

**VICTORIAN INDEPENDENT
EDUCATION UNION**

**SUBMISSION TO
THE EQUAL OPPORTUNITY REVIEW
(VIC)**

FINAL CONSULTATION PHASE

MAY 2008

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1. VIEU's Interest

- 1.1. VIEU is the professional industrial organisation representing principals, teachers, school officers and school service officers across Victoria's 500 Catholic schools, as well as other non-government schools and educational institutions. VIEU has 15,500 members with the majority in Catholic schools.
- 1.2. On 18 April this year VIEU submitted a submission to the Department of Justice review of the exceptions and exemptions in the Equal Opportunity Act 1995 (Vic) ("the exceptions review"). VIEU submitted that the religious exception as it applies to the employment of staff in religious educational institutions and bodies in Victoria should be removed. Evidence of systemic discrimination against employees on the basis of their marital status and sexual preferences in religious schools in Victoria was referred to throughout the submission. VIEU is committed to ensuring that members in religious schools are not discriminated against on religious grounds. The submission to the exceptions review is attached for ease of reference including written legal advice from the Victorian bar barrister, Kristen Walker, on the incompatibility of the religious exception with the Charter of Human Rights and Responsibilities Act 2006.
- 1.3. VIEU is committed to working towards the elimination of discrimination against job applicants and employees, not only in religious schools but also across the independent schools sector. This commitment stems from VIEU's statement of values, which was endorsed by Annual Conference, VIEU's supreme policy making body, which states as follows:

"that discrimination in all forms including that based on race, religion, ethnicity, gender, age, disability, marital status, sexual preference and political beliefs is unacceptable and should be opposed."

and...

that workplaces should be safe, secure, healthy and free of harassment, intimidation, violence and discrimination."
- 1.4. In working within the union and with members to alleviate discriminatory behaviour and practice within the independent schools sector against job applicants and employees, VIEU has felt constrained by the individual complaints system that is currently in operation in Victoria. The main reason being that members, in the majority of cases, choose not to lodge a formal complaint because either they fear recrimination or feel burdened by the process they must undergo in order to address and resolve the discrimination and its consequences. It must be noted however that despite these constraints, VIEU has on many occasions represented members who have complained of discrimination and have successfully resolved the complaint with their

employers through informal dispute resolution. However this work has not effectively addressed systemic discrimination or assisted those who do not come forward at all for fear of publicising the complaint.

- 1.5. VIEU relies upon the resources and expertise of the Victorian Equal Opportunity and Human Rights Commission (“VEOHRC”) in its work in addressing discriminatory behaviour in schools. Over the past few years VIEU organisers have participated in equal opportunity training programmes conducted by the VEOHRC both on a fee for service basis at the union offices and also at the VEOHRC. This training has been invaluable. Organisers who have attended the training are, as a result, well-versed in equal opportunity law and practice. On occasion and as required VIEU organisers also call on the VEOHRC’s inquiry line to determine whether a complaint will be accepted by the VEOHRC for conciliation.
- 1.6. Further, as part of its commitment to human rights and ending discrimination, VIEU was also an active participant in the consultation process on the Charter of Human Rights & Responsibilities Bill. VIEU is currently in discussion with the VEOHRC to work out ways it can assist the VEOHRC to distribute information to independent schools in Victoria on the Charter of Human Rights and Responsibilities Act 2006.
- 1.7. VIEU faces many challenges now and in the future in the area of discrimination. The main areas include alleviating discrimination against members in religious schools on the basis of religion and also ensuring that, as the teaching population ages, discrimination on the basis of age by school employers does not become a trend. Other challenges include, but are not limited to, working to ensure that employees with caring responsibilities, either for children or the elderly, are not discriminated against for possessing these attributes and that they have access to quality part time work. VIEU relies upon the Government and its commitment to alleviate discrimination to assist it in addressing these challenges. The equal opportunity system in Victoria that is recommended and adopted will greatly influence and determine how VIEU will work in the future to alleviate discrimination in the sector. VIEU therefore welcomes the opportunity to participate in this review and comment on the options paper from its perspective and experience. VIEU congratulates the Government for initiating such a review.

2. Executive Summary

- 2.1 The main aims of this submission are (i) to provide the review with information on how members in the independent schools sector experience discrimination and how VIEU works to address, resolve and alleviate such discrimination on an individual and systemic level and (ii) to comment on the options and indicate, where possible, VIEU's preferences.
- 2.2 Reform is welcome and overdue. The complaints system as it currently operates does not work effectively to address discrimination on a systemic level or at an individual level in most cases. Systemic discrimination and substantive equality are not being addressed adequately under the EO Act.
- 2.3 In dealing with complaints of discrimination in the sector, VIEU mainly resolves such complaints through informal dispute resolution and sub-branch activity. VIEU tries to work to alleviate systemic discrimination through awareness raising and collective bargaining/negotiations.
- 2.4 VIEU strongly supports a new framework for the Act as outlined in Option 2 in the Options paper. Creating a positive duty on employers to not discriminate against job applicants and employees and requiring that reasonable adjustments are made to ensure that positive measures are taken to address discrimination, will greatly assist the union in representing its members both on an individual level and across the system.
- 2.5 VIEU supports the proposal to amend the definition of marital status to include a partner and also to broaden the definition of discrimination to include systemic discrimination.
- 2.6 VIEU supports Option 2 – the facilitator role in relation to the powers and functions of the VEOHRC. VIEU supports the VEOHRC having powers of inquiry, investigation, education, research, alternative dispute resolution and enforcement. VIEU however does not support the VHREOC continuing in its role as complaints handler. VIEU supports Option 2 in relation to how complaints are handled as outlined in Chapter 4 (excluding the advisory function being handled by the VEOHRC). It is submitted that all complaints should be lodged directly with VCAT and dealt with accordingly through VCAT with the ability of complainants and respondents to request alternative dispute resolution conducted by VHREOC. VCAT should have the power to issue costs orders and interim injunctions. Importantly VCAT should also have the power to issue systemic orders to address systemic discrimination arising from a complaint.
- 2.7 VIEU prefers Option 3 in relation to Legal representation and advice models. VIEU agrees that legal services and advice to complainants could be provided

through an independent statutory office in the same way that the New Zealand Office of Human Rights Proceedings or the Ontario Human Rights Legal Support centre provide assistance. This independent statutory office should also be given the ability to bring proceedings for an offence under the EO Act.

- 2.8 VIEU at this stage has no comment in relation to governance except to say that in the event that a model is adopted that relies on industry expertise, VIEU would be ready and willing to participate.

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3. Discrimination in the independent schools sector

- 3.1 VIEU receives many calls from members complaining that they have been discriminated against in employment. The main areas of discrimination centre on the attributes of marital status and sexuality (in the case of religious schools) and age, family and carers responsibilities.
- 3.2 VIEU submits that in almost all cases where members have complained of discrimination, the discrimination complained of is part of a systemic problem either at the school level or across the sector more generally. VIEU has attempted to address systemic discrimination through collective bargaining (part- time work provisions, anti- discrimination clauses) and through its magazine VIEUPOINT which often contains articles on equal opportunity law and practice, so that members are aware that if they experience discrimination they can contact the union and have the matter redressed.
- 3.3 Often discriminatory behaviour is caused by a lack of awareness of the law or an incorrect interpretation of the law. In other cases the discrimination is blatant and deliberate and is only reversed if the person being discriminated against complains publicly and threatens to formally complain. In a few cases all factors can apply. A good example to illustrate this point occurred last year when the principal of a large secondary school called a staff meeting to discuss leadership positions within the school. At the meeting the principal put “older teachers” on notice that they were not going to be offered positions of leadership and that younger teachers instead would be offered them to bring fresh ideas into the school. VIEU worked with members at the local branch level and also legally to address members’ complaints of discrimination. The local branch organised a petition which was sent to the principal expressing their opposition to the comments. In addition VIEU, with the assistance of its lawyers, tried to persuade individuals to come forward and make a formal complaint to the VEOHRC. Only one teacher came forward. Fortunately the matter was resolved with the principal reversing the statement publicly to all staff at a meeting and claiming that the statements were misinterpreted.

- 3.4 As previously highlighted in this submission, formal complaints are rarely lodged with the VEOHRC as members choose not to wear the heavy burden of making a formal complaint and are frightened off by the process which insists they must confront their employer in a formal setting. VIEU organisers are therefore placed in a position where the complaints are resolved using informal alternative dispute resolution methods on a case by case basis.
- 3.5 Informal alternative dispute resolution is carried out in the following manner. After initial member contact, which almost always results in the member requesting confidentiality, the VIEU organiser will attempt to establish whether the employer's alleged behaviour is discriminatory according to the law or not. At this stage the VIEU organiser will rely on their own knowledge. However in some instances the organiser will phone the VEOHRC to confirm their understanding of the law and whether the complaint is likely to be accepted or not. VIEU notes that it has been the experience of several organisers that at this stage the VEOHRC advisers are cautious about the advice given to avoid any allegations of bias. Once it has been established that discrimination has taken place, the organiser will discuss with the member several options, depending on the circumstances of the case, on how they would like to proceed. Options are many and varied but may include the member simply phoning the employer to clarify the situation or organising a meeting with the employer to discuss the employer's position with the complainant present. If the organiser or member fails to resolve the discrimination, representatives from VIEU and the employer's representatives will sometimes meet to resolve the matter, most certainly if the complaint has systemic implications. In VIEU's experience it will be very rare for a member to lodge a complaint with the Commission without having exhausted all attempts to resolve the matter at the local level. VIEU notes that this process of alternative dispute resolution is able to take place because of the members being able to access the services free of charge from VIEU. Non-members would not have such access.
- 3.6 When VIEU has been involved in conciliation at the Commission on behalf of members lodging complaints, VIEU's experience has been mostly positive. Several years ago VIEU represented a member at the Commission who was discriminated against on the basis of her family responsibilities. The complainant was a teacher at an elite girls private primary school in Melbourne. During the interview process she explained to her employer that she was a sole parent caring for her eight year old daughter. The employer agreed to her working several days a week and commencing work at 9.30am which enabled her to drop off her daughter at school in the mornings and then drive to work. Staff meetings were held at 8am. Then half way through the year the principal decided to issue an instruction that all staff would be required to attend the staff meeting which commenced at 8am. The teacher complained and explained that it would be impossible for her to attend. Her complaint was ignored and the principal insisted she attend. Despite attempts that were made to resolve the dispute at the local level the principal would not change the behaviour. The union became involved

on behalf of the member. An interim arrangement was entered into which maintained that the teacher did not have to attend staff meetings at 8am. However, the relationship had soured from the teacher's point of view and she resigned from the school. Because she was no longer working at the school she felt confident in lodging a formal complaint and was successful in gaining financial compensation through a conciliated outcome. No one else was prepared to come forward and address the problem, despite the fact that there were other staff members caring for young children.

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4. VIEU's preferred model

i A new framework for the EO Act

VIEU prefers Option 2 outlined in the Options paper at Chapter 2.

(a) Objectives:

It is imperative, for discrimination in Victoria to be effectively alleviated, to ensure that the objectives in the Act include:

- the recognition that the Commission's obligations include the protection and promotion of the human rights contained in the Charter, particularly the right to equality before the law and
- Reaffirmation of the requirement in the Charter that all acts and decisions of the Commission be performed and made in a way that is cognisant of, and compatible with, the human rights contained in the Charter.

(b) Express requirement to make reasonable adjustments

VIEU strongly supports the proposal that the requirement to make reasonable adjustments should be made express and clearer and apply to all attributes.

VIEU submits that in order to enable the Commission or an employee or person to determine whether or not a 'reasonable adjustment has been made' and therefore whether discrimination has occurred, it will be necessary to ensure that the Commission, person or employee has access to information relating to the factors to be taken into account. For instance, in the case of a school employer, to

timetabling and staffing information and the school's financial records (subject to reasonable privacy considerations).

(c) Positive duty not to discriminate

As previously noted the current burden on the individual to complain of discrimination is not only a barrier to addressing the individual complaint but also to addressing systemic discrimination at either the local school level or the sectoral level.

VIEU supports the proposal to introduce positive duties on employers, both public and private, so that systemic issues are identified and addressed on a much larger scale subject to the duty being enforceable through guidelines, action plans and codes of practice.

ii. The role and powers of the Victorian Equal Opportunity and Human Rights Commission

VIEU supports Option 2 outlined in Chapter 3 of the Options paper excluding the advisory function in relation to individual complaints and Option 2 of Chapter 4 subject to several provisos which are outlined below.

VIEU submits that the main roles of the Commission should be as facilitator, educator and awareness raiser, researcher, reporter, trainer, systemic investigator and enforcer. It should not process and conciliate individual complaints or provide legal advice in relation to them. Individual complaints should be lodged directly with VCAT. However it should deal with complaints where the parties request alternative dispute resolution after they have lodged their complaint with VCAT and VCAT has accepted it and when it applies on its own motion to refer a complaint to VCAT on the grounds listed in Option 2. The alternative dispute resolution function should not be outsourced as the Commission and its staff has the expertise and experience to deal with these matters.

(a) Education and awareness raiser

VIEU has submitted, in the exceptions review, that the religious exception be amended to exclude coverage of employees working in and for religious educational institutions in Victoria. If the Government accepts this submission and removes the religious exception in this way, it is envisaged that a broad-based education program will need to be instituted to ensure that both employers and employees understand the law and its implications. In the event that employers

and staff in the sector act to discriminate on religious grounds, it will be imperative that such discrimination is viewed not only from an individual complainant's point of view but also systemically. VIEU therefore strongly supports the proposal that the education power be amended to link it to the objectives in the EO ACT and specify goals which include raising awareness of systemic discrimination.

(b) Guidelines/ Action plans

VIEU supports the proposal that will give the Commission the express power to issue guidelines and industry action plans. Guidelines should be issued after consultation takes place with key stakeholders including unions. Such guidelines should be given the force of law to ensure they are complied with.

(c) Investigations, Inquiries, research

VIEU supports the Commission having the power to initiate possible breaches of the EO Act of its own motion and to conduct inquiries into issues of systemic discrimination of its own motion. VIEU further supports the Commission having powers to subpoena information and persons it requires to give evidence.

In order to effectively conduct inquiries and obtain information about discrimination and equality it is submitted that the Commission be given additional right of entry powers, similar to those contained in industrial relations legislation. Such powers could include the right of staff to inspect records and documents of employers and businesses.

VIEU supports the proposal that the Commission should be empowered to review a public authority's programs and practices upon request to assess compliance with the EO Act. However VIEU submits that independent schools in Victoria should not be excluded from the definition of "public authority". Independent schools receive government funding and exercise a public function, that of education. The Commission should have the same powers in relation to independent schools as it does in relation to public authorities under the Act.

(d) Alternative dispute resolution

VIEU agrees with the Commission's own submission to the review that it has the expertise and experience to conduct the ADR function which will also be applied to the Commission's other functions.

VIEU submits that if the Commission conducts ADR, it must be conducted with the right of complainants to seek an interim injunction at VCAT to maintain interim arrangements. This will ensure that while the matter is being resolved through ADR or even at VCAT itself, the complainant is not denied basic rights i.e. to employment. VIEU agrees that ADR should be by consent. If a complaint is settled, the consent agreement should have the same force of law as a VCAT order, similar to the Family Law Act consent orders.

Informal ADR

The concept of an informal ADR practitioner is a good one. VIEU would like to make a few comments in relation to this proposal. The ADR practitioner should:

- have knowledge of the industry sector the complainant comes from;
- liaise with a union officer if the complainant is represented by a union;
- in employment situations, be experienced in resolving disputes in the areas of both workplace and discrimination.

VIEU also notes that informal ADR is how VIEU currently resolves complaints of discrimination.

In VIEU's experience, informal alternative dispute resolution works if the following factors are present:

- positive relationship between the "practitioner" and the employer;
- local level knowledge;
- the desire on the part of all parties for positive short-term and long term relationships;
- public reputation and privacy ;
- informality and flexibility;
- the ability of the parties to meet on demand at the local level (physical presence)

VIEU notes that dispute resolution models should take into account the vulnerability of complainants, especially complainants from a non-English speaking background and for this reason only supports mediation if a complainant has access to free and quality union or legal representation.

As noted previously, any agreement by the parties arising from alternative dispute resolution should have the same force of law as consent agreements under Family Law Act 1975.

(e) Enforcement

It is important to grant the VEOHRC with enforcement powers if the proposed changes are to be followed and complied with. To not grant these powers will leave the VEOHRC with lots of fur and no teeth.

VIEU agrees that the Commission has the knowledge, objectives and expertise to pursue such cases.

iii. The role and powers of VCAT

VIEU supports the proposal that complaints be lodged directly with VCAT and it should be the first point of contact for a complaint with referral to alternative dispute resolution happening after the complaint has been lodged. This will ensure that a complainant can pursue alternative dispute resolution in the knowledge that if ADR is unsuccessful access to VCAT will be easy as the complaint process has already been initiated.

Further, VIEU submits, that VCAT should have the power to:

- (i) issue interim injunctions on application, to prevent any harm from being done to the complainant whilst either ADR resolves the matter or whilst the complaint is being heard at VCAT and;
- (ii) issue costs orders against an unsuccessful party. VIEU is of the opinion that members do not complain vexatiously and that if a member or person formally complains then they are genuinely aggrieved;
- (iii) issue systemic orders.

iv. Legal Representation and advocacy

VIEU prefers Option 3 outlined at page 86 of the Options paper. Legal services, including advice to complainants could be provided through an independent statutory office in the same way that the New Zealand Office of Human Rights Proceedings or the Ontario Human Rights Legal Support centre provides assistance.