

THE EXCEPTIONS REVIEW

**A review of the exceptions to,
and exemptions from, the
*Equal Opportunity Act 1995 (Vic.)***

Submission

by the

**Association of Independent Schools
of Victoria Incorporated**

Contents of Submission

	<u>Page</u>
About the Association	1
Introduction	1
Exceptions to Discrimination in Employment and Employment-related Areas <i>Sections 17, 22, 23, 24, 25, 27, 27B, 36</i>	2
Exceptions to Discrimination in Education <i>Sections 38, 39, 40, 41</i>	5
Exceptions to Discrimination in Accommodation <i>Sections 53, 56</i>	7
Exceptions to Discrimination in Sport <i>Section 66</i>	8
General Exceptions <i>Sections 70, 72, 73, 75, 76, 77</i>	8
Exemptions by the Tribunal <i>Section 83</i>	10
Summary	11
Contact Details	11

About the Association

The Association of Independent Schools of Victoria Incorporated ('the Association') represents 218 independent schools or 9.5 per cent of all schools in Victoria.

More than 116,000 students or 14 per cent of Victoria's student population attend these independent schools. The Association's membership includes secular and religious schools of various denominations.

The Association provides services and products to enable schools to support their students in the changing educational environment. As a member service organization, the Association develops and delivers quality products and services to support Member Schools to fund and provide quality educational outcomes.

The Association works closely with state and federal education departments, academic and professional organisations and individuals, contributing to national and state education policy objectives.

Introduction

The Association submits that the general and specific exceptions to, and the exemptions from, the *Equal Opportunity Act 1995* (Vic.) ('the Act') have operated appropriately since the establishment of the Act and do not warrant change to be compatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic.) ('the Charter').

The Association has elected to comment upon those exceptions and exemptions of relevance to its Member Schools. The exceptions and exemptions are relevant in the context of independent schools providing educational services to students and employing staff members.

Exceptions to Discrimination in Employment and Employment-related Areas

Section 17 – Exception – Genuine occupation requirements

An employer may discriminate by offering employment to people of one sex where it is a genuine occupational requirement that the employees be people of that sex.

This exception is important to schools. For example, schools providing boarding facilities for students may need to employ staff members who are of one sex rather than the other. Schools, together with the parents of their students, would find it unacceptable to employ men in a girls-only boarding facility. Equally, a boys-only boarding facility employing only women as supervisors would be unacceptable.

In relation to sports coaching and the teaching of physical education classes, it may be appropriate in some sports/classes in some schools for staff members to be of a particular sex.

In some faith-based schools, due to beliefs of the adherents to the religion, students above a particular age may only be taught by a staff member of the same sex.

This exception should be retained.

Section 22 – Exception – special services or facilities

An employer may discriminate against another person on the basis of impairment in certain circumstances where in order for that person to perform the genuine and reasonable requirements of the job that person would require special services or facilities and it is not reasonable in the circumstances for those services and facilities to be provided.

An employer may discriminate against another person where a person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of special services or facilities for that person.

In certain circumstances, this exception is relevant to schools. One of the genuine and reasonable requirements of a person employed by a school is the capacity of the person to provide the duty of care owed to students. It is, therefore, important for the Act to ensure that it is possible to take this requirement into account when making employment decisions. For example, it may be reasonable in some circumstances, to not offer employment to a teacher who has a mental impairment, if the teacher cannot meet the duty of care to be provided to students. At times, the provision of special services or facilities will not assist the teacher to perform the genuine and reasonable requirements of the job.

This exception should be retained.

Section 23 – Exception – reasonable terms of employment

An employer may set reasonable terms or requirements of employment, and vary those terms or requirements, to take into account the reasonable and genuine requirements of the employment, any special limitations imposed on an employee by their impairment or physical features, or any special services or facilities required for an employee to enable him or her to undertake the employment.

It is fair and reasonable that an employer be permitted to set reasonable terms of employment in the context of a school. As stated above, the duty of care owed by teachers and others employed by a school means that it may be necessary to set such requirements.

This exception should be retained.

Section 24 – Exception – standards of dress and behaviour

An employer may set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.

Such an exception is reasonable. In the context of faith-based schools, it may be necessary to set standards of dress and behaviour so that religious beliefs and tenets of the adherents to the religion are not offended. In some faith-based schools, women are required to wear a head scarf. To not allow a school to set dress standards will cause injury to the adherents of the faith.

It is also reasonable for an employer to set and enforce standards of appearance and behaviour. This is particularly the case for schools, where teachers, for example, are role models for students and owe a duty of care to students.

This exception should be retained.

Section 25 – Exception – care of children

An employer may discriminate against prospective and existing employees where an employment position involves the care, instruction or supervision of children and the employer believes that the discrimination is necessary to protect the physical, psychological or emotional wellbeing of children.

This exception is relevant to schools. The duty of care owed by schools to their students is such that there may be occasions where the exception is relevant.

It is acknowledged that the recent introduction of Working with Children Checks in Victoria seeks to protect children. However, this check only reviews specific serious offences. It does not assess the suitability of a person for working with children in any other context. There may be situations where a person is not suitable to be employed,

or to continue to be employed, to work with children, despite having passed a Working with Children Check.

This exception should be retained.

Section 27 – Exception – youth wages

An employer may pay an employee who is under the age of 21 years according to the employee's age.

It is acknowledged that this exception is controversial. The capacity to pay lower rates of pay is determined by bodies such as the Australian Industrial Relations Commission when determining rates of pay and classification structures in awards.

In the context of schools, some schools employ their own students to undertake various work requirements. Sometimes, the students (15 years and over) may be employed to assist with an outside school hours program, to assist with activities at a school fund-raising event, to undertake gardening or to assist with a whole-school mail-out. If adult wages were required to be paid, then employment opportunities for young people may reduce, particularly for 15, 16 and 17 year old students.

This exception should be retained.

Section 27B – Exception – Gender Identity

An employer may discriminate against job applicants and employees on the basis of gender identity if the person does not give the employer adequate notice of the person's gender identity or the person gives the employer adequate notice of the person's gender identity but it is unreasonable in the circumstances for the employer not to discriminate against the person.

This exemption is important to faith-based schools in the context of the beliefs of the adherents to some religions. It is also important where a school is seeking to employ a person as a supervisor in a single-sex boarding school facility, as a sports coach or as a teacher to teach a physical education class.

This exception should be retained.

Section 36 – Exception – reasonable terms of qualification

A qualifying body may set reasonable terms in relation to an occupational qualification, or make reasonable variations to those terms, to take into account any special limitations that a person's impairment or physical features imposes upon his or her capacity to practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates.

Association of Independent Schools of Victoria Incorporated

This exception is of relevance to schools. The Victorian Institute of Teaching registers teachers in the State of Victoria. It is important that the Institute has the capacity to not register a person as a teacher should an impairment possessed by that person mean that the person cannot meet the inherent requirements of the occupation of teaching.

This exception should be retained.

Exceptions to Discrimination in Education

Section 38 – Exception – educational institutions for particular groups

An educational authority may exclude a person from an educational institution or program whether that institution or program is wholly or mainly for students of a particular sex, race, religious belief, age or age group, or for students with a general or particular impairment and the person is not of the particular sex, race, religious belief, age or age group or if they do not have a general or particular impairment.

This exception is important to schools. In Victoria, there are schools established:

- for girls only;
- for boys only;
- for particular age groups, e.g., a primary school (5/6 to 11/12 year olds), secondary school (11/12 to 17/18 olds), etc.;
- for students with particular types of impairments, e.g., social, emotional and behavioural disorders, language and learning disorders, autism, etc.; and
- for students with particular religious beliefs, including Judaism, Islam and Christianity, which includes the Greek Orthodox and Coptic Orthodox faiths.

It would be difficult for schools if this exception were to be removed. If faith-based schools were unable to exclude persons who did not fit with the school's community or subscribe to the purpose of the school, then the culture, ethos and/or faith would be eroded. For example, it could be difficult for a few students not of the Jewish faith to feel comfortable in an orthodox Jewish school.

Further, a student who is not autistic should not be enrolled in a school that is geared to meeting the needs of autistic children. Such a school would not be able to appropriately meet the learning needs of a student who does not have the disability of autism.

Also, by way of example, it would not be appropriate for a school for boys to enrol one girl in the Year 10 class. The school, and its curriculum and staffing, is geared to the teaching of boys. The school would be unlikely to be able to meet the educational needs of one female student.

This exception should be retained.

Section 39 – Exception – special services or facilities

An educational authority may discriminate against a person on the basis of impairment if special services or facilities are required in order for that person to participate in an educational program and it is not reasonable for those services or facilities to be provided.

An educational authority may also discriminate where, even after special services or facilities are provided, that person could not participate or continue to participate in, or derive benefit from, the educational program.

Again, this exception is important. There may be times when it is not reasonable to provide the services or facilities required for a person to participate in an educational program. This is particularly true for small schools where the cost of such facilities or services is greater than the school's capacity to fund.

Schools are aware of their obligations under the *Disability Discrimination Act 1992* (Cth.) and the *Disability Standards on Education 2005* (Cth.). However, the Victorian legislation should retain the capacity for a school to reject the enrolment, or discontinue the enrolment, of a student on the basis that it is not reasonable to provide the facilities or services needed by the student where to do so would impose an unjustifiable hardship upon the school.

This exception should be retained.

Section 40 – Exception – standards of dress and behaviour

An educational authority may set and enforce reasonable standards of dress, appearance and behavior for students. A standard for appearance or behaviour must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard.

Many schools require their students to wear the school's uniform and to meet specified dress and appearance standards. In requiring a uniform to be worn, or regulating appropriate dress standards in boarding facilities or for school excursions and camps, it is appropriate to also set appropriate standards for appearance. This exception allows schools to set these requirements, in consultation with the school community.

Schools need the capacity to determine appropriate standards of behaviour. Schools are required to manage the behaviours of their students. Therefore, they need the capacity to set standards, after taking into account the views of the school community. In order to meet the duty of care to students, staff members and other visitors to the school's premises, schools must be able to set and enforce standards of behavior. The school's community and the wider community expect schools to manage the behaviours of their students.

This exception should be retained.

Section 41 – Exception – age based admission schemes and age quotas

An educational authority may select students for an education program on the basis of an admission scheme that has a minimum qualifying age or that imposes quotas in relation to students of differing age groups.

Schools need to determine their capacity to enrol students at particular levels and to determine the number of students to be enrolled, both in total and at year levels. Schools will have a maximum student enrolment, determined by the Victorian Registration and Curriculum Authority ('the VRQA'), which cannot be exceeded. This maximum student enrolment number is determined by the school's facilities. Schools wishing to change this number must make application to the VRQA for approval.

Schools adjust their enrolments according to demand. For example, a Prep-Year 12 school may have one stream from Prep to Year 4 and two streams at each year level from Year 5 as the demand for places is higher from Year 5 upwards. Schools should have the capacity to determine the number of students enrolled at particular ages, within their maximum enrolment number.

It is also important for schools to have the capacity to ensure that students are ready to be enrolled at a school. For example, a parent may wish to enrol a four-year old child who has not attended a preschool in Year 2 but the capacity for most four-year olds to manage, educationally and socially, with a group of students who are predominately seven/eight years old, will be limited. Although the needs and capacities of children vary, exceptions such as this one can be managed with educational programs for gifted children.

It is also reasonable for an educational authority offering scholarships to define those scholarships on the basis of age. For example, scholarships are offered for entry to particular year levels in a school. It is reasonable to limit the number of scholarships available, the year levels to which the scholarships apply and the nature of the scholarships.

This exception should be retained.

Exceptions to Discrimination in Accommodation

Section 53 – Exception – accommodation unsuitable for children

A person may refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.

Schools may offer accommodation to employees either as a component of the remuneration package or, more commonly, as a requirement of the position of employment. In the latter situation, where the accommodation is in a school boarding facility, it may not be possible or appropriate to accommodate a child. For example, it may not be appropriate for a person with a teenage son to be accommodated in a girls-only boarding facility.

This exception should be retained.

Section 56 – Exception – accommodation for students

An educational authority may provide accommodation wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular impairment at an education institution wholly or mainly for students with that attribute.

For the reasons outlined in relation to Section 38, this exception should be retained. It is reasonable to provide such facilities in the context of providing education services to students.

Exceptions to Discrimination in Sport

Section 66 – Exception – competitive sporting activities

Schools engage in competitive sport, at intra-school and inter-school levels. The nature of competitive sport is such that not every student can be selected to play in every sport.

It is reasonable for:

- a girls team to comprise only girls and a boys team to comprise only boys;
- a team to comprise those students who are able to play the sport at the required skill levels;
- a team to comprise students of a specified age group;
- a team to comprise students with a general or particular impairment; or
- a school to select the student best suited to compete in a sporting event on behalf of the school.

This exception should be retained.

General Exceptions

General exceptions may affect schools, with respect to either their students or their employees.

Section 70 - things done to comply with orders of the courts and tribunals

It is possible that an order of a court of tribunal may require a school to discriminate.

This exception should be retained.

Sections 72 and 73 – Superannuation – existing and new fund conditions

Association of Independent Schools of Victoria Incorporated

The retention of discriminatory superannuation fund conditions (Section 72) as at the commencement of the Act (1 January 1996) should continue. To do otherwise, could adversely impact upon the employees who were members of the fund at the time, particularly if they became members of the fund due to the conditions in existence at that time.

The circumstances in which superannuation funds are currently permitted to discriminate should be retained (Section 73).

Sections 75, 76 and 77 – Religious bodies, religious schools and religious beliefs and principles

Section 75, 76 and 77 are important to faith-based schools.

These general exceptions are supported by the following:

- *International Covenant on Civil and Political Rights*, which was ratified by Australia in 1980. Article 18 provides as follows:
 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 collectively 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, morals or the fundamental rights and freedoms of others.*
 4. *The State 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.*
- *Charter of Rights and Responsibilities Act 2006 (Vic.)* ("the Charter"), with Section 14 providing as follows:
 - (1) *Every person has the right to freedom of thought, conscience, religion and belief, including –*
 - (a) *the freedom to have or to adopt a religion or belief of his or her choice; and*
 - (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
 - (2) *A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

Association of Independent Schools of Victoria Incorporated

Section 38 of the Charter states that a public authority is not required to act in a way or make a decision that has the effect of impeding or preventing a religious body from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

- *Education and Training Reform Act 2006* (Vic.) states in Section 1.2.1(d) that “parents have the right to choose an appropriate education for their child”.

It is submitted that the legislation referred to above and the Convention ratified by Australia support the retention of Sections 75, 76 and 77 of the Act. The history of Australia is such that faith-based schools have always been able to be established and should be able to continue to operate in accordance with the doctrines, beliefs and tenets of the religious body that established the school. The capacity for faith-based schools to act in accordance with their religious beliefs and principles is essential to comply with Section 14(1)(b) of the Charter.

The removal or modification of Sections 75, 76 and 77 of the Act has the potential to impair the capacity of faith-based schools to operate in accordance with the beliefs and tenets of their faith. This may mean that, in time, faith-based schools would close. If faith-based schools were not able to continue operating, then it is possible that there may be no other schools in which parents will enrol their children. This may lead to an expansion of home schooling or to students ending their education earlier than is the case at the current time. Parental choice in education would be restricted.

These exceptions should be retained.

Exemptions by the Tribunal

It is recommended that Section 83 of the Act be retained. As the Consultation Paper indicates, this section has been utilised by coeducational schools to favour one gender over the other to promote, or to ensure, an equal gender balance in coeducational schools.

It is important to retain this section. The Victorian Civil and Administrative Tribunal ('the VCAT') has capacity to grant or not grant an application for exemption, should the application not be substantiated or if it is not reasonable to grant the exemption in the context of the Charter.

Summary

This submission supports retention of a number of exceptions and the exemption provision in Section 83 of the Act. In supporting this position, it is recognised that there is a need to balance human rights. However, the conditional nature of the current exceptions under the Act is appropriate in the context of balancing human rights, as required by the Charter. The exceptions are not blanket exemptions. Rather, they represent considered, measured and reasonable responses to ensuring that human rights are honoured and protected by society.

In the event that the Victorian Government determines to amend or remove any exceptions or change the manner in which exemptions may be obtained under Section 83 of the Act, it is recommended that such changes should be made available for public comment prior to enactment.

Submitted by	Ms Michelle Green Chief Executive Association of Independent schools of Victoria Incorporated (AISV)
Telephone	9825 7200
Facsimile	9826 6066
E-mail	michelle.green@ais.vic.edu.au
Url	http://www.ais.vic.edu.au
Date	18 April 2008