

## *Equal Opportunity (Religious Exceptions)* *Bill 2016* Fact Sheet for Parents



### **Equal Opportunity Act - History of Amendments**

Religious freedoms are currently protected by way of exceptions and exemptions in equal opportunity or anti-discrimination legislation. The form of these exemptions has been largely consistent across all States/Territories and the Commonwealth for over thirty years – in the form currently used in the Victorian legislation, the Equal Opportunity Act.

The Department of Justice commenced a review of the exceptions and exemptions in the Act and released a Consultation Paper in February 2008. The consultation paper sought comments on the desirability of reform and modernisation of the exceptions and exemptions in the Act.

In response to this paper over 500 submissions were received by the Department. Christian Schools Australia (CSA) made a detailed submission to this review on behalf of member schools.

Prior to the Department releasing a report on its community consultation, the Scrutiny of Acts and Regulations Committee (SARC) was given a reference on the same subject matter by the Attorney General, effectively taking over the review process. SARC is a Parliamentary Committee and at the time of the Review was chaired by and had a majority of Labor members. SARC released a further 'Options Paper' as part of its approach. Once again CSA made a detailed submission.

After receiving over 1600 submissions the SARC provided a final report which recommended in relation to the employment of staff in Christian schools that:

#### ***'Recommendation 49 [page 64]***

*The Committee recommends that the exception in section 76 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.'*

The then Labor Government pre-empted the Review's report and ignored the Review's recommendations to introduce an 'inherent requirements' limitations in the exemptions for Christian schools. The amendments would have had the impact of removing our right to employ Christian staff without the threat of Government intervention in the process.

CSA wrote to the then Attorney-General in a letter dated 25 March 2010 pointing out our concerns and seeking some assurances on behalf of our schools. The Attorney-General's response was not sympathetic to our position and a campaign through CSA member schools in Victoria took place prior to the election in 2010.

As a result of this campaign and those of other groups the Coalition made a commitment to repeal the amendments before they took effect. Following the Coalition victory in the 2010 State Election they *repealed* the former Labor Government's proposed changes. Labor's changes were never enacted. There has never been an 'inherent requirements' test in Victorian law.

**Our position** has not changed from that outlined in the fax to the then Attorney General on 25 March 2010, namely that **the recommendation of the wide ranging SARC Review struck an appropriate balance between competing rights and should form the basis of the exemption in the Equal Opportunity legislation.**

## Recent Developments

Earlier this week the Andrews Government introduced the *Equal Opportunity (Religious Exceptions) Bill 2016* into Parliament. This Bill would again introduce an 'inherent requirements' limitations in the exemptions for Christian schools.

The amendments would remove the presumption that, as faith based educational institutions, our school ought to be able to employ staff on the basis of faith. Instead, the onus will be on the school to make a special case as to why this is necessary *for each position within the school*. This is a burdensome, overbearing and an unwarranted attempt by the state to make decisions about what are essentially matters of faith.

Should a faith-based school's decision to establish a position for which faith is a requirement be challenged, the onus will be on the school to prove the requirement, with little regard for the school's establishment as a faith-based institution. The matter will then be decided by a state instrumentality, the Equal Opportunity and Human Rights Commission or VCAT.

## Exemption FAQs

### Do Christian schools need an exemption from equal opportunity legislation?

Yes. This is the mechanism used to protect the right of religious freedom. It allows a sensible way of balancing religious freedom rights with other human rights such as equality and non-discrimination. These rights, which incidentally are derived from Christian principles, are the basis of equal opportunity legislation. The exemption recognises that sometimes one right needs to be balanced against another. To protect religious liberty, churches and religious institutions such as schools need to be able to make a choice in the employment of staff. Political parties, incidentally, are also exempt, and can choose staff who comply with their political beliefs.

### Why do Christian schools need to employ Christian staff?

Quite simply to provide a genuine Christian education! As widely recognised education is more than the mere transfer of knowledge. Education involves the formation of the whole person, including values and beliefs. This is recognised in the *Melbourne Declaration on Educational Goals for Young Australians* which outlined the agreed goals for education across Australia. It is essential in a Christian school committed to faith formation and a holistic education, that staff must share the beliefs and values of the school and live out those values and beliefs. Their example to students of the Christian life is essential in contributing to the spiritual formation of students.

### Is the exemption needed for all staff?

Yes. Education is not confined to the classroom. It occurs throughout the school community and students are well attuned to the interactions between and actions of all members of the school community. Just as it takes a whole village to raise a child it takes a whole school to educate a child.

### Do all religious schools rely upon the exemption?

No. Different faith communities undertake faith formation and religious instruction in different ways. Even within schools of a Christian tradition there are a range of approaches to communicating faith and a range of views on the role of schools in that process. This does not make one approach more correct than another or more deserving of protection, the approaches are just different.

## Will the 'inherent requirement' test stop Christian schools from employing only Christian staff?

To be frank, we don't know.

Our view is that, should it be required, schools will be able to provide the legal justification necessary to meet an 'inherent requirement' test. Statements by the former Equal Opportunity Commissioner, when Labor originally legislated for this test (see above) raised some concerns that, for some positions at least, there was a pre-conceived notion that the test could not be met. More recently these concerns have been reinforced by comments made by the Premier during that last election campaign who suggested, without any evidence or justification, that the test would be unlikely to be met in relation to staff apart from teachers. This view was echoed by the Attorney-General, Martin Pakula, on ABC radio on 1st September. He was also unable to provide clear answers to a number of scenarios put to him about how the legislation would work.

Given these views, and the obvious uncertainty created by these changes, there will undoubtedly be challenges and costly legal action involved. The result will be VCAT or the Courts, determining the 'inherent requirements' of roles within faith based organisations. **Why should this be necessary?**

It is acknowledged that there needs to be a balance between the fundamental right of religious freedom and the right to equality of opportunity – this is not in debate. The critical issues are how that balance is determined, and by whom? After an exhaustive review the former Labor Government's SARC Review determined that the appropriate balance would not involve any change to the existing exemption. **Why ignore the recommendation of an exhaustive review process?**

## What approach is taken in other states?

Federally and in every other State and Territory apart from Queensland the form of exemption in equal opportunity legislation or the equivalent is along the lines of the current exemption in Victoria.

The introduction of an 'inherent requirement' test would put Victoria out of step with other jurisdictions and provide potential conflict with the requirements under Commonwealth legislation such as the *Fair Work Act 2009*. Established by the ALP at the Commonwealth level this provided an exemption in a very similar form to the existing Victorian exemption. It makes no sense to create confusion and inconsistency.

## Are there lessons from the experiences of schools in Queensland?

Yes and no. There tends to be little litigation in this area as staff generally understand and agree with the approaches taken by Christian schools. Schools also tend to reach a settlement with aggrieved staff rather than engaging in long and complicated legal action.

Anecdotally some Christian schools have indicated that the form of the exemption has created public confusion about the rights of Christian schools to employ Christian staff. The lack of a clear and unambiguous exemption has led to some misunderstanding and conflict. In addition the potentially complex nature of litigation has led to increased costs to settle claims and a broadening of the scope for disgruntled staff to make a claim, in some cases with little justification.

### Do these changes only affect schools?

No. The Bill imposes similar requirements on all staff of all religious bodies except in relation to:

- the ordination or appointment of priests, ministers of religion or members of a religious order; or
- the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

Churches and para-church organisations will need to be able to justify the imposition of faith based requirements in relation to every single position apart from those within the above categories. If challenged, they may also be called upon to demonstrate whether current positions in the church fall into the categories above.

### Do any other organisations have an exemption?

Yes; political parties are a good example!

The current exemption in section 27 of the *Equal Opportunity Act 2010* (Vic) provides:

*'An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.'*

There is no requirement to demonstrate that political beliefs are an 'inherent requirement'. It is simply, and rightly, determined that all positions in such a position need to hold consistent political beliefs – all Christian schools are asking is the same treatment.