



1. Introduction

1. The Victorian parliamentary Scrutiny of Acts and Regulations Committee (**SARC**) is currently conducting an inquiry into whether any amendments should be made to the permanent exceptions in the *Equal Opportunity Act 1995* (Vic) (**the Act**).
2. The Act prohibits unlawful discrimination on the basis of protected attributes, including age, religious belief or activity, sex, race, sexual orientation, political belief, impairment and marital status. The Act also contains over fifty exceptions that permit discrimination on the basis of one or more of those attributes. Currently, exceptions are made for single sex clubs, sporting clubs and religious institutions, among others.
3. In addition to these exceptions, section 83 of the Act provides a mechanism to apply for, on a case by case basis, exemptions that effectively allow a person or organisation to engage in conduct that would otherwise constitute unlawful discrimination under the Act.
4. The Human Rights Law Resource Centre considers that the permanent exceptions, including the religious exceptions, should be removed from the Act and replaced by a regime that allows for temporary exemptions in cases where it is reasonable and proportionate to discriminate (similar to the section 83 temporary exemptions regime).
5. The model proposed ascribes value to all human rights, including the right to freedom of religion and the right to equality. Neither of these rights is absolute in law or in practice and, in cases of conflict, neither should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination would be allowed.
6. The remainder of this briefing paper is set out as follows:
 - (a) background to the exceptions review;
 - (b) amendments proposed by the HRLRC; and
 - (c) responses to arguments against reform.
7. Schedule one contains examples of how the right to freedom of religion has been balanced against other human rights in international and domestic jurisdictions.

2. Background

8. The Act contains the following religious exceptions:

s. 75(1)	Permits discrimination in appointing, training and selecting religious personnel.
s. 75(2)	Allows religious groups to discriminate where the action conforms with the doctrines of the religion or is necessary to avoid injury to the religious sensitivities of people of the religion. ¹
s. 76	Permits religious educational institutions (not necessarily under the control of a religious body, but established to be conducted in accordance with religious principles) to discriminate in accordance with their relevant religious belief or principles.
s. 77	Permits a person to discriminate if the discrimination is necessary to enable that person to comply with their genuinely held religious beliefs of principles

9. This briefing paper focuses on the exception contained in section 77 and argues that it is not a reasonable limitation on the right to equality and should not be included in the Act.
10. While the other religious exemptions are not considered in detail, the principles discussed in relation to section 77 are similarly applicable to an analysis of sections 75 and 76. Of course, given the different content of each of the exemptions, conclusions reached in relation to the sections 75 and 76 may differ.²

3. Proposed reform

3.1 Removal of Section 77

11. Section 77 permits discrimination if it is necessary to enable a person to comply with their 'genuinely held religious belief'. A 'religious belief' is defined in s.4 of the Act to include holding or not holding a lawful religious belief or view and also engaging in, not engaging in or refusing to engage in a lawful religious activity. When a religious belief is 'genuinely held' is not defined under the Act.
12. The Options Paper identifies that section 77 'purports to prioritise any claimed religious belief over any other human right, regardless of the situation and relative importance of the two'. The example provided is of taxi services being refused to people with guide dogs based on religious grounds.³

¹ Section 75(3) extends this protection to anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

² The Options Paper prepared for the SARC review suggests that, based on a limitations analysis (described below) section 75(1) should be maintained and sections 75(2)-(3) and 76 should be narrowed in scope. The Options Paper is available at http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/default.htm#options_paper

³ Options Paper, p. 130.

13. Section 77 has an extremely broad and potentially subjective application which means that, while it may allow for justifiable discrimination in some circumstances, it may also allow for discrimination that is not 'justified in a free and democratic society'.⁴ There is no scope for analysis or consideration of either the merit or the effect of the discrimination in question.

3.2 The right to freedom of religion is not absolute

14. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights. However, freedom of religion is not absolute in either law or practice.
15. Ordinary civil and criminal laws are applied to religious institutions and individuals. Australians can only be married to one person at a time; regardless of how deeply entrenched polygamy is in their religion.⁵ Similarly, the ritual use of narcotic substances and misleading and deceptive trade practices are prohibited even where the prohibition infringes upon religious belief.
16. On the other hand, there are some cases where concessions are made to religious groups and laws are altered to provide for religious freedom. For example, in some jurisdictions exemptions from animal cruelty laws allow religious groups to slaughter animals in a manner that is kosher or halal.⁶
17. The point is that neither full religious freedom in all circumstances, nor complete disregard for religious autonomy is expected or accepted in Australia. Rather, through discussion and debate, a line is drawn between those religious practices that can be accommodated in a fair and functioning society and those which cannot. Drawing this line is not a simple or uncontroversial exercise, but it is a legitimate and important subject for discussion and debate. Currently s.77 precludes this discussion in the context of religious discrimination and equality.
18. It is accepted that the proposed amendment to s.77 may result in a limitation of the right to manifest religion. However, international and domestic human rights law allows for limitations on the right to manifest religion and belief.⁷ In this context any discussion of whether legislation is in breach of the right must consider whether a limitation is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' (under the

⁴ Section 7(2) of the Victorian Charter of Human Rights and Responsibilities states that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.

⁵ Carolyn Evans and Beth Gaze, "Between Religious Freedom and Equality: Complexity and Context" *Harvard International Law Journal* Volume 49, April 21, 2008; Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No. 167 (2007)

⁶ Evans and Gaze, *ibid*, p. 43.

⁷ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 7(2); *International Covenant of Civil and Political Rights*, art 18(3).

Charter);⁸ or 'prescribed by law and ... necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others' (under the ICCPR).⁹

19. This general approach to the limitation of freedom of religion in civil law has is reflected in section 7 of the Second Vatican Council's Declaration (*Dignitatis Humanae*) which provides that (emphasis added):¹⁰

The right to religious freedom is exercised in human society: **hence its exercise is subject to certain regulatory norms.** In the use of all freedoms the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all. Men are to deal with their fellows in justice and civility.

Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. **It is the special duty of government to provide this protection.**

20. This briefing paper takes as a point of departure the principle that religious freedoms may, in some circumstances, be limited. The argument put forward here is that, in some cases at least, a limitation should allow for the pursuit of equality.
21. Currently, section 77 sets up a regime whereby religious freedom (so long as it is exercised in pursuit of a 'genuinely held' belief) can't ever be curtailed in the name of equality. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.

3.3 The Right to Equality

22. There is broad recognition of the importance of equality in Australian society. In addition, non-discrimination constitutes a basic and general principle relating to the protection of all human rights.¹¹ Australia is obliged under several international human rights instruments to ensure full and effective legislative protection of the right to equality and freedom from discrimination.¹² In addition, recent studies have shown that equality not only increases social welfare, but is also associated with increased growth and prosperity.¹³

⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

⁹ *International Covenant of Civil and Political Rights*, above n 10, art 18(3).

¹⁰ Second Vatican Council's Declaration, *Dignitatis Humanae*, available at <http://www.christusrex.org/www1/CDHN/v10.html>

¹¹ HRC, General Comment 18, Non-discrimination, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

¹² Including *International Convention on the Elimination of All Forms of Racial Discrimination*,

opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 UNTS 3 (entered into force January 2, 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981);

23. Human rights principles take a sophisticated approach to equality and non-discrimination. This briefing paper does not attempt to provide a comprehensive study of the various theoretical frameworks of equality.¹⁴ However, a basic understanding of the different conceptions of equality and non-discrimination recognised by international human rights law is necessary in order to appreciate the nature of the human right to equality. The three dominant models of equality are:
- (a) *formal equality*, which entails neutral treatment in all circumstances;¹⁵
 - (b) *equality of opportunity*, which recognises that all people and groups do not necessarily have the same experiences and should therefore not be treated identically in all circumstances;¹⁶ and
 - (c) *equality of results*, which focuses on equality of outcomes and requires the transformation of the underlying structures that are the cause of inequality.¹⁷
24. It is generally acknowledged in human rights laws that each model may contribute to the promotion of equality. However, the focus of human rights instruments is on eliminating all forms of discrimination so that substantive equality, which requires equality in practice and requires the elimination of the structural causes of inequality, might be achieved.¹⁸
25. It is notable that many religious groups see equality as an integral theological principle and a great number of these groups do important work which promotes substantive equality.

3.4 Inclusion of a Mechanism for Balancing Rights

26. The removal of section 77 from the Act (and the inclusion of a mechanism for balancing rights) would not result in a situation where a person or organisation could never discriminate in order to comply with their religious beliefs. Rather, it would mean that before such discrimination is deemed permissible, regard must be had to the particular circumstances of the case and an

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

¹³ Some of these are considered in the UK Equalities Review, see *The Equality Review, Fairness and Freedom: The Final Report of the Equalities Review* (2007), p 133-138.

¹⁴ See ALRC Report, above n.8; Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights", in I. Boerefijn et. al. (eds.). *Temporary Special Measures* (2003) 111.

¹⁵ Graycar and Morgan, "Thinking about Equality", *27 University of New South Wales Law Journal* 833 (2004) at 834, criticise this model because "[h]istorically, women and men have not been treated identically. Treating them exactly the same now may only reinforce the already existing disadvantage of women. This model also has nothing to offer where there is no comparable male experience by which to claim women's right to identical treatment. Nor can it respond to structural disadvantages faced by women."

¹⁶ Graycar and Morgan, *ibid* at 835, criticise this model because "different treatment has more often meant less favourable treatment for women... women can be further disadvantaged because discriminatory practices will be justified by resort to women's differences with men."

¹⁷ Fredman, Sandra Fredman, "Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights", in I. Boerefijn et. al. (eds.). *Temporary Special Measures* (2003) 111.

¹⁸ See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights*, 2009.

- effort must be made to strike an appropriate balance between competing rights and interests, similar to that which allows for temporary exemptions under section 83 of the Act.
27. The notion of balancing competing rights and interests is not radical. In fact, it is a fundamental concept embedded within the international and domestic legislative instruments protecting human rights. Schemes for limiting human rights to allow for the realization of other rights or public goods are an integral part of the human rights framework and have been successfully applied for decades.¹⁹
28. Legislative mechanisms for balancing rights commonly provide that a right may only be limited in circumstances where the limitation:
- (a) has a **legitimate aim** (the limitation must reflect a concern that is pressing and substantial in a free and democratic society and must have a specific purpose, rather than being based on a general concern);
 - (b) is **reasonable** (the limitation must not be arbitrary, irrational or ineffective); and
 - (c) is **proportionate** (there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised).
29. Action in accordance with a genuinely held religious belief will generally constitute a legitimate aim, so the question becomes whether the discrimination at issue is reasonable and proportionate to that aim.²⁰ This question cannot be answered by reference to the broad class of actions deemed permissible under section 77. The answer would be entirely different for, say, the refusal of a landlord to rent premises to a man on the basis that he wore an earring, compared to the refusal of a Christian church to hire a Satanist to teach Sunday school classes.²¹
30. It is anticipated that under this paper's proposal that some forms of discrimination which are currently permissible under section 77 will pass a human rights-based limitations analysis. However, others will not. Schedule 1 to this briefing paper contains a discussion and analysis of six real life cases where the right to freedom of religion has been balanced against other rights in the manner described above.

¹⁹ See for example, the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*; section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

²⁰ See, for example, *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada) and *R (on the application of Begum (by her litigation friend Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School* (Appellants) [2006] UKHL 15 (United Kingdom)

²¹ In *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998) the (then) Victorian Anti-Discrimination Tribunal held that the refusal to allow males to wear earrings 'conformed with religious doctrines' and therefore did not constitute discrimination on the basis of sex.

4. Response to Arguments Against Reform

4.1 Perpetuation of a hierarchy of rights

31. It has been suggested that the removal of section 77 would perpetuate a trend towards a hierarchy of rights in which some rights are given precedence over others.²²
32. The removal of section 77 would have precisely the opposite effect. The only way to avoid the establishment of such a hierarchy is to ensure that neither the right to freedom of religion nor the right to equality act as an automatic and pre-determined trump in cases of conflict, regardless of the circumstances.

4.2 False distinction between 'core' and 'non-core' religious functions

33. Some of the arguments concerning the repeal of the religious exceptions consider the extent to which the protected discriminatory activity is 'internal' or a 'core function' of the religion, as opposed to an 'extended activity' of the religious organisation.²³ A core function usually refers to the observance, practice or teaching of a religion. An external function may involve the provision of a public service (such as welfare services) and possibly the receipt of public funds.
34. This distinction has been challenged on the basis that '[i]n reality, people of faith do not make a distinction between private and public, or 'core' and 'peripheral' observance... For a Christian, how one lives in the world is as much a 'religious observance' as ritual acts conducted in the privacy of a home or locked chapel.'²⁴
35. This argument has some merit. Just as human rights advocates will argue that rights must be capable of practical realisation rather than merely formal recognition, religious groups place significant emphasis on the manifestation of their religious beliefs beyond private worship.
36. However, the distinction between 'core' and 'non-core' religious activities is significant not because it delineates vital and non-vital religious observance. The line dividing public and private is relevant because it marks the point at which the religious beliefs of one person or group impact upon other people and society generally. When religious practice affects those who do not subscribe to the religion, the Government's regulatory capacity and responsibilities are increased.²⁵

²² Mark Durie *Changes to the Victorian Equal Opportunity Act 1995: Options for Changing Exceptions and Exemptions* (copy on file with author).

²³ Options Paper, p. 115.

²⁴ Mark Durie, above n.22.

²⁵ See for example, John Stuart Mill's statement "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it ...". 'On Liberty' in Mary Warnock (ed), *Utilitarianism*, Collins/Fontana, London, 1962, at p.205.

37. Consider, for example, a State in which single women are legally entitled to access IVF treatment. If IVF is only available at a small number of medical facilities and those facilities refuse, based on a religious principle, to treat single women, then the discriminatory manifestation of religious belief has a significant impact on women's legal entitlements. If a facility also receives public funds then a further objection is that single women contribute through their taxes, but are nevertheless excluded. The State's role in resolving this conflict is surely greater than in a case where a single woman is prohibited from participating in a particular religious ceremony.
38. The recognition of a distinction between public and private activities does not mean acceptance of a system in which all public activities are denied the protection of freedom of religion. It simply means that the impact of these activities on others will be a relevant factor in a balancing exercise.
39. For example, a religious school receiving public funds would not be prevented from teaching religious classes. On the other hand, a rural church-run emergency accommodation facility which received public funding would not be entitled to evict a lesbian into homelessness on the basis of her sexuality. In each case the impact of protection of religious freedom is vastly different in terms of harm done, the effect on those who don't subscribe to the religion, and the entrenchment of harmful stereotypes.

4.3 Inappropriate subject for judicial consideration

40. An additional concern with the replacement of section 77 with a balancing mechanism is that it is ultimately a non-religious body (for example, VCAT) that will be the final arbiter of whether a discriminatory act or policy is a permissible limitation on the right to equality.
41. Under the existing s.77, the same non-religious body is called upon to determine whether a particular belief is a 'religious' belief and also whether it is genuinely held. Such determinations involve no less a complicated exercise than the balancing exercise proposed in this paper.²⁶
42. It is true that in some circumstances the limitations analysis will be a complex exercise (in others it will be fairly clear cut). It is also true that judges are not experts in all the areas of religious doctrine that may become relevant subjects for consideration. Nevertheless, in a pluralist society the independent judiciary is regularly called upon to consider complex matters in which they are not expert.²⁷ Judges make difficult decisions in areas such as child custody, testamentary matters and Native Title. They are not unfamiliar with the complexities of dealing with enormously important and intensely personal issues.

²⁶ See for example Latham CJ's observations in the *Jehovah's Witness* case (1943) 67 CLR 114 at 123 in relation to defining religion for the purposes of s.116 of *The Constitution* that such a task was 'difficult, if not impossible'.

²⁷ This is facilitated in the adversary system by allowing parties to call expert witnesses to provide evidence on matters in which ordinary lay persons, and the Tribunal itself, do not have expertise.

43. In any case, the only alternative is that the issue is finally determined by parliament (which, incidentally is not expert in religious doctrine either). If this happens then no scope is allowed for the balancing of religious freedoms against other rights, the undesirability of which is considered in section three, above.

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Schedule 1 – Comparative Cases

4.1 **Multani v Commission scolaire Marguerite-Bourgeoys [2006] 1 SCR 256 (Canada)**

In this case, a young boy was allowed to carry his kirpan to school in accordance with his religious beliefs and against school policy. It was determined that a total ban on carrying the kirpan was a disproportionate response to unsubstantiated concerns about safety.

44. In 2001, a 12 year old child was playing at school when he accidentally dropped his kirpan. A kirpan is made of metal and resembles a dagger and must be worn at all times by devout Sikh males. Following the incident, the school board allowed the child to wear the dagger if safely sealed inside his clothing. However the governing board revoked the compromise on safety grounds and forbade the child from wearing a kirpan at school. The child's parents then withdrew him from the public school system because the ban was irreconcilable with the tenets of their faith.
45. The Supreme Court of Canada struck down the order of the school board and held that the blanket prohibition of the kirpan infringed the child's freedom of religion protected by section 2(a) of the Canadian *Charter of Rights and Freedoms* (**Canadian Charter**) and that this infringement cannot be justified in a free and democratic society, as is required under section 1 of the Charter.
46. In arriving at this decision, the Supreme Court first considered whether the child believed that the practise of wearing the kirpan was connected to a religious belief. It held that this was the case, as Orthodox Sikhism considers the carrying of a kirpan to be necessary and the child sincerely believed that he must carry a metal kirpan at all times. The Supreme Court held that the interference with the child's freedom of religion was considerable because he was forced to leave the public school.
47. Having identified a significant Charter infringement, the Court then turned to a limitations analysis, according to section 1 of the Charter, as summarised below.

(a) Importance of the objective

48. The school board's main concern was school safety and eliminating weapons at schools. The Court held that the standard of safety required at a school is not the highest degree of safety, which would require the banning of scissors and other objects and would be unreasonable. The Court held that schools require a reasonable degree of safety and that the objective of achieving this is undeniably pressing, substantial and important.

(b) Proportionality

49. The Supreme Court then considered whether the total ban on carrying the kirpan was a proportionate response to the aim of ensuring a reasonable standard of school safety. In determining the proportionality of the limitation, the Court considered the following issues:
- (1) Whether there was a rational connection between the ban of the kirpan and the aim of ensuring school safety.
 - (i) Evidence was given that there had never been a school incident involving kirpan-related violence, and there was no proven link between children wearing the kirpan to school and decreased school safety.
 - (ii) Evidence was also submitted about the claimant's non-violent nature and his religious belief that the kirpan must not be used to harm others.
 - (2) Whether the total ban is the least intrusive way of achieving the aim, or whether there are reasonable alternative solutions.
 - (i) The claimant was prepared to comply with various conditions if allowed to wear the kirpan, such as wearing the kirpan sealed beneath his clothing. If the claimant complied with these conditions, it was considered unlikely that the kirpan could be stolen.
 - (ii) The Court held that the school board could deal with many of its concerns – including concerns about school safety, a proliferation of weapons in schools and the potentially negative impact of kirpans on the school environment – through education about the importance of freedom of religion, which would be beneficial in any event.

(c) Effects of the measure

50. The Court held that '[a]n absolute prohibition [on wearing the kirpan] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others'.²⁸
51. Following a detailed human rights limitation analysis, the Supreme Court concluded that the school board's total ban of the kirpan was not a proportionate response, and that the student should be allowed to wear the kirpan to school subject to certain conditions.

4.2 Christian Education South Africa v Minister of Education, 2000 (4) SA 757 (South Africa)

In this case, corporal punishment was prohibited in schools despite claims that it was part of a protected religious conviction. The restriction on religious belief was considered minimal and significant weight was placed on the government's obligation to protect pupils from degradation and indignity.

²⁸ *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, [78].

The South African Parliament passed the Schools Act, which prohibited corporal punishment in schools. Christian Education South Africa (**CESA**), an umbrella body of 196 independent Christian schools in South Africa, argued that this ban violated the rights of parents of children in independent schools who, based on their religious convictions, had consented to corporal punishment.

52. The Constitutional Court of South Africa assumed, without deciding, that CESA's religious rights were limited by the prohibition of corporal punishment in schools. The Court then considered whether the limitation was reasonable and justifiable under section 36 of the South African Bill of Rights, the limitations clause.

53. The Court concluded that, weighing the different factors together, any limitation imposed by the *Schools Act* on the right of parents to freedom of religion was reasonable and proportionate. In its limitations analysis, the Court came to the following conclusions.

(a) The nature of the rights and the scope of their limitation

54. The impact of the legislation on the right to religious and parental practices was, in the view of CESA, far from trivial. However, the *Schools Act* did not deprive parents from the right and capacity to bring up their children according to their Christian beliefs, it merely prevented them from empowering schools to administer corporal punishment.

(b) The purpose, importance and effect of the limitation, and the availability of less restrictive means

55. The South African government has an obligation to protect pupils from degradation and indignity, and to take all appropriate measures to protect children from violence, injury or abuse in accordance with the United Nations Convention on the Rights of the Child. Taking this into account, as well as South Africa's history, involving violence against protesting youth, and the prevalence of child abuse, the Court held that the government has a powerful obligation to act to reduce violence in public and private life.

(c) Proportionality analysis

56. The Court held that the total ban of corporal punishment was necessary and proportionate to the aim of reducing violence because the ban:

was part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.²⁹

²⁹ *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757, [50].

57. Anything less than a total ban would potentially undermine '[t]he whole symbolic, moral and pedagogical purpose of the measure.'³⁰ The Court also noted the inherent difficulty of monitoring corporal punishment.

4.3 YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 (4 May 2009) (Australia)

In this case, a public pool was allowed to open for women-only swim sessions. Discrimination on the basis of sex was permitted in order to allow for freedom of religion.

58. Due to their cultural and religious values and beliefs, Muslim women in the community were not able to participate in mixed male/female swimming sessions. YMCA wanted to open one of its recreation centres on Sunday evenings, outside normal operating hours, for women-only swimming sessions. The centre would only be staffed by women during those hours.
59. YMCA applied for an exemption from the *Equal Opportunity Act 1995* (Vic) (**the Act**) to allow it to conduct women-only swimming sessions at the centre. YMCA brought the case under s 83 of the Act, which authorises the Victorian Civil and Administrative Appeals Tribunal (**VCAT**) to grant temporary exemptions to facilitate equality of opportunity and elimination of discrimination.
60. VCAT granted the exemption, allowing the YMCA to hold its women-only swimming sessions. In arriving at this decision, VCAT first considered whether the proposal invoked a ground of prohibited discrimination under the Act. In this case, the proposal involved a possible form of discrimination against men.
61. Having established a possible form of discrimination prohibited under the Act and a limitation on rights, VCAT then weighed the interests served by the proposed exemption against the interests served by the prohibitions under the Act. The following were considered in this limitations analysis:
- (a) Purpose of the proposed exemption**
62. The purpose of the proposed exemption was to give Muslim women the same opportunities that were currently available to men and women who did not hold these beliefs and were therefore able to access the Centre during public opening hours. The exemption was designed to promote equality of opportunity for a particular group of women.
- (b) Whether the goal could be achieved in a less restrictive way**
63. VCAT held the aim of the proposed exemption could not be achieved in a less restrictive way. The proposed exemption did not impact on the use of the centre's facilities by both men and women during ordinary public opening hours.

(c) Financial impact on the centre

³⁰ Ibid.

64. VCAT held the proposed exemption did not impact the centre financially because women who will access the facility out of hours under the exemption must also pay the same fees.
65. VCAT concluded that, weighing the different factors together, any limitation imposed by the proposed exemption to the Equal Opportunity Act on human rights found in the *Charter* was reasonable.

4.4 R (on the application of Begum (by her litigation friend Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15 (United Kingdom)

In this case, a female Muslim student was prohibited from wearing a strict form of attire because the dress code, which was designed to promote social inclusion, had already been reasonably adapted to suit religious beliefs. It was significant that the school's dress code had been developed after extensive consultation with the staff, parents, students and imams.

66. For religious reasons, a Muslim student sought to attend school wearing a form of dress known as the jilbab rather than the shalwar kameeze, which was allowed under the school's uniform policy. The school refused to allow her to wear the jilbab on the basis that the uniform policy, which had been developed in consultation with staff, students and religious leaders, was reasonable in taking into account cultural and religious concerns.
67. The student claimed that the school unjustifiably limited her right to manifest her religious beliefs under article 9 of the European Convention on Human Rights ('ECHR') and violated her right to an education under article 2 of the First Protocol to the Convention.
68. The Court engaged in a limitations analysis, considering whether there had been an interference with manifestation of religious belief and whether it was justified.
69. The House of Lords unanimously held that even if it was accepted that the school's action constituted an interference with the student's right to manifest her religion, the limitation was justifiable.³¹ The following factors were considered:
- (a) Prescribed by law**
70. The Court held the dress code was prescribed by law. The school authorities had statutory authority to lay down rules on uniform, and those rules were very clearly communicated to those affected by them.
- (b) Legitimate purpose**
71. The respondent student did not suggest that the rules were not made for the legitimate purpose of protecting the rights and freedoms of others.

³¹ For further consideration of 'justification' under article 9, see *Sahin*, *supra* note 6; *Gorzelik and Others v. Poland*, 40 Eur. H.R. Rep. 4 (2005); *R (X) v. Governors of Y School*, *supra* note 6; *Surayanda v. Welsh Ministers* [2007] EWCA (Civ) 893.

72. Further, teachers and parents were concerned that acceptance of the jilbab as a permissible variant of the school uniform would lead to undesirable differentiation between Muslim groups according to the strictness of their views. They felt the school policy was necessary to promote inclusion and social cohesion. The school had in the past suffered the ill-effects of groups of pupils defining themselves along racial lines, with consequent conflict between them.

(c) Proportionality

73. The Court recognised the importance of rights protected by article 9, the need in some situations to restrict freedom to manifest religious belief, the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness, the need for compromise and balance, the role of the state in deciding what is necessary to protect the rights and freedoms of others, the variation of practice and tradition among member states, and the permissibility in some contexts of restricting the wearing of religious dress.

74. It was significant that the school's dress code had been developed after extensive consultation with the staff, parents, students and imans and the school was entitled to consider that the uniform code protected the rights and freedoms of others.

75. Finally, the Court determined that the respondent had not been denied access to education. The appellants were entitled to require the respondent to comply with the uniform code and there was nothing to suggest that the respondent could not have found an alternative school which permitted her to wear the jilbab. The Lords observed that there were three schools in the area where the wearing of the jilbab was permitted.

76. In deciding the case, the House of Lords affirmed that what constitutes interference with the manifestation of religious belief depends on the particular facts and circumstances of the case, including the extent to which an individual can reasonably expect to be at liberty to manifest his beliefs in practice. The interference was justified because the school had taken pains to devise a uniform policy that respected Muslim beliefs and did so in an inclusive, unthreatening, and uncompetitive way.

4.5 Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47 (Canada)

In this case, Jewish condominium owners were allowed to construct succahs on their balconies contrary to the ownership agreement because to hold otherwise would be a significant interference with their freedom of religion.

77. Condominium owners, who were Orthodox Jews, constructed succahs on their Montreal condo balconies to celebrate the autumn festival of Sukkot. The condominium ownership agreement prohibited decorations and constructions on balconies and proposed an alternative communal structure in the garden. The condominium corporation filed an application for a permanent injunction, which was granted by the lower court. The Jewish apartment owners

claimed a right to freedom of religion under the Quebec *Charter of Human Rights and Freedoms*.

78. The Supreme Court of Canada held the stipulations of the ownership infringed upon the condo owners' freedom of religion under s 3 of the Quebec *Charter*.
79. In the first stage of analysis, the Court determined that the owners' right to religious freedom was triggered. The Court stated that freedom of religion under the *Charter* does not require a person to prove that his or her religious practices are supported by any mandatory doctrine of faith. The first requirement is simply that there is a sincere and honest belief. In this case, the Court held that expert evidence of the owners' sincere individual belief concerning the commandment of dwelling in a succah sufficed.
80. In the second stage of analysis, the Court examined the degree of interference with the right to freedom of religion. It found that the prohibition on the succahs was a non-trivial interference with religious freedoms, determined by the context.
81. Third, the Court considered whether the non-trivial limitation on the exercise of freedom of religion could be justified. The condo corporation claimed the succahs interfered with the co-owners' rights to the peaceful enjoyment of their property and to personal security (claiming succahs were a possible fire hazard). Furthermore, it was alleged that the succahs affected the economic and aesthetic value of the property. These intrusions were found to be minimal.
82. Overall, the burden on the Jewish condo owners as a result of the operation of the clauses was found to be evidently substantial. The condo owners proved that the alternatives of either imposing on friends and family or celebrating in a communal succah would lead to distress and detract from the celebration of the occasion.
83. Preventing the Jewish owners from building their own succahs constituted a non-trivial interference. When this interference was balanced with competing interests, it was found that religious freedoms should take precedence.

4.6 *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561 (Canada)

In this case, because of a bonafide occupational safety requirement, an employee who refused to wear a hard hat because of his religious beliefs failed in his claim of discrimination.

84. A railway introduced a work rule that all employees wear a hard hat at a particular work site. A Sikh employee refused to comply because his religion did not allow the wearing of headgear other than the turban. His employment ceased since the railway refused to make exceptions.
85. In a split decision, the Supreme Court of Canada ruled that the employee was not discriminated against. The majority found that the hard hat requirement was a bona fide occupational requirement, leaving no need to accommodate. Since s 14(a) of the *Canadian Human Rights Act* clearly states that no discriminatory practice exists where a *bona fide* occupational requirement is established, applying such a requirement to each individual with

varying results would rob the requirement of its character as an occupational requirement and would ignore the plain language of the section. Since there was a bonafide occupational requirement, there could be no claim of discrimination, not even adverse affect discrimination.

4.7 *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F.2d 1362, (United States Court of Appeals for the Ninth Circuit)

In this case, the Court stated that because there was a compelling interest in eliminating discrimination and only minimal interference with the practice of religion, a religious school could not discriminate in providing health benefits to its employees.

86. A religious school provided health insurance benefits only to “head of household” employees, interpreted to mean single persons and married men. One of the tenets of the church sponsoring the school held that in any marriage, the husband is the head of the household and is required to provide for that household. The health insurance policy related to this belief.
 87. The Equal Employment Opportunity Commission argued this was a form of discrimination in violation of *Title VII* and the *Equal Pay Act*. The school denied violation and also claimed a right to the freedom of religion under the establishment and free exercises clauses of the First Amendment, which prevent the government from interfering with the establishment and free exercise of religion respectively.
 88. Although the school denied violation, arguing that the religious exemption found in s 702 of *Title VII* prohibits interference with the employment practices of religious institutions, the Court of Appeals held otherwise. Religious employers were not automatically immune from liability for all discrimination based on sex.
 89. Next, the Court determined that if the school was required to provide health insurance benefits to all employees, regardless of their sex and marital status, the right to freedom of religion under the free exercise and establishment clauses of the First Amendment would not be violated. To determine whether there was a breach of the free exercise clause of the First Amendment, the Court considered:
 - (a) the magnitude of statute’s impact on exercise of a religious belief and held that interference with religious belief was minimal at best; and
 - (b) Existence of compelling state interest justifying burden imposed upon exercise of religious belief, with the Court stated a compelling state interest in ending discrimination outweighed any minimal interference with religious belief.
5. Because of the existence of a strong compelling state interest in eradicating discrimination, coupled with the fact that eliminating the employment policy involved would not interfere with religious belief, and only minimally, if at all, with the practice of religion, the Court ruled for the Equal Employment Opportunity Commission.