

**SCRUTINY OF ACTS AND REGULATIONS COMMITTEE**  
**Inquiry into exceptions and exemptions in the Equal Opportunity Act**

Melbourne — 5 August 2009

Members

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Witnesses

Mr M. Pountney, communications officer, and  
Mr A. Frees, board member, Association of Independent Schools of Victoria.

**The CHAIR** — The next witness is the Association of Independent Schools of Victoria. I welcome Alan Frees and Michael Pountney. Thank you for attending today. The purpose of the hearings is to report to Parliament as to whether any amendments should be made to the exceptions and exemptions to the Equal Opportunity Act 1995. Anything you say or publish before the committee today is protected by parliamentary privilege, however once you leave the hearing, anything you say or publish outside the room is not so protected.

I invite you to make a brief statement to the committee on the relevant issues that you consider important in terms of this inquiry, and we will follow that up with questions from committee members.

**Mr FREES** — I would like to thank you on behalf of the association for the opportunity to attend today and speak to our submission. Might I just explain that I am a member of the governing body of the Association of Independent Schools of Victoria and a former chairman. It is an honorary role that directors perform; I am not an educationalist and therefore technical, difficult questions will have to be passed to others, I am afraid.

I am joined today by a member of staff of the association, Mr Michael Pountney, who is the communications officer. Also at the outset I would like to extend an apology on behalf of Dr Elizabeth Jedynak, the chairman of AISV, and Mrs Michelle Green, the chief executive, for their inability to attend today. However, between Michael and me, we might be able to assist the committee in its deliberations and answer any questions that members may have.

The Association of Independent Schools of Victoria represents and promotes the interests of and provides services to over 215 independent schools throughout the state which educate 99 per cent of the total number of students in the independent sector. That equates to over 120 000 Victorian primary and secondary students. As you will appreciate, the association is the umbrella body for a vast and disparate group of schools spread geographically far and wide throughout the state. Sizes range from extremely large to very small. Some but not all are faith-based and therefore unlike the previous submission that you heard this afternoon, we have a wide range of differing interests that as an association we seek to support.

The association's submission to the Scrutiny of Acts and Regulations Committee inquiry into the exceptions and exemptions of the Equal Opportunity Act was driven by its desire to provide input into the discussion of 22 clauses that directly affect the day-to-day running, values and unique identity of the association's member schools. The association's submission identifies the practical use made of the exceptions and exemptions by independent schools and supports the retention of all the exceptions and exemptions currently contained in the act.

The association is of the belief that some of the proposed options outlined in the committee's options paper were ill-conceived and would have made both government and non-government schools and their students and parents the unwitting victims of a case of unintended consequences should some of the proposed changes to the act successfully pass into legislation.

The association also notes that the committee has made specific reference in the options paper to submissions which have been made containing reference to the Victorian Charter of Human Rights and Responsibilities Act in clauses that affect schools both directly and indirectly. However, our submission points out — and we would invite the committee to note and acknowledge — that the charter explicitly excludes non-government schools from needing to comply with the public authority provisions in the charter as outlined in section 4(c).

Despite this fact, in preparing its submission the association did attempt to frame its arguments with reference not only to the charter but also to other applicable state, commonwealth, international or common laws. Where none of these were available or appropriate, the association attempted in all cases to apply common sense in responding to the committee's options paper.

The association, in its formal written submission, has specifically addressed each of the relevant 22 sections of the act that contain exceptions and exemptions and were identified as being of particular importance to good governance and/or the culture of its member schools. I do not propose to summarise the association's position on each of these questions but would be more than happy to attempt to answer any questions the committee may have.

But before closing, I wish to highlight what in my opinion is one of the most important aspects of the association's submission. The association's submission highlights the systemic discrimination against students

attending non-government schools by virtue of funding arrangements which see these students receiving less than half the amount of funding as their peers attending government sector schools.

This amount could exceed \$30 000 per student if we discuss the funding needs of a student with special needs. As parents of a child with special needs, my wife and I have personally been confronted by what to us then was a totally baffling and unfair funding regimen, and what with the passing of time and still no change is a totally inequitable and outrageous state of affairs that demands to be addressed.

The association's submission flags the need for this disparity to be investigated and, most importantly, it also proposes a funding model to redress the injustice. I and the association would submit that the committee should give particular attention to the association's detailed submission in this context.

The final thing that I am obliged to do, with regret, is to point out that the association's submission has two errors, both contained on page 12. The errors are with reference to two pieces of Victorian legislation. In the first instance, section 1.2.1(a) of the Education and Training Reform Act should read 'section 1.2.1(d)' as (a) was incorrectly inserted in the first place.

The second change is that section 8(a) of the charter should read 'section 8(4)'. I believe copies of the corrected submission are available. Thank you, Chair.

**The CHAIR** — I will just take up the issue of sections 75 and 76 and put a question that obviously I have been putting to virtually everyone today about the attributes. In the act they are very broad. When you say that you want to maintain the exemptions, do you want to maintain the broadness of all those attributes, which include things like impairment, age and a whole host of others, or are we trying to identify the attributes that might conflict with the freedom of religion?

**Mr FREES** — Our submission is directed solely to the question of choice based on freedom of religion. It relates to other aspects. You identify, Chair, the question of age. There are, of course, in our context some schools that operate only as primary schools. Others operate as secondary, and others as primary and secondary. That of course is an area where the ability to discriminate should not be of concern, and no change should apply to anyone.

**The CHAIR** — I meant in the employment of staff. Do we really want a whole lot of attributes that are not going to conflict with freedom of religion, because that is what you are trying to defend? What I understood from your submission is that there is this right of freedom of religion, and you are trying to maintain and defend that important right and therefore limit the rights of equality. There is a whole host of things listed in the Equal Opportunity Act. I am just wondering whether you would be prepared to look at that list and reduce it to the ones that actually interfere. It does not really matter.

**Mr LANGUILLER** — Can I refer to section 38 of the act?

**The CHAIR** — Section 6 lists the attributes. I am just wondering, if we are trying to protect freedom of religion, do we need to ensure that all those attributes are exempted, or would you be prepared to consider identifying those that could provide a conflict with freedom of religion?

**Mr FREES** — If we take section 38(a), where it talks about discrimination on the basis of 'sex, race, religious belief, age or age group', are you inviting me to indicate whether any of those — —

**Mr LANGUILLER** — I certainly am.

**The CHAIR** — I was referring to section 6 of the act, where there is a whole host of attributes.

**Mr POUNTNEY** — I guess at the end of the day these decisions and the employment decisions of schools are best left to the people at the schools. We are not a systems group. We do not mandate how or which employees should be employed by a school, but we are of the firm belief that the people at schools are in the best position to employ those people they feel are the best people to educate students attending those schools, based on the values and tenets of those schools, whether they be faith or not.

**The CHAIR** — I do not quite understand how some of those attributes could possibly conflict with faith-based or any other value-based teaching.

**Mr POUNTNEY** — Are there any specifically that you refer to or believe?

**The CHAIR** — Impairment, age, political belief or activity, race — they seem to be ones that would not interfere with what you are calling for.

**Mr POUNTNEY** — We can also look to the Victorian Institute of Teaching as the registration board for all teachers. If VIT claims that a person should not be able to teach under its tenets, then they should not have that right to do so under your legislation, as that of the government of the day. In terms of these attributes, we still maintain that if a teacher can be registered as a teacher and the people at a school wish that person to teach at their school or not teach at their school, they have the right to make that decision.

**Mrs PEULICH** — Could I just ask for clarification? Did you say that under section 4 of the charter you would be exempt, because you are not a public authority?

**Mr FREES** — Yes, that is correct.

**Mrs PEULICH** — However, following the review of the charter, if I understood it correctly, phase 2 of the charter would include the further devolution of the charter to bodies that receive government funding. Although you obviously have a very good case in terms of the underfunding of independent and faith-based schools, compared to the state ones, you would still be in receipt of some funding. Would you be captured under that phase 2?

**Mr FREES** — I will defer to Mr Pountney on that, but if I might say at the beginning whilst we believe that currently we are not captured by the charter, despite that we have attempted to reflect in the submission our belief of where we fall within its spirit, even if we are not obliged to do so.

**Mr POUNTNEY** — All I can refer to, Mrs Peulich, is section 4(1)(c):

... an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State of a public authority —

that is, one that is regarded as a public authority —

...

Example

A non-government school in education students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of this Charter.

I would assume, and I think it would be a fair assumption, that non-government schools would be exempt as public authorities in regard to the charter?

**The CHAIR** — That is right.

**Mr LANGUILLER** — The reason I referred you to section 38 of the act is because you stated — and correct me if I am wrong — that your preferred option would be the retention of all exemptions and exceptions?

**Mr FREES** — That is correct.

**Mr LANGUILLER** — Some submitters have said to us that that is why in section 38 it talks about the potential provision for discrimination on the basis of age, disability or race. I wonder about that broad statement that you made in relation to the retention of all the exceptions and exemptions, that in fact is somewhat rhetorical, that you could actually do that, if we were to water down — let me put it plainly in English — section 38? Is that a fair representation?

**Mr FREES** — In responding to that, I would say that whilst I personally may believe in one or possibly more of the criteria specified in that section, I could not envisage instances of how that would be applied in practice in the selection of staff. However, for others I could see that at particular schools they would have a valid basis for doing so.

**Mr POUNTNEY** — Could I add that in terms of reference to age or age group, our reading of section 38 is that it refers to the actual enrolment of students. It is probably linked quite closely to section 41 which relates to age-based admission schemes and so forth. We would be saying that age and age-base relates to the actual admission of students in schools. You would not want the circumstance of a year 10 student wanting to attend a primary school. The school would not be set up to accommodate that student. Likewise, a year 5 student attending a school set up specifically for years 11 and 12 students. That goes to the heart of the age and the age-base question.

In regard to race, we are of the opinion that of course any discrimination on any one of the grounds of race is absolutely disgusting, but we would also maintain that the charter itself protects the rights of cultural groups and minorities. If a community wishes to create a school based on race or a right or a cultural group then they should be permitted to do so. I understand they would be protected under section 9 of the charter in relation to cultural rights and so forth. You would expect that that community would be able to foster those cultural rights and have some protection in that regard.

**The CHAIR** — Earlier you said that you represent religious and also non-religious schools. Is that right?

**Mr FREES** — Our membership base? Yes.

**The CHAIR** — Because exemptions in 75 and 76 apply to religious schools. I wonder how you reconcile the fact that certain schools would be covered by the Equal Opportunity Act and others would have exemptions to the act? It seems to me that in practice there is probably very little difference between the two?

**Mr FREES** — Certainly in practice I would agree with you that there is little difference in the two. But the rights of choice that are made by parents are not necessarily based solely, and at times at all, on a religious basis. There is the same requirement for the right to choose in the employment category by reference to the sex of the teacher, or the staff member if it is single-sex school. That can be a matter of importance to parents making that choice.

**The CHAIR** — Yes, but non-religious schools do not have the same exemptions. That is the part that it is difficult to reconcile. I suspect in a practical sense there is probably not much difference in the way they work.

**Mr POUNTNEY** — Could you go further to explain that, Chair?

**The CHAIR** — Sections 75, 76 and 77 include an exemption for religious bodies and religious schools. They do not have to abide by the Equal Opportunity Act. But if the employer is a non-religious school, they do not get the same exemption.

**Mr POUNTNEY** — Okay.

**The CHAIR** — Your argument seems to be that as long as the employer wants to employ someone, they do not have to follow the Equal Opportunity Act. That is only true for religious schools.

**Mr POUNTNEY** — No. That is not what we are saying, and it is not what we have said in our submission. What we have said is that schools would need to comply with the way laws need to exist. If we refer to sections 75, 76 and 77, which make up only 3 of the 22 clauses we have spoken on — or written on in our submission — there are exemptions that exist for schools of a faith-based nature. If those exemptions still exist, then schools can make those decisions based on the exemptions that exist.

In terms of any other school, whether that be a non-faith-based school or otherwise, again schools should be able to make a choice based on whatever needs they have. Regardless of whether or not it is faith-based, if a school wants to employ a person who is of a particular religious bent, or is a fantastic mathematics scholar, or is male or female, it is entirely up to that school to make that decision, obviously within the law that exists in this state.

**The CHAIR** — Yes, but that would expand those exemptions beyond religious schools? That is what you are really arguing.

**Mr POUNTNEY** — Not at all. Surely an employer would be able to employ whoever they needed, within the terms of the Equal Opportunity Act.

**The CHAIR** — Yes.

**Mr JASPER** — I have a dilemma about this too. Does your organisation represent the religious schools apart from, say, some independent schools, or do you represent all of the religious schools across Victoria?

**Mr FREES** — Yes. Our organisation has membership across that whole broad —

**Mr JASPER** — It seems to me that there is some difference between what you are saying and what we have heard from representatives of the Catholic school system.

**Mr SMITH** — They do not represent Catholic schools.

**Mr JASPER** — Apparently you do not represent Catholic schools, but you represent all other — —

**Mr FREES** — We have a certain number of Catholic schools which are members of our association.

**Mr JASPER** — I hear what you are saying, but it appears to me that there is some difference between what you are saying and what the Catholic schools have been saying to us in their representations today.

**Mr FREES** — I accept that, Mr Jasper, because they are solely responsible for a particular class of non-government schools in a particular system. Some of those schools have elected voluntarily also to become members of the AISV and to take part of the services and other offerings that we provide to member schools. Over and above those small number of Catholic schools, every other independent school, almost without exception, has voluntarily elected to apply for membership of the association — —

**Mr JASPER** — And many of those — —

**Mr FREES** — And hence it makes it very difficult to have a common approach, like our colleagues in the Catholic sector can do, because we are talking about a vastly disparate group of schools in many cases.

**Mr JASPER** — I will just finish on that point and we can move on. We have other denominational schools apart from the Catholic system which may not support the line that you have put forward.

**Mr FREES** — I believe the non-denominational schools would certainly support their right of choice and autonomy to the extent permitted by law, and any diminution of that freedom would be opposed by them as it is opposed by our other member schools.

**Ms PULFORD** — Thank you for clarifying the relationship to the Catholic schools, because I think I was making an assumption about the 98 per cent of all independent schools, which has now been cleared up. I appreciate that. Of the 215 or so schools that you represent, how many of them are without a religious affiliation? A ballpark figure is fine.

**Mr POUNTNEY** — I will have to take that question on notice.

**Ms PULFORD** — A half, most, a handful?

**Mr FREES** — The majority of member schools would have some faith-based connection.

**Ms PULFORD** — The majority of the schools you represent would have an interest in our review of religious exemptions?

**Mr FREES** — Given time I could certainly come back to you and the committee with a specific answer on that.

**Mrs PEULICH** — Again, someone may wish to direct me: am I right in understanding that the exemptions apply to the faith-based schools that you represent, whereas those that have no faith-based connection are not covered by the existing exemptions?

**The CHAIR** — 75 and 76.

**Mrs PEULICH** — Yes.

**Mr FREES** — That has been pointed out to me.

**Mrs PEULICH** — It would be great actually if you could let us know many of those — —

**Mr FREES** — I said I am a volunteer at the outset.

**Mrs PEULICH** — I thought your catchall statement about choice and autonomy and the right to choose within the extent of the law, I think from what I know, is a very accurate summation of what their views would be, but it would be interesting to know what proportion of them — —

**Mr FREES** — I am certainly very happy to organise that information to be extracted and provided to the committee as soon as possible.

**Mrs PEULICH** — Thank you.

**The CHAIR** — We are a good-natured committee; we are not trying to trip you up!

**Mr FREES** — I did not take it that way, Chair.

**The CHAIR** — Thanks very much for coming in and giving us your time. It was a very thorough submission. Thanks a lot for that. It will obviously assist in our deliberations.

**Mr FREES** — Thank you very much, Chair, once again for the opportunity, and I thank the members.

**Witnesses withdrew.**