Submission
to the

Victorian Human Rights & Responsibilities Act 2006 – Enquiry

Shop, Distributive and Allied Employees’ Association
SDA SUBMISSION – Vic Human Rights & Responsibilities

Act 2006 – ENQUIRY

INTRODUCTION

The Shops, Distributive and Allied Employees' Association (the SDA) welcomes the opportunity to make this submission to the Enquiry.

The SDA respectfully advises the Enquiry that it has in excess of 210,000 members, is represented in each state and territory of Australia, and is the largest union affiliated with the Australian Council of Trade Unions, is represented at and holds senior office in Regional and International Trade Union Associations.

The membership of the SDA is culturally diverse and representative of many racial and ethnic backgrounds. In addition, the SDA has the largest proportion of youth membership and arguably the largest number of females in its membership of any union in Australia.

The SDA’s submission will concentrate on the inherent right of each person to a dignified existence. The right of peaceful assembly and freedom of association and the right to thought, conscience and religion and belief. It is submitted that these three heads best represent the aspirations of our members, are relevant to our members' daily lives and are within the competence, knowledge and grasp of the SDA to express in the interests of our members.

Before addressing each of these heads it is worth considering the purpose of the Charter of Human Rights and Responsibilities Act 2006 (the charter).

1. PURPOSE OF THE CHARTER

1.1 Section 1 (2) states the main purpose of the Charter is to protect and promote human rights and is then followed by eight subsections which complete the list of the purpose.

1.2 It is disappointing to note that the human rights to be protected are those nominated by the Parliament.¹

¹ Subsection 1(2)(a) – Charter of Human Rights and Responsibilities Act 2006
1.3 By this acknowledgement it can be assumed that human rights are not those handed down in the main International Instruments\(^2\) converging on fundamental human rights and civil and political rights but rather a subjective selection of the Parliament’s belief.

1.4 The Charter’s protection of the rights therefore is subject to the whim of Parliament as is constituted from time to time. Such fragility may result in the nomination of rights which are not in reality human rights but rights which strong interest groups have propounded.

1.5 Given this fragility of moveable rights, the Charter may be viewed or thought to be a relativist document rather than one founded on the deepest sense of dignity inherent within the life of every human person.

1.6 Contrary to the Charter, the Universal Declaration of Human Rights (UDHR) respectfully, in our submission, gets it right. The very first article of the UDHR attributes human rights as belonging to human rights. It states:

Article 1:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

1.7 It is our submission that human rights attach to the human person from birth and it is not for the state to qualify, remove, weaken or select which human rights will be protected.

1.8 The Charter’s purpose does not meet the central point of the protection of human rights because the purpose and the list of human rights is subject to the will of the Parliament.

2. INHERENT RIGHT OF EACH PERSON TO DIGNIFIED EXISTENCE

2.1 Part 2 of the Charter nominate what are human rights and to what extent they can be exercised or limited.

2.2 By the words of section 7 it is inferred that no human right is absolute. If this is not correct then a charter must state which human rights are absolute.

\(^2\) Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.
2.3 The right to life⁴, protection from torture⁵, freedom of thought, conscience, religion and belief⁶, and in our submission, peaceful assembly and freedom of association⁷, amongst others, should not be subject to limitation.

2.4 Article 4.2 of the International Covenant on Civil and Political Rights (ICCPR) states: No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.

2.5 The articles in the ICCPR from which no derogation is permitted cover all of the matters raised at 2.3 above bar that relating to peaceful assembly and freedom of association.

2.6 The Charter does not truly protect human rights as it does not give an absolute protection to any human rights.

2.7 The Charter should confine itself to fundamental human rights. Either rights exist or they don’t exist. Matters before courts or tribunals should be assessed according to law and the process of the law followed.

2.8 Where the courts are required to interpret the existence of a human right then the process of statutory interpretation be followed.

2.9 Parliament should make and or amend existing laws according to proper community expectation and consultation including public debate.

2.10 Our members respect the supremacy of the Parliament as the law making institution and do not believe that courts should be law making institutions.

3. PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION

3.1 As would be appreciated the SDA strongly supports this provision as found at section 16 in the Charter.

3.2 However, we would encourage the Enquiry to consider a stand alone section to recognise the right to form and join a trade union.

---

³ Charter of Human Rights and Responsibilities Act 2008, Section 9
⁴ Ibid, s. 10.
⁵ Ibid, s. 14
⁶ Ibid, s. 16
⁷ Ibid, s. 16
3.3 The ICCPR takes this approach and devotes article 22 specifically to this purpose.

Article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interest of national security or the public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition or lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorise states Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and the Protection of the Rights to Organise to take legislative measures which would prejudice, the guarantees provided for in that Convention.

3.4 The Charter is silent as to the rights of a union delegate apart from the right to join and or form a trade union.

3.5 The SDA submits that the Charter is not relevant to the activity of its members on a daily basis at the workplace.

3.6 The SDA commends the sentiments to legislate for a Charter but respectfully submits it is ill advised.

3.7 Existing laws relating to the right to join trade unions should be adjudicated by competent jurisdictions with knowledge of Industrial Relations and Employment laws.

3.8 Having a Charter that addresses the right to join and form a trade union under the head of peaceful assembly and freedom of association may create a tension between a right and established laws.
3.9 A sole director of a middle sized employer would have rights under the Charter that may be relied upon to frustrate the activity of a trade union.

3.10 The sole director may press protection of property rights to prevent trade union activity under the Charter.

3.11 Assertion of such a right under the Charter would create a tension with existing laws, particularly the Fair Work Act 2009 (Cth).

3.12 The SDA reiterates that the absence of a stand alone section such as found at article 22 of the ICCPR is unhelpful.

4. FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF

4.1 It bears repeating that a large number of members of the SDA come from many and varied ethnic and racial backgrounds.

4.2 Many of our members have an inherent feel for the meaning of conscience, religion and religious belief.

4.3 Whether this arises from religious upbringing or is readily present in human being is not a matter that needs debating in this submission.

4.4 The SDA stands firm in its defence of any member who acts in accordance with a sense of conscience or a genuine religious belief (albeit within the ordinary laws of Australia) and such act meets with the displeasure of an employer.

4.5 There are numerous instances where conscience is regarded as synonymous with religious belief. One instance was stated by John T Noonan Jr, former member of the United States Court of Appeals, Ninth Circuit. He said:

The foundation of religious rights is found in the human conscience, that capability of every human being to tell right from wrong. That this common capacity gives rise to a right, or rights, flows historically from conscience being conceived as having access to something beyond individual whim, inherited conventions, or community custom.7

---

4.6 Noonan’s observation is in our submission, profound and correct. Human conscience shapes the inner most beliefs of a person.

4.7 The SDA accepts anecdotally that conscience is shaped by religious teachings and upbringing. It also accepts that conscience may be formed by a process of reasoning untouched by religion.

4.8 Nonetheless conscience reaches into the most inner part senses of human identity.

4.9 For this reason the SDA cannot accept a law which requires conscience to be compromised or pushed aside.

4.10 The Victorian Parliament legislated the Abortion Law Reform Act 2008 in October 2008. Section 6 grants to a woman the right to abort a child at will up to week 24 of gestation.

4.11 No member of the Victorian Health Service is permitted a right to refuse to collaborate with a process of fulfilling the woman’s desire to terminate the pregnancy.

4.12 A member of the Victorian Health Service who has a conscientious belief that abortions are immoral and does not wish to be part of a collaborative process in procuring an abortion are either compromised of forced to act against the law.

4.13 The Charter reaffirms the freedom of conscience but in reality is party to the quashing of such freedom at the whim of the Parliament.

4.14 Similarly the Charter affirms religion and belief but in reality offers neither protection nor promotes the manifestation of religious beliefs.

4.15 Coban Community Health Services v Christian Youth Camps Ltd Anor is a case in point.

4.16 The Victorian Civil and Administrative Tribunal (VCAT) found against the respondent merely for attempting to manifest its religious beliefs.

4.17 The issue here is not for the Charter to permit the creation of a hierarchy of rights as this merely down grades religious belief rights to the lowest denominator.

---

6 [2010] VCAT 1613 (8 October 2010)
4.18 As is the case for many of the SDA members, religious beliefs are not fanciful occasional beliefs but a permanent fixture in their daily lives. They act out their beliefs in conduct and personal dealings in the workplace.

4.19 On many occasions personal beliefs objecting to religious based beliefs are given preference and employers bend to these objections.

4.20 Although no law compels employers to give preference to non-religious beliefs, there is growing a pattern of conduct that expects religious beliefs to be private matters and not for public expression.

4.21 A system where a hierarchy of rights is permitted inevitably results in a prevailing mood that religious beliefs are not to be publicly aired. Many of our members feel shamed by such practice.

4.22 The Charter does not truly protect and promote the public manifestation of religious beliefs as VCAT, not infrequently refers to the limiting provisions as found at section 7(2) of the Charter which states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society...

This results in comparisons being drawn between the rights of a person who no religious beliefs or anti religious beliefs and one with a religious belief.

4.23 The belief that a limit on the public manifestation of a religious belief is reasonable in a democratic society given the rights of those with no religious beliefs, appears to be a feature of various VCAT decisions.

4.24 The conflict between rights merely intensifies the debate whether the Charter fulfils its purpose.

**CONCLUSION**

It is the SDA's conclusion that given the propensity for the overlay of laws and conflict between rights, serious consideration be given to scrapping the Charter.

It is difficult to accept arguments which contend that Australia has a history and culture of repression and or oppression. By any measurement Australia is a free, open and
tolerant society. It is not without faults nor have administrative and public decisions and policies been perfect. It is obvious that time and Government policies have not successfully resolved pressing issues of need in areas of health, education, housing and welfare.

The obvious failure to satisfactory resolve enduring problems associated with Indigenous people is not because of lack a of trying. It is untruthful to suggest that successive Governments have not genuinely attempted to address the enduring problems. It is hyperbole to suggest that a Charter of Rights magically rectifies all the collective failures of pervious policies.

Given all of these failures and mistaken policies, there is nothing that a Charter brings which corrects these misadventures.

Australia does not want for human rights. Our existing laws are mindful of the need for humane treatment and fairness in our daily lives. Danger lurks because of bad human behaviour and uncontrollable forces of nature. Rarely does public policy bring about circumstances in which public order and safety are put at risk. In this respect a functioning sovereign Parliamentary system provide a greater safeguard than does a Charter, however laudable is its purpose.

Joe de Bruyn
National Secretary – Treasurer.
Shops, Distributive and Allied Employees’ Association