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 SUBMISSIONS

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A. INTRODUCTION AND 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.

2. To the extent that the Commission makes submissions in relation to the operation of the *Charter of Human Rights and Responsibilities Act* 2006 (**Charter**), we note that the Commission has a statutory right of intervention under section 40 of the Charter in relation to proceedings before a court or tribunal where a question arises with respect to the interpretation of a statutory provision in accordance with the Charter.

3. The Commission's submissions are directed to the questions of law relevant to the Charter and the proper interpretation of the EO Act.

4. The complaint in this proceeding concerns allegations of discrimination on the basis of religious discrimination in the area of education.

5. The Commission confines its submissions in this case to:

   (a) The operation of the EO Act, and in particular any relevant exceptions raised by the First Respondent; and

   (b) the application of the Charter to the interpretative task of the Tribunal by the operation of s 32(1) of the Charter.

6. None of the submissions of the Commission are relevant in the event the Tribunal finds, as a matter of fact, that no discrimination took place. The Commission takes no position in relation to the facts before the Tribunal.

7. In summary, the Commission submits that:

   (a) The general prohibition on discrimination in s 38 of the EO Act is to be read in a broad and beneficial manner, so as to broaden the protection afforded to individuals seeking to access education in Victorian schools on an equal footing.

   (b) Section 38(1) is the appropriate section that applies in this case as the Applicant is a "person" not a "student".

   (c) The specific exception provided for in s 42 of the EO Act is to be read in a narrow and confined way, having regard to the circumstances in which it is intended to have operation. That interpretation is informed by the interpretive obligation in s 32 of the *Charter*.

   (d) Section 42(1) of the EO Act provides an exception in relation to the operation of s 38(2), but does not provide an exception to the discrimination prohibited by s 38(1).

   (e) In the alternative, if the Tribunal finds that section 42 operates as an exception to what would otherwise be unlawful discrimination under section 38(1), the Commission submits that the exception must be interpreted narrowly and in accordance with human rights under the Charter.

8. The reasons for this position are outlined in detail, below.

B. The Legislative Framework

The EO Act

9. The EO Act identifies the circumstances in which discrimination occurs:

   (a) either directly or indirectly (EO Act, s 8 and 9 respectively);

   (b) on the basis of a protected attributed (as set out in s 6 of the EO Act);

   (c) in a protected area of public life (set out in Part 4 of the EO Act); and

   (d) in a prohibited way (in this case, it appears that s 38(1) is relied upon by the Applicant).

10. It is not clear from the Applicant's case whether the allegation of discrimination relates to direct (section 8 EO Act) or indirect discrimination (section 9 EO Act).

11. Indirect discrimination[1] requires the identification of a facially neutral requirement, condition or practice that has the effect of disadvantaging the complainant because of his attribute of religious belief or activity. It appears that the uniform policy at Melton Christian College (**MCC**) is the facially neutral requirement that the Applicant seeks to rely upon and that this proceeding involves an allegation of indirect discrimination.

12. The following observations can be made about indirect discrimination under the EO Act:

   (a) it is necessary for an Applicant to establish that a requirement condition or practice has been imposed which causes, or is likely to cause, disadvantage[2]; and

   (b) there must be a causal link between the identified requirement, condition or practice, the attribute in question, and the alleged disadvantage.[3]

13. If the Applicant can show that a requirement, condition or practice was imposed, it falls to the Respondent to show that it was reasonable.[4]

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1 EO Act, s 9.
2 *Pham v Drakopoulos & Ors* [2012] VCAT 1198 at [19] (Coghlan DP).
3 *Lomax v National Australia Bank Ltd* [2014] VCAT 348 at [45]-[46] (Member Dea).
4 Section 9(2); see also *Lomax v National Australia Bank* [2014] VCAT 348 at [44] (Member Dea).

14. The case of *Watkins Singh v Aberdare Girls' High School*[5] the Court considered the terms of the Race Relations Act and the Equality Act, then in force in the UK. In that case, a Sikh sought to wear a "Kara", being a small plain steel bangle worn by Sikhs as a visible sign of their identity and faith.

15. The Court considered whether it was indirectly discriminatory. The case was again, fact-sensitive. The Court in that case concluded that by not being allowed to wear the Kara, the claimant suffered a "particular disadvantage" or "detriment".[6] In considering whether that discrimination was proportionate or justified, the Court noted that "*the Courts as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination*."[7] It concluded that the reasons offered by the school in that case were not sufficient.[8] The application of the case is limited, but the Court's emphasis on the need for careful consideration of any justification is instructive.

Section 38

16. Part 4 of the EO Act sets out the circumstances in which discrimination (as defined in Part 2) is unlawful. Relevant for the purposes of this case, Division 3 sets out the prohibition on discrimination in education in Victoria in the following terms:

> **38 Discrimination by educational authorities**
>
> (1) An educational authority must not discriminate against a person –
>
> (a) in deciding who should be admitted as a student; or
>
> (b) by refusing or failing to accept, the person's application for admission as a student; or
>
> (c) the terms on which the authority admits the person as a student.
>
> (2) An educational authority must not discriminate against a student—
>
> (a) by denying or limiting access to any benefit provided by the authority; or
>
> (b) by expelling the student; or
>
> (c) by subjecting the student to any other detriment.

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5 [2008] EWHC 1865.
6 [67].
7 [75].
8 [88].

17. The prohibition on discrimination is directed to "An educational authority" and is expressed in mandatory terms: "must not". This, together with its beneficial purpose suggest a broad construction of s 38 is appropriate. In particular:

    (a) Where legislation is enacted pursuant to, or in contemplation of, the assumption of international obligations, in cases of ambiguity a court or tribunal should favour a construction which accords with Australia's obligations.[9] While the EO Act does not directly incorporate a specific international human rights law, it is well accepted that freedom from discrimination and the right to equality of treatment are long-standing and well accepted human rights.[10] The EO Act specifically protects those human rights in Victorian law.

    (b) Discrimination legislation should be interpreted beneficially.[11] When adopting a beneficial and purposive approach, a court or tribunal may give such legislation *'the widest interpretation that its language will permit'*.[12]

18. If the Tribunal is satisfied that there has been discrimination in breach of s 38, then it must consider whether a relevant exception applies.

19. There are two kinds of exceptions under the EO Act: exceptions specific to a particular Division, and exceptions of general application.

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9 *R & R Fazzolari Pty Limited v Parramatta City Council*; *Mac's Pty Limited v Parramatta City Council* [2009] HCA 12 at [43], [44] (French CJ), and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [28] (Gleeson CJ).

10 See for example article 55(c) of the UN Charter, article2(1) of the Universal Declaration of Human Rights, articles 2(2) and 26 of the International Covenant on Civil and Political Rights, General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, pp. 134-137, article 2(2) of the International Covenant on Economic, Social and Cultural Rights. See also *South West Africa Case (Second Phase)* (1966) Rep 6, pp303-304, 305 per Tanaka J, *Case of Abdulaziz, Cabales and Balkandali v. United Kingdom,* judgment of 28 May 1985, Series A, No. 94, p. 36 para 72.

11 *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J), *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J) and *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 (Kirby J).

12 *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, 260-261 (McHugh J), *Bropho v Western Australia* (1990) 171 CLR 1, 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112-113 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381, 384.

20. The Respondent has raised the exception in s 42 of the EO Act in its defence.[13] Section 42 is a specific exception that applies in respect of certain parts of Part 4. It provides:

> **42 Exception—standards of dress and behaviour**
>
> (1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students.
>
> (2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, 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.

21. The Respondent bears the onus of establishing that an exception applies based on the evidence.[14]

22. As a matter of general principle, where human rights are limited, "*courts should not impute into the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language*." [15] Section 42 of the EO Act is an example of an exception that should be read strictly in accordance with its terms. Those terms are considered in detail, below.

Section 42(1)

23. Section 42(1) is the exception that applies to conduct in relation to students that would otherwise be discriminatory. Consistently with general principles, exceptions or defences in discrimination legislation should be construed strictly.[16]

24. Section 42 has a number of features:

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13 Defence, [17] – [18].

14 EO Act s 13(2).

15 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-92 [43], *South Australia v Totani* (2010) 242 CLR 1 at [53] (French CJ), *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at [47] (French CJ), *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) citing *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 and *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ). See also *Dover v Doyle & Anor* [2012] VSC 117 at [44] - [45].

16 *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J) and *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J). If an exception exists to protect an identifiable right, it might be appropriate to give the words their ordinary meaning, rather than to construe them narrowly: *Aitken & Ors v State of Victoria* [2012] VCAT per Judge Ginnane (as his Honour then was) [539] – [540]. The Commission submits that this is not such a case.

(a) It applies to an 'educational authority';[17]

(b) It permits that educational authority to either set or enforce a 'reasonable standard of dress, appearance and behaviour for students'.

(c) The educational authority could administer multiple schools, and in so doing, would be permitted to set a "reasonable standard of dress" for all of those schools.

(d) The exception applies to an educational authority's conduct towards *students*.

25. A plain reading of the text of s 42(1) makes clear that it is an exception that applies only to *students*. In this sense, it is an exception that only operates in respect of the prohibition on discrimination against students: s 38(2). Section 38(1) by contrast, prohibits discrimination 'against a person' and operates, in its terms, prior to that person's admission to the school.

26. There is therefore a question as to whether or not s 42(1) operates in the context of a claim of discrimination under s 38(1). As a matter of construction, the Commission contends that it does not.

27. The key questions raised by s 42(1) are:

(a) by what methods can a reasonable standard of dress be 'enforced';

(b) what are 'reasonable standards of dress, appearance and behaviour' for the purposes of s 42(1) and how are they to be determined?

Section 42(1) - Enforcement

28. The Commission submits that while standards of dress can be "enforced" in a differential way, by operation of s 42(1) it does not follow that the enforcement can be at large, or arbitrary.

29. This is because the exception conferred by s 42 renders lawful what would otherwise be unlawful discrimination against school students in Victoria. It ought to be read in a confined way, and having regard to the *Charter* rights identified below. Having regard to those principles, the Commission submits

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[17] That term is defined in s 3 of the EO Act to mean '…the person or body administering an educational institution'. An "educational institution" means, inter alia, a school where education or training is provided.

that s 42(1) authorises only the least restrictive means necessary to enforce the reasonable standard of dress, appearance and behaviour, in accordance with the Charter and statutory construction principles. To construe the provision otherwise would be to create the capacity for differential treatment in Victorian schools through the arbitrary application of a school uniform policy.

30. In this respect, any differential or arbitrary application of the uniform policy would be relevant to whether it has been lawfully "enforced".

Section 42(1) – "Reasonable Dress / Appearance"

31. The Commission submits that identifying what is "reasonable" dress or appearance does not occur by reference to the expectations or beliefs of a particular school community. Rather, s 42(1) is a provision which permits an educational authority to set 'reasonable standards' over a potentially broad number of schools or institutions.

32. It follows that the identification of "reasonable standards" in that context is directed to broadly accepted community expectations around reasonable dress and appearance.

33. The Commission submits that the broader concept of "reasonable standards" in s 42(1) does not encompass restricting religious expression. This is evident having regard to the text, context and purpose of s 42(1) as reflected in the Explanatory Memorandum[18], which states:

> Clause 42 is not intended to allow schools to apply standards in a way that unreasonably restricts the rights of students and teachers to adhere to religious dress codes, for example by wearing a turban or hijab.[19]

34. While the language of s 42 shifted somewhat between the Equal Opportunity Bill and the EO Act, the legislative intention described in the Explanatory Memorandum remains, and is manifest in the text of the provision.

35. The Tribunal may find it instructive to consider the Department of Education and Training's Policy on *"Developing and Reviewing Dress Codes"*[20], in

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18 The Explanatory Memorandum is an aid to interpretation, not to be substituted for the language of the provision in question: *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, per French CJ, Gummow, Hayne, Crennan and Kiefel JJ at [32], per Heydon J at [74].

19 *Equal Opportunity Bill* 2010, Explanatory Memorandum, page 30, clause 42.

interpreting what are broadly accepted community standards around reasonable dress and appearance.

36. This Policy has some useful direction on what a consultation process should look like, including the breadth of the community that should be consulted; the manner in which the consultation should take place; and specific issues that should be addressed in the consultation, including cultural and religious requirements and requirements of students with special needs.

37. Where a specific school seeks to reflect its particular values or priorities in a specific manner in a way that would not be captured by s 42(1), that is a matter that is provided for by s 42(2), discussed below.

Section 42(2)

38. Section 42(2) is a deeming provision. It makes a particular dress code conclusively "reasonable" for the purposes of the exception in s 42(1), if the criteria in that section are met.

39. Section 42(2) has a number of features:

    (a) The focus in s 42(2) is on what takes place in a specific school rather than the conduct of an educational authority more broadly.

    (b) it is intended to apply to a specific school (not an educational authority by way of contrast). It is a means by which a particular school community can set dress standards that reflect that community's views or values.

    (c) the requirement of community involvement is significant. It is not sufficient to merely consult with the community – the views of the 'school community' must be 'taken into account'.

    (d) section 42(2) applies only to setting the reasonable standard of dress, appearance and behaviour.

40. The Tribunal will be required to accept a standard as reasonable if it is satisfied that the school has taken into account the views of the school community in setting that standard.

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[20] Accessible at http://www.education.vic.gov.au/school/principals/spag/management/Pages/developing.aspx viewed on 14 July 2017.

41. The right to establish a "reasonable" standard is accompanied by a *responsibility* for schools to undertake a community consultation. The effect of complying with s 42(2) is to engage the exception in s 42(1). Accordingly, the Commission submits that the school community consultation requirement must be broad and meaningful. It must not exclude significant portions of the school community, and should not restrict itself to members of a group identifiable by ethnicity or religion.[21]

The Charter

42. MCC is not a public authority[22]. The Charter applies to this case because the interpretive obligation in s 32 is of general application.

43. Section 32 does not permit the Tribunal to adopt a meaning inconsistent with a 'fundamental feature' or the 'underlying thrust' of the EO Act.[23] The Tribunal is not permitted to 'play with [the] words' of the EO Act.[24] The task remains one of determining what Parliament would reasonably be understood to have meant by using the actual language of the EO Act.

44. Section 32 requires the Tribunal to interpret the provisions of the EO Act in a way that is compatible with the below mentioned relevant human rights so far as it is possible to do so consistent with the purpose of the provisions. Section 32 applies "*in the same way as the principle of legality but with a wider field of application*"[25].

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22 See section 4(1)(c) of the Charter and the example included in respect of that provision – a non Government school is expressly excluded from the application of s 4(1)(c).

23 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] (per Nicholls LJ) and see discussion by the Court of Appeal in *Momcilovic* at [52] – [53].

24 *Wilkinson v Inland Revenue Commissioners* [2006] 1 WLR 1718 discussed in *Momcilovic* at [55].

25 The principle of legality being the well-established rule of statutory which presumes "that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires statutes to be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.": *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 [43] (French CJ); see also *WBM v Chief Commissioner of Police* [2012] VSCA 159 [76] (Warren CJ), [133] (Hansen JA).)

45. Thus it requires the Tribunal, where a choice of construction is available, to adopt the interpretation that does not limit or least limits human rights[26].

46. The Commission's primary submission is that no ambiguity or constructional choice is available on a proper reading of ss 38 and 42 of the EO Act. Those provisions should be read in the manner outlined above. However, if the Tribunal concludes that a constructional choice is available, then it should favour the interpretation identified by the Commission because it is the most compatible with the rights protected by the *Charter*.

47. Charter rights are not absolute. There can be limitations or restrictions on certain rights. As to the types of any restriction or qualification to a human right or the manner in which a human right may be enjoyed, the Charter sets out when and how a restriction operates. There are two ways in which the Charter does this. The first is that some Charter rights are subject to 'definitional' or 'internal limitations'. The second way in which a Charter right may be limited is by the general limitation clause in s 7(2). It applies to all Charter rights. It provides 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 including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

48. There remains uncertainty about whether or not the proportionality analysis called for by s 7(2) is part of the s 32 process or not.[27] The Commission submits that it may be relevant if the Tribunal is faced with competing interpretations of a provision, or competing rights impacted upon by a

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[26] (*Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25 [24], [45]; *WBM v Chief Commissioner of Police* [2012] VSCA 159 [97] (Warren CJ); *Nigro v Secretary to the Department of Justice* [2013] VSCA 213 [73].

[27] The High Court in *Momcilovic* did not reach a concluded view in respect of that issue.

provision. Where there is such a conflict, the analysis in s 7(2) may assist the Tribunal in identifying the construction that is least restrictive. However, for the reasons explained below, the Commission submits that s 7(2) does not have any work to do in the context of the case as it is presently conceptualised.

49. Implicit in s 32(1) of the Charter is the need to identify whether a human right in Part 2 is relevant to the interpretative task. The Commission submits that *Charter* rights relevant to this case include:

(a) **Section 8:** Equality before the law and non-discrimination;

(b) **Section 14:** The right to freedom of religion; and

(c) **Section 15**: The right to freedom of expression.

Section 8 Equality before the law and non-discrimination

50. Section 8 provides that every person has "the right to equal and effective protection against discrimination".

51. In the decision of *Lifestyle Communities Ltd (No 3)*[28] Bell J undertook a lengthy analysis of jurisprudence relating to the rights to equality and non-discrimination. His Honour's observations in relation to the scope of s 8 as a whole, and each of its individual sub-sections, have since been adopted in other matters[29]. The right to equality 'is high in the hierarchy of rights recognised in the Charter'[30]. It is broader than s 8(2), which is limited to ensuring that Charter rights are equally accessible to all. In contrast, s 8(3) ensures that all laws and policies are applied equally, and do not have a discriminatory effect. Section 8(3) provides that each person is entitled to equal protection before the law.

52. It is the requirement of equality before the law, directed to the administration rather than the content of the law, that is relevant in this matter. The Commission submits that to the extent there are competing interpretations open, s 8 of the Charter operates to require that decisions about the

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28 [2009] VCAT 1869.

29 See, eg, *Victorian Toll v Taha; State of Victoria v Brookes* [2013] VSCA 37 [209] (Tate JA); *Kuyken v Chief Commissioner of Police* [2015] VSC 204 [35].

30 *PJB v Melbourne Health & Anor (Patrick's Case)* [2011] VSC 327 [42].

reasonableness of a standard of dress or behaviour ought not be arbitrary. Similarly, in considering whether the school community has been consulted, s 8 of the Charter operates in combination with s 32 to give breadth to the requirement of community consultation.

The right to freedom of religion (s 14)

53. Section 14 of the *Charter* provides that:

> (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
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> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
>
> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
>
> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

54. The United Nations Human Rights Committee has provided some guidance on the scope of Article 18 of the ICCPR, on which the right to freedom of religion or belief in the Charter was modelled[31]. The Committee has observed:

- the terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions;
- Article 18 distinguishes between the freedom to *have or adopt* a religion or belief (internal freedom) and the freedom to *manifest* that religion or belief in worship, observance, practice and teaching (external freedom). Article 18 does not permit any limitations whatsoever on the internal freedom. The external freedom is subject to limitations as provided by Article 18(3).

55. Under the comparative jurisprudence, not all assertions of religious beliefs will necessarily be accepted as such[32] (and not all acts motivated by a religion or belief are 'manifestations' of that belief)[33].

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[31] Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Art 18)*, 48th sess. UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

56. The Commission submits that the Court must be satisfied on the evidence that the person genuinely holds the religious beliefs they profess (and acts in connection with those beliefs). This should be done without engaging in the examination of the objective validity of the beliefs and without being overly zealous in the investigation of the genuineness of those beliefs[34].

57. The genuineness of the belief is a question of fact to be objectively determined by the Courts[35]. It is irrelevant that within a faith group, some practice their religion differently.[36]

58. There are cases from the United Kingdom or the European Court of Human Rights that consider whether the application of a uniform policy constituted a breach of the right to freedom of religion or expression.[37] In general the approach in those jurisdictions is to consider whether the conduct in the circumstances of that case constituted a breach of the relevant human rights legislation. This means that the availability of alternative means of religious observance was often considered.

59. The Commission submits that these cases are of limited assistance to the Tribunal's task under s 32 of the *Charter*. It is necessary only to consider whether one interpretation of the relevant provision of the EO Act is likely to infringe upon a particular right as against another, also available interpretation. Because a statute is construed generally, rather than by reference to the facts of one case, much of the international jurisprudence (which turn on their own facts) do not assist.

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[32] *R (Williamson) v SS Education and Employment* [2005] 2 AC 246, [22]-[23] per Lord Nicholls.

[33] *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358 [60]; cited with approval in *R (Williamson) v SS Education and Employment* [2005] 2 AC 246, [63] per Lord Walker. In the context of protests conducted outside and within reproductive health clinics, see also: *Van Schijndel, Heydon and Leeman v The Netherlands*, European Commission of Human Rights, Second Chamber, App No. 30936/96, 10 September 1997; cf the approach in *Van den Dungen v The* Netherlands, App No. 22838/93, 22 February 1995.

[34] *Holt v Hobbs* -- (US) -- (US Supreme Court) 20 January 2015.

[35] *Christian Youth Camps Ltd v Cobaw Community Health Services* [2014] VSCA 75 [424]–[426] (Neave JA); cf [528]–[530] (Redlich JA).

[36] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15 (**Begum v Denbigh**), [50].

[37] For example: *Begum v Denbigh* considered a uniform policy that permitted a head scarf by excluded the Jilbab; or *X v Head Teacher and Governors of Y School* [2002] 2 All ER 249 where a uniform policy that excluded the *niqab* was considered; in *Sahin v Turkey (Application No 44774/98) 29 June 2004* the European Court of Human Rights considered and upheld a Constitutional ban on religious dress in secular institutions.

60. The genuineness and depth of community consultation was given particular significance in some UK decisions under the *Human Rights Act*. While those cases arise in distinct factual and legal frameworks, the importance of consultation in identifying where there had been a reasonable limitation on the right to freedom of religion is instructive.[38]

The right to freedom of expression (s 15(2) and (3))

61. Section 15(2) of the Charter provides that:

> Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
>
> (a) orally; or
>
> (b) in writing; or
>
> (c) in print; or
>
> (d) by way of art; or
>
> (e) in another medium chosen by him or her.

62. The right to freedom of expression belongs to an individual, rather than a group as a whole. Section 15(2) recognises an individual's freedom to express opinions and views of any kind. Importantly, the right applies in three ways:

(a) to the content of the expression (substance of the expression);

(b) to the manner or form in which the content is conveyed (manner of expression); and

(c) the right applies to the person who conveys the content and the person who receives or seeks out the content.

63. Section 15(3) provides for an 'internal limitation' on the right. It permits certain restrictions to be placed on free expression in limited, proscribed circumstances.

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[38] In *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*, [2006] UKHL 15, [33] – [34] the long and detailed consultation with (among others) the Muslim community was part of the Court's determination that a refusal to permit the Jilbab at school was proportionate. Particularly where provision was made for a headscarf as part of the uniform.

64. In construing the extent of the operation of the exception in s 42, the Tribunal should adopt an approach that is least restrictive of a person's self-expression. In the context of this case, that imperative is consistent with the construction advanced by the Commission above.

Charter – Conclusion

65. The Commission submits that to the extent there are competing interpretations of s 38 or 42 of the EO Act open, the *Charter* rights identified above operate to require that decisions about the reasonableness of a standard of dress or behaviour ought not be:

    (a) Arbitrary in their scope, or differential in their operation, such that they are inconsistent with s 8 of the *Charter*[39];

    (b) unduly burdensome to a person's compliance with their religious obligation such that they are inconsistent with s 14 and the right to freedom of religion; and

    (c) unduly burdensome of a person's personal expression such that they are inconsistent with the right protected by s 15 of the *Charter*.

66. In considering whether the school community has been consulted, s 8 of the Charter operates in combination with s 32 to give breadth to the requirement of community consultation.

67. If any constructional choice is available, the proportionality analysis in s 7(2) of the *Charter* could assist the Tribunal to determine which approach least burdens the *Charter* right in question.

C. Analysis

68. The Tribunal is tasked with:

    (a) determining whether there has been discrimination under the EO Act;

    (b) if so, construing the relevant exception in accordance with the facts that it has found.

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39 See paragraph [52], above.

69. Save for general comments concerning the structure and operation of the EO Act, the Commission makes no submission about the process for determining whether there has been unlawful discrimination. It makes no submission about whether unlawful discrimination has occurred in this case, as a matter of fact.

70. The Commission submits that in determining the operation of the exceptions relied upon, the EO Act it is clear that:

(a) Section 38(1) identifies the circumstances in which an educational authority will unlawfully discriminate against a person who is not yet a student. It does not correlate with the exception in s 42(1) which provides for an exception in relation to standards being set and enforced for students.

(b) Section 38(2) on the other hand identifies circumstances in which an educational authority will unlawfully discriminate against a student. There is an exception in s 42(1) which correlates with that (otherwise unlawful) discrimination.

71. The Commission therefore submits that the exception in s 42(1) does not arise if the Tribunal is satisfied that there has been discrimination under s 38(1) of the EO Act.

72. If the Tribunal concludes that s 42 is relevant to the case before it, it should be construed on the basis that:

(a) Section 42(1) is the provision which confers the exception to the discriminatory conduct.

(b) Section 42(2) is a deeming provision which sets out the circumstances in which a school can enjoy the benefit of s 42(1), irrespective of the generally applicable standards of dress or appearance.

(c) A school can enjoy the benefit of the s 42(1) exception through s 42(2) only where it has both:

i. conducted a process by which the views of the "school community" can be identified; and

ii. taken into account the views of the school community.

73. The Commission submits that the process for obtaining the views of the "school community" must be genuine, and representative. It will not be sufficient if:

    (a) only a portion of the "school community" is taken into account; or

    (b) only members of the school community with a particular religious view are taken into account.

74. It appears that there are two school uniform policies before the Tribunal:

    (a) A standard applicable from 2014 until 2017 (the **2014 Standard**)[40]; and

    (b) A standard applicable following an apparent consultation in 2017 (the **2017 Standard**)[41].

75. The Commission submits that the deeming provision in s 42(2) is only available where a consultation has taken place **prior** to the standards of dress being set or enforced.

76. In the circumstances of this case, it is not clear whether the Respondent intends to rely upon s 42(2) to justify the 2014 Standard, nor the consultation that would be relied upon to do so.

77. The Commission submits that it is not open to the Respondent to rely upon s 42(2) in relation to the 2017 Standard in response to this alleged discrimination. That is because there does not appear to be any dispute that the consultation relied upon by the Respondent occurred after the alleged act of discrimination.[42]

D. Conclusion

78. The Commission will appear at the hearing of this matter to provide what further assistance the Tribunal considers appropriate.

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40 Exhibit SL-1 to the statement of Simon Liefting dated 2 June 2017.

41 The results of the survey are included at DG-10 to the Statement of David Gleeson dated 2 June 2017; The policy to which it referred is at DG-1 to that statement. It is not clear when that policy came into being.

42 The results of the survey are included at DG-10 to the Statement of David Gleeson dated 2 June 2017 show that the survey took place in January 2017.

E A Bennett

Counsel for the Commission

17 July 2017