



**Independent
Schools** Victoria

Submission to the Religious Freedom Review

February 2018

Independent Schools and Religious
Freedom

The Independent Schools Victoria Vision:

‘A strong Independent education sector demonstrating best practice, providing excellent outcomes for students and choice for families’.

To realise this, we:

- advocate for excellence in education
- champion Member Schools
- support quality education
- protect the right of parents to choose where and how their children are educated.

Independent Schools Victoria will assist our 218 diverse Member Schools to continue providing the best possible education outcomes for the citizens of tomorrow.

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Introduction

Independent Schools Victoria (ISV) welcomes the opportunity to make a submission to the Expert Panel appointed by the Australian Government to examine and report on whether Australian law (commonwealth, state and territory) adequately protects the human right to freedom of religion.

This submission is made on behalf of our 218 Member Schools, a significant number of which are faith-based or have a religious affiliation.

It addresses the first of the Review's terms of reference; that is, the intersections between the enjoyment of the freedom of religion and other human rights.

Our submission is shaped by our commitment to ensuring our Member Schools retain their independence, based in turn on a commitment to the rights of parents to seek to educate their children in schools that match their values and religious beliefs, their expectations and the individual needs of their children.

Religious-based schools have operated in Australia since 1788. They play a continuing, prominent and important role in Australian school education.

In particular, we support the maintenance of current provisions in Victorian and Commonwealth anti-discrimination laws that protect the freedom of religious or faith-based schools.

We do not believe that the intersection between freedom of religion and other human rights necessarily has to create conflict between those rights. Instead, we believe those rights can be balanced.

Background

ISV was established in 1949 and today represents, promotes the interests of, and provides services to 218 Member Schools, which educate some 140,000 school-aged students on more than 300 campuses across metropolitan Melbourne and in regional and rural Victoria, and employ more than 18,000 teachers and other staff to support these students.

ISV is an association providing professional services and support, not an authority that manages Member Schools.

This submission is shaped by the educational, social and philosophical diversity of the Victorian Independent school sector. Our membership reflects a variety of religious faiths and ethos, with schools affiliated to Anglican, Assemblies of God, Baptist, Brethren, Catholic, Christian, Coptic Orthodox, Greek Orthodox, Jewish, Lutheran, Islamic, Pentecostal, Presbyterian, Seventh-day Adventist and Uniting churches. There are inter, multi and non-denominational schools, as well as schools for students with learning difficulties and individual needs and schools adhering to the Montessori and Steiner education philosophies.

Submission

ISV supports the maintenance of current provisions in Victorian and Commonwealth legislation that provide specific protections for religious freedom as it is exercised by religious and faith-based schools. Where a school, in support of its religious freedom, seeks to discriminate, it must be able to show that this discrimination is necessary, reasonable and undertaken in good faith.

Victorian Legislation

Part 5 of the *Equal Opportunity Act 2010* (Vic.) details specific exceptions that apply to religious bodies and religious schools. Section 83 of the Act authorises some types of discrimination in relation to religious schools.

The religious schools exception applies to ‘a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles’.

It covers conduct ‘in the course of establishing, directing, controlling or administering the educational institution’ provided the conduct:

- conforms with the doctrines, beliefs or principles of the religion; or
- is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

This exception is limited to discrimination on the basis of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

Exceptions do not provide an unfettered right for schools to discriminate. There is also a requirement that the discrimination is ‘**reasonably necessary** to avoid injury to the religious sensitivities of adherents to the religion’ (emphasis added). The term ‘reasonably necessary’ requires an objective assessment of whether the discrimination is necessary.

Commonwealth Legislation

A similar exemption applies under section 38 of the *Sex Discrimination Act 1984*. Section 38 details the circumstances where an ‘educational institution established for religious purposes’ can discriminate on the basis of certain attributes protected by the Act.

An educational institution established for religious purposes can discriminate against an employee or contract worker on the basis of the person’s sex, sexual orientation, gender identity, marital or relationship status or pregnancy provided that:

- the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion and creed; and
- the person who discriminates against the employee/contract worker does so in good faith in order to avoid injury the religious susceptibilities of adherents of that religion or creed.

Section 38 also states that, providing the two conditions detailed above are satisfied, it is not unlawful to discriminate against a person based on their sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training.

An examination of whether the discrimination was undertaken in 'good faith' to avoid injury to the religious susceptibilities of adherents of that religion or creed, is an important factor in determining whether the exemption applies.

ISV's View

As outlined above, existing legislation does not provide unfettered or unqualified rights to religious schools. Any discrimination must be necessary, reasonable and undertaken in good faith.

In recent times in Victoria, religious freedom can be seen to have intersected, if not conflicted, with other human rights, with the introduction in 2016 of bills in the Victorian Parliament to amend sections of the *Equal Opportunity Act 2010* relating to religious schools.

While both bills – one related to employment, and the other to student enrolments – were defeated, a summary of our submissions to government and parliamentarians during consideration of the bills might be of interest to the Expert Panel conducting the Religious Freedom Review.

In our submissions, ISV restated our commitment to ensuring Member Schools retained their independence while providing respectful and safe environments that were free of discrimination and met legislative requirements and community expectations.

Taking account of the broad range of views held by Member Schools, we expressed concerns about the government's bill regarding employment. Our concerns related to questions about the need for the amendment, its scope and its practical application if implemented.

The bill would have limited exceptions for religious schools in hiring employees by reinstating the 'inherent requirements test' for schools that might seek to rely on a religious defence to discriminate in the area of employment. This meant schools and religious bodies would be able to discriminate in employment on religious grounds, but only when conformity with the doctrine, beliefs and principles of the religion was an inherent requirement of the particular position.

Member Schools recognised that the bill could bring into conflict two fundamental human rights – the right to freedom of religion, on the one hand, and, on the other, the right of individuals not to suffer discrimination on the basis of their sex, sexual orientation, gender identity, marital status or differing religious beliefs.

Our schools recognised that both of these rights were important and needed to be protected. That meant finding a balance between the two if they came into conflict.

We argued that the existing Act sought to achieve this balance. The Act did not give religious schools a blanket right to discriminate in employment. Instead, a school could only discriminate if it was 'reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion' operating the school. So unless a school could prove its actions are 'reasonably necessary', employees were already protected from discrimination.

Given the existing qualified right to discriminate, the question arose as to whether there was a demonstrated need to change the law, based on evidence that existing and potential employees of religious schools faced unreasonable and unnecessary discrimination.

To the best of our knowledge, no evidence had been presented to prove that this discrimination took place to an extent that required a legislative remedy.

Some Member Schools were concerned that the proposed amendments to the Act were too broad, and could result in an unbalanced application of rights if they came into conflict.

The Act already defined discrimination very broadly. It included direct and indirect discrimination, and acting and omitting to act. The motive and intentions of the person allegedly discriminating were not relevant, and the burden of proof rested with the defendant to show that their action was not discriminatory. The amendment would have made it even more wide-ranging.

The Bill stated that ‘the nature of the religious body 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’ of a particular position.

Any decision on whether a school had committed unlawful discrimination would be determined by the Victorian Civil and Administrative Tribunal (VCAT), which would be required to determine whether conformity to a school’s religious doctrines, beliefs and principles was an inherent requirement of a particular position of employment. And while VCAT would be required to take those doctrines, beliefs and principles ‘into account’, it would be left to the tribunal to determine what those doctrines, beliefs and principles were, and then to decide what weight was attached to them.

Given the uncertainty and ambiguity as to what defined an inherent requirement of a position, and the categories of employees covered by it, schools faced the risk of becoming engaged in time-consuming, resource-intensive and unpredictable court actions. There was also the risk of vexatious litigation.

In making these comments, ISV was not advocating that freedom of religion should have absolute primacy over other freedoms and rights. As indicated above, our Member Schools believed then, and now, that what is needed is an appropriate balance.

In the case of this Victorian bill, we did not believe a legislative instrument was necessarily the best way to achieve this balance, particularly since issues would vary from case to case.

We argued that similar issues and principles applied to the Bill introduced by the Greens in 2016 to amend the *Equal Opportunity Act* to provide that religious schools cannot discriminate against students on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

We stressed that Member Schools were committed as part of their duty of care to provide respectful, safe and inclusive school environments for all students, in schools that are free of discrimination, harassment, bullying, vilification, victimisation and otherwise unlawful and unacceptable behaviour.

As with the government’s Bill, implicit in the amendment proposed by the Greens was the suggestion that discrimination which the Bill sought to outlaw took place in religious schools, and that legislative change was the best or the only way to deal with it.

To the best of our knowledge no evidence had been presented to prove this discrimination took place to such an extent that it requires a legislative remedy.

Finally, proponents of the amendment insisted it would have no impact on Section 30 of the *Equal Opportunity Act 2010*, which allows education providers to operate a school solely for students of a particular sex. While this might have been the intention, it was not clear to ISV that this would remain the case if the amendment was passed.

We have summarised our concerns about the two Victorian bills in some detail, because the issues we raised remain relevant to any consideration of the matters currently being reviewed by the Expert Panel.