



**SUBMISSION TO
THE SCRUTINY OF ACTS AND
REGULATION COMMITTEE**

**VICTORIAN PARLIAMENTARY
INQUIRY INTO THE EXCEPTIONS
AND EXEMPTIONS IN THE EQUAL
OPPORTUNITY ACT 1995**

JULY 2009

Contents

Part	Description	Page No.
1	Background	3
2	Executive Summary	4
3	The Exceptions Generally – Balancing Competing Rights	6
4	The Options Considered– ss.75-77	8
5	Conclusion	16

1. Background

- 1.1 VIEU is the peak organisation representing the professional and industrial interests of principals, teachers, school officers, school service officers and education support staff across Victoria's 500 Catholic schools, as well as all other non-government religious schools and educational institutions. VIEU has over 15,000 members in non-government schools.
- 1.2 We rely on our earlier submission to the Department of Justice Inquiry into the exceptions and exemptions in to the Equal Opportunity Act (Vic) ("the **Act**") to inform our response to the Options Paper, which is attached to this submission for convenience. That submission will be referred to as the "*first submission*" and includes legal opinion on the compatibility of s25 and ss.75-77 of the Act to the *Charter of Rights and Responsibilities Act 2006 (Vic)* (the **Charter**) by Kristen Walker, barrister and law lecturer.
- 1.3 This submission details VIEU's analysis of the options in relation to ss.25 and ss.75-77 of the Act, which are outlined in the Options Paper and argues in support of legislative reform to more narrowly define the religious exception as it currently stands.

.....

2. Executive Summary

- 2.1 VIEU supports the existence of a religious exception under the Act in a limited form. In doing so, VIEU acknowledges the importance of the right to religious freedom as enshrined in the *Charter of Rights and Responsibilities Act 2006 (Vic)* (the **Charter**) and in international human rights law. The right to religious freedom is not disputed and is also not under threat as some religious bodies are claiming.
- 2.2 The right to religious freedom is not absolute and must be balanced against competing rights, in this instance the right to be protected from discrimination and to equality before the law. The Charter, in accordance with the reasonable limitations test in s.7(2) confirms this approach. We argued in our *first submission* that ss.75-77 of the Act were incompatible with the Charter because religious freedom was not balanced appropriately against other competing rights such as the right to equality before the law.
- 2.3 It is submitted that the right to religious freedom and the religious exception contained in the Act can and should be redrafted in a way that is less restrictive on the right to equality before the law. We propose that any redrafting of sections 75-77 should be more narrowly tailored so as to ensure that what is protected is the expression and teaching of religion to students in schools rather than simply the protection of religious sensitivities. The Act should permit a church to discriminate only in limited circumstances namely in relation to the ordination of religious officials, such as priests or rabbis and probably also in the employment of religious education teachers and faith leaders depending on the circumstances.
- 2.4 More specifically, in considering the options outlined in the Options Paper in relation to ss.75-77 VIEU supports the following: The repeal of sections 25 and 77 and the redrafting of sections 75 and 76. Sections 75 and 76, it is proposed, should be redrafted to incorporate the same

tests in relation to how the exception will apply in religious schools in relation to employment.

2.5 The religious exception should only apply in religious schools to employees if:

- it can be proven that an employee cannot perform the “inherent requirements of the job” and;
- an application is lodged with VCAT by the religious body/school seeking to rely on the exception and;
- the applicant proves why they should be entitled to rely on the exception in the particular case based on the circumstances at the school.

2.6 In supporting the repeal of section 25 VIEU relies on its *first submission* and in particular the advice of Kristen Walker, which forms part of VIEU’s submission, as to why it should be repealed.

2.7 In adopting the above position VIEU believes the following criteria that SARC needs to take into account, will be addressed:

- The exception will be compatible with the Charter;
- The law is modern, appropriate, relevant, efficient and effective;
- The exception will be improved and easier to use and understand.

.....

3. The exceptions generally – balancing competing rights

- 3.1** The Options Paper outlines the rationale behind the existing exceptions in the Act. The “religious exception” provision can be categorised as a measure that excuses a person or organisation from the prohibition of discrimination. The paper states that because religious bodies are being excused from the legislation, the exception should be checked to ensure that it is not used inappropriately or too widely and is out of touch with modern understandings of equality.
- 3.2** VIEU submits that the exception is being used too widely, inconsistently and is out of touch with modern understandings of equality. Evidence of this can be found in VIEU’s *first submission* and also in the submissions to this inquiry put by the various religious organisations. For instance, the Catholic Church argues that religion can be interpreted so broadly as to impinge on the private lifestyle choices of employees even if those employees participate in the religious life of the school in relation to its students. On the other hand the Anglican Church seems to agree that the exception has been expressed too broadly and should be more narrowly defined.
- 3.3** Religious organisations who argue for the retention of the exceptions or even a broadening of the current exceptions have adopted an extreme approach to their right to religious freedom. Despite the fact that they seem to, at the same time, acknowledge the right of persons to be protected from discrimination and therefore to equality before the law, this acknowledgement is tokenistic at best. The right to religious freedom is not an absolute right. VIEU rejects the argument put by the Catholic Education Office Melbourne that the right to religious freedom as contained in the Act has been, as it is currently structured and worded, reasonably restricted.

- 3.4** We strongly support the following comments at p. 15 of the Options Paper and are guided by them in our response when considering the options in relation ss.75-77:

Despite its 30 years of existence, few of the exception provisions in the Act have been clarified through litigation. This throws great importance onto the legislative drafting of the exceptions, as it is likely that they will have to be given effect without assistance from interpretation by a court. Unless drafting is very precise, ambiguities leave it open for an exception to be relied upon very widely in circumstances where no individual affected has the resources or energy to challenge it. Such ambiguities tend to advantage potential respondents because they can simply rely on the broader interpretation, and then leave the person affected to take legal action to seek redress. Thus the risks arising from ambiguity tend to fall on the party who has to take action to seek a remedy.

.....

4. The Options Considered – ss.75-77

4.1 Section 75(1) – protection for religious orders in selection training and ordination of officials, members, or people performing functions or participating in religious observance or practice

Options for reform:

Option 1: No change.

Option 2: Add a provision to s. 75(2) that VCAT may grant an exemption to allow discrimination on the ground of religious belief or activity in relation to the selection or appointment of people to perform senior management functions of a religious body where religious belief or activity is a genuine and reasonable requirement of the position.

- 4.1.1 VIEU respects the right of religious orders to be protected from discrimination claims in selecting, training and ordaining people who perform functions or participate in religious observance or practice in that order. VIEU therefore supports **Option 1**.

4.2 Section 75(2) provides protection against discrimination claims on any ground (but not against sexual harassment claims) for anything done by a body established for religious purposes where the action either conforms with the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion.

Options for reform:

Option 1: No change.

Option 2: Amend s. 75(2)(a) to ensure that only actions ‘reasonably necessary’ to conform with religious doctrines are excepted’.

Option 3: Amend s. 75(2)(b) to require that in deciding whether the exception applies in an employment context, attention should be paid to ‘the nature of the employment and the context in which it is carried out’.

Option 4: Amend s. 75(2)(b) by changing the words ‘religious sensitivities’ to ‘religious convictions’.

Option 5: Adopt a further subsection of s. 75 that requires the consideration of factors similar to those in s. 7(2) of the Charter in deciding whether or not the exception applies.

4.2.1 Option 1 is opposed for reasons outlined in this submission and in VIEU’s *first submission* in that the exception as it is currently worded is too broad, open to abuse and is inconsistently applied. It is also incompatible with the Charter and is an unreasonable limitation on the right to treated equally before the law.

4.2.2 s.75(2)a):

Option 2 will be unworkable in schools as religious organisations will argue that it is reasonably necessary to discriminate against an unmarried pregnant woman on the basis of marital status as such a personal lifestyle choice is in opposition to religious doctrine.

4.2.3 VIEU agrees with the Anglican Church submission that states:

“To overlay the limitations in s 75(2) with a requirement of reasonableness, as mooted, will lead to disputes as to the ‘reasonable’ scope of doctrine and thus the need for a state tribunal to arbitrate upon what is ‘true’ doctrine and what is not – a proposition which should be relished neither by the state nor the church.”

4.2.4 s.75(2)b):

Option 3 is not supported as it will lead to claims by religious schools that the very nature of employment in religious schools is that employees must lead by example in their personal lifestyle choices. VIEU rejects these claims. In any event the first limb of the test in s.75(2)(a) will ensure that a person discriminated against because of their personal lifestyle choices will not be protected.

4.2.5 VIEU submits that there is not a great deal of difference between the terms “religious sensitivities” and “religious convictions”. Amending the section to this effect will not lead to further clarity. **Option 4** is therefore unworkable also.

4.2.6 There is currently much disagreement over the application of s.7(2) of the Charter in relation to the religious exception and how it applies. **Option 5** will not address VIEU’s concerns that the religious exception worded so broadly is therefore open to interpretation and abuse. It is for this reason that **Option 5** is not supported.

4.3 Subsection 75(3) and section 76 – Religious Schools

Options for reform:

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.*

OR

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.*

4.3.1 VIEU rejects **Option 1** for reasons outlined above at **paragraph 4.2.1.**

4.3.2 Option 2 is not supported for the same reasons outlined to the options in respect of s.75(2).

4.3.3 Option 3, although moving more towards a narrower religious exception, still represents a blanket approach and on this basis is not supported.

4.3.4 Options 4, 5 and 8 are together supported subject to the following conditions:

(i) *Inherent requirements test*

If a person who works in a religious school is able to carry out the essential duties (inherent requirements) of a job either as a teacher or non-teacher, the law should provide that they must be given the same opportunity to do that job as anyone else.

The inherent requirements of a job in a religious school should be defined by the fundamental duties that must be carried out in order to get the job done. It is submitted that the inherent requirements of a job in a religious school will vary depending on the role the employee is engaged to perform. Personal lifestyle choices relating to marriage and sexuality, it is submitted, will not be relevant factors in determining whether or not the inherent requirements of a job will be able to be performed or not.

For example, a maths teacher who is living in a de facto relationship in a Catholic school might be required to participate in school mass and prayer assembly with students and will be able to do so. In these circumstances, the maths teacher will still be able to get the inherent requirements of the job done in that he/she can teach the students maths and participate in the religious life of the school in relation to its students. It would,

therefore, be unlawful to refuse to deny that teacher a job simply on the grounds of his/her marital status.

Another example would be a Catholic primary school teacher who becomes pregnant and is not married. In this circumstance she will still be able to perform the inherent requirements of the job in that she can teach religious education, attend mass and participate in the religious life of her students. It would therefore be unlawful to refuse to deny that teacher a job simply on the grounds of her pregnancy and marital status.

(ii) Exception activated by an application to VCAT

The exception should only be allowed upon application to VCAT. This condition must be met before the exception can apply. VCAT will only be able to grant the exception where a school can argue that the employee in question can not fulfil the inherent requirements of the job. VCAT is an appropriate body to deal with such applications in the first instance, as it has experience with the rights protected by the Charter and is less expensive and formal than a court. Ultimately of course an appeal will lie with the Supreme Court.

(iii) Onus on religious school/body

The onus should be on the employer to prove why the exception should be extended. Employees who have been discriminated against in religious schools rarely follow through with a formal complaint. We refer to our first submission to support this statement.

(iv) Attributes

VIEU supports the limiting of attributes but in doing so notes that limiting the attributes will have no real practical effect because

what will determine whether or not the exception applies or not will be the application of the inherent requirements test.

4.3.5 Option 7 is not supported for reasons outlined in relation to Option 5/s.75(2) as detailed above.

4.4 Section 77 – Religious beliefs or principles

Options for reform:

Option 1: No change.

Option 2: Section 77 be repealed.

Option 3: Section 77 be amended to allow an application for an exemption to be granted where:

- The religious claim is objectively validated.
- It is reasonable and proportionate (within s. 7(2) of the Charter) in light of the restriction of other people's rights that would result.

4.4.1 VIEU supports **Option 2**, the repeal of section 77. The exception is too broad and is incompatible with the Charter and extends far beyond the right to religious freedom.

5. Conclusion

- 5.1** The main purpose of the Act is to foster a more tolerant society. The rationale behind the existence of the religious exception, provided for in the Act, is that it gives effect to the right to religious freedom. VIEU submits that this exception has gone too far, is expressed too broadly and therefore has been open to interpretation, inconsistency and abuse in its application.
- 5.2** SARC and the Government are now in a position to address the serious imbalance that exists in relation to the religious exception. In redrafting the exception to limit its application, VIEU believes that the competing rights to religious freedom and the right to be treated equally before the law can be fairly balanced. VIEU also believes that, despite assertions to the contrary by religious bodies, religion in Victoria is not under threat due to proposals to amend the exception to make it fairer to all. The spiritual life of religious schools will not be restricted and religious education will continue to be taught freely in all schools. If a religious body or school believes that this is not the case due to an employee not respecting the religion as it is taught to students, then that body/school will still be able to apply to VCAT to have their concerns heard based on an inherent requirements test.
- 5.3** Personal lifestyle choices should not be the sole factor in allowing religious bodies/schools to arbitrarily remove an individual's fundamental human right to be treated equally before the law.

.....