff had no impact on the religious identity of the school let alone the existence or functioning of the school.[137]

Notwithstanding this evidence, the position effectively advanced by the Catholic Church was that the mere presence of a person on staff who is known to be gay, lesbian, a single mother or in a de facto relationship will irretrievably compromise the religious identity of the school and as such represent an unreasonable limitation on the right of a parent or child to freedom of religion.[138] The preceding analysis demonstrates that the removal of the exception under the *1995 EO Act* for religious schools would not have precipitated the cataclysmic consequences as envisioned by the Catholic Church. Indeed it would have constituted a relatively minor inference that would not lead to the complete secularisation of education as suggested by religious groups.

4 *The Relationship between the Limitation and its Purpose*

The next consideration in assessing the reasonableness of the relatively minor limitation on the right to freedom of religion, if the exception under the *1995 EO Act* had been removed, is the requirement under s 7(2) of the *Charter* to examine the relationship between the limitation and its purpose. This is sometimes referred to as the 'rational connection test' and demands that there be some objective basis upon which it can be determined that the limitation is necessary to achieve its purpose.[139] In relation to this issue, the Catholic Church argued 'that no evidence has been offered that there is community support for extending equality provisions to denying the right of religious people to deliver services in

137 The evidence of the VIEU was that the formal policy of the CEO is applied inconsistently so that staff in many Catholic schools are gay, lesbian or in non marital relationships: *VIEU Submission 2008*, above n 23. It also discusses the factors that influence the extent to which a school will comply with the official policy of the Catholic Education Office. This practice was also recognised by the Chair of SARC during the public hearings: Evidence to SARC, Parliament of Victoria, Melbourne, 5 August 2009, 9 (Victorian Independent Education Union). However, there was no evidence to suggest that existence of such persons on staff had any negative impact on the functioning of these schools.

138 It is worth bearing in mind that many, if not the overwhelming majority of primary school children, will have absolutely no practical understanding of how homosexuality is different from heterosexuality. Indeed this is more likely to be the case in a Catholic school where sex education is prohibited by the Catholic Church. In such circumstances it almost becomes farcical to assert that the mere presence of a gay or lesbian staff member will act as an inappropriate role model and thus undermine a child's right to freedom of religion.

139 See *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [153] (Bell J), citing *R v Oakes* [1986] 1 SCR 103, 139 [69]–[70] (Dickson CJ). See also Economic and Social Council, *Status of the International Covenants on Human Rights*, 45th sess, UN Doc E/CN.4/1985/4 (28 September 1984) annex ('*The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*') para 10: 'Any assessment as to the necessity of a limitation shall be made on objective considerations'.

accordance with their own beliefs'.[140] It also argued that the SARC Options Paper failed to cite any legal cases or provide instances of complaints of injustice by religious agencies that would justify law reform.[141]

But the Catholic Church appears to have overlooked three critical issues when making this submission. First, it is an accepted principle of international human rights law that a lack of public support does not determine whether a practice is consistent with human rights.[142] Within Victoria, the question of whether a law accords with human rights is determined by a consideration of the factors in s 7(2) of the *Charter*. Second, the removal of the exception for religious schools under the *1995 EO Act* would have represented an inference with, rather than the complete denial of, the right to manifest freedom of religion in community with others. If the denial of such a right were to occur, this would involve the prohibition and criminalisation of religious schools, not simply a requirement to refrain from discrimination on the basis of attributes such as sexual orientation or marital status. Third, the lack of litigation and complaints against Catholic schools was due to the fact that the law in Victoria provided no avenue for redress — the *1995 EO Act* allowed religious schools to discriminate against persons on the basis of what would have otherwise been protected attributes. The Catholic Church also appeared to overlook the evidence of unions which have been regularly called upon to assist staff in negotiating with religious schools in relation to issues that arise because of discrimination on grounds that would otherwise be protected attributes under the *1995 EO Act*.[143]

In contrast to the approach adopted by the Catholic Church, an examination of the evidence available to justify the removal of the exemption would be based on two considerations. First, it is self evident that a blanket entitlement to discriminate against someone on the basis of their sexual orientation, parental or marital status creates a situation where certain people — children and adults alike — are denied the right to equality before the law as required under s 8 of the *Charter*. As a consequence, the removal of that entitlement would have ended this blanket discrimination. Second, as detailed above, the evidence suggests that a social and cultural environment which is intolerant of homosexuality and sanctioned by law carries the risk of significant negative health consequences for same sex attracted youth. The current ability of religious schools to marginalise and delegitimise homosexuality therefore presents significant risks for the development of same sex attracted youth. The removal of the exception under the *1995 EO Act* would

140 *Catholic Church Submission*, above n 21, 17.

141 Ibid.

142 See, eg, *Tyrer v United Kingdom* (1978) 26 Eur Court HR (ser A) 1, 15 [31], where the fact that the administration of judicial corporal punishment did not outrage public opinion was not relevant in the determination of whether such conduct amounted to degrading treatment; *State v Makwanyane* [1995] 3 SA 391, 431 [88] (Constitutional Court), where, in response to the argument that public opinion favoured the death penalty, Chaskalson JP declared: 'Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication'.

143 Evidence to SARC, Parliament of Victoria, Melbourne, 5 August 2009, 6 (Debra James, Victorian Independent Education Union). See also *VIEU Submission 2008*, above n 23, 13–21.

have represented a significant measure in creating a culture of tolerance for same sex attracted youth.[144] In terms of the *Charter*, the resultant limitation on the right to freedom of religion can be rationally connected to its objective, namely the promotion of the right to equality and non-discrimination for adults and students and securing the best interests of children.

5 *The Principle of Minimal Impairment*

The final factor to be considered in assessing whether the removal of the exception for religious schools is reasonably and demonstrably justified is a requirement to determine whether there are any less restrictive means reasonably available to ensure the protection of the right to equality and the best interests of the child. This is often referred to as the 'minimum impairment principle' and requires that the interference with the right to freedom of religion be 'as little as possible'.[145] The Options Paper prepared by SARC listed eight options with respect to the treatment of the exception for religious schools.[146] But rather than express a view as to which of these options satisfied the test under s 7(2)(e) of the *Charter*, it essentially took the view that an application of s 7(2) was too complex. When the Attorney General announced that the exception for religious schools would be maintained he also failed to engage with s 7(2). He simply justified his position as an appropriate balance between the competing rights by explaining that religious schools would have to justify why any discrimination was necessary to protect their religious beliefs.[147]

An analysis of the likely operation of this approach in practice reveals that the Attorney General's claim of achieving an appropriate balance cannot be substantiated. This is because his approach preferences freedom of religion in a way that maintains an unreasonable limitation of the rights to equality, non-discrimination and the requirement to secure the best interests of children. The approach adopted by the Attorney General is certainly a less restrictive interference with the right to freedom of religion relative to the complete removal of the exception for religious schools. Moreover, it reflects the view of the Attorney General that 'religious groups should be allowed to discriminate on some grounds if it was in accordance with their beliefs'.[148] But there remains a question as to whether this approach actually satisfies the purpose for which the

144 Evans and Ujvari, above n 28, 56, argue that 'it may be helpful for children and young people to learn to live in communities where there are people who do not always comply with religious teachings that the child may adhere to, but who are none the less valued members of the community. This can be an important part of breaking down prejudice and intolerance'; Mishna et al, above n 98, 1603 argue that legislative protection against discrimination on grounds of sexual orientation may contribute to a more accepting climate for lesbian and gay youth.

145 *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [157] (Bell J). For a discussion of this principle, see also *Lifestyle Communities Ltd [No 3]* [2009] VCAT 1869 (22 September 2009) [332]–[334] (Bell J); *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 (7 September 2009) [154] (Warren CJ); *R v Sharpe* [2001] 1 SCR 45, [95]–[97] (Canada).

146 See above n 36.

147 *Attorney General Media Release*, above n 9.

148 Ibid.

interference was intended, that is, does it strike an appropriate balance between the competing rights of freedom, equality, non-discrimination and children's best interests?

The imposition of a burden on religious bodies to prove that any discrimination on the grounds of sexual orientation, parental or marital status is *reasonably* necessary to protect religious beliefs certainly represents an interference with the right to freedom of religion.[149] However, this burden is unlikely to operate as a significant form of accountability on the way in which religious bodies exercise their entitlement to discriminate. The new provision in the *2010 EO Act*, s 83(2), does at least require that the discrimination be 'reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion equivalent'. But as this analysis has sought to demonstrate, there is no reasonable justification for allowing the exception in the first place. Thus in practice there is the risk that the mere assertion by a religious group that discrimination on the basis of sexual orientation or marital status is necessary to ensure parents' right to freedom of religion will remain unchallenged. And it is important to recall that this approach was sufficient to persuade SARC and the Attorney General to maintain the exception for religious schools under the *2010 EO Act* despite the fact that, as has been argued in this paper, the necessity and reasonableness of such measures is highly questionable.

Ultimately, the model advocated by the Attorney General is unlikely to contribute to the effective protection of the right to equality and discrimination for all Victorians and the best interests of children. With respect to the situation of adults, the Attorney General would presumably argue that gays, lesbians, adults living in de facto relationships or single parents are not prevented from applying for positions within religious schools. This is because these schools now carry the burden of establishing why any discrimination against such individuals on the basis of these otherwise protected attributes is justified by the inherent requirements of the particular position.

This inclusion of the inherent requirements test is certainly an advance on the treatment of employees or potential employees in religious schools under the *1995 EO Act* which provided a blanket exception for such schools in relation to discrimination against any of the protected attributes under the Act. But it still places the onus on teachers who are gay, lesbian, single parents or living in a de facto relationship to challenge a claim by a religious school that their sexual orientation, marital or parenting status is relevant to the inherent requirements of a particular position. The reality is that, as discussed above, the Catholic Church has said quite unequivocally that such attributes are incompatible with the inherent requirements of all positions within Catholic schools despite the absence of evidence to support this claim. As a consequence, the model adopted under the *2010 EO Act* will rely heavily on the courage and fortitude of teachers who are gay, lesbian, single parents or living in a de facto relationship to apply to

149 Indeed the Attorney appealed to this obligation to deflect criticism that his approach represented a disproportionate concession to the interests of religious groups: Rob Hulls, 'A Crucial Balance', *The Sunday Age* (Melbourne), 11 October 2009, 14.

schools where they know they are not wanted or to conceal their identify for fear of potential reprisal.[150]

Even more problematic is the complete indifference to the capacity for religious schools to discriminate against students on the basis on their sexual orientation or parental status under s 83(2) of the *2010 EO Act*. This prospect, as noted above, is far from illusory with a recent study indicating that principals in some religious schools would discriminate against students on the basis of such attributes.[151] However it is essentially overlooked in the SARC Inquiry and there is no mention of the impact of the exception on children in the Statement of Compatibility for the *2010 EO Act*.[152]

Such an approach is not consistent with a society that seeks to promote tolerance and equality. To completely overlook the potential for students to be subject to discrimination on the basis of their sexual orientation or parental status; and to dissuade teachers who are gay, lesbian or unmarried from working in nearly 20 per cent of all Victorian schools, or to force them to conceal their identity, is not — contrary to the opinion of the Anglican Archbishop, Dr Phillip Freier — merely 'a modest infringement on the right to equality'.[153] It is a significant interference with the right to equality and non-discrimination, and as such requires in the words of the Chief Justice of the Victorian Supreme Court, 'cogent and persuasive evidence'[154] if it is to be justified — evidence that was not provided by the Catholic Church or any of the other religious bodies that made submissions to SARC. Moreover to enable religious schools, whose operation is heavily dependent upon the allocation of significant public money,[155] to foster and maintain a culture of intolerance is an

150 See Margaret Thornton, 'Balancing Religion and Rights: The Case against Discrimination', *Extra, The Sunday Age* (Melbourne), 4 October 2009, 19. It is important to acknowledge that there is the prospect under s 127 of the *2010 EO Act* for the Victorian Human Rights Commission to undertake inquiries with respect to the existence of systemic discrimination which could extend to discrimination by religious schools against people on the basis of attributes such as their sexual orientation, parental or marital status. However, such an approach still places the onus on individuals to bring evidence of such discrimination to the attention of the Commission and there are powerful incentives for not making such disclosures.

151 See Evans and Gaze, above n 82.

152 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 772 (Rob Hulls, Attorney General).

153 *Anglican Church Submission*, above n 22, 12 [51].

154 *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 (7 September 2009) [147] (Warren CJ), affd *R v Momcilovic* (2010) 265 ALR 751, [144].

155 In 2007–08, the Department of Education provided $380 million for non-government schools: Department of Education and Early Childhood Development (Vic), 'Annual Report 2007–08' (Report, October 2008) 51. Of this, a significant percentage would have been allocated to Catholic schools. But what this figure does not reveal is that the majority of the revenue for many Catholic schools comes from public funding. To take one example in the Catholic Parish of East Ivanhoe, there are three Catholic primary schools. The financial reports for these schools indicate that in 2008 approximately 80 per cent of their core funding came from state and federal government sources: Mary Immaculate Parish Primary School, Ivanhoe, 'Annual Report to the School Community' (Annual Report, 2008) 14 (total recurrent income $1 336 286: $202 000 state government; $846 000 federal government); St Bernadette's Primary School, Ivanhoe 'Annual Report to the School Community' (Annual Report, 2008) 18 (total recurrent income: $1 260 472: state funding $203 603; federal funding $879 121); Mother of God Primary School, Ivanhoe East, 'Annual Report to the School Community' (Annual Report, 2008) 17 (recurrent revenue: $1 467 112; state funding $238 807; federal funding $915 329).

outcome that is not demonstrably justified in a democratic society. It is harmful to both adults and children who possess those attributes upon which religious schools can discriminate. In contrast, the extent of the harm alleged by the religious bodies should gays, lesbians and single parents be allowed to teach in religious schools has been shown to be without foundation.

IV CONCLUSION: ABANDONING THE ASYMMETRY THESIS

Democratic states are understandably reluctant to take any measure that will interfere with freedom of religion. Religious bodies make an enormous contribution to the provision of social services within most states — a point that was stressed in the submissions of the Catholic Church[156] — and freedom of religion is a fundamental human right. But these factors alone do not make religious schools immune from government intervention and regulation. For Cass Sunstein, the assessment of whether an intervention will be justified depends on the 'extent of the interference with religious convictions and the strength of the state's justification'.[157] In Victoria, the relevant test is contained in s 7(2) of the *Charter* which requires a consideration of five factors in determining whether any interference on the right can be justified as a reasonable limitation in a democratic society.

Although SARC, the Attorney General and the overwhelming majority of the parties involved in the SARC Inquiry, failed to address each of these factors in any detail, this paper has sought to demonstrate that such an analysis is possible. Moreover the benefit of using the *Charter* in this way is that identifies the nature and scope of the relevant rights and provides a series of steps by which to achieve the proper balance between competing rights. Importantly, this process is informed by evidence rather than unsubstantiated allegations or assumptions. Thus the Catholic Church and religious groups were entitled to stress the need to guard against prosleytisation, secularisation of religious education and any threat that would jeopardise the delivery of education by religious schools and the requirement that staff bear witness to faith. However, an examination of the available evidence indicates that the presence of gay, lesbian, single parents, or unmarried persons on the staff of religious schools would not lead to the realisation of any of these fears. As a consequence, the removal of the exception against discrimination enjoyed by religious schools under the *1995 EO Act* would have constituted a relatively minimal interference with the religious beliefs of some parents and children. It would not, in the words of Sunstein, 'seriously jeopardise the continuing functioning of the relevant religion'.[158]

156 See, eg, *Catholic Church Submission*, above n 21, 3–5, 7–8; Evidence to SARC, Victorian Parliament of Victoria, Melbourne, 5 August 2009, 2 (Bishop Christopher Prowse, Catholic Bishops of Victoria), who emphasises 'that the Catholic Church is a major contributor to the social fabric of the Victorian community'.

157 Sunstein, above n 1, 13.

158 Ibid 10.

It is acknowledged that the removal of the exception would still cause considerable anxiety for some parents and children whose views with respect to sexual orientation and relationship status are genuinely informed by their religious beliefs. But this anxiety is not a sufficient justification for maintaining what Sunstein has described as the Asymmetry Thesis especially when the consequences of this approach are that gay, lesbian and unmarried parents will be prevented or dissuaded from pursuing employment in over 20 per cent of an education sector which receives significant public funding. Further, more than 20 per cent of children in Victoria including several thousand gay and lesbian students will be educated in schools which delegitimise, devalue and have the capacity to discriminate against such students on the basis of their sexual orientation and parenting status, despite the fact that these attributes are recognised as legitimate and otherwise protected under Victorian law.

When the Attorney General read the second reading speech for the *Charter* in 2005, he proclaimed that it 'will help us become a more tolerant society, one which respects diversity and the basic dignity of all'.[159] When the principles under the *Charter* are properly applied, this instrument is able to affirm the importance of freedom of religion but also recognise its limits when the manifestation of religious beliefs seriously threatens other core values protected in a liberal democratic state. The US Supreme Court recognised this in *Bob Jones University v United States*[160] — a matter in which a Christian university sought to justify racial discrimination on religious grounds — when it declared:

> On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. … The governmental interest at stake here is compelling … the government has a fundamental, overriding interest in eradicating racial discrimination in education.[161]

The promotion of the rights to equality, non-discrimination and children's best interests under the *Charter* provided the 'compelling interests' to justify the Victorian Parliament's removal of the exception enjoyed by religious schools under the *1995 EO Act*.[162] Importantly, such an amendment would not have destroyed or denied an individual's right to freedom of religion, but merely imposed a reasonable limitation on the right to manifest one aspect of a person's religious beliefs in community with others.

159 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney General).

160 461 US 574 (1983). The discrimination in question concerned a prohibition against interracial relationships which if breached would lead to expulsion.

161 Ibid 603–4 (Burger CJ).

162 See Sunstein, above n 1, 7.