

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
DISCRIMINATION AND HUMAN RIGHTS LIST
AT MELBOURNE

H227/2016

BETWEEN:

SAGARDEEP SINGH ARORA
Applicant

MELTON CHRISTIAN COLLEGE
First Respondent

**VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS
COMMISSION**
Intervener

**INTERVENER'S SUPPLEMENTARY SUBMISSIONS CONCERNING THE
OPERATION OF S 39 OF THE *EQUAL OPPORTUNITY ACT* (2010) VIC**

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A. Introduction & Summary

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought and was granted leave to intervene in this proceeding under section 159 of the *Equal Opportunity Act* 2010 (Vic) (**EO Act**) by Order of the Victorian Civil and Administrative Tribunal (**Tribunal**) dated 12 July 2017. It filed submissions on 17 July 2017.
2. On 24 July 2017 it was informed that the Respondent sought to rely upon s 39 of the EO Act. These submissions are made in relation to the availability of that exception.
3. Section 39 of the EO Act *relevantly* provides:

An educational authority that operates an educational institution or program wholly or mainly for students of a particular... religious belief... may exclude from that institution or program –

 - (a) people who are not of the particular sex, race, religious belief, age or age group; or

...

4. Section 39 operates as an exception to part of the operation on the prohibition on discrimination in s 38.
5. It is necessary to consider the scope and effect of s 39 operation only if the Respondent is found to have discriminated against the Applicant, and only if that discrimination was by way of the exclusion of the Applicant. It should be noted at the outset that s 38(1) prohibits discrimination in a number of ways. It is not limited to the exclusion of the person.
6. In the event that the Respondent is found to have discriminated against the Applicant by excluding him from the school, the question of the exception in s 39 applies.
7. For the reasons explored in detail below, the Commission submits that s 39 has no application to the circumstances of this case.

B. The Scope of section 39

8. At the outset, the Commission notes that the principles relevant to the operation of the exception in s 39 are the same that were identified in relation to s 42, in particular:
 - (a) the Respondent bears the burden of establishing that an exception applies, based on the evidence¹;
 - (b) exceptions in discrimination legislation should generally be construed strictly, or in accordance with the ordinary meaning of the words²
9. Section 39 is a provision that is intended to serve the welfare and advancement of particular groups where discrimination would otherwise be the by-product of that advancement³. It is not intended to provide a sphere within which discrimination law has no effect. It is through this lens that the exception must be examined.
10. There are two key difficulties with the Respondent's reliance on s 39:
 - (a) the exception covers only religious beliefs, not religious activities; and

¹ EO Act s 13(2).

² Primary submissions of the Commission, at [23], and the authorities cited therein.

³ The explanatory memorandum accompanying the introduction of this provision states that: "The purpose of this limitation is to allow schools to provide educational settings targeted towards the **needs** of particular groups" (emphasis added): *Equal Opportunity Bill 2010*, Explanatory Memorandum, page 29, clause 39.

- (b) the exception does not permit the exclusion of non-Christians in a selective or discriminatory way.

Religious Beliefs and Religious Activities

11. The EO Act prohibits discrimination on the basis of an attribute. The attributes in question are listed in s 6. The attribute in s 6(n) has two aspects:
 - (a) religious belief; or
 - (b) religious activity.
12. Both are a protected attribute.
13. The first characteristic of s 39 is that it applies to permit the exclusion of people of a particular religious belief. It does not authorise the exclusion of a person for particular religious activity.
14. In most cases, it would be expected that the distinction between belief and activity would not lead to different results. However, in this case the clear evidence of the Respondent is:
 - (a) they do not exclude people with Sikh religious beliefs;
 - (b) they do not exclude anyone with non-Christian religious beliefs.
15. The Applicant's case, if proved, would establish that the religious activity of the Applicant is the reason that he cannot attend the school.
16. Excluding a person on the basis of their religious activity falls outside the scope of section 39.

Section 39 does not permit discriminatory exclusion

17. Section 39 identifies two groups:
 - (a) the students of a "particular religious belief" for which the education institution is operated (the **Included Group**);
 - (b) the people who are not of the "particular religious belief" for which the education institution is operated (the **Excluded Group**).
18. The Included Group in this case are said to be Christians. If it is established that an Educational Authority operates the educational institution for wholly or

mainly for Christian Groups, then it may exclude from the school the Excluded Group.

19. The Excluded Group are people who are not Christian. That is the population that can be excluded. The words of s 39 do not permit discrimination *within* that group. Put another way, s 39 does not create a veil behind which the Included Group may discriminate as it sees fit. It is not open to the Respondent to:
 - (a) discriminate within the Excluded Group, so that some Sikh's are excluded and others are not;
 - (b) discriminate within the Excluded Group so that some (non-Christian) religious beliefs are excluded and others are not. For example, excluding Sikh's but not Hindus would be an impermissible expansion of the terms of the exception.
20. This construction is supported by the words of s 39 itself: it permits exclusion of people who **lack** a particular religious belief, it does not authorise the exclusion of people who **have** a particular religious belief.
21. The approach advanced above is consistent with the clear words of the statute, even absent the strict approach that is generally applied to the construction of exceptions. Such a construction is all the more appropriate in light of the central intention of the provision being to promote advancement and welfare rather than to facilitate exclusion.

C. Conclusion

22. The Educational Institution in question has a majority of students who are non-Christian.⁴ Those students pay fees, and facilitate the operation of the school as a whole.
23. The construction advanced by the Respondent is one that is broad and inconsistent with the words of the provision, in particular:
 - (a) Section 39 does not provide that an exception applies to the manifestation of a religious belief;

⁴ Witness statement of David Gleeson, [45].

- (b) Where the criteria for the provision are met, s 39 does no more than permit Christians to exclude non-Christians. It does not authorise or permit the educational authority to discriminate between categories of non-Christians. Such an approach could entrench disadvantage in particular communities, and does nothing to advance the purposes of the EO Act.
24. The Respondent's construction sits uncomfortably with its positive obligations to eliminate discrimination⁵ and with the evidence that has been led in the proceedings.
25. The Commission submits that s 39 of the EO Act does not operate in the circumstances of this case.

E A Bennett
Counsel for the Commission

25 July 2017

⁵ EO Act s 15.