

5 June 2007

AP:CJ  
Alice Palmer  
(03) 9607 9381  
apalmer@liv.asn.au

Ms Karen Ellingford  
Executive Officer  
Education and Training Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

**By post and by email ([etc@parliament.vic.gov.au](mailto:etc@parliament.vic.gov.au))**

Dear Ms Ellingford

**Inquiry into Dress Codes and School Uniforms in Victorian Schools**

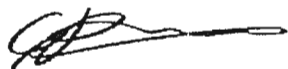
The Law Institute of Victoria (LIV) welcomes the opportunity to provide a written submission to the Education and Training Committee to its inquiry into dress codes and school uniforms in Victorian schools.

The LIV's submission is attached for your review and consideration.

We would be pleased to meet with the Education and Training Committee to discuss this submission or to provide further written comments as required.

If you would like to discuss any of the matters raised in the submission, please contact Alice Palmer, Solicitor, Advocacy & Practice Section on 03 9607 9381.

Yours sincerely



**Geoff Provis**  
President  
Law Institute of Victoria

Attach



# Submission

---

## Administrative Law & Human Rights Section and Workplace Relations Section

---

### Inquiry into Dress Codes and School Uniforms in Victorian Schools

To: Education and Training Committee

A submission from the Administrative Law & Human Rights Section and the Workplace Relations Section of the Law Institute of Victoria

Date 5 June 2007

**Queries regarding this submission should be directed to:**

Contact person Alice Palmer (Administrative Law & Human Rights Section) and Elizabeth Hayes  
(Workplace Relations Section)

Ph (03) 9607 9381

Email [apalmer@liv.asn.au](mailto:apalmer@liv.asn.au)

## Contents

1	Introduction .....	3
2	Matters which need to be considered to ensure dress codes and uniform policies are consistent with anti-discrimination legislation policies .....	4
3	Appropriate enforcement and sanctions .....	5
4	Appropriate exemption criteria and processes .....	6
5	National and international trends .....	6
	5.1 National trends .....	6
	5.2 International trends .....	7
6	Conclusion.....	9

## 1. Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make a submission to the Education and Training Committee on the Inquiry into Dress Codes and School Uniforms in Victorian Schools (the Inquiry).

The LIV notes that the Department of Education states that "[e]ach school council decides whether the school will have a uniform, what the uniform will be, and whether it will be compulsory to wear."<sup>1</sup> The LIV is also familiar with the *Schools Reference Guide*, including the guidance provided regarding "student dress codes",<sup>2</sup> and the *Student Discipline Procedures* 1994.<sup>3</sup>

The LIV is generally satisfied that the relevant section of the *Schools Reference Guide* (s4.8) represents an appropriate guidance for student dress codes. However, the LIV submits that the Department of Education should develop a more formal policy to guide Victorian schools that elect to have a student dress code on how best to develop and implement the code.

The school uniform policy must take account of fundamental rights and principles, including those enshrined in the *Charter of Human Rights and Responsibilities* 2006 (Vic) (the *Human Rights Charter*). The development of a school uniform policy by the government, and the subsequent development of a code by the schools, should be undertaken in consultation with appropriate people and bodies, including student and parents' groups and religious and cultural bodies, and it should be subject to regular review.

The LIV wishes to make comments in regard to the following terms of reference in the Inquiry:

- d. matters which need to be considered to ensure dress codes and uniform policies are consistent with anti-discrimination legislation policies;
- e. appropriate enforcement and sanctions;
- f. appropriate exemption criteria and processes; and
- g. national and international trends.

Please note that for the purposes of this submission the LIV has assumed that the Inquiry is limited to dress codes and uniform policies for students. We have not addressed issues concerning dress codes for school staff. If the Inquiry is to consider issues concerning dress codes for school staff, developments in Australia and internationally should be taken into account.<sup>4</sup>

---

<sup>1</sup> <http://www.education.vic.gov.au/aboutschool/lifeatschool/uniforms.htm>

<sup>2</sup> <http://www.education.vic.gov.au/edulibrary/public/schadmin/environment/4-8.pdf>

<sup>3</sup> Incorporated in the *Guidelines on Developing a Student Code of Conduct*, <http://www.eduweb.vic.gov.au/edulibrary/public/stuman/wellbeing/conduct.pdf>

<sup>4</sup> See e.g. European Court of Human Rights case concerning a Swiss teacher wishing to wear a religious veil while teaching *Dahlab v Switzerland* (dec), no 42393/98, ECHR 2001-V and a recent UK case concerning a teaching assistant *Azmi v Kirklees Metropolitan Borough Council* [2007] UKEAT 0009\_07\_3003

## **2. Matters which need to be considered to ensure dress codes and uniform policies are consistent with anti-discrimination legislation policies**

The Victorian *Schools Reference Guide* highlights the existence of anti-discrimination laws and reminds school councils that they cannot discriminate, either directly or indirectly, on the grounds of sex, race, ethnic group, nationality, religious beliefs, marital status, colour or disability (s4.8.2). The *Schools Reference Guide* recommends the consistent application of rules to avoid direct discrimination and the use of exemption rules to avoid indirect discrimination (ss4.8.2 and 4.8.3.2).

The LIV proposes that a formal Department of Education policy on school uniforms should include a more detailed explanation of the obligations incumbent on schools under anti-discrimination legislation. This should include examples of indirect discrimination to assist schools in the development of their exemptions policy and processes.

Section 37 of the *Equal Opportunity Act* 1995 (Vic) provides that an educational authority must not discriminate against a student by denying or limiting access to a benefit, by expelling the student or by subjecting the student to any other detriment. It also provides that the educational authority must not discriminate in deciding who should be admitted as a student, by not accepting an application for admission or in the terms on which a person is admitted as student. An educational authority is a person or body administering a school, college university or other educational institution.

Section 40(1) of the *Equal Opportunity Act* provides an exception to the prohibition of discrimination in relation to standards of dress and behaviour for students. It provides that the educational authority may set and enforce reasonable standards of dress, appearance or behaviour for students. Section 40(2) provides that a standard 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.

The LIV also notes that there are additional grounds on which discrimination is prohibited under the *Equal Opportunity Act* than those currently listed in the *Schools Reference Guide*. The LIV recommends that any school uniform policy that is adopted should reflect the attributes as set out in the *Act*. For example, section 6 of the *Act* includes the attributes of age and physical features (height, weight, size or other bodily characteristics). The policy should note that discrimination is prohibited on the basis of any of the attributes set out in section 6 of the *Equal Opportunity Act*.

The Victorian *Human Rights Charter* sets out a range of rights that would be relevant to a school uniform policy, including: "the right to enjoy... human rights without discrimination" (s8); "the right to freedom of thought, conscience, religion and belief" (s14); "the right to hold an opinion without interference" (s15); and "the right... to enjoy [a person's] culture" (s19). These rights are, however, limited by s7 of the *Human Rights Charter*, which states that human rights may be subject to "such reasonable limits as can be demonstrably justified in a free and democratic society", taking account of all relevant factors including the nature and extent of the limitation and the importance of the purpose of the limitation.

Any policy developed by the Department of Education regarding school uniforms must be compatible with the *Human Rights Charter*. Further, Victorian Government schools are likely to be public authorities within the meaning of s 4(1)(c) of the *Human Rights Charter* and, accordingly, their school uniform policies must also be compliant with the *Human Rights Charter*.<sup>5</sup>

### 3. Appropriate enforcement and sanctions

The LIV notes that the *Schools Reference Guide* states that enforcement measures should be consistent with the *Student Discipline Procedures* 1994 (s4.8.3.4). The *Schools Reference Guide* goes on to state that "infringement of a dress code is not usually linked with interference to the rights of other students or the capacity of a teacher to teach a class, and therefore withdrawal from classroom instruction (or other school activities) will not normally apply" except, for example, where there are issues of safety.<sup>6</sup>

The LIV submits that measures for enforcing a student dress code should be developed in consultation with the relevant stakeholders and in light of the exemption process agreed in that consultation. However, the LIV submits that a student should *never* be suspended or expelled from school, on the basis of a breach of school uniform policy. Suspension or expulsion from school is not, in the LIV's view, a sanction that would be justified as a "reasonable limit" within the meaning of the *Human Rights Charter* (s7) or under the *Equal Opportunity Act*. As is the case in New South Wales, a Victorian school uniform policy should expressly prohibit suspension or expulsion on the basis of non-compliance with a student dress code.<sup>7</sup>

The Department of Education could consider listing examples of sanctions that might be considered reasonable. In Queensland, for example, sanctions for non-compliance with a student dress code are limited to:

- "Imposing a detention for a student during lunch or after school (if after school, inform parents before detention occurs);
- Preventing student from attending, or participating in, any activity for which student is representing school; or
- Preventing student from attending or participating in any school activity that is not an essential school educational program."<sup>8</sup>

The introduction of any sanctions should take account of the right to education which is expressed, for example, in both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on the Rights of the*

---

<sup>5</sup> See e.g. Victorian Government Solicitor's Office Charter of Human Rights January 2007 Newsletter, available at <http://www.vgso.vic.gov.au/resources/publications/HUM/Human%20Rights%20Issue%201.pdf>

<sup>6</sup> Above n 3, s4 3 8 4

<sup>7</sup> NSW Department of Education and Training School Uniform Policy PD/2004/0025/V001, available at: [https://www.del.nsw.edu.au/policies/student\\_admin/uniforms/school\\_uniform/PD20040025.shtml](https://www.del.nsw.edu.au/policies/student_admin/uniforms/school_uniform/PD20040025.shtml)

<sup>8</sup> The Queensland Department of Education, Training and the Arts Student Dress Code SMS-PR-022 available at <http://education.qld.gov.au/strategic/eppr/students/smspr022/>

*Child*.<sup>9</sup> Article 13 of ICESCR notes that education should "enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups".

#### 4. Appropriate exemption criteria and processes

According to the *Schools Reference Guide*, a dress code is expected to include a process for exemptions, including the grounds and procedures for seeking and granting an exemption (s4.8.3.2). The *Schools Reference Guide* states that "[l]egal requirements necessitate that grounds of exemption must be provided where:

- an aspect of the code offends a religious belief held by the student/parents/guardians
- an aspect of the code prevents the student from complying with a requirement of their ethnic or cultural background
- an aspect of the code prevents students with disabilities from being able to attend school or participate in school activities on the same terms as other students
- the student has a particular health condition that requires a departure from an aspect of the code
- the student or the parents/guardians can demonstrate particular economic hardship that prevents them from complying with the code." (s4.8.3.2)

Students who wish to deviate from the student dress code should be invited to apply for an exemption. This should be a formal process that ensures procedural fairness. The exemption criteria developed in the context of an individual school must comply with the *Human Rights Charter* and equal opportunity laws. In the process of granting exemptions, the LIV agrees with the position in New South Wales and Queensland that "conscientious objections" (e.g. religious) by parents to the wearing of a school uniform, and other factors – such as economic circumstances or physical impairments – should be respected (see below, part 5) The school should be required to give reasons for rejecting an application for an exemption in light of the *Human Rights Charter* and equal opportunity laws

#### 5. National and international trends

##### 5.1 National trends

The school uniform policies adopted in other Australian states and territories could guide the Department of Education in its development of a school uniform policy. As noted above, the school uniform policies developed in both New South Wales and in Queensland contain elements that could be considered for incorporation in a Victorian school uniform policy

---

<sup>9</sup> *International Covenant on Economic, Social and Cultural Rights*, Article 13 and the *Convention on the Rights of the Child*, Article 28. Australia is a party to both of these international instruments

In particular, the NSW Department of Education and Training School Uniform Policy:

- requires "formal" consultation on the development of a school uniform policy. This includes consultation with the "Parents and Citizens Association" and local "Aboriginal Education Consultative Group" where relevant (s5.3.2);
- prohibits suspension or expulsion on the basis of non-compliance with a school uniform policy (s6.1.3);
- states that "conscientious objections" by parents to the wearing of a school uniform should be respected (s6.1.5);
- recommends review of a policy every five years (s5.3.4).

The NSW Department of Education and Training has also produced a publication called "School Uniform in New South Wales Government Schools", which outlines the benefits of school uniforms and the relevant principles and issues.<sup>10</sup>

We have already outlined the sanctions allowed for breaches under the Queensland Department of Education, Training and the Arts Student Dress Code (see above, part 3). The Queensland Student Dress Code also points out circumstances in which flexibility in the application of the dress code could be justified, such as:

- "Mobile families requiring sufficient time to purchase items of dress;
- Economic hardship requiring special arrangements, or an extended period of time, to purchase new items of dress;
- Students with physical impairments requiring greater flexibility in interpretation of dress codes; and
- Conscientious objections, for example objections raised on any reasonable religious or cultural grounds." (under "Responsibilities")

The Queensland Student Dress Code also suggests that a possible solution to non-compliance is to offer appropriate items of clothing or uniform from a "bank" of clothing held at the school.

## 5.2 International trends

Many of the international trends on school uniforms have concerned freedom of religion. In particular, the LIV notes a growing body of case law in the United Kingdom discussing the issue of school uniforms and the right of people to manifest their religion under the UK *Human Rights Act* 1998. In the case of *Begum, R (on the application of) v Denbigh High School*,<sup>11</sup> the House of Lords found that the school did not interfere with a pupil's right to manifest her religion by refusing to let her wear a jilbab (a full length, loose cloak) to school because "Article 9 [of the *European Convention on Human Rights* on the right to freedom of thought, conscience and religion] does not require that one should be allowed to manifest

---

<sup>10</sup> School Uniform in New South Wales Government Schools, available at: <http://www.schools.nsw.edu.au/studentssupport/studentwellbeing/index.php>

<sup>11</sup> *Begum, R (on the application of) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (the *Begum* case)



one's religion at any time and place of one's choosing".<sup>12</sup> The Lords' majority judgment turned on the fact that the claimant *chose* to attend a school that did not allow the jilbab to be worn, when in fact three other schools in the area did allow for the jilbab in their dress code.

The Lords also held that even if there had been an interference with the claimant's rights, the interference was objectively justified following the reasoning of the European Court of Human Rights (the European Court) in *Sahin v Turkey*.<sup>13</sup> In that case, the European Court held that there is a need for compromise and balance, recognising "the value of religious harmony and tolerance between competing groups and of pluralism and broadmindedness."<sup>14</sup> The Lords found that the school uniform policy at Denbigh High was developed following extensive consultation with Muslim students, parents and local mosques and that it served the wider educational purposes of promoting harmony. This aim was deemed important given the complex make-up of the school, with students from 21 different ethnic backgrounds and 79 per cent of students who were practising Muslims.

This case has been followed in the recent case of *R (on the application of X) v Head teachers of Y School and Governors of Y School*,<sup>15</sup> in which the High Court of England and Wales upheld a school uniform policy that prohibited the niqab (a veil that covers the face, also known as a burqa). The LIV also notes recent media reports about a teenage girl in the UK banned from wearing a Christian chastity ring at school who is taking her case to the High Court.<sup>16</sup>

The UK Department for Education and Skills (DfES) has launched a consultation on its draft "Guidance to Schools on School Uniform Related Policies" which closes on 12 June 2007.<sup>17</sup> The draft and final Guidance document, as well as the submissions made to DfES in the course of the consultation, might be of interest to the Department of Education in formulating a school uniform policy. Of particular note are the recommendations regarding consultation, which the Guidance states should include "representatives of different groups in the wider community, taking care to identify community leaders representing minority ethnic and religious groups, as well as groups representing pupils with special educational needs or disabilities." The Guidance directs schools to:

- Consider how the proposed uniform policy might affect each group represented in the school;
- Consider the concerns of any groups about the proposed policies, and whether the proposed policies amount to an interference with the right to manifest a religion or belief, or whether they are discriminatory. The school will need to weigh up the concerns of different groups and it might not be practical to accommodate fully the concerns of all groups; and

---

<sup>12</sup> As per Lord Hoffman, [2006] UKHL 15 at para 50

<sup>13</sup> *Sahin v Turkey*, (Application No 44774/98, 10 November 2005, unreported)

<sup>14</sup> As per Lord Bingham, [2006] UKHL 15 at para 32

<sup>15</sup> *R (on the application of X (by her father and litigation friend)) v Head teachers of Y School and Governors of Y School* [2006] EWHC 298

<sup>16</sup> Daily Telegraph, 29 April 2007 available at:

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/04/28/nring28.xml>

<sup>17</sup> See <http://www.dfes.gov.uk/consultations/conDocument.cfm?consultationId=1468>

- Document the consultation process undertaken, the points made by respondents, and the decisions taken in weighing up competing points of view <sup>18</sup>

The position taken in the UK and in the European Court can be contrasted with developments in Canada. In the case of *Multani v Commission scolaire Marguerite-Bourgeoys*,<sup>19</sup> an orthodox Sikh student had been banned from wearing a kirpan (a knife-like religious object). The Supreme Court of Canada found for the student, concluding that the ban on wearing a kirpan violated the student's freedom of religion under s2(a) of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter*) and could not be justified under the reasonable limits permitted under s1 of the *Canadian Charter*. The Court rejected the school's claim that the kirpan might be used to commit violent acts and held that "the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified". This relies on a test of proportionality, so that where two or more rights conflict, the least restrictive measure should be implemented to balance these rights.

## 6. Conclusion

The LIV is generally satisfied that the relevant section of the *Schools Reference Guide* (s4.8) represents an appropriate guidance for student dress codes. However, the LIV submits that the Department of Education should develop a more formal policy to guide Victorian schools on how best to develop and implement student dress codes in accordance with the *Human Rights Charter* and equal opportunity laws. The LIV submits that government policy and individual school dress codes on school uniforms must strike an appropriate balance between allowing students to exercise their rights – such as the right to practise their religion – and the limits to be placed on that right.

Schools should balance the rights of individual pupils against the best interests of the school community as a whole. This will differ between schools and therefore the LIV supports the current position that each school should decide on the exact form of their uniform. As highlighted in the UK draft Guidance, "the essential point is that schools should act fairly and reasonably", in the light of their human rights and anti-discrimination obligations.<sup>20</sup>

---

<sup>18</sup> *The Guidance* at 1.2, above n17

<sup>19</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S C R 256, available at <http://scc.lexum.umontreal.ca/en/2006/2006scc6/2006scc6.html>

<sup>20</sup> *The Guidance* at 1.2, above n17