

Curtin Law School


The Regulation of the Employment Decisions of Religious Schools under Anti-Discrimination Legislation

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To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made. This thesis contains no material which has been accepted for the award of any other degree or diploma in any university

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ABSTRACT

The thesis addresses the merits of different approaches to regulating the ability of religious schools to make employment decisions based on an employee's compatibility with the school's religion. The particular focus of the thesis is on the merits of the general exception approach adopted under the *Anti-Discrimination Act 1977* (NSW) that allows religious schools to make employment decisions on grounds that would otherwise be prohibited under the Act. The merits of the general exception approach are considered in relation to two alternative approaches: the inherent requirement test and the opt-in model. The inherent requirement test allows religious schools to make employment decisions on the basis of a person's compatibility with the school's religion for employment positions where a religious component is an inherent requirement. The opt-in model is an original approach that I have devised for regulating the employment decisions of religious schools that involves a registration process that adapts the protections provided under the *Anti-Discrimination Act 1977* (NSW) to the needs of each religious school.

The merits of the models are considered according to ten criteria: the promotion of equality and religious liberty, the welfare of children, the rights of parents and minorities, the right to privacy, freedom of association, respect for multiculturalism, the promotion of human rights, and the compliance cost of the models. On the basis of these criteria the opt-in model should be regarded as the superior approach to regulating the employment decisions of religious schools in New South Wales compared to the general exception approach and the inherent requirement test.

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PREFACE

The appropriate regulation of the employment decisions of religious schools has been a topic of interest to me for many years. I first researched the topic while studying for a Master of Laws degree at The University of Sydney. As part of the assessment for a unit on employment law I wrote an essay addressing some of the major flaws of the current approach adopted under the *Anti-Discrimination Act 1977* (NSW) for regulating religious schools in New South Wales ('NSW'). The issues raised by the topic were of sufficient interest to me that I decided to undertake a doctorate exploring the limitations of the current regulatory approach and the merits of alternative models that might more appropriately regulate the employment decisions of religious schools.

Researching and writing a thesis on the appropriate regulation of religious schools has allowed me to deepen my understanding of human rights jurisprudence and the influence that international human rights instruments and organisations have, and should have, on domestic political and legal issues. I have found it particularly interesting how activists adopt different interpretations of a wide range of rights to justify their claim that the protections provided to religious schools should be increased or decreased.

The topic was also of interest considering that religious schools can have a major impact on the lives of many individuals. Religious schools often play a central role in the lives of religious communities by providing religious education and formation to religious adherents, allowing religious adherents to fulfill spiritual and charitable obligations, and acting as a community centre for the religious community to socialise together and meet to discuss issues of mutual concern. They can also make an important contribution to the common good by developing desirable character traits in their students, employees and others involved with the school. Religious schools, however, also have the capacity to harm many individuals in the community by promoting a range of controversial theological and ethical beliefs, and denying individuals the opportunity to be included within religious schools as employees and students. The potential for religious schools to both help and harm members of the

community is increasing due to the long term rise in popularity of religious schools in Australia.

I wrote the thesis with the hope that it would assist individuals interested in the issue develop a better understanding of the importance of the topic and the limitations in both the current approach adopted in NSW and also some of the main alternative models that have been proposed for regulating religious schools. Considering the repeated attempts by some parliamentarians to repeal the current regulatory model used in the *Anti-Discrimination Act 1977* (NSW) there may be a need in the near future for parliamentarians and others interested in the issue to carefully consider the best model to adopt in regulating religious schools if the current approach is repealed. I consider that the opt-in model that I propose has some major advantages over alternative approaches currently relied upon in Australia, and the model, or at least aspects of it, should be seriously considered for implementation.

A wide range of sources have been used in the thesis to assess the merits of different models for regulating religious schools including legislation and cases, articles on the merits of different approaches to regulating religious schools, and studies on religious schools, especially those addressing how religious schools rely on anti-discrimination legislation in making employment decisions. Due to the specific focus of the thesis on the appropriate regulation of religious schools in NSW most of the sources relied upon are Australian and address issues of particular relevance to Australian jurisdictions. However, considering that the appropriate regulation of religious schools and the broader issue of how the State should interact with religious groups are issues of importance in jurisdictions throughout the world, there is also a substantial reliance on material produced by international human rights bodies, judgments of national courts and articles by academics working in the area.

There are many people who have helped me in completing the thesis who I would like to thank. In particular, I would like to thank Professor Gabriël Moens, Professor Patrick Parkinson, and Associate Professor Belinda Smith who provided detailed advice that was invaluable in helping me to complete the thesis. I am grateful to The University of Notre Dame Australia for supporting me throughout my thesis and in particular for approving my professional development leave that allowed me to

complete my thesis. I would also like to especially thank my family and friends who have provided me with constant love and support throughout my life.

CHAPTER ONE

INTRODUCTION

The thesis addresses the merits of different approaches to regulating the ability of religious schools to make employment decisions based on an employee's compatibility with the school's religion. The particular focus of the thesis is on the merits of the current approach adopted in NSW that allows religious schools to make employment decisions on grounds that would otherwise be unlawful. The appropriate approach to adopt in structuring anti-discrimination legislation in this area is an important issue to address considering the rights involved, the extensive government and community focus on the area, and the value of promoting a uniform approach to regulating religious schools.

The protection of the right to equality is central to anti-discrimination legislation and inappropriately limiting its operation can cause substantial harm to the members of the community who can be denied employment, accommodation or access to goods and services through the discriminatory acts of other individuals. The merits of any approach to anti-discrimination legislation that regulates religious schools differently to non-religious schools should be carefully assessed considering it has the capacity to adversely affect an extensive number of individuals employed or seeking employment at these schools.

In 2011, for example, there were 9435 schools in Australia, comprising 6705 government schools, 1710 Catholic schools and 1020 Independent schools (the majority being religious schools)¹—with the Catholic and Independent schools together employing 104 779 teachers.² The actual number of employees who could be adversely affected by the employment decisions of religious schools would be much higher than this as this figure does not include management, support or maintenance staff of these schools or the employees of educational institutions other than schools. Furthermore, the scope of individuals who could potentially be harmed

¹ Australian Bureau of Statistics, *Schools* (3 May 2012)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features202011>>.

² Australian Bureau of Statistics, *Teaching Staff (Number)* (3 May 2012)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features502011>>.

is greater than simply those individuals currently employed by religious schools as all members of the community have the potential to be adversely affected by the employment decisions of religious schools if they decide to apply for a teaching or non-teaching employment position. A range of further concerns are also expressed about the operation of religious schools including that they may be harmful to the wellbeing of their students, fail to effectively promote human rights standards, and undermine the social cohesion that is essential to a successful multicultural society.³ The extent of the possible adverse impact from the operation of religious schools is increasing considering that in Australia non-government schools are becoming more popular with the percentage of students attending non-government schools rising from 31% in 2001 to 34.6% in 2011.⁴

The right to religious liberty is also of substantial importance in determining the appropriateness of any approach adopted in regulating the employment decisions of religious schools. Religious schools often play an important role in the life of many religious communities, and the ability to select staff members on the basis of their compatibility with the school's religion (their 'mission fit') can significantly assist a religious school in delivering an effective religious education to students, staff members and other individuals involved in the school, and in providing general support to the religious community. A failure by the State to provide appropriate protections under anti-discrimination legislation for this aspect of the management of religious schools has the potential to significantly undermine the right to religious liberty. There are a variety of other rights that can also be adversely affected depending upon the particular approach the State adopts to regulating the employment decisions of religious schools including the rights of children, parents and minority groups, freedom of association and the right to privacy.

The potential impact that protections provided under anti-discrimination legislation to religious schools can have on an extensive range of human rights is a major justification for a detailed analysis of the merits of the different approaches that can

³ See generally Jennifer Buckingham, *The Rise of Religious Schools* (The Centre for Independent Studies, 2010); Deb Wilkinson, Richard Denniss and Andrew Macintosh, 'The Accountability of Private Schools to Public Values' (The Australia Institute, 2004).

⁴ Australian Bureau of Statistics, *Students* (3 May 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features302011>>.

be adopted on the issue.⁵ The nature and importance of all of these rights in evaluating the appropriate approach to adopt in regulating the employment decisions of religious schools is discussed in greater detail in subsequent chapters.

There is extensive government and community debate concerning the appropriate structure of anti-discrimination legislation in relation to the employment decisions of religious schools. There has been significant government focus in recent years on the interaction between anti-discrimination legislation and the operation of religious groups. For example, at the Commonwealth level the Australian Human Rights Commission conducted a national inquiry into freedom of religion in Australia,⁶ the Attorney-General's Department undertook a review of the merits of consolidating the five Commonwealth anti-discrimination Acts,⁷ and the Senate delivered two relevant reports—one on reforming the *Sex Discrimination Act 1984* (Cth) and another on the merits of a draft bill for consolidating the Commonwealth anti-discrimination Acts.⁸

There has been a similar level of focus on the issue at a State level. For example, the Parliament of Victoria's Scrutiny of Acts and Regulations Committee conducted a detailed review in 2009 into the merits of the *Equal Opportunity Act 1995* (Vic),⁹ the law regulating the employment decision of religious schools was subsequently

⁵ Although terms such as 'exceptions' and 'exemptions' are commonly used to refer to limitations provided to the operation of anti-discrimination legislation these terms are not used extensively in the thesis as they can suggest that the limitations are merely permissions to engage in discrimination that the government was forced to provide due to political pressure. The term 'protections' is preferred as it more accurately recognises that the limitations to the operation of anti-discrimination legislation are typically aimed at ensuring that a range of important rights are appropriately respected. For similar reasons the article avoids referring to employment decisions made by religious schools under the protections granted as acts of 'discrimination'. Such terminology is more appropriate after the relevant factors have been considered and it has been concluded that the employment decisions cannot be justified.

⁶ Gary Bouma et al, *Freedom of religion and belief in 21st century Australia* (2011) Australian Human Rights Commission, 30–65.

⁷ Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws - Discussion Paper* (2011) Attorney General's Department, 37–41.

⁸ Parliament of Australia Senate Standing Committee on Legal and Constitutional Affairs, *'Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality'* (2008)

<http://www.aph.gov.au/binaries/senate/committee/legcon_ctte/sex_discrim/report/report.pdf> 91–103; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 56–71, 114–5.

⁹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 29–33, 106–129; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Final Report* (2009) 60–66.

amended by the Victorian Parliament in 2010, and again, in 2011.¹⁰ In South Australia legislation was successfully enacted in 2009 to restrict the protections provided to religious schools.¹¹ While in NSW, bills were introduced into Parliament in 2005 and 2013 in an unsuccessful attempt to remove the protections provided under anti-discrimination legislation to private educational authorities.¹²

The substantial government interest in determining the appropriate role anti-discrimination legislation should play in regulating the employment decisions of religious schools is similarly found within the community. An excellent insight into the extensive number of individuals and groups who are actively involved in debates concerning the approach that should be adopted in the area is provided by the submissions they make to various government inquiries. For example, the Senate Legal and Constitutional Affairs Legislation Committee in 2013 received 3464 submissions in relation to its inquiry into the merits of the Commonwealth's draft consolidation anti-discrimination bill. Out of these submissions 1300 were 'form letters' of which 1220 expressed a variety of concerns about the draft bill including that it would violate the rights of religious groups.¹³ Many of the more substantial submissions also addressed the appropriate approach that the Commonwealth should adopt to regulating the employment decisions of religious organisations as is evidenced by the reliance of the Committee on extracts from the submissions in their report.¹⁴

A similar result was found in relation to the inquiry undertaken by the Parliament of Victoria's Scrutiny of Acts and Regulations Committee into the merits of exceptions in the *Equal Opportunity Act 1995* (Vic). Members of the Committee stated that '[t]he response to the Inquiry has been overwhelming, with approximately 1800 submissions considered and a significant level of public interest. The majority of the submissions made were in response to proposed changes to sections 75 and 76, the

¹⁰ *Equal Opportunity Act 2010* (Vic) s 83(3)–(4), later repealed by *Equal Opportunity Amendment Act 2011* (Vic) s 19.

¹¹ *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA) s 19.

¹² Anti-Discrimination Amendment (Equality in Education and Employment) Bill 2005 (NSW) cls 1–13; Anti-Discrimination Amendment (Private Educational Authorities) Bill 2013 (NSW).

¹³ Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012—Submissions Received by the Committee* (2013).

¹⁴ See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 56–71.

sections dealing with religious freedom. The overwhelming majority of those submissions sought the retention of those sections as they currently stand'.¹⁵ Further evidence of the strong community interest in the regulation of the area is provided by the public hearings conducted over two days by the Committee. Representatives from 20 out of the 27 organisations who gave oral evidence to the Committee directly addressed the merits of providing anti-discrimination legislation protections for religious schools and other religious organisations.¹⁶

A further benefit of undertaking a detailed analysis of the merits of different approaches that could be adopted in regulating the employment decisions of religious schools is that it can serve the valuable purpose of promoting cooperation among members of the community interested in determining the most appropriate model to adopt. The ideal outcome would be for the analysis of the different models to clearly demonstrate that a particular model is superior to the alternatives resulting in jurisdictions throughout Australia implementing the same, or at least a similar, approach to the issue. Greater uniformity between Australian jurisdictions would be highly desirable considering the significantly different approaches currently adopted in each jurisdiction with the resulting difficulties it creates for school authorities, employees and others involved in the area in understanding their legal rights and duties.¹⁷

Even if such an outcome does not occur a detailed analysis of different models can serve the valuable purpose of helping individuals with different perspectives develop a better understanding of the relevant facts, agree to the principles that are important in assessing different models, and obtain a more detailed appreciation of the merits of alternative approaches. Developing the understanding of those actively involved in the area may also play an important role in reducing animosity between individuals with different perspectives on the best approach to adopt in regulating religious schools. Widespread agreement among community members on the merits of a

¹⁵ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Final Report* (2009) 116.

¹⁶ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions in the Equal Opportunity Act 1995—Public Hearings* (1 June 2010).

¹⁷ For a discussion of the limited understanding that some school authorities have regarding the applicability of anti-discrimination legislation provisions to employment decisions see, eg, Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views From The Coal Face' (2010) 34 *Melbourne University Law Review* 392, 419–421.

particular approach, or at least a more detailed understanding of the relevant issues, may also assist in reducing the substantial financial and non-financial resources that Australian governments are devoting to government inquiries on this issue.

1 THE CURRENT APPROACH TO REGULATING RELIGIOUS SCHOOLS IN NSW

The *Anti-Discrimination Act 1977* (NSW) ('the Act') makes it unlawful for a person in an employment decision to discriminate on the grounds of race, sex, transgender status, marital or domestic status, disability, a person's responsibilities as a carer, homosexuality or age.¹⁸ An example of the protections that the Act gives to employees in relation to the specified grounds can be provided in relation to discrimination on the ground of marital status. Section 40 states:

(1) It is unlawful for an employer to discriminate against a person on the ground of marital status:

- (a) in the arrangements the employer makes for the purpose of determining who shall be offered employment,
- (b) in determining who should be offered employment, or
- (c) in the terms on which the employer offers employment.

(2) It is unlawful for an employer to discriminate against an employee on the ground of marital status:

- (a) in the terms or conditions of employment which the employer affords the employee,
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or
- (c) by dismissing the employee or subjecting the employee to any other detriment.¹⁹

An exception from the operation of these provisions is provided not just to religious educational institutions but any organisation that qualifies as a 'private educational authority', which is defined as:

¹⁸ *Anti-Discrimination Act 1977* (NSW) ss 8–16, 25–31, 38C–38J, 40–46, 49D–49K, 49V–49ZC, 49ZH–49ZN, 49ZYB–49ZYK.

¹⁹ *Ibid* s 40(1)–(2).

a person or body administering a school, college, university or other institution at which education or training is provided, not being:

- (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or
- (b) an agricultural college administered by the Minister for Agriculture.²⁰

Under the Act, private educational authorities can make employment decisions on the grounds of sex, transgender status, marital or domestic status, disability, and homosexuality that would otherwise be unlawful.²¹ However, no exceptions are provided on the grounds of race, age or a person's responsibilities as a carer.²² As religion is not an attribute protected in the Act an adverse employment decision made by a private educational authority on the grounds of religion does not breach the Act. Although the Act defines race to include 'ethno-religious' origin, which covers groups such as Jews, this has been held to not allow discrimination complaints on the grounds of religion.²³

In addition to the specific exception granted to private educational authorities it is also possible for a person or organisation to apply to the Anti-Discrimination Board of NSW ('the ADB') for an exemption from the operation of the Act.²⁴ In determining whether to grant an exemption the President of the ADB must consider six factors: (1) whether the proposed exemption is appropriate or reasonable; (2) whether the proposed exemption is necessary; (3) whether there are any non-discriminatory ways of achieving the objects for which the proposed exemption is sought; (4) whether the applicant has taken reasonable steps to reduce any adverse

²⁰ Ibid s 4 (definition of 'private educational authority').

²¹ Ibid ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).

²² Ibid ss 8, 49ZYB, 49V.

²³ *A on behalf of V and A v NSW Department of School Education* [2000] NSWADTAP 14, [16]. Although the focus of the thesis is on the merits of the current approach adopted in the *Anti-Discrimination Act 1977* (NSW) to regulating religious schools, it should also be noted that section 351(1) of the *Fair Work Act 2009* (Cth) regulates employers in NSW and prohibits them from taking adverse action against an employee or prospective employee on a range of grounds including religion. However, this prohibition has a limited application to private educational authorities as the prohibitions do not apply in any jurisdiction where the conduct is not unlawful under that jurisdiction's anti-discrimination legislation: s 351(2)–(3). A complaint concerning an employment decision of a religious school in NSW can also be made to the Australian Human Rights Commission. However, the Commission has no coercive powers and can only attempt to conciliate the matter between the parties and provide a report on the matter to the Commonwealth Attorney-General: *Australian Human Rights Commission Act 1986* (Cth) ss 31(b), 32(1)(b).

²⁴ *Anti-Discrimination Act 1977* (NSW) s 126(1).

consequences before seeking the exemption; (5) the public, business, social or other community impact of the exemption; and (6) any conditions or limitations to be included in the exemption.²⁵ If after consideration of these factors the President considers an exemption should be granted then they may grant a renewable exemption from any part of the Act for a period of up to ten years.²⁶

A person who considers that they have suffered harm from an adverse employment decision of a private educational authority can make a complaint to the ADB. The officers of the ADB will evaluate the merits of the claim made by the individual (referred to by the ADB as ‘the complainant’) and if they consider that it has merit will conduct an investigation into the matter.²⁷ If after the investigation they consider that the private educational authority (‘the respondent’) may have violated the Act they will invite the complainant and the respondent to a meeting and attempt to conciliate the matter.²⁸ If this is not possible then the ADB can refer the matter to the Administrative and Equal Opportunity Division of the Civil and Administrative Tribunal, which will evaluate whether the respondent engaged in discrimination.²⁹ It is possible for either party to appeal from a Tribunal decision to the Appeal Panel of the Civil and Administrative Tribunal or to a court.³⁰ If the Act was breached by the employment decision then the Tribunal is empowered to order a variety of remedies including ordering the respondent to compensate the complainant up to \$100,000, apologise to the complainant, refrain from any future conduct that would violate the Act, or perform any reasonable act to redress any harm suffered by the complainant.³¹

The extent of reliance by religious schools on the protections provided under the Act to their employment decisions is unclear. There were 584 Catholic primary and secondary schools operating in NSW in 2011 employing the full time equivalent of 20 651 teaching and non-teaching employees—the actual number of employment

²⁵ *Anti-Discrimination Regulation 2009* (NSW) reg 5(1).

²⁶ *Anti-Discrimination Act 1977* (NSW) s 126(3)–(4).

²⁷ Anti-Discrimination Board, *Complaining to the Anti-Discrimination Board* (July 2008), 2, 4.

²⁸ *Ibid* 5.

²⁹ *Ibid* 6. The determination of whether the respondent had engaged in discrimination was previously determined by the Administrative Decisions Tribunal. However, this Tribunal was consolidated with a number of other legal bodies in NSW to form the Civil and Administrative Tribunal upon the enactment of the *Civil and Administrative Tribunal Act 2013* (NSW).

³⁰ *Civil and Administrative Tribunal Act 2013* (NSW) ss 80–4.

³¹ *Anti-Discrimination Act 1977* (NSW) s 108(2).

positions would be higher than this figure as it refers to full time equivalent positions and is not broken down into full time, part-time and casual positions.³² In addition to the Catholic schools there were 449 independent schools (the majority of which are religious) operating in NSW in 2010 employing a similarly large number of employees.³³ Considering these figures it is reasonable to conclude that there would be in excess of 40 000 employment positions at religious schools in NSW. However, despite there being more than 1000 non-government schools in NSW, no decision of a tribunal or court could be located that addressed the legality of a religious school relying on the protections contained in the Act. Such a result is not surprising considering that the broad nature of the limitations covers most employment decisions that could be made by religious schools. The need to interpret and apply the provisions would only arise in the rare situation where it was alleged that a private educational authority was discriminating on the grounds of race, age or a person's responsibilities as a carer. However, if an adverse employment decision were made on one of these grounds it is likely that the private educational authority would settle the matter before it was heard by a court.³⁴

2 THE REGULATION OF THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS IN OTHER JURISDICTIONS

There is a wide range of different approaches possible for regulating the employment decisions of religious schools ranging from allowing religious schools complete freedom in relation to their employment decisions with no government oversight to structuring anti-discrimination legislation so that government and non-government schools are regulated in exactly the same manner. One of the most common legislative approaches in Australia allows religious schools to make adverse employment decisions in order to avoid injury to the religious susceptibilities of religious adherents. This approach has been adopted in the anti-discrimination

³² National Catholic Education Commission, *2011 Annual Report* (Canberra, 2011) 29–31.

³³ Non-government Schools Guide, *The NSW Schooling System*
<<http://www.privateschoolsguide.com/schooling-in-nsw>>.

³⁴ To avoid needless repetition for the remainder of the thesis any reference to 'courts' should be understood as also referring tribunals, any reference to 'judge' should be understood as referring to any person assigned the role of determining the merits of a claim that a religious school has breached anti-discrimination legislation, any reference to 'employee' should be understood as also referring to a person applying for employment, and any reference to 'principal' should be understood as referring to anyone involved with a school who has the power to employ, manage or dismiss a person on behalf of the school.

legislation of the Commonwealth, the Australian Capital Territory and Western Australia in almost identical language.³⁵ An example of a religious susceptibilities test can be provided by the *Sex Discrimination Act 1984* (Cth). Under section 38(1) it is not

unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Additional protection is provided to religious schools by the Australian Capital Territory to allow adverse employment decisions to be made for employment positions that involve 'the teaching, observance or practice of the relevant religion',³⁶ while Western Australia provides this protection to private educational authorities for employment positions that involve 'the participation of the employee in any religious observance or practice'.³⁷

A similar approach has been adopted in Victoria which provides protection to religious educational institutions for employment decisions on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity that conform to 'the doctrines, beliefs or principles of the religion' or are 'reasonably necessary to avoid injury to the religious

³⁵ *Sex Discrimination Act 1984* (Cth) s 38(1)–(2); *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination'); *Age Discrimination Act 2004* (Cth) s 35; *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b); *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73(1)–(2). Section 56(d) of the *Anti-Discrimination Act 1977* (NSW) adopts a similar protection for a 'body established to propagate religion' in relation to any act or practice that 'conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'. A religious school may be able to also rely on this protection to justify employment decisions if it can satisfy a court that it is a 'body established to propagate religion'. However, considering the broad scope of the protections provided to private educational authorities the section would likely only be of relevance if there was an allegation against the religious school of discrimination on the grounds of race, age or a person's responsibilities as a carer.

³⁶ *Discrimination Act 1991* (ACT) s 44.

³⁷ *Equal Opportunity Act 1984* (WA) s 66(1).

sensitivities of adherents of the religion’.³⁸ Further protection is provided in Victoria under a general section that provides that a person does not engage in discrimination if their conduct is ‘reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion’.³⁹ The Northern Territory also protects the employment decisions of religious educational institutions if they are made ‘in good faith to avoid offending the religious sensitivities of people of the particular religion’, but only on the grounds of sexuality and religious belief or activity.⁴⁰

Queensland previously adopted a religious sensitivities test which protected the employment decisions of religious schools if they were in accordance with the school’s religion and were necessary to avoid offending the religious sensitivities of people of the religion.⁴¹ This test was replaced with an approach that permits employers to declare that a genuine occupational requirement applies to employment positions, which the *Anti-Discrimination Act 1991* (Qld) specifically indicates includes ‘employing persons of a particular religion to teach in a school established for students of the particular religion’.⁴² Under the current provisions a religious

³⁸ *Equal Opportunity Act 2010* (Vic) s 83(1)–(2). No case law was located that indicated that there is any significant difference between a ‘religious susceptibilities’ test and a ‘religious sensitivities’ test. For the sake of uniformity the phrase ‘religious sensitivities’ is used in the thesis although it should be understood as also referring to a ‘religious susceptibilities’ test.

³⁹ *Ibid* s 84.

⁴⁰ *Anti-Discrimination Act 1996* (NT) s 37A. A similar approach to a religious sensitivities test has been adopted in the United Kingdom under the *Equality Act 2010* (UK) where employment decisions for the purposes of organised religion can be made on a range of grounds if the decision is to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers (sch 9 pt 1 s 2(1)–(6)). For a detailed discussion of the approach adopted by the UK Parliament see Russell Sandberg, ‘The Right to Discriminate’ (2011) 13(2) *Ecclesiastical Law Journal* 157, 173–180; James Dingemans et al, *The Protections for Religious Rights* (Oxford University Press, 2013) 408–418.

⁴¹ *Anti-Discrimination Act 1991* (Qld) s 29(1) (as originally enacted).

⁴² *Ibid* s 25(1). A genuine occupational requirement has also been adopted by the European Union in relation to the ground of religion where a difference of treatment is held not to constitute discrimination if ‘a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos’: *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16 art 4(2). Guided by the *Council Directive*, the British Parliament enacted legal provisions to allow a person with a religious ethos to make employment decisions on the basis of religion if they can show that religious identity is an occupational requirement, the requirement is a proportionate means of achieving a legitimate goal, and that the person who suffered from the adverse employment decision was unable to meet the requirement: *Equality Act 2010* (UK) sch 9 pt 1 s 3. A similar approach has also been adopted in the United States where it is lawful for an employer to hire employees on ‘the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise’: *Civil Rights Act of 1964*, 42 USC § 2000e–2(e)(1). Further protection is provided through a general exception for a ‘religious

school can make an adverse employment decision that is not unreasonable against a person who openly acts in a work situation in a way that they knew or should have known was contrary to the school's religion, and it is a genuine occupational requirement that the person acts consistently with the school's religion when in the work environment.⁴³ A determination of the reasonableness of the employment decision depends on all the circumstances of the case including whether the school's conduct was 'harsh or unjust or disproportionate to the person's actions' and 'the consequences for both the person and the employer should the discrimination happen or not happen'.⁴⁴ A religious school is not able to make an adverse employment decision on the grounds of age, race or impairment, and the school can by agreement remove its ability to make adverse employment decisions on any ground.⁴⁵ Victoria briefly adopted a similar approach to the employment decision of religious schools introducing an inherent requirement test in 2010—subsequently repealed in 2011 with a change of government—that would have allowed a religious school to make an adverse employment decision if compatibility with the school's religion was an inherent requirement of the employment position and the applicant or employee was unable to fulfill this requirement.⁴⁶

Tasmania allows a religious school to make adverse employment decisions on the grounds of religion if it is in 'order to enable, or better enable, the educational institution to be conducted in accordance with [the religion's] tenets, beliefs, teachings, principles or practices'.⁴⁷ A general protection is also provided for employment decisions made by persons on the grounds of religion if religious

corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities' (ibid 1(a)), a specific exception to religious educational institutions to employ persons of a particular religion: (ibid 2(e)(2)) and a Constitutional prohibition on the US government regulating the decisions of religious bodies in respect of their ministers (*Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694 (2012)). For more detailed information on the scope of the constitutional and legislative protection of religious groups in the United States see Michael McConnell, 'Reflections on Hosanna-Tabor' (2012) 35 *Harvard Journal of Law and Public Policy* 821; Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1(1) *Oxford Journal of Law and Religion* 81, 83–94.

⁴³ *Anti-Discrimination Act 1991* (Qld) s 25(2)–(3).

⁴⁴ *Ibid* s 25(5).

⁴⁵ *Ibid* s 25(6)–(7).

⁴⁶ *Equal Opportunity Act 2010* (Vic) s 83(3)–(4), later repealed by *Equal Opportunity Amendment Act 2011* (Vic) s 19.

⁴⁷ *Anti-Discrimination Act 1998* (Tas) s 51(2).

observance or practice is a ‘genuine occupational qualification’ for the position.⁴⁸ Additional protection is provided to religious institutions if they are required by their religion to ‘discriminate against another person on the ground of gender’.⁴⁹

South Australia protects employment decisions of religious schools made on the grounds of chosen gender or sexuality if the decision is based on the school’s religion, and the school provides a written policy on its position to persons to be interviewed or offered employment and any other person who requests a copy.⁵⁰ Religious schools are also permitted to make adverse employment decisions in relation to persons in a same-sex domestic partnership.⁵¹ Further protection is provided to bodies established for religious purposes for conduct ‘that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.⁵²

3 THE ALTERNATIVE MODELS SELECTED FOR ANALYSIS

In addition to focusing on the merits of the current approach adopted in NSW to regulating the employment decisions of religious schools (the ‘general exception approach’), the thesis also focuses on the merits of two alternative approaches: the inherent requirement test and the opt-in model.

3.1 THE INHERENT REQUIREMENT TEST

The inherent requirement test permits religious schools to select employees for mission fit but only for those positions where compatibility with the doctrines of the school’s religion is an ‘inherent requirement’ of the employment position.⁵³ The

⁴⁸ Ibid s 51(1).

⁴⁹ Ibid s 27(1)(a).

⁵⁰ *Equal Opportunity Act 1984 (SA)* s 34(3).

⁵¹ Ibid s 85Z(2).

⁵² Ibid s 50(ba)–(c).

⁵³ The term ‘doctrine’ was given a limited meaning by Hampel J in *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 at [288] to refer only to ‘the core architectural statements of faith, or the body of teachings that describes the fundamental shape of that form of religious belief ... doctrines operate to provide the architecture of belief, that is the essential overall organising ideas, or the essentials of [the religion]’. The protection provided to religious individuals, schools and other organisations has recently been expanded and now covers the ‘doctrines, beliefs or principles’ of the religion: *Equal Opportunity Act 2010 (Vic)* ss 81–4. To avoid

courts are provided with the role of determining both whether a religious component is an inherent requirement of a particular employment position and the ability of a particular person to meet such an inherent requirement. Depending upon a school's religion and the organisational structure of the school a court may decide that a religious component is not an inherent requirement for a wide range of teaching and non-teaching employment positions.

The inherent requirement test has been selected as one of the main alternative models to the current NSW approach due to the substantial support the approach receives from many individuals actively involved in lobbying for religious schools to be appropriately regulated, the availability of detailed, contemporary information regarding its merits compared to alternative approaches, the significant possibility that the inherent requirement test will be introduced into Australian jurisdictions in the near future, and the understanding of the merits of alternative models for regulating religious schools that can be obtained from an analysis of the inherent requirement approach.

A key reason in favour of selecting the inherent requirement test is that it has the support of a substantial number of persons who, after detailed consideration of the merits of implementing different approaches, have concluded that the inherent requirement test best protects the rights that can be affected by the different approaches available. Clear evidence of considered support for the model can be provided by the jurisdictions that have introduced the model either in the form of an inherent requirement test (such as Victoria) or as a genuine occupational requirement (such as Queensland, the European Union, the United Kingdom, and the United States).⁵⁴ Further support for adopting the model was provided in a detailed report

unnecessary repetition where the term 'doctrine' is used it should be understood as referring to any doctrine, belief, principle or tenet of a religion.

⁵⁴ The possibility of there being a significant distinction between an inherent requirement test and a genuine occupational requirement test was considered in *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13. On the possible difference in meaning between the 'genuine occupational requirement' contained in the *Anti-Discrimination Act 1991* (Qld) and the 'inherent requirement' test contained in the *Disability Discrimination Act 1992* (Cth) Member Mullins held at [100-1] that the view 'that the "inherent requirements" of a particular employment is a broader test than the "genuine occupational requirement" under the Queensland legislation ... [is rejected as] there is no relevant distinction between the two tests'. The phrase 'inherent requirement test' is the preferred description considering that the most recent attempt at introducing this kind of test in an Australian jurisdiction was in Victoria which referred to the test as an 'inherent requirement test'. For information on approaches adopted in the United Kingdom and the United States see above nn 40, 42.

produced by the ADB entitled ‘Discrimination and Religious Conviction’.⁵⁵ The Report recommended that the general exception approach should be repealed and a new provision inserted that permitted religious schools to make employment positions on the basis of religious conviction when it was a ‘genuine occupational qualification’.⁵⁶

Further contemporary evidence of widespread support for the inherent requirement test is provided in the submissions advocates make to government inquiries on the appropriate regulation of religious schools, which often provide detailed reasons for the merits of an inherent requirement approach, respond to criticisms made of the inherent requirement test, and indicate the limitations of the alternative possible approaches.⁵⁷ Additional support for the value of an inherent requirement test is provided by the adoption of the test in anti-discrimination legislation in various Australian jurisdictions for regulating a wide variety of different organisations.⁵⁸

A further reason in favour of adopting the inherent requirement test as one of the main models considered is that the merits of this approach has recently been extensively considered in Australia. The detailed consideration of the merits of the inherent requirement test in comparison to a variety of different approaches that could be adopted provides an extensive range of material useful in identifying and evaluating the arguments for the different approaches available for regulating the employment decisions of religious schools. In particular, the submissions to the government inquiries provide invaluable information from many of the individuals and groups who are likely to be most directly affected by the different models that can be adopted on the issue, which is essential information in determining the most appropriate model to adopt.

⁵⁵ Juliet Sheen, *Discrimination and Religious Conviction: A report of the Anti-Discrimination Board in accordance with Section 119(a) of the Anti-Discrimination Act 1977* (NSW Anti-Discrimination Board, 1984).

⁵⁶ *Ibid* 441–2.

⁵⁷ See, eg, Jobwatch, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 18, 21–2; Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 4–5, 11–14.

⁵⁸ See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of ‘discrimination’); *Anti-Discrimination Act 1998* (Tas) s 51(1); *Anti-Discrimination Act 1996* (NT) s 35(1)(b); *Equal Opportunity Act 1984* (SA) s 34(2); *Equal Opportunity Act 1984* (WA) s 27(1); *Sex Discrimination Act 1984* (Cth) s 30(1).

The contemporary nature of the debate concerning the merits of the inherent requirement test can be observed in the substantial political and community discussion concerning the introduction of an inherent requirement test in the *Equal Opportunity Act 2010* (Vic). The decision to introduce the test was preceded by the commissioning of expert reports and community consultation on a wide range of issues relating to anti-discrimination legislation including the appropriate approach to adopt in regulating the employment decisions of religious schools. On the extensive preparatory work undertaken before the introduction of the *Equal Opportunity Act 2010* (Vic) the Labor parliamentarian, Ms Jill Hennessy, noted that a

discussion paper was developed and then released by Julian Gardner in November 2007. There was an extensive period of consultation throughout 2008 in which the community genuinely engaged and debated the issues canvassed in the Gardner report. The final Gardner report was released in June 2008, and in December 2008 the former government introduced a bill for an act to amend the Equal Opportunity Act 1995 that went to changing the governance arrangements of what was then known as the Equal Opportunity Commission. The Scrutiny of Acts and Regulations Committee (SARC) then released an options paper and called for public submissions. It received over 1800 written submissions and hundreds of comments in petition form. Two public hearings were held in 2009, and SARC delivered a final report on the exceptions and exemptions of the act in November of that year. In March 2010 the government released a report detailing its responses to the final report's recommendations.⁵⁹

Interestingly the Victorian Scrutiny of Acts and Regulations Committee after a detailed review of the merits of the inherent requirement test decided not to recommend such an approach to the Victorian government.⁶⁰ However, the Victorian government in its official response to the Committee's report rejected without explanation the views of the Committee and concluded that it was appropriate to introduce the inherent requirement test to regulate the employment decisions of religious schools.⁶¹ The extensive parliamentary and community debate that occurred

⁵⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2011, 1448 (Jill Hennessy).

⁶⁰ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Final Report* (2009) xxiii, 64–5.

⁶¹ Victorian Government, 'Scrutiny of Acts and Regulations Committee—Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995: Government Response' (2010)

in relation to the inherent requirement test, especially when it was successfully introduced by the Victorian government and when it was subsequently repealed with a change in government, provides an excellent source of material regarding the merits of the inherent requirement test compared to alternative approaches.

There are also various factors that indicate that the inherent requirement test might be introduced by an Australian jurisdiction in the near future. In relation to Victoria, the Labor government made a clear commitment to reintroducing the inherent requirement test when it returned to government.⁶² As it was elected in late 2014 it is likely that the Labor government will soon attempt to reintroduce the inherent requirement test into Victoria.

In relation to the other Australian jurisdictions the likelihood of the introduction of the inherent requirement test in the near future may not be as strong. For example, the Commonwealth in its recent review of the law regulating the employment decisions of religious schools decided to remain with a general sensitivities test in its draft consolidation bill.⁶³ However, this decision should be seen in the context of the Federal Labor Party only holding power at the time that the draft bill was produced under a minority government arrangement and also facing significant political challenges in its attempt to be re-elected. The tenuous position of the Federal Labor Party likely made it reluctant to risk any adverse political consequences that might have resulted from an attempt to modify the protections provided to religious schools.

It is also relevant to note that both Queensland and Victoria had a general sensitivities test before adopting the inherent requirement test, which indicates that many of the individuals wanting to amend anti-discrimination provisions relating to the employment decisions of religious schools consider the inherent requirement test to be one of the main alternative approaches to appropriately regulating the area. Considering that five Australian jurisdictions adopt a general sensitivities test there is

<http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/government_response.pdf> 25–6.

⁶² John Ferguson, 'Labor vows to get tough on religious discrimination at school', *The Australian (Online)* 21 November 2014 <<http://www.theaustralian.com.au/national-affairs/state-politics/labor-vows-to-get-tough-on-religious-discrimination-at-school/story-e6frgczx-1227096591487>>.

⁶³ Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) s 33(4).

a realistic possibility that the inherent requirement test will be adopted by reformers in some of these jurisdictions in the future.

A further benefit of an assessment of the merits of the inherent requirement test is that it involves a consideration of a variety of issues relevant to the merits of alternative models. For example, the inherent requirement test requires a court to determine the religion on which a school is based, the doctrines that should be attributed to that religion, and their relevance to the employment decision made by the school. A consideration of these issues is also necessary in relation to other approaches adopted in various jurisdictions such as the religious sensitivities test. Consequently, an assessment of the inherent requirement test can provide an insight into the merits of alternative models that could be used for regulating the area.

3.2 THE OPT-IN MODEL

The third model selected for detailed consideration is an original model that I have devised for regulating the employment decisions of religious schools labelled the ‘opt-in model’. The essence of the approach involves religious schools individually determining for themselves the particular grounds and employment positions for which they require protection. If the school authorities consider that they do require protection for their employment decision then they can arrange for the school to be registered with the ADB. Once registered the school can legally make employment decisions in accordance with the scope of the registered protection. There is no initial assessment process for determining the appropriateness of a school’s registration. However, the executive can override or modify a registration at any time by enacting a statutory rule under the Act if it considers that the protection requested by a particular religious school is inappropriate.

The approach is similar to an individual exemption approach proposed by some advocates where no explicit legislative protection is provided on any grounds and religious organisations need to apply to anti-discrimination bodies for specific, often temporary, exemptions from the operation of anti-discrimination legislation.⁶⁴

⁶⁴ See, eg, Liberty Victoria, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act*

However, the proposal is significantly different to this approach as under the opt-in model the executive and parliament play a significant role in determining whether to override the registration of the religious school, and the registration is ongoing until the government or the school cancels or modifies the registration. A more detailed account of the elements of the proposed opt-in model and how it is different from various alternative approaches that have been proposed for regulating religious schools in NSW is provided in Chapter 5.

There is a need to consider a novel approach considering the widespread disagreement among many members of the community regarding the suitability of the various approaches currently adopted or proposed in the area. The opt-in model has the potential to more appropriately regulate the employment decisions of religious schools, and consequently may reduce social division and help the community avoid the substantial financial and non-financial costs involved in governments repeatedly conducting inquiries into the appropriate approach that should be adopted in regulating religious schools.

3.3 NO PROTECTIONS FOR THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

An alternative approach not currently adopted by any jurisdiction in Australia is the removal of any protections for religious schools so that anti-discrimination legislation regulates religious schools in the exact same way in which it regulates government schools. Such an approach does have a significant number of supporters. For example, the Discrimination Law Experts' Group, consisting of nine Australian academics specialising in discrimination law, argued in their submission to the Attorney-General's Department's *Inquiry into the Consolidation of Commonwealth Anti-Discrimination Laws* that religious schools and other religious organisations should not be provided with additional protections under anti-discrimination

1995, 17 July 2009

<http://libertyvictoria.org/sites/default/files/Liberty_Submission_Religion_Exem.pdf> 8; Jobwatch, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 2.

legislation.⁶⁵ The Group stated that ‘the religious exceptions should be removed because we do not accept that religious rights should prevail over the rights of individuals to be treated in a non-discriminatory way in public sphere activities’.⁶⁶

Despite the significant support for such an approach it is difficult to see how it could be consistent with an appropriate respect for a range of rights including the right to religious liberty, freedom of association and the rights of parents and minorities. On the problems such an approach would encounter in relation to religious freedom Carolyn Evans notes that ‘[e]liminating religious exemptions altogether, however, would put in danger core areas of religious autonomy, including the choice of religious leadership, religious educators and other core employees’.⁶⁷ In particular, a failure to adequately protect the employment decisions of religious schools in anti-discrimination legislation—at least on the ground of religion—would likely achieve a similar result as an outright prohibition on religious schools. A school that is unable to favour at least some employees on the basis of their commitment to the school’s religion would be unable to realistically function as a religious school. It is also essential that adequate protections are provided on a range of other grounds to ensure that religious schools are not significantly impaired in their ability to provide an authentic religious education and formation. A failure to provide adequate protections for the employment decisions of religious schools could result in religious adherents deciding to close their religious schools rather than violate their religious beliefs. Such an outcome would be a major loss not only to the adherents of the religion, but often also to the wider community who may benefit from the various social services provided by the religious school. A substantial part of the thesis is devoted to justifying these claims and explaining why an approach that provides minimal or no protection to the employment decisions of religious schools is inappropriate.

⁶⁵ Discrimination Law Experts’ Group, Submission to the Commonwealth Attorney-General’s Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011, 16.

⁶⁶ *Ibid.*

⁶⁷ Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (2009) 40.

4 THE CRITERIA USED TO EVALUATE THE MODELS

The merits of the general exception approach, inherent requirement test and opt-in model in regulating the employment decisions of religious schools will be assessed according to ten criteria. Seven of the criteria have already been mentioned regarding the importance of the issue—the promotion of equality, religious liberty, the welfare of children, the rights of parents and minorities, the right to privacy, and freedom of association. The other three criteria are respect for multiculturalism, the promotion of human rights standards and the compliance cost of the different models. A more detailed explanation of the importance of these criteria in the context of the operation of religious schools is undertaken in subsequent chapters. Although all criteria are relevant to the merits of each model, the extent of the discussion of each criterion will vary between the chapters on the basis that each model raises distinctive issues that need to be considered in assessing its merits. The thesis argues that the opt-in model better satisfies the criteria compared to the general exception approach and the inherent requirement test and that the NSW government should implement the opt-in model.

5 THE STRUCTURE OF THE THESIS

Chapter 2 is specifically focused on assessing the merits of the general exception approach according to the right to religious liberty. Considering this right is commonly relied upon to justify the general exception approach if the model is inconsistent with the right to religious liberty then this would be a major flaw of the approach. If it cannot be supported on this ground then this would provide a strong justification for assessing the merits of alternative approaches that may more appropriately respect the right to religious liberty and other relevant rights. The chapter begins with a discussion of the importance of the right to religious liberty especially in the context of religious schools and the significant role that religious schools can play in the life of religious communities. The importance of allowing religious schools to make employment decisions on the basis of a person's compatibility with the school's religion is also considered. Finally the merits of the general exception approach is evaluated according to whether it either violates the

right to religious liberty or provides excessive protections that cannot be justified on the basis of this right.

Chapter 3 addresses the merits of the general exception approach on the basis of the right to equality. A significant violation of the right to equality by the model would similarly indicate that it has substantial deficiencies and that the merits of implementing alternative models should be closely examined. The chapter discusses the importance of the right to equality and focuses on the critical issue of the likely extent and nature of the harm, if any, being caused by religious schools relying upon the protections provided by the general exception approach. The final section addresses whether any harm currently being caused by the employment decisions of religious schools can be justified by relying on the right to equality.

Chapter 4 focuses on the suitability of adopting the inherent requirement test to regulating the employment decisions of religious schools. The chapter considers the merits of various arguments made in favour of the model including a more appropriately adapted approach to respecting religious liberty and a substantial reduction in the harm that may be caused by a general exception approach. Detailed consideration is given to two central issues: the merits of the claim that the importance of the mission fit of employees at religious schools cannot be restricted to particular roles; and the possible difficulties courts in NSW would encounter in attempting to apply the inherent requirement test to the employment decisions of religious schools.

Chapter 5 discusses the merits of adopting the opt-in model for regulating the employment decisions of religious schools in NSW. The chapter provides a detailed account of the elements of an opt-in model and evaluates whether such an approach more appropriately protects the interests of religious schools, the individuals who may be affected by adverse employment decisions and other members of the community according to the criteria considered in previous chapters.

Chapter 6 assesses the merits of the three models according to the remaining eight criteria not addressed in detail in the previous chapters that focused substantially on the right to equality and religious liberty.

6 THE SCOPE OF THE THESIS

The thesis focuses specifically on the merits of different models that can be adopted in regulating the employment decisions of religious schools in NSW. There are many other religious organisations offering educational and training services that also employ people (for example, universities, theological colleges and religious artistic organisations), and the appropriate approach to adopt in regulating these institutions likely raises similar issues to those involving religious schools. The appropriate operation of anti-discrimination legislation in situations where it interacts with the right to religious liberty is an issue that also arises in an extensive range of different areas including the enrolment and management of students at religious schools, religious accommodation, the wearing of religious symbols and clothing, religious charitable organisations, religious health care institutions and the general provision of goods and services by religious individuals and organisations. Although these areas are outside the scope of the thesis a substantial amount of the material covered in the chapters is relevant to many of the issues raised in these areas.⁶⁸

Although it is not a comparative analysis the thesis does rely upon legislation and cases from overseas jurisdictions for the purpose of enriching the analysis of the merits of the different models considered. The specific focus of the thesis is on the appropriate approach that should be adopted in NSW to regulating religious schools under anti-discrimination legislation. However, the assessment of the merits of the different models would be relevant to any inquiry on how religious schools should be regulated in other jurisdictions in Australia and overseas.

⁶⁸ For further information on important aspects of the interaction between the right to equality, religious liberty and other rights, see generally, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013); W. Cole Durham Jr and Brett G Scharffs, *Law and Religion—National, International, and Comparative Perspectives* (Aspen Publishers, 2010).

CHAPTER TWO

THE MERITS OF THE CURRENT REGULATION OF RELIGIOUS SCHOOLS BY THE ANTI-DISCRIMINATION ACT 1977 (NSW)

1 INTRODUCTION

Considering the central role of the right to religious liberty in discussions concerning the approach that should be adopted in regulating the employment decisions of religious schools it is appropriate to closely examine the nature and importance of the right and the extent of any support that the right can provide to the selected models. The chapter begins with a focus on both the fundamental importance of the right to religious liberty and the understanding that it can be limited in a range of circumstances. It then addresses the important role that religious schools play in the life of many religious communities by providing religious education to the children of religious adherents, promoting social cohesion within the religious community, and allowing many religious adherents to fulfill their spiritual obligations to be involved in charitable work. The section also addresses the critical role that employment decisions can have on the ability of religious schools to fulfill their religious objectives. The next section identifies and assesses the merits of a range of criticisms that can be made against the general exception approach on the basis that it violates the right to religious liberty or provides excessive protections to religious schools that cannot be justified on religious liberty grounds. The chapter concludes with a consideration of the merits of the claim that as religious schools are publicly funded the government should not provide religious schools with protection under anti-discrimination legislation for their employment decisions.

2 THE IMPORTANCE OF THE RIGHT TO RELIGIOUS LIBERTY

The importance of the right to religious liberty is recognised in an extensive range of international human rights treaties.⁶⁹ Although these instruments also emphasise the

⁶⁹ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 18; *Convention for the Protection of Human Rights and*

importance of many other rights there are significant features of these instruments that indicate that the State should be particularly committed to ensuring that the right to religious liberty is protected.⁷⁰

There is the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* ('1981 Declaration'), an entire international instrument dedicated to recognising the importance of the right to religious liberty and ensuring that it is protected.⁷¹ Some international human rights

Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 9; *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 4; *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) arts 1–2, 5; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 12; *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) art 5; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18; *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 13(3); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 8; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36 UN GAOR, 36th sess, Supp No 51, UN Doc A/36/684 (25 November 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 14; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 1–8; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 12.

⁷⁰ It is accepted that the claim that a State should be particularly focused on protecting some human rights is contestable considering international human rights instruments declare the equal importance of all human rights. A relevant illustration is the *Vienna Declaration and Programme of Action*, A/CONF.157/23 (12 July 1993), which states: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis': art 5. One approach to such a criticism could be to simply argue that this view is wrong. For example, the Human Rights Committee would be justly condemned if it held that States must aim at protecting all the rights contained in the *ICCPR* in a 'fair and equal manner, on the same footing, and with the same emphasis' and that States cannot consider that there is a significant difference in importance between rights in the *ICCPR* (such as the right a person has to receive just compensation in the event of unlawful arrest under Article 9(5) compared to the prohibition on torture under Article 7). An alternative response to the criticism could be to accept that all human rights are of equal importance but that States can legitimately adopt a nuanced approach to promoting human rights that takes account of a range of relevant factors, and that under this approach adopting a particular emphasis on promoting religious liberty, equality or some other right is acceptable and consistent with an understanding that all rights are of equal importance.

⁷¹ GA Res 36/55, 36 UN GAOR, 36th sess, Supp No 51, UN Doc A/36/684 (25 November 1981). Although the United Nations General Assembly committed to producing a convention on religious freedom this has not yet occurred. For an explanation regarding why a convention on religious liberty has not yet been established and an evaluation of the merits of producing such a convention see

instruments also place particular restrictions on States in relation to their ability to limit the protection provided to rights such as the right to religious liberty. Under the *International Covenant on Civil and Political Rights* ('ICCPR'), for example, the right to religious liberty is one of only seven rights that are non-derogable even in times of public emergency.⁷² The Human Rights Committee has emphasised that this restriction that the Covenant places on States 'underlines the great importance of non-derogable rights'.⁷³ The importance that the Covenant attributes to the right to religious freedom is further illustrated by the other six non-derogable rights, which include the right to life, the right not to be tortured and the right not to be enslaved.⁷⁴ Further support for the importance of the non-derogable rights is provided by the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* ('*Siracusa Principles*'), a document produced by the United Nations Economic and Social Council. The *Siracusa Principles* hold that

[n]o state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.⁷⁵

The importance of the right to religious liberty is also emphasised in a range of statements contained in these instruments, especially the *1981 Declaration*. For

Malcolm Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change' (2012) 11(1) *Oxford Journal of Law and Religion* 5, 6–9.

⁷² ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4.

⁷³ Human Rights Committee, *General Comment No 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, 52nd sess, UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994) para 10.

⁷⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4.

⁷⁵ United Nations Economic and Social Council, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984) [58].

example, the Preamble of the *Declaration* states:

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations ... religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life.⁷⁶

The fundamental importance of the right to religious liberty is also frequently affirmed by international and national courts. The European Court of Human Rights, for example, emphasised the importance of religious liberty in *Kokkinakis v Greece* upholding the applicant's claim that his religious liberty had been violated when he was prosecuted under laws prohibiting proselytism.⁷⁷ The Court held that

freedom of thought, conscience and religion is one of the foundations of a 'democratic society' ... It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.⁷⁸

In *Christian Education South Africa v Minister of Education* ('*Christian Education South Africa*') the Constitutional Court of South Africa was required to consider the constitutionality of corporal punishment of students in Christian schools administered with parental consent.⁷⁹ Although the Court ultimately rejected the attempt by the schools to rely on religious liberty to justify corporal punishment Sachs J strongly emphasised the importance that should be given to religious freedom when he argued that

[t]he right to believe or not to believe, and to act or not to act according to his or her

⁷⁶ 1981 *Declaration* Preamble paras 3–4.

⁷⁷ (1994) 17 EHRR 397, 422.

⁷⁸ *Ibid* 418.

⁷⁹ *Christian Education South Africa v Minister of Education* [2000] 4 SA 757 (Constitutional Court) [1]–[5].

beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.⁸⁰

Despite the importance of religious freedom it is important to note that neither the right to religious liberty nor the other rights considered in later chapters are absolute rights that can never be limited by the State.⁸¹ Rather a determination of what justice requires in a particular situation will typically involve a consideration of different, sometimes conflicting, human rights, and there will be situations where the right to religious liberty should be curtailed on the basis that other rights in that situation should be given priority.

The legitimacy of the State being able to limit religious liberty is supported by international human rights instruments. The *ICCPR*, for example, declares that the '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁸²

The understanding that religious liberty is not an absolute right and that it can be limited by the State in pursuit of other legitimate goals is repeatedly affirmed in the decisions of national courts. The High Court of Australia, for example, clearly emphasised this principle in *Church of the New Faith v Commissioner of Pay-Roll*

⁸⁰ Ibid [36].

⁸¹ Although the claim that absolute human rights exist is contested, some rights that are commonly considered to be absolute include the right not to be tortured and the right an innocent person has not to be intentionally killed. For a useful discussion of the claim that some human rights should be considered to be absolute see John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 223–6.

⁸² *ICCPR* art 1(3).

Tax (Vict) (the ‘*Scientology case*’) in which the Court decided that the Church of the New Faith should be regarded as a religion for the purposes of taxation.⁸³ On the limitations on the right to religious liberty Mason ACJ and Brennan J held that

the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them ... Religious conviction is not a solvent of legal obligation.⁸⁴

A similar point was made by Kirby J in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. His Honour stated that ‘[c]ourts will seek to avoid entanglements in what are substantially issues of religious doctrine where there is no applicable legal norm or specific judicial competence. But courts will reject the notion that religious organisations, as such, are somehow above secular law and exempt from its rules’.⁸⁵

National courts in other jurisdictions similarly affirm the limited nature of the right to religious liberty. An example of such an approach is provided by the United States Supreme Court in *Reynolds v United States*, which upheld a conviction for polygamy.⁸⁶ The man’s attempt to avoid conviction on the basis that he was under a religious obligation to engage in polygamy was rejected by the Court, which held that allowing such a defence ‘would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances’.⁸⁷

⁸³ (1983) 154 CLR 120, 148–9, 162, 177.

⁸⁴ *Ibid* 135–6. Cf Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 79–80 where Evans is critical of the reliance placed on *Cantwell v Connecticut* 310 US 296 (1940) to support what Evans referred to as the ‘rather wide proposition’ that general laws ‘are not defeated by a plea of religious obligation to breach them’ considering that the authority of the case had been undermined by the subsequent decision of *Wisconsin v Yoder*, 406 US 205 (1972).

⁸⁵ *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 121.

⁸⁶ 98 US 145, 168 (1879).

⁸⁷ *Ibid* 167.

The limited nature of the right to religious liberty was reaffirmed in the context of a religious educational institution in *Bob Jones University v United States*.⁸⁸ In the case, the United States Supreme Court upheld a government decision to deny tax benefits to a university that had a policy of prohibiting interracial dating and marriage on the grounds that such relationships were prohibited by Christianity.⁸⁹ In affirming that religious liberty is not an absolute right the Court held that

[t]he governmental interest at stake here is compelling ... the Government has a fundamental, overriding interest in eradicating racial discrimination in education ... [the] governmental interest substantially outweighs whatever burden denial of tax benefits places on [the] petitioners' exercise of their religious beliefs.⁹⁰

Although the right to religious liberty can be limited in appropriate situations a State's decision to limit the right must be supported by a strong justification. The importance of ensuring that the State does not undermine the religious liberty of its citizens unless there is an adequate justification was supported by the Human Rights Committee in a General Comment issued on Article 18 of the *ICCPR* dealing specifically with the obligations imposed on States in relation to respecting freedom of religion. The Committee stated that Article 18 permits

restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others ... In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and *must not be applied in a manner that would vitiate the rights guaranteed in article 18*. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.⁹¹

⁸⁸ 461 US 574 (1983).

⁸⁹ *Ibid* 579–80, 605.

⁹⁰ *Ibid* 604.

⁹¹ Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion (Art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 8 (emphasis added).

3 THE IMPORTANCE OF RELIGIOUS SCHOOLS TO RELIGIOUS COMMUNITIES

The determination of the nature and scope of a particular religious commitment is essentially a theological issue that the State should generally avoid addressing. However, this does not mean that the comparative importance of religious commitments is an issue that the State cannot attempt to address in deciding how it should act in areas involving religious liberty. Instead an evaluation of the importance of a religious commitment is essential in determining whether it is appropriate for the government to regulate an area, and if so, the nature of any permissible regulation. If the religious commitment is of substantial importance to the religious individual and their community then the State should only implement a measure that has the effect of limiting or prohibiting the religious activity if it can be justified by the importance of the objectives being pursued by the State. As Evans and Gaze note in the context of anti-discrimination laws:

The centrality of a particular activity to a religion is a key factor that needs to be taken into account when assessing whether non-discrimination laws should apply to that activity. This is a fraught issue because it requires legislatures or courts to make an assessment of religious practices, but it is still of crucial importance if religious freedom is to be respected. The hiring of staff in religiously run hospitals, schools and other institutions may well be important to many religions, but it usually does not have the central place of activities such as the selection and training of clergy, the language and symbolism of ritual, and the determination of membership of the religious community. Such core religious activities have a greater claim for freedom from regulation (including from the imposition of non-discrimination laws) than activities that are more peripheral.⁹²

A State also needs to adequately assess the validity and importance of a religious liberty claim to address the possibility that an individual might be fraudulently abusing the right. For example, some individuals may attempt to abuse the right to religious liberty by claiming that their conduct is required by their religious beliefs when they actually consider that it is unrelated to their religious views, or

⁹² Carolyn Evans and Beth Gaze, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 *Harvard International Law Journal* 40, 47 (citations omitted).

alternatively that a commitment is central to their faith when they actually consider it to be of only minor importance. A relevant example is *R (on the application of Spiropoulos) v Brighton and Hove City Council*, where the claimant argued that he was unable to open a bank account on religious grounds as he believed in ‘the 12 Olympian gods in which Greeks in classical times believed’.⁹³ Mitting J held that although it would be inappropriate for the court to assess the reasonableness of the applicant’s religious beliefs the claim should be rejected as insufficient evidence was provided by the applicant to explain why a person adhering to the ancient Greek religion would be prohibited from opening a bank account.⁹⁴

A more striking example of a court rejecting an individual’s claim for religious protection is provided in *United States v Kuch*, in which the defendant attempted to avoid a drug conviction on the basis that she was an ‘ordained minister of the Neo-American Church’ and that drug use was an essential part of her religion.⁹⁵ In the judgment the Court emphasised various aspects of the alleged religion including that the head of the Church was a ‘Chief Boo Hoo’, each member carried a ‘martyrdom record’ to reflect their drug arrests, the Church symbol was a three-eyed toad, its bulletin was called the ‘Divine Toad Sweat’, the Church key was a bottle opener, the Church’s motto was ‘Victory over Horseshit!’, and the official songs of the Church were ‘Puff, the Magic Dragon’ and ‘Row, Row, Row Your Boat’.⁹⁶ Relying on these factors the Court rejected the defendant’s attempt to justify her conduct on religious liberty grounds holding that

[w]hat is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence. It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence.⁹⁷

⁹³ [2007] EWHC 342 (Admin) [8].

⁹⁴ *Ibid* [8].

⁹⁵ 288 F Supp 439, 442 (1968).

⁹⁶ *Ibid* 444–5.

⁹⁷ *Ibid* 444 (citations omitted).

3.1 THE RELIGIOUS DIMENSIONS OF RELIGIOUS SCHOOLS

The views of commentators such as Evans and Gaze that the establishment and management of religious schools is not of the same fundamental importance to religious communities as activities such as the selection of religious leaders and the conduct of religious ceremonies would likely be true for most religious communities. However, even if religious schools are not critical to the existence of religious communities it does not mean either that the establishment and maintenance of religious schools are not important expressions of religious faith, or that they do not play a central role in the life of the religious communities. Indeed, there are good grounds for considering that religious schools play a fundamentally important role in the wellbeing of many religious communities by contributing to religious education, supporting the general religious community and allowing religious adherents to fulfill a spiritual obligation to engage in charitable works.

3.1.1 THE ROLE OF RELIGIOUS SCHOOLS IN PROVIDING RELIGIOUS EDUCATION

Many religious communities establish religious schools to fulfill what they consider to be a spiritual obligation to educate members of the religious community—in particular children of religious adherents—so that they know and are committed to their religion. This is not to disregard the other essential roles that educational institutions have of developing the skills, knowledge and character of their students and employees for their benefit and for those within and outside of the religious community. However, many religious individuals understand that their religion imposes on them—either by explicit statements in holy texts or by necessary implication from the tenets of the religion—a fundamental obligation to be involved in educating others about their religion on the basis that the religious knowledge is of primary importance for the welfare of individuals in both living a fulfilled life and in properly preparing them for divine judgement after death. As Darcy notes ‘each religious heritage is precious, and it is a primary task of every tradition to hand on an intact understanding of it to successive generations’.⁹⁸

⁹⁸ John D'Arcy May, 'Can tolerance be taught?: Steps towards inter-religious education' (2006) 54(4) *Journal of Religious Education* 11, 13–14.

The central importance of religious education to religious adherents is clearly recognised in Article 18 of the *ICCPR*, which declares that parents have the right ‘to ensure the religious and moral education of their children in conformity with their own convictions’.⁹⁹ The Human Rights Committee in General Comment 22 confirmed that the establishment of religious schools is integral to the functioning of religious groups and that Article 18 explicitly protects the right of religious groups to establish religious schools. The Committee noted that

[t]he freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private’. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts ... the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, *the freedom to establish seminaries or religious schools* and the freedom to prepare and distribute religious texts or publications.¹⁰⁰

The establishment and management of religious schools allow the religious community to effectively teach their religious beliefs to their children and others interested in the religion. Establishing religious schools allows the religious community to be confident that their religion will be appropriately explained and defended in a wide range of subjects in which religious issues might arise—a result that is very unlikely to occur in a government school where subjects will likely be taught by teachers with little, or no, knowledge about the beliefs of the religion. Furthermore, control over the school environment allows the religious group to incorporate a wide range of religious and cultural practices and symbols into the daily operation of the school increasing the opportunities available to students, staff members and others involved with the school to learn about their religion and participate in religious ceremonies. Such a situation will normally be superior—from the perspective of the religious community—to an approach where students attend

⁹⁹ *ICCPR* art 18(4).

¹⁰⁰ Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion (Art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4] (emphasis added).

government schools and receive their religious education at an external location outside school hours.

Religious schools are particularly important to many religious communities as in most countries in the world there are a wide variety of religious and non-religious worldviews competing for adherents. The establishment of their own religious schools is an effective way that the religious community can educate their children and other members of the community of the merits of their religion compared to alternative religious and non-religious worldviews. Furthermore, many religious adherents throughout the world suffer extensive ridicule, distrust and even violence due to their religious commitments, especially in situations where the religious community is a small minority group.¹⁰¹ Religious schools will often be one of the few locations where the religious community will be able to positively present their religion in an environment that is supportive of their religion's theological and ethical teachings. This ability to create a positive environment in which the religion can be understood and assessed illustrates the central importance that religious schools will often have in supporting religious communities.

3.1.2 THE PLACE OF RELIGIOUS SCHOOLS IN THE RELIGIOUS COMMUNITY

Religious schools are often not just places of education, but religious communities that have been established to create a supportive environment for the religious adherents where the religion can be taught, religious obligations met, and the religious community supported. Places of worship are incorporated into many religious schools allowing religious ceremonies to be performed for staff and students attending the religious school and also for members of the wider religious community not formally a part of the religious school.

Religious schools also often function as meeting places for the religious community to learn more about their faith and cultural traditions, engage in charitable work, meet the various challenges that their religious community is faced with, socialise

¹⁰¹ For a detailed analysis of the oppression suffered by religious adherents throughout the world see, eg, US Commission on International Religious Freedom, 'Annual Report 2013' (2013).

with other members of the community, and meet friends and potential spouses from within the religious community. A narrow focus solely on the role religious schools play in providing an education to students fails to appreciate that religious schools play a much broader role, and that while most members of religious communities would consider the teaching aspect of schools to be essential, many would also consider that the other aspects of the operation of religious schools are another important part of their operation.

3.1.3 THE RELIGIOUS OBLIGATION TO ESTABLISH RELIGIOUS SCHOOLS

Religious schools are also often established by religious groups as a way of fulfilling a spiritual obligation to engage in charitable works. This spiritual obligation is clearly indicated in the numerous statements that can be found within the holy texts of various religions requiring religious adherents to be involved in charitable work.¹⁰² In support of the spiritual obligation imposed on religious adherents Garvey used the example of the charitable work undertaken by the Catholic Church arguing that:

[r]eligious organizations like schools, hospitals, and Catholic Charities ... do their work because of their religious beliefs. Catholic Charities does adoptions because the gospel tells us to care for the weak and vulnerable. Catholic universities exist because the gospel tells us to teach all nations. Migration and Refugee Services lives out the teachings of the Sermon on the Mount and Matthew 25. This is the heart of the Christian religion. Serving others – not just Catholics; *all* others – is not just a recommendation. It's a requirement.¹⁰³

The Anglican Diocese of Sydney made similar points in its submission to the Commonwealth Inquiry into the Consolidation of Commonwealth Anti-Discrimination Laws. The Diocese stated:

¹⁰² For example, see the Bhagavad Gita 17: 20–22 for Hinduism, see Deuteronomy 15:7–11 for Judaism, see Matthew 25:31–40 for Christianity, and see the Quran 2:177 for Islam.

¹⁰³ John Garvey, 'Religious Freedom and the Love of God' (Speech delivered at the General Assembly of the United States Conference of Catholic Bishops, Atlanta, June 12 2012) <<http://publicaffairs.cua.edu/releases/2012/garvey-bishops-address.cfm>>.

Religious belief affects the whole person and all aspects of life. It is expressed corporately and personally. It is often expressed corporately by establishing organisations to pursue a variety of purposes in furtherance of those religious beliefs. To this end we submit that religious schools and welfare organisations (among others) are religious bodies. They exist to undertake a variety of charitable purposes and to do so in a manner that upholds and promotes certain religious belief.¹⁰⁴

Considering the role of religious schools in providing religious education, supporting the religious community, and fulfilling charitable obligations, in most situations religious schools will be of substantial, and in some situations of critical, importance to the religious community. Consistent with the human rights instruments and the views of the Human Rights Committee members discussed above, the importance of religious liberty in the context of religious schools should be understood as imposing a strong obligation on the State to protect the ability of religious groups to establish and maintain religious schools and avoid acting in a way that undermines the operation of religious schools.

3.2 THE IMPORTANCE OF EMPLOYMENT DECISIONS TO RELIGIOUS SCHOOLS

A significant way in which the State can protect religious schools is to provide them with sufficient freedom so that they can employ persons compatible with the school's religion. The ability to employ individuals with good mission fit is central to the ability of religious schools to provide an effective religious education in the classroom environment as religious adherents will likely have a more detailed understanding of the religion and, even more importantly, their personal commitment to the faith will make them more effective in explaining the merits of the religion. The employment of religious adherents in a variety of employment positions within a religious school also provides important opportunities to students and others involved with the school to continue learning about the religion in informal social discussions, to be inspired by the example set by how a committed religious adherent

¹⁰⁴ Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 2 February 2012, 13.

lives their life in conformity with the religion, and to obtain personal assistance in living an ethical life as understood by the religion.

Furthermore, for those religions that teach that only certain persons can perform religious ceremonies and other religious activities it is particularly important that religious schools are able to employ only those persons for employment roles within the school involving these functions. A failure to provide this protection would likely result in schools abolishing these employment positions in order to avoid violating their religious commitments. Such a result would significantly impair the school's ability to provide an authentic religious environment for students, staff and others involved with the school.

Adequate protection for the employment decisions of religious schools is also necessary to ensure that there are a sufficient number of religious adherents within religious schools to allow the religious identity of the schools to be established and maintained. As Mortensen notes: 'the right to discriminate on religious grounds is essential to the freedom [of a religious organisation] as the group could not exist as a distinctive religious entity without it.'¹⁰⁵ Such an identity is essential in helping religious schools recruit suitable employees in the future, obtain external support, and to act as a source of motivation for employees. Being clearly identified as an organisation that adheres to a particular worldview can be critical for a religious school's continued existence as it might be the central reason why it receives donations and why individuals are willing to undertake paid and voluntary work for the school.

Considering these reasons the ability of religious schools to select employees compatible with the school's religion should be understood as an important aspect of the right to religious liberty in the context of religious schools. Consequently, the State should be understood to be under a strong obligation to protect this aspect of the right to religious freedom and avoid limiting the ability of religious schools to

¹⁰⁵ Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 320, 323.

select employees for mission fit unless there are sufficiently strong grounds to justify any limitation.

4 THE COMPATIBILITY OF THE GENERAL EXCEPTION APPROACH WITH THE RIGHT TO RELIGIOUS LIBERTY

Considering that the general exception approach allows religious schools to make employment decisions on all grounds except race, age and a person's responsibilities as a carer it would appear that the provisions are substantially compatible with the right to religious liberty. However, on closer examination there are some important issues to consider in determining if the provisions are consistent with the right to religious liberty.

4.1 THE MERITS OF EXCLUDING SOME GROUNDS FROM THE GENERAL EXCEPTION APPROACH

The general exception approach may violate the religious liberty of particular religious groups that consider the excluded grounds of race, age and a person's responsibilities as a carer are significant in making employment decisions for their schools. Some groups, for example, may want to exclude persons with these attributes from their schools as they consider that persons with these attributes are of inferior worth on the basis of the particular attribute. Such a situation would arise with racial supremacist groups that situate their worldview within a particular religion and want to exclude persons of different races from their schools due to their perceived inferiority.

Although such groups could argue that the failure by the State to provide adequate protection for their employment decisions is a violation of their religious liberty, the State would be justified in refusing to enact measures to allow the groups to make decisions on these grounds. Importantly, it may not even be appropriate to regard the denial of protection to these groups as a violation of their religious liberty if it appears that the groups are fraudulently claiming religious status. Even if some of these groups could legitimately claim to be religious then the State could easily justify its actions due to the importance of promoting racial equality, which would

clearly fall within the permissible limitations on the right to religious liberty as it would involve protecting ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’.¹⁰⁶

There may be other religious groups, however, with a strong commitment to racial equality that may want to be able to make decisions on the basis of race to allow an environment to develop within the school that is an authentic expression of the group’s religious and cultural identity. A Jewish group, for example, managing a religious school could operate on the understanding that the definition of a Jew can have both a religious and racial component. Such a group may want to employ persons satisfying their definition of a Jew to assist the school in effectively promoting the religious beliefs and culture of the Jewish people. Under the general exception approach adopted in NSW a school that made employment decisions on these grounds may violate the prohibition on racial discrimination contained in the Act.

This issue was considered by the Supreme Court of the United Kingdom in *R (on the application of E) v Governing Body of JFS* (‘*JFS*’).¹⁰⁷ The case concerned a refusal by an Orthodox Jewish school to enrol a student whose mother’s conversion to Judaism was not recognised as valid according to the Orthodox Jewish faith as understood by the Office of the Chief Rabbi, but was recognised as valid by other branches of the Jewish faith.¹⁰⁸ The school’s decision could not be unlawful on the basis that it involved religious discrimination as religious schools were permitted under the *Equality Act 2006* (UK) to make decisions regarding the admission of students on the grounds of religion.¹⁰⁹ However, a majority of the Supreme Court held that the school’s decision to exclude the student was made on the grounds of ‘ethnic origin’ and that this violated the legal prohibition on discrimination on the grounds of race, which was defined in the *Racial Relations Act 1976* (UK) as including ‘colour, race, nationality or ethnic or national origins’.¹¹⁰

¹⁰⁶ *ICCPR* art 18(3).

¹⁰⁷ [2009] UKSC 15 (16 December 2009).

¹⁰⁸ *Ibid* [5]–[7].

¹⁰⁹ *Equality Act 2006* (UK) s 59(1)–(2).

¹¹⁰ *Race Relations Act 1976* (UK) s 3(1); *JFS* [2009] UKSC 15 (16 December 2009), [46], [71], [92], [124], [149].

The judgment was controversial with some of the judges in dissent concerned that it would undermine the ability of Jewish groups to maintain religious schools. Lord Rodger, for example, stated that the ‘decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief’.¹¹¹ Considering that in NSW ‘race’ is defined in the Act as including ‘colour, nationality, descent and ethnic, ethno-religious or national origin’ the case demonstrates that a similar decision could be made by a NSW court in relation to both students and employees.¹¹²

One response to criticisms of this aspect of the general exception approach is to argue that religious groups that consider the excluded grounds to be significant could apply to the ADB for an exemption from the provisions regarding racial discrimination or the other grounds excluded. However, this approach could be burdensome—especially for a small school with limited resources—as the school would likely devote a substantial amount of time and money to ensuring that they submit the highest quality application in support of the exemption. Considering the importance that these schools would likely attach to having the exemption granted it is likely that many of them would also employ lawyers and other relevant professionals to ensure their application was of the highest quality possible.

Furthermore, there is no guarantee that the President would grant such an exemption, and even if one were granted the temporary nature of exemptions means that these religious schools would need to meet the recurring expenses involved in periodically submitting new exemption applications. Such an approach would also fail to adequately respect the importance of religious liberty in the educational context. Religious liberty is a fundamental human right and the State should not be adopting a

¹¹¹ *JFS* [2009] UKSC 15 (16 December 2009) [225].

¹¹² *Anti-Discrimination Act 1977* (NSW) s 4 (definition of ‘race’). The Western Australian Equal Opportunity Tribunal addressed a similar situation in *Goldberg v G Korsunski Carmel School* (2000) EOC¶93-074, which concerned an Orthodox Jewish school that would accept students who were not considered to be Jewish (according to an Orthodox Jewish perspective) if they accepted restrictions on their enrolment including being ineligible for student leadership roles, scholarships or financial assistance: 74 236. The Tribunal held that the school was able to rely on a general defence for religious educational institutions, and also rejected the claim that the school had engaged in racial discrimination as the conditions were imposed due to theological considerations: 74 238. Although it is an interesting decision, it was a very concise judgment in a different Australian jurisdiction and so is unlikely to be an influential precedent on the appropriate approach that should be adopted in the event of a similar case arising before a NSW court.

minimalist approach that may fail to adequately protect the right by making it burdensome for religious groups to establishing authentic religious institutions. It is also important to recognise the important distinction between the motivations of groups (such as Jewish schools) that want sufficient protection for their employment decisions so that they can create authentically religious institutions, compared to alternative groups (such as the example of racial supremacist groups) motivated by a desire to exclude persons considered to be inferior.

It is also important to recognise that in various jurisdictions the ability of an organisation to make adverse employment decisions on the grounds of race is regarded as desirable. In NSW, for example, there are exceptions contained in the Act that allow adverse decisions to be made on the basis of race in relation to employing staff to work at restaurants and hiring actors for artistic productions on the understanding that such decisions might be necessary to create an authentic culinary or artistic experience.¹¹³ Even more relevant are the legal protections that can be provided to organisations established on racial grounds to allow the organisations to select employees of that race and avoid hiring employees of a different race.¹¹⁴ These provisions would allow a school based on indigenous spiritual and cultural beliefs to make employment decisions on the basis of race so that a genuine indigenous culture was established within the school. There would likely be widespread support for the operation of such a school even though it was making employment decisions that were denying individuals employment on the basis of their race.

Considering these reasons the failure of the general exception approach to extend the protections to cover all grounds should be understood as a significant violation of the religious liberty of some religious groups. If the inherent requirement test or opt-in model can protect the religious liberty of groups that are aimed at positively promoting religious and cultural identity, but deny protection to groups that are not committed to respecting the equal dignity of all persons then they should be regarded as superior to the general exception approach in relation to this consideration.

¹¹³ *Anti-Discrimination Act 1977* (NSW) s 14(a)–(b).

¹¹⁴ *Ibid* s 14(c).

4.2 THE SIGNIFICANCE OF WIDESPREAD DISAGREEMENT WITHIN RELIGIOUS GROUPS

The general exception approach can be criticised on the basis that many religious communities are engaged in intense debate on a variety of theological and ethical matters and the State should not be seen to be supporting one side by providing protections that others in the religious community consider to be unnecessary, if not inappropriate. In some religious communities many adherents disagree on an extensive range of issues ranging from the restriction of religious leadership roles to male adherents, sexual ethics, and whether the particular religion's claim to be the truth is valid or whether the correct position should be that the truth is found in a variety of different religious and non-religious worldviews that are all equally valid. As Evans and Gaze note: 'There is no single 'religious schools' response to anti-discrimination law; differences arise both between and within religious communities about whether religious schools should have exceptions and whether they should use the exceptions that they currently have'.¹¹⁵ Mortensen expands on this point with the example of the diversity that exists within Christianity:

A surprising number of Christians ... presented theologically informed reasons for the application of sexuality and marital status discrimination laws to employment decisions in religious schools. They appealed to the principles of tolerance taught by Christ, the place of free will in the biblical tradition, the moral insignificance of sexual conduct, the malleability of Christian morals, and the need for churches to modernise.¹¹⁶

The Anglican Church provides a contemporary example of a religious community where there is currently widespread disagreement about the theological significance of attributes like gender and sexuality. Similarly, in the Catholic Church there is widespread dissent among adherents from official Catholic teaching especially in areas involving issues of sexuality, human life and the validity of other religions. The Victorian Independent Education Union, for example, in a government inquiry into Victorian discrimination laws stated that they had 'observed on many occasions' school employers and priests declining to follow official Catholic teaching which

¹¹⁵ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 395.

¹¹⁶ Mortensen, above n 105, 330–1 (citations omitted).

they considered to be ‘uncaring, harmful, intolerant and in conflict with the social justice teachings of the Catholic Church’.¹¹⁷

It is undoubtedly true that there are significant divisions in most, probably all, religious communities of any significant size. However, division within a religious community should not be understood as reducing any support that could be provided to the general exception approach on the grounds of religious liberty. The right to religious liberty would be a very weak right if State and non-State actors could reject the applicability of the right to religious liberty simply because there are other individuals who identify as belonging to the same religious group who do not share the same theological or ethical commitments.

The United States Supreme Court was required to address this issue in *Thomas v Review Board of the Indiana Employment Security Division*, a case concerning a Jehovah’s Witness who resigned after he was transferred to a department that produced turrets for military tanks.¹¹⁸ The authenticity of his claim that his religion required his resignation was challenged by a lower level court on the basis that there was another Jehovah’s Witness working in the department who did not consider that the work was prohibited by the religion. The majority of the Supreme Court justices held that the different theological views were not significant explaining that ‘[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed ... [but] the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect’.¹¹⁹ Their Honours emphasised that ‘it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation’.¹²⁰

The existence of an ongoing dispute within a religious community of the correct interpretation of holy texts or religious traditions should not be relied upon by law

¹¹⁷ Victorian Independent Education Union, *Submission to The Department Of Justice Review Of The Exceptions And Exemptions In The Equal Opportunity Act 1995* (2008) <http://www.ieuvictas.org.au/files/3613/3163/9447/vieu_submission_to_exceptions_review_2.pdf> [5.1.3].

¹¹⁸ 450 US 707, 709 (1981).

¹¹⁹ *Ibid* 715–6.

¹²⁰ *Ibid* 716.

makers to argue that a particular position cannot be supported by the right to religious liberty. The correct approach to adopt was appropriately expressed by Mortensen who argues that

if parliamentarians want their churches, or church schools, to exemplify them then they should take efforts to do so through the appropriate Synod, congregational meeting or school council. It is not proper for Christian parliamentarians, inactive or uninfluential in their own churches' forums, to exploit the privileged position they have in Parliament, and try to realise their religious beliefs by use of the coercive powers of government. Legislators exercising a public trust are not free to rely on their own religious convictions when crafting legislation for the State as a whole, especially when those convictions do not represent a strong mandate of the people they represent.¹²¹

As Mortensen notes the appropriate response for religious adherents who disagree with the teachings of their religion is to attempt to change the doctrines of the religion through methods available within the religious group. If they are unsuccessful in changing the religion then they have the freedom to leave the religious group and either join an alternative religious group that more closely aligns with their beliefs or establish a new religion that is completely compatible with their theological commitments. Disagreement with the current teachings of a religion by some religious adherents should not be understood as weakening the ability of the religious group to claim protection for their beliefs on the ground of religious liberty.

4.3 THE VIOLATION OF THE RELIGIOUS LIBERTY RIGHTS OF EMPLOYEES

A further criticism of the general exception approach is that it can violate the religious liberty of individuals by allowing principals of religious schools to make adverse employment decisions against persons because of their religion. If a Buddhist maths teacher, for example, applied for employment at a religious school and was rejected on the grounds that she was Buddhist then she would appear to have a valid argument that her right to religious liberty has been violated. The Sikh Interfaith Council of Victoria emphasised the potential for the protections provided

¹²¹ Mortensen, above n 105, 331.

to religious schools to violate the religious liberty of individuals arguing that exceptions to anti-discrimination legislation

should not extend to allowing or sanctioning discrimination on the basis of a person's religion or adherence to a religious observance. All schools, regardless of whether they are state schools or private schools, receive significant funding from public revenue. Public revenue is collected and spent without discrimination as to a person's religion ... No Sikh or person of any other faith should be placed in a circumstance where they have to choose between their religion and their employment or education.¹²²

The appropriate outcome of a conflict between an individual employee's religious liberty and the religious liberty of a religious group has been considered extensively in a range of national and international cases. The European Commission of Human Rights, for example, considered the issue in *X v Denmark*, which involved a clergyman in the State Church of Denmark who claimed that his right of religious liberty had been violated when he was requested by his religious superiors under threat of sanctions to change his approach to performing baptisms.¹²³ As the clergyman was not required to remain with the religious group the Commission held that there had been no violation of the right to religious liberty considering that a

church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under [the right to religious liberty] the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters. Further, in a State church system its servants are employed for the purpose of applying and teaching a specific religion. Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom

¹²² Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Sikh_Interfaith.pdf>, 5 August 2009 (G S Gill and J S Shergill, Sikh Interfaith Council of Victoria) 2–3.

¹²³ (1976) 5 DR 157 [1]. Although the case specifically dealt with religious liberty in relation to a State Church, Evans argues that the 'reasoning of the Commission in making this decision is important ... in regard to the religious freedom of members of a Church, whether the Church is established or not': Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) 85. A view echoed by Ahdar and Leigh: Ahdar and Leigh, above n 68, 393.

of religion in case they oppose its teachings. In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction.¹²⁴

The significance of a person's religious liberty when working for a religious organisation was reconsidered by the European Court of Human Rights in *Siebenhaar v Germany*.¹²⁵ The case involved a Protestant kindergarten dismissing an employee after she converted to the religion of a group called the 'Universal Church', which had a range of incompatible doctrines including a belief in reincarnation.¹²⁶ Importantly, unlike in *X v Denmark* the option that the applicant had of resigning was not considered to be fatal to the claim that her right to religious liberty had been violated.¹²⁷ However, on the facts of the case the Court held that there was no violation of the right to religious liberty as the requirement in her employment contract that she not convert to an incompatible religion was reasonable considering it had the legitimate aim of ensuring that the kindergarten was genuinely Protestant for the benefit of the parents, the children and members of the public.¹²⁸

The issue was also considered by the United States Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* ('*Amos*').¹²⁹ The case concerned the operation of a public gymnasium owned and operated by adherents of the Mormon faith who had established the gymnasium in the hope that 'all who assemble here, and who come for the benefit of their health, and for physical blessings, [may] feel that they are in a house dedicated to the Lord'.¹³⁰ The managers of the gymnasium employed a building engineer who was subsequently dismissed on the basis that he did not conform to the requirements of

¹²⁴ *X v Denmark* (1976) 5 DR 157 [1].

¹²⁵ (European Court of Human Rights, Chamber, Application No 18136/02, 3 February 2011).

¹²⁶ *Ibid* [8]–[12], [15].

¹²⁷ *Ibid* [36]–[48].

¹²⁸ *Ibid* [24], [46]–[47]. For a general discussion of the view that recent decisions of the European Court of Human Rights indicate that the Court is moving from a position where the right to leave a religious group prevents a member of the group claiming protection under the right to religious liberty to a position where a court will balance the applicant's right to religious liberty against other relevant considerations including the rights of the religious organisation see Nicholas Bratza, 'The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights' (2012) 14(2) *Ecclesiastical Law Journal* 256, 261; Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1(1) *Oxford Journal of Law and Religion* 109.

¹²⁹ 483 US 327 (1987).

¹³⁰ *Ibid* 330, 337.

the Mormon religion.¹³¹ The employee's claim was dismissed as the Court was concerned that intervening in such cases might result in an excessive entanglement of the government in religious matters and that court intervention might impair the freedom of religious groups to make employment decisions they consider appropriate.¹³² However, Justices Brennan and Marshall did consider that the exception granted to the gymnasium from the operation of anti-discrimination legislation had the effect of undermining the religious liberty of individual employees and was an important consideration in determining how the case should be resolved. They held that the legal provision

necessarily has the effect of burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in these cases, employment itself. The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief.¹³³

These cases support the view that denying a person employment because of their religion is a significant violation of their right to religious liberty and an important factor to take into account in determining the merits of a particular legal provision. If the inherent requirement test and opt-in model can reduce the number of persons who are excluded on religious grounds while appropriately respecting other important rights then they should be considered to be superior to the general exception approach with respect to this consideration.

4.4 THE BROAD SCOPE OF THE PROTECTIONS PROVIDED TO RELIGIOUS SCHOOLS

The general exception approach can also be criticised for providing protections to religious schools far in excess of the level of protection required by the right to religious liberty. Religious groups want sufficient protection under anti-discrimination legislation so that they are able to hire, manage and dismiss

¹³¹ Ibid 330.

¹³² Ibid 336, 343–5.

¹³³ Ibid 340–1 (citations omitted).

employees according to the employee's mission fit. The importance placed by religious groups on having the ability to regulate the membership of their organisations was appropriately expressed by Anglicare in its submission to the Commonwealth Inquiry into the Consolidation of Commonwealth Anti-Discrimination Laws. Anglicare argued that they

cannot employ, at any level, someone who is hostile to or unsupportive of our mission, vision or values. Provided this is done in good faith, religious organisations such as ANGLICARE Sydney maintain the right to decide whether some or all of the positions offered by it carry such a 'faith dimension'. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom. Without this requirement, we cannot maintain our character as a Christian organisation, or carry out our mission. In this respect it is in the same position as any organisation – be it a company, political party or environmental advocacy group. It is a well-accepted principle that all organisations require their employees to be capable of working towards the mission of their employing organisation while respecting the organisation's values.¹³⁴

The general exception approach, however, provides far greater protection than what is required by religious groups. The Act provides protections to 'private educational authorities' rather than specifically to religious schools. Such a broad approach may (or may not) be justifiable on other grounds, but the provision of protections to schools not based on a religious or non-religious worldview cannot be justified on the grounds of religious liberty.¹³⁵ The protections are also provided to all religious schools regardless of whether they actually want to be included resulting in many religious schools that do not want protection being covered by the provisions.

A further problem is that the protections provided to religious schools automatically apply to all employment positions regardless of the importance or religious content of the position within the school, and covers all attributes of employees except for race, age and a person's responsibilities as a carer. However, many religious schools that want to receive protection for their employment decisions may only want

¹³⁴ Anglicare Sydney, Submission No 153 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 1 Feb 2012, 11.

¹³⁵ A broad definition of the term 'religion' to include both religious and non-religious worldviews is supported by a number of international human rights bodies including the Human Rights Committee. The appropriateness of such an approach is considered in greater detail in Chapter 5.

protection for a few central employment positions and only on a few grounds rather than the near complete protection currently provided. A religious group managing a particular school, for example, may consider that the school's religious character can be adequately safeguarded by limiting the protection to employment positions that they consider to be of central importance to the religious identity of their school such as the principal, religious education teachers, and religious ministers.¹³⁶ Furthermore, they may only want to be able to make employment decisions on the basis of religion and marital status on the understanding that according to their religion there is no relevant significance in the differences that exist for attributes such as gender, race and sexuality. Under the current approach such a school would be provided with additional protection that is unwanted and, more importantly, unjustifiable according to the right to religious liberty considering the religious commitments of the school.

This provision of automatic protection to all religious schools allows a religious school to refuse to employ a person on almost all grounds for any reason—even if denying a person employment for that reason would contradict the explicit teachings of the school's religion. Therefore a principal of a Christian school could openly refuse to hire a woman for an employment position involving religious leadership within the school despite the school being based on a Christian denomination that is committed to gender equality in religious leadership positions. Such a decision might result in action being taken against the principal by others in the school or within the religious community. However, the decision is legally permitted under the general exception approach even though it is entirely contrary to the religion on which the school is based.

Similarly, employment decisions by religious school authorities based on a prejudiced understanding of the likely conduct that particular individuals might engage in would also be legal under the current approach. The Gay and Lesbian

¹³⁶ The term 'religious minister' is used in a broad sense to refer to any person within a religious community who plays a central role in providing religious education and performing religious ceremonies (for example, priests, imams, rabbis, etc). It is accepted that for some religious groups a broad range of religious adherents can legitimately be regarded as religious ministers, while for other non-hierarchical religions the concept of a religious minister may have little, if any, meaning. In many situations the definitional difficulties regarding who should be regarded as a religious minister for a particular religious community will not be significant. However, as will be seen in Chapter 4 the determination of who can appropriately be considered to be a 'religious minister' can be of critical importance in some situations.

Rights Lobby emphasised this undesirable aspect of the general exception approach in relation to the ground of sexuality arguing that

people frequently act, or claim to act, in the honest belief that their discrimination against gay men and lesbians is justified, even necessary or good. Discrimination is usually based on ignorance and/or prejudice and frequently manifests in stereotyping. Prejudices may be honestly held ... An obvious example of a stereotype that may result in discrimination is the genuinely held belief that gay men are all paedophiles. This myth persists in the face of all evidence that child sexual abuse is overwhelmingly perpetrated by heterosexual male family members. Yet if true it would make gay men (and lesbians when they are tarred with the same brush) unsuitable for a wide range of occupations. This would include not only those directly working with children but any occupation in which they were likely to come into contact with children.¹³⁷

The extensive overreach of the protections provided under the current approach is a major flaw of the general exception approach. The current model fails to adapt the protections provided for the employment decisions of religious schools to the particular needs of each religious group, and lacks ongoing, effective government review of employment decisions to ensure religious schools are not abusing the protections provided. If the alternative models are able to satisfy these two criteria then that would be an important consideration in favour of concluding that these models are preferable approaches to adopt in regulating religious schools.

5 THE RELEVANCE OF GOVERNMENT FUNDING OF RELIGIOUS SCHOOLS

The provision of substantial government funding to religious schools is often used as a justification for limiting or removing any protections the State provides to the employment decisions of religious schools. The Victorian Scrutiny of Acts and Regulation Committee in their review of the exceptions contained in the *Equal Opportunity Act 1995* (Vic) considered that

¹³⁷ Gay and Lesbian Rights Lobby Inc, Submission to the Attorney General's Department, *Law Reform Commission Report 92 (1999) Review of the Anti-Discrimination Act 1977 (NSW)* (2000), 14.

where public money is spent on activities that are argued to be excepted from equality rights, there is a responsibility to consider the people whose rights are limited to provide freedom of religion. While some minor limitations may be acceptable, it may be difficult to justify the religious exceptions at their current levels in a large number of publicly funded institutions such as non-government schools, because of the systemic impact on the employment and equality rights of women and gay teachers.¹³⁸

Along similar lines Thornton argues: ‘But why should private schools that are the recipients of considerable public funds be entitled to ignore the general law? If religious bodies claim that their freedom of religion justifies them discriminating against citizens by virtue of sex, sexuality or marital status, they should be precluded from receiving substantial moneys from the state. After all, it has been contributed by those selfsame citizens’.¹³⁹ A more detailed explanation of the merits of the criticism is provided by Mortensen:

Once account is taken of the fact that most religious schools in Australia are major recipients of government funding, the issue can be seen to involve questions of distributive justice. And, continuing a typical liberal analysis of the collision of rights, the redistribution of wealth by government through taxation and education funding is often regarded as being legitimately subject to conditions of fair equality of opportunity. In these circumstances ... [it is fair to demand] equal opportunity in employment for gays, lesbians and people in de facto relationships in all schools - State and non-State - which receive government funding. ... Furthermore, where equal opportunity is attached to the voluntary receipt of government funding no question of religious freedom arises. The school that wished to retain the freedom to discriminate on the ground of sexuality or marital status could do so by refusing funding, and the school that accepted funding would, in a legal sense, freely choose to do so on conditions of equal opportunity.¹⁴⁰

There can be little dispute that religious schools in Australia receive major financial assistance from the Commonwealth and State governments. In the 2010-11 financial

¹³⁸ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 128.

¹³⁹ Margaret Thornton, 'Balancing religion and rights: the case against discrimination', *The Sydney Morning Herald* (Sydney), 4 October 2009 <<http://www.smh.com.au/opinion/society-and-culture/balancing-religion-and-rights-the-case-against-discrimination-20091003-gh9y.html>>.

¹⁴⁰ Mortensen, above n 105, 331 (citations omitted). For a general discussion of the significance of government financial support in determining how anti-discrimination legislation should regulate religious organisations see Jeff Spinner-Halev, 'Discrimination within Religious Schools' (2012) 1(1) *Journal of Law, Religion & State* 45.

period non-government schools in NSW were provided with \$2.2 billion in funding from the Commonwealth government and \$853 million in funding from the NSW government for the recurring expenses of non-government schools.¹⁴¹ A substantial amount of additional government funding is also available to non-government schools for other purposes including improving school infrastructure through the capital grants program. The Commonwealth government in 2009, for example, allocated \$1.35 billion for improving the infrastructure of non-government schools throughout Australia.¹⁴²

Despite significant support for the position, the view that government funding to religious schools justifies the limitation or removal of legal protections for the employment decisions of religious schools should be rejected. A major justification for rejecting the position is that it is inconsistent with how governments treat other individuals and groups within the community. Thornton argues that government funds should not usually be used to support groups that exclude community members, while Mortensen argues that government funding should be subject to requirements regarding equality of opportunity. However, these arguments can apply as easily to the funding and protections provided to non-religious groups as they can to religious groups. States regularly provide financial support to different groups based on particular attributes—such as race, gender and sexuality—without there being any understanding that the provision of State support undermines the group’s ability to claim protection from the State in other areas, such as, by being provided with the ability to preferentially employ persons who are compatible with the group’s identity. If the State allowed an indigenous group to make employment decisions on the grounds of race to allow it to promote an indigenous culture within the group it is highly unlikely that government funding of the group would be considered by many to be a factor in favour of limiting or removing the indigenous group’s freedom in making employment decisions.

¹⁴¹ Productivity Commission Steering Committee for the Review of Government Service Provision, 'Report on Government Services 2013' (2013) <http://www.pc.gov.au/__data/assets/pdf_file/0005/121784/government-services-2013-volume1.pdf> 4.5.

¹⁴² Marilyn Harrington, 'Australian Government Funding for Schools Explained' (Background Note, Parliamentary Library, Parliament of Australia, 2013) <http://apo.org.au/sites/default/files/docs/ParliamentaryLibrary_AusGovFundingforSchools_March2013.pdf> 33.

The view that the provision of government support to religious groups makes it more appropriate to subject them to government regulation is flawed as it involves a devaluing of the right to religious liberty compared to other human rights in a way that cannot be justified. Furthermore, considering that a majority of Australians identify as religious¹⁴³ and make a substantial contribution to the funds available to the government from taxes paid, it is reasonable for them to expect that some government funding will be directed in a manner that they consider appropriate including funding schools they establish and manage. On the need for the State to act impartially in providing government funds to community groups the Anglican Diocese of Sydney in its submission to the Commonwealth Inquiry into the Consolidation of Commonwealth Anti-Discrimination Laws observed that

the Australian government funds organisations and activities on a regular basis that are directed to particular segments of the community or which are undertaken on the basis of particular social or cultural norms. There is no apparent reason for singling out religiously based organisations as somehow needing to become monochrome in their recruitment and service delivery.¹⁴⁴

Critics of religious schools may claim that there is a significant difference between government support for religious groups and for other groups constituted on non-religious grounds that justifies governments in removing, limiting or refusing to provide additional State protection for religious groups. However, those making such a claim should explicitly state the reasons for such a distinction. Critics often simply state that the protections for the employment decisions of religious schools should be removed or limited if the schools are receiving government funding without justifying their position. Various explanations could be provided by such critics—for example, religions are irrational, they promote inappropriate ethical standards, they are inherently divisive, religious groups have not been disadvantaged to the same extent as other protected groups, and that there should be a substantial separation

¹⁴³ The 2011 Census found that 61% of the population identify as Christian, 2.5% as Buddhist, 2.2% as Muslim, and 1.3% as Hindu with the remainder of the population identifying with another religion, no religion or declining to answer the question in the Census: Australian Bureau of Statistics, *2011 Census reveals Hinduism as the fastest growing religion in Australia* (21 June 2012) <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/CO-61>>.

¹⁴⁴ Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 2 February 2012, 15.

between the State and religious groups.¹⁴⁵ These arguments may (or may not) be valid. However, the critical point is that these arguments can be legitimate grounds for denying these religious groups protections under anti-discrimination legislation *and* for denying them government funding. The mere provision of public funds should not be a factor in determining whether the State should provide a particular type of support to a group, rather it should be one of the possible results that may occur if the resolution of the issue is in favour of the State supporting the group.

The central issue should be what involvement, if any, the State should have in supporting or limiting the operation of a group. If the State does consider it appropriate to support a group then a particular type of support—such as financial assistance—should not in itself be understood as an argument against additional State support—such as the provision of protections under anti-discrimination legislation for employment decisions to allow the group to protect its identity.

6 CONCLUSION

The broad nature of the general exception approach would satisfy the religious liberty claims of many religious groups as it allows religious schools to employ, manage and dismiss individuals according to their mission fit. There are, however, some significant problems with the general exception approach on the grounds of religious liberty.

The current approach denies religious schools protections on the grounds of race, age and a person's responsibilities as a carer. As illustrated in the *JFS* case these grounds can be important for some religious schools and the failure to extend the protections to cover the grounds can appropriately be regarded as a violation of religious freedom.

¹⁴⁵ For a useful discussion of the jurisprudence of the United States Supreme Court on the appropriate separation that should exist between the State and religious groups see Gabriël Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' (1996) *Brigham Young University Law Review* 29; Gabriël Moens, 'The Menace of Neutrality in Religion' (2004) Summer 2004 *Brigham Young University Law Review* 535.

A further problem with the general exception approach is that the protections that are provided to religious schools will often result in an adverse employment decision being made against a person on the grounds of their religion. It is important to respect the religious liberty claims of the individuals who are adversely affected and recognise that the current approach has the potential to unjustifiably violate their religious liberty in situations where the school's religious commitments do not require the adverse employment decision to be made.

The major criticism of the current approach is that it provides protections that greatly exceed what can be appropriately justified on the basis of religious liberty. Providing protections to all 'private educational authorities' cannot be justified on the grounds of religious freedom. Similarly, automatically providing protections for the employment decisions of all religious schools for all employment positions on almost all grounds regardless of the reasons for the employment decision cannot be justified by the right to religious liberty, especially considering that such extensive protection will often not even be wanted by many religious schools.

Considering these criticisms the general exception approach should be recognised as being inconsistent with the right to religious liberty. Due to the importance of the right there is a clear need to consider alternative models to determine whether they may regulate religious schools in a way that more appropriately respects religious liberty while avoiding providing excessive protections to religious schools that cannot be justified.

CHAPTER THREE

THE RIGHT TO EQUALITY AND THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

1 INTRODUCTION

The central focus of the previous chapter was on the merits of the general exception approach in relation to the right to religious liberty. This chapter addresses the relevance of the right to equality and the extent to which the general exception approach can be regarded as being consistent with this right. The right to religious liberty and the right to equality are central to a determination of the merits of any model that regulates the employment decisions of religious schools. Considering that the general exception approach was inconsistent with the right to religious liberty in a range of important respects, a similar finding in relation to the right to equality would clearly demonstrate the need to closely review the alternative models to determine if they would more appropriately regulate the area.

A major concern about the general exception approach on the grounds of equality is that it allows religious schools to make employment decisions that can cause individuals to suffer harm including financial loss, emotional trauma and a violation of their dignity as human beings. This chapter examines the validity of this claim in relation to the importance of the right to equality, the number of individuals who may be adversely affected by the protections, and the nature of the harm that may be suffered by those who are adversely affected. The specific focus of the chapter is on evaluating the harm experienced by employees who suffer a detriment from adverse employment decisions. Chapter 6 considers the merits of the claim that models such as the general exception approach can harm various other individuals including students, parents, other staff members and the wider community.

2 THE IMPORTANCE OF THE RIGHT TO EQUALITY

The importance of the right to equality and the need for States to adopt measures to address discrimination has been widely recognised by international human rights

instruments and leading rights theorists. As with the right to religious liberty, the right to equality is similarly emphasised as being of central importance in the major international human rights instruments.¹⁴⁶ The central importance of the right to equality in international human rights instruments was emphasised by the NSW Law Reform Commission in its review of the Act. The Commission stated that:

laws prohibiting discrimination are designed to give effect to one facet of the basic philosophical principle, first expressed in the *Universal Declaration of Human Rights* ('UDHR') and passed by the United Nations General Assembly in 1948, that 'all humans are born free and equal in dignity and rights'. That principle is also reflected in the *International Covenant on Civil and Political Rights*.¹⁴⁷

Of particular interest to a discussion on the appropriate regulation of religious schools is the strong emphasis placed on the right to equality in the *1981 Declaration*. An example of this can be provided from an extract from the first two paragraphs of the *Declaration*:

one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged

¹⁴⁶ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 7; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 14; Protocol No 12 art 1; *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 3; *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 1; *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) arts 1–10; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 1, 24; *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) arts 1–7; *ICPPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 3, 26; *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) arts 2–3; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) arts 3, 15, 18(3), 19, 22, 28; above n arts 2–4; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 2–4; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 7.

¹⁴⁷ NSW Law Reform Commission, 'Review of the Anti-Discrimination Act 1977 (NSW)', Report No 92' (1999), para 3.2.

themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion ... the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief.¹⁴⁸

The importance of the right is similarly reflected in statements made by leading human rights theorists. Sir Hersch Lauterpacht, for example, argued that '[t]he claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties'.¹⁴⁹ Similarly, Nazila Ghanea claims that the '[p]rovisions on non-discrimination and equality have long been the *sine qua non* of all international human rights instruments'.¹⁵⁰ Iacobucci J in *Law v Canada (Minister of Employment and Immigration)* emphasised that the right to equality should be respected to 'prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings'.¹⁵¹ The detailed account by Bell P in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination) ('Lifestyle Communities')* of the fundamental importance of the right to equality in the Victorian *Charter of Human Rights and Responsibilities* is particularly noteworthy:

Discrimination is repugnant and has insidious consequences. It demeans people in the humanity and dignity which is their birthright, impairs their personal autonomy and development, damages society and violates the principle of equality on which freedom in democracy ultimately depends. The community looks to the law for equal treatment and protection against discrimination ... The first human right recognised in the Charter (in s 8) is equality and its natural correlatives – freedom and protection from discrimination. It is a recurring theme in the other rights. Equality permeates every pore of the Charter.

¹⁴⁸ 1981 Declaration Preamble para 1–2.

¹⁴⁹ Sir Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945) 115 quoted in John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, 31 n 83.

¹⁵⁰ Nazila Ghanea, 'Religion, Equality, and Non-Discrimination' in John Witte Jr and M. Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press, 2012) 204, 204.

¹⁵¹ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [51].

The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy.¹⁵²

3 THE EXTENT OF THE ADVERSE IMPACT OF THE GENERAL EXCEPTION APPROACH

A major criticism of the general exception approach is that it has the potential to violate the right to equality of a large number of individuals considering the substantial number of non-government schools and other educational institutions that exist in NSW. There are more than 1000 non-government schools in NSW employing the full time equivalent of more than 40 000 teaching and non-teaching employees.¹⁵³ The actual number of individuals employed by religious schools would be much higher than this as it refers to full time equivalent positions and is not broken down into full time, part-time and casual positions.¹⁵⁴ Importantly, there is also a long term trend in Australia away from government schools to non-government schools increasing the potential scope of those who may be affected by a general exception approach.

3.1 THE LACK OF EMPIRICAL EVIDENCE REGARDING SCHOOL RELIANCE ON THE PROTECTIONS

Considering the number of employees at religious schools there is clearly a significant potential for the protections provided to religious schools to harm many individuals. However, a determination of the extent of the actual adverse impact on individuals is problematic considering the great difficulty involved in conducting empirical studies into the extent to which the protections provided under the general exception approach are relied upon.

An initial challenge in undertaking empirical studies in the area is that any conflict between a religious school and an employee may be resolved through confidential

¹⁵² [2009] VCAT 1869 [1], [106]-[107].

¹⁵³ National Catholic Education Commission, *2011 Annual Report* (Canberra, 2011) 29–31, Non-government Schools Guide, *The NSW Schooling System*

<<http://www.privateschoolsguide.com/schooling-in-nsw>>.

¹⁵⁴ *Ibid.*

discussions in a way that is acceptable to both parties. A principal of a religious school, for example, who concludes that an employee is undermining the school's religious environment through openly rejecting a moral principle of the religion may privately request that the employee refrain from doing so. If such a request is not heeded the principal and the employee may agree that it is best for the employee to look for employment elsewhere with the principal agreeing to continue employing the person until they have secured alternative employment.

Further difficulties in undertaking empirical studies are created through an unwillingness on the part of employers and employees to openly discuss adverse employment decisions, confidentiality clauses that can be attached to any settlement that is reached with a religious school, and pervasive institutional and cultural pressure that can discourage individuals from reporting adverse employment decisions.

Evidence of the existence of both informal settlements and the inclusions of confidentiality clauses between religious schools and employees is provided in a detailed study carried out by the ADB entitled 'Discrimination and Religious Conviction'.¹⁵⁵ The ADB identified a number of incidents in which informal settlements were reached including one situation in which a teacher at a Catholic school was dismissed for holding views on abortion that were inconsistent with official Catholic teaching.¹⁵⁶ The matter did not reach the courts as the teacher agreed to a settlement offer that contained a confidentiality clause.¹⁵⁷ The ADB only became aware of the matter as the teacher had published an account of her experience before agreeing to the settlement offer.¹⁵⁸

The level of reporting of adverse employment decisions may also be significantly reduced due to institutional pressure against complaints and a reluctance among employees to jeopardise future employment. Thornton, for example, argues that '[c]onciliation of complaints alleging sex discrimination by a well-qualified female

¹⁵⁵ Sheen, above n 55.

¹⁵⁶ Ibid 426–7.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

teacher is unlikely as she would be faced with the entire weight of the church against her'.¹⁵⁹ Similarly, the ADB noted that

[i]n our view, the cases that reach us may be only a fraction of those that occur, such is the pressure in the Catholic school system to stifle knowledge of such dismissals. We suspect that this pressure has successfully deterred teachers from trying to gain redress for dismissal through taking industrial action. The silence and stigma that surround these cases isolate the teachers concerned and promote a sense of guilt that effectively ensures that secrecy will be observed. Under these circumstances it has been difficult for us to quote directly from individual case histories, because even those teachers who contacted the Board are unwilling to be identified by an organisation that they hope will employ them again some day. Others have been restrained from contacting us by the terms of a legal settlement.¹⁶⁰

Further support for the existence of informal and confidential settlements is provided by Debra James, General Secretary of the Victorian Independent Education Union, an organisation with 15 000 members in non-government educational institutions representing principals, teachers, school officers, school service officers and education support staff in Victoria.¹⁶¹ During public hearings held in Victoria by the Scrutiny of Acts and Regulations Committee into the merits of exceptions contained in the *Equal Opportunity Act 1995* (Vic) James informed the Committee that

'[o]n average every year the union will deal with cases dealing with alleged discrimination ... We have represented members in discussions and negotiations with individual employers to varying degrees of success. Often employers do not want the detail of the case to become public and they agree to settle'.¹⁶²

¹⁵⁹ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 109.

¹⁶⁰ Sheen, above n 55, 425–6. Although in this section the ADB specifically addressed the situation in Catholic schools in other sections of the report it was clear that the ADB also had such concerns in relation to other religious schools: 407.

¹⁶¹ Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 3.

¹⁶² Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 3-4 (Debra James).

In addition to an informal approach to resolving conflicts, the protections themselves are a key reason why empirical studies in the area are so rarely undertaken. There is often little incentive for a person who considers they have been denied employment due to a particular attribute to complain about the school's conduct when they realise that the religious school will likely be legally protected from a discrimination action. On the lack of complaints in relation to the protections provided in Victoria John Tobin argues that 'the lack of litigation and complaints against Catholic schools was due to the fact that the law in Victoria provided no avenue for redress — the 1995 *EO Act* allowed religious schools to discriminate against persons on the basis of what would have otherwise been protected attributes'.¹⁶³ Similarly, Michael Gorton, the Chairperson of the Victorian Equal Opportunity and Human Rights Commission, stated that

[w]e have had complaints in relation to religious schools, but we also cannot tell how many complaints we do not get because the exemptions apply at the moment. We clearly have a lot of inquiries about those issues which do not lead to complaints, because once they are advised of the extent of the exception that may apply in their case, they do not proceed to a formal complaint. We certainly have anecdotal evidence of a number of complaints that have not proceeded to formal complaints because the exceptions apply.¹⁶⁴

A further challenge in obtaining reliable empirical evidence on the extent of reliance on the protections is that principals at religious schools are reluctant to openly discuss adverse employment decisions that have been made at their schools. There would be a range of reasons for such reluctance including a desire to protect the school's public reputation, a concern that staff members and students might openly challenge the principal on the appropriateness of the employment decision, and a fear that publicly discussing employment decisions may jeopardise the principal's own employment. The existence of a reluctance among principals to openly discuss their reliance on the protections was confirmed in an empirical study of religious schools

¹⁶³ Tobin, above n 149, 44.

¹⁶⁴ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/4_August_-_Victorian_Equal_Opportunity_and_Human_Rights_Co.pdf>, 4 August 2009 (M Gorton, H Szoke and E Turner, Victorian Equal Opportunity and Human Rights Commission), 7 (Michael Gorton, Chairperson, Victorian Equal Opportunity and Human Rights Commission).

in Australia undertaken by Carolyn Evans and Beth Gaze.¹⁶⁵ The authors reported that although a ‘wide variety of religious schools were approached to take part in the research ... there was a low participation rate’ and only 18 principals agreed to participate in the study.¹⁶⁶ Further evidence was provided by the principals who did agree to be interviewed for the study with authors observing that some of the principals ‘who were critical of their own religious leaders did not want to be identified because they feared for their careers if it was known that they dissented from the official view’.¹⁶⁷

3.2 EVIDENCE THAT INDIVIDUALS ARE BEING ADVERSELY AFFECTED

Despite the difficulties in obtaining empirical evidence due to the different factors discussed, there is evidence that indicates that religious schools are relying on the legal protections provided to them to make adverse employment decisions against a substantial number of individuals.

3.2.1 COURT DECISIONS ON THE EMPLOYMENT DECISIONS OF RELIGIOUS GROUPS

As mentioned in Chapter 1, no cases were located that addressed the legality of a religious school in NSW relying on the protections contained in the Act. However, there have been a few cases involving religious schools relying on similar protections contained in other Acts, which demonstrate that religious schools are relying on the legal protections provided to them in an attempt to legally justify their employment decisions.

In *Thompson v Catholic College, Wodonga* (*Thompson*) a Catholic school argued that its decision to dismiss a school teacher for being in a non-marital sexual relationship did not violate the *Industrial Relations Act 1979* (Vic) as it was an implied term of the employment contract that employees would adopt a lifestyle that

¹⁶⁵ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17.

¹⁶⁶ Ibid 400.

¹⁶⁷ Ibid 421.

was consistent with Catholic morality.¹⁶⁸ The Conciliation and Arbitration Board found that the dismissal was unlawful but may have been justified if it had been made clear to her before she started her employment that adherence to the ethical beliefs of the school was an essential element of her employment.¹⁶⁹

In *Griffin v Catholic Education Office* ('Griffin') a woman's application for classification as a teacher in Catholic schools was refused by the NSW Catholic Education Office of the Archdiocese of Sydney on the basis that her high profile activism for gay rights was contrary to the teachings of the Catholic Church.¹⁷⁰ The Catholic Education Office relying on defences in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) argued that she was both unable to meet an inherent requirement of the position, and her employment would injure the religious susceptibilities of adherents.¹⁷¹ The Human Rights and Equal Opportunity Commission (the government body now known as the Australian Human Rights Commission) rejected the attempt by the Catholic Education Office to rely on the protections and found that the employment decision was discriminatory.¹⁷²

In *Goldberg v G Korsunski Carmel School* the WA Equal Opportunity Tribunal found that an Orthodox Jewish school was able to rely on a defence provided to religious schools under section 73(3) of the *Equal Opportunity Act 1984* (WA) to justify a decision to impose restrictive conditions on the enrolment of a non-Orthodox Jewish boy within the school.¹⁷³

¹⁶⁸ (1988) EOC ¶92-217, 77 054.

¹⁶⁹ *Ibid* 77 055.

¹⁷⁰ [1998] AusHRC 6; Chris Sidoti, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation* (March 1998) Human Rights and Equal Opportunity Commission, 5–9. As the Commission had no powers to enforce its finding of discrimination the case was part of a formal report prepared by the Human Rights Commissioner for the Commonwealth Attorney-General.

¹⁷¹ *Ibid* 11–13, 19–20. The name of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) was changed to the *Australian Human Rights Commission Act 1986* as the right to 'equal opportunity' was considered to be part of all human rights and therefore did not need to be included in the title, while 'Australian' was included to emphasise the national identity of the Australian Human Rights Commission: Australian Human Rights Commission, *Frequently Asked Questions about the Australian Human Rights Commission's new name and logo* (5 August 2009) <<https://www.humanrights.gov.au/frequently-asked-questions-about-australian-human-rights-commission-s-new-name-and-logo>>.

¹⁷² Sidoti, above n 170, 23.

¹⁷³ (2000) EOC ¶93-074, 74 236–8. For additional information on the case see above n 112.

Further evidence that religious individuals and organisations will attempt to rely on protections available under anti-discrimination legislation can be provided by other cases involving religious individuals and organisations that have excluded individuals from becoming members of their organisation, receiving services from the organisation, or participating in some way in the life of the organisation. For example, in *Walsh v St Vincent de Paul Society Queensland [No 2]* ('Walsh') the Society tried unsuccessfully to rely on various protections provided to religious organisations to claim that a person had to be Catholic to hold a leadership position in the organisation.¹⁷⁴ In *OW & OV v Members of the Board of the Wesley Mission Council* ('Wesley Mission') a Christian adoption agency's refusal to provide adoption services to a same-sex couple on the grounds that it would be contrary to their religious beliefs was found to be covered by the protections.¹⁷⁵ While in *Cobaw Community Health Services v Christian Youth Camps Ltd* ('Cobaw') an attempt by Christian Youth Camps to rely on protections provided to religious organisations to justify a decision to not provide weekend accommodation to a welfare organisation aimed at helping same-sex attracted youth was rejected by the court.¹⁷⁶ Similarly, in *Burke v Tralaggan* a religious couple who considered that they were unable ethically to rent out their premises to an unmarried couple were held to be unable to rely on a general protection provided to religious organisations.¹⁷⁷

These cases raise a variety of important points regarding the merits of different approaches to regulating the operation of religious schools and are discussed in greater detail in subsequent chapters. For the purposes of this section they provide evidence that individuals are being adversely affected by religious individuals and organisations (such as religious schools) attempting to rely upon protections provided under anti-discrimination legislation. Considering the vast majority of cases are settled before a hearing the few cases that have been considered by the courts

¹⁷⁴ [2008] QADT 32 [70]–[78]; [79]–[126].

¹⁷⁵ [2010] NSWADT 293 [34].

¹⁷⁶ [2010] VCAT 1613 [211]–[356]. The decision of the Tribunal was affirmed in a majority judgment by the Victorian Supreme Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75.

¹⁷⁷ (1986) EOC ¶92-161, 76 586. For additional Australian cases involving religious organisations and protections provided under anti-discrimination legislation see: *Hazan v Victorian Jewish Board Of Deputies* (1990) EOC 92,298; *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441; *Rocca v St Columba's College Ltd & Rogers* [2003] VCAT 774; *Dixon v Anti-Discrimination Commissioner of Queensland* (2004) QSC 58; *Mornington Baptist Church Community Caring Inc (Exemption Anti Discrimination)* [2005] VCAT 2438.

suggest that many other individuals are likely being adversely affected by the protections.

3.2.2 REPORTS OF RELIGIOUS SCHOOLS RELYING ON PROTECTIONS

Reports by government bodies, the media and members of the public can also play a useful role in assessing the extent of reliance by religious schools on protections provided under anti-discrimination legislation. In 2006, for example, media outlets reported that a principal of a Catholic school had been suspended for remarrying when his first marriage was still recognised as valid by the Catholic Church.¹⁷⁸ In 2009, it was reported that a primary school teacher at a Catholic school had been advised that her contract would not be renewed when she became pregnant from a non-marital relationship.¹⁷⁹ The school did renew her contract after she complained to the Victorian Equal Opportunity and Human Rights Commission.¹⁸⁰ However, the school insisted as a condition of her ongoing employment that she sign an agreement not to promote her lifestyle.¹⁸¹ In the same year the principal of a Christian school refused to provide a Muslim woman training to be a teacher with a placement on the grounds that her religious beliefs were incompatible with the Christian commitments of the school—a result that was particularly disappointing to the applicant as the school was the closest to her home and taught subjects in which she had a particular interest.¹⁸² In 2012, a primary school teacher at a Christian school was dismissed when she became pregnant from a non-marital relationship in violation of the school's lifestyle agreement.¹⁸³ While in 2014, a principal of a Christian school

¹⁷⁸ Matthew Bennis, Eamonn Duff and Hannah Edwards, 'Catholic school principal sacked for getting married', *The Sydney Morning Herald* (Sydney), 16 April 2006 <<http://www.smh.com.au/news/national/sacked-for-getting-married/2006/04/15/1144521541555.html>>.

¹⁷⁹ Melissa Fyfe, 'Teacher scorned for 'chosen lifestyle'', *The Age* (Melbourne), 4 October 2009 <<http://www.theage.com.au/national/teacher-scorned-for-chosen-lifestyle-20091003-ghbl.html>>.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Farrah Tomazin, 'Christian school rejects teacher', *The Age* (Melbourne), 25 March 2009 <<http://www.theage.com.au/national/christian-school-rejects-teacher-20090324-98y0.html>>.

¹⁸³ Bridie Jabour, 'Teacher sacked over pregnancy', *Brisbane Times* (Brisbane), 1 May 2012 <<http://www.brisbanetimes.com.au/queensland/teacher-sacked-over-pregnancy-20120501-1xw79.html>>.

refused to allow trainee teachers to work at the school as they indicated they would wear Muslim headdress during the internship.¹⁸⁴

Government and non-government reports on religious schools provide further evidence on the extent of the reliance by religious schools on the protections. The study undertaken by Evans and Gaze provides clear evidence that religious schools are making employment decisions that would be unlawful if the protections were not available.¹⁸⁵ Similarly, the Discrimination and Religious Conviction report undertaken by the ADB referred to a number of incidents of adverse employment decisions made by religious schools.¹⁸⁶ In relation to the conduct of Catholic schools the ADB provided the following examples:

One Catholic teacher complained to us that a position she had already been appointed to was withdrawn in 1978 when her parish priest informed the Catholic Education Office that she had been living with her husband before their marriage. A divorced teacher said that when she announced in 1980 that she was marrying again she was told by the parish priest that she had to resign, because he didn't want the children influenced into accepting divorce. A third teacher was dismissed from her position in 1978 after another staff member, who had initially been friendly to her, told the principal, students, and their parents that she was a lesbian. When a parent complained, the principal dismissed the teacher allegedly 'because of the suspicious nature of your relationship with the girl you live with'. A fourth teacher told the Board in 1978 that after he renounced the priesthood and married, he was unable to find another teaching position in Catholic schools.¹⁸⁷

3.2.3 THE CONDUCT OF RELIGIOUS GROUPS AND EMPLOYEE ADVOCATE GROUPS

Further evidence that a significant number of individuals are adversely affected by

¹⁸⁴ Rhian Deutrom, 'Principal of Redlands College, Mark Bensley, transfers Muslim student teachers after they wear hijab to school', *The Courier Mail* (Brisbane), 25 May 2014 <<http://www.couriermail.com.au/news/queensland/principal-of-redlands-college-mark-bensley-transfers-muslim-student-teachers-after-they-wear-hijab-to-school/story-fnihsrf2-1226930481260>>.

¹⁸⁵ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 404–422.

¹⁸⁶ Sheen, above n 55.

¹⁸⁷ *Ibid* 425. For additional examples of adverse employment decisions being made and a general discussion of the context in which the decisions were made see 407–442.

the protections can be provided by the religious groups that lobby in favour of their retention and employee advocacy groups that lobby in favour of the protections being limited or abolished. A recurrent focus of law reform in jurisdictions throughout Australia is on the appropriate operation of anti-discrimination legislation, especially on the merits of any exceptions granted to the operation of anti-discrimination legislation. In situations where government bodies invite submissions from interested members of the community on the merits of reforming anti-discrimination legislation it is common for a large percentage of the submissions to be from religious groups and employee advocacy groups. As discussed in Chapter 1, an excellent illustration of this is the statement by members of the Parliament of Victoria's Scrutiny of Acts and Regulations Committee that of the approximately 1800 submissions received from community members regarding reforms to the *Equal Opportunity Act 1995* (Vic) the majority focused on the exceptions provided to religious organisations and were in favour of their retention.¹⁸⁸ Furthermore, 20 out of the 27 organisations that gave oral evidence to the Committee directly addressed the merits of providing anti-discrimination legislation protections for religious schools and other religious organisations—9 organisations lobbied in favour of the limitation or abolition of the protections, while 11 lobbied in favour of their retention.¹⁸⁹

It is highly unlikely that religious groups and employee advocacy groups would be spending so much effort lobbying on whether religious schools should be able to select employees for mission fit if they did not consider that it was likely that religious schools would be relying upon the protections in the future. The high number of submissions on these grounds is persuasive evidence that a wide variety of religious schools are relying on the protections and that consequently a significant number of person are likely being adversely affected by the protections.

¹⁸⁸ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Final Report* (2009) 116.

¹⁸⁹ Scrutiny of Acts and Regulations Committee, above n 16. Those organisations lobbying against the protections were the Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Resource Centre, Public Interest Law Clearing House, Law Institute of Victoria, JobWatch, Victorian Gay and Lesbian Rights Lobby, ALSO Foundation, the Victorian Independent Education Union and the Sikh Interfaith Council of Victoria. Those organisations lobbying for the protections were the Catholic Bishops of Victoria, Catholic Social Services, Anglican Church of Australia, Presbyterian Church of Victoria, Islamic Council of Victoria, Christian Schools Australia, B'nai B'rith Anti-Defamation Commission, Mt Evelyn Christian School, Australian Christian Lobby, the Catholic Education Office, and the Association of Independent Schools of Victoria.

Taking into account the cases that have been heard by courts, the extensive lobbying efforts of a diverse range of parties and the reports of individuals excluded from religious schools, it is clear that a significant number of individuals are being adversely affected by religious schools making employment decisions relying on protections such as those provided by a general exception approach.

3.3 LIMITED RELIANCE BY RELIGIOUS SCHOOLS ON THE PROTECTIONS

Considering the above factors and that there are approximately 950 non-government schools in NSW—many of them religious schools that consider attributes such as gender, sexuality, marital status and religion to be significant in making employment decisions—it could be concluded that a very high number of individuals are being adversely affected by the protections provided to religious schools.¹⁹⁰ However, there are a range of factors that make it likely that the number of individuals who actually are adversely affected by the protections would be substantially less than might be expected.

3.3.1 MANY INDIVIDUALS DO NOT WANT TO WORK FOR RELIGIOUS ORGANISATIONS

An important issue to consider in any attempt to determine the extent of the adverse impact of the general exception approach is that many individuals do not want to work for religious schools. Often a person will be uncomfortable working in schools where the religion of the school is integrated into the work environment in a variety of different ways (for example, religious symbols on the walls of the buildings, meetings beginning with prayers, religious ceremonies, discussions about faith, and different gender expectations regarding appropriate clothing). The identity of a school as a religious school will likely attract applicants compatible with the school's religious teachings—against whom adverse decisions by the religious schools are less likely to be made—and deter individuals from even applying for employment

¹⁹⁰ Non-government Schools Guide, *The NSW Schooling System* <<http://www.privateschoolsguide.com/schooling-in-nsw>>.

who are critical of the existence of particular religious schools or religious schools in general. This disinclination among individuals to work for religious schools would substantially reduce the likely extent of any disadvantage caused by the general exception approach.

3.3.2 RELIGIOUS SCHOOLS THAT DO NOT NEED PROTECTIONS FOR EMPLOYMENT DECISIONS

It is also important to note that a substantial number of religious schools will rarely, if ever, rely on the protections provided under the general exception approach as according to the religion on which these schools are based it would be unacceptable to exclude a person from employment on the basis of an attribute such as their gender, sexuality or marital status. The existence of a variety of different theological and ethical commitments among religious schools was supported in the empirical study undertaken by Carolyn Evans and Beth Gaze who found that for many religious schools the grounds covered by the general exception approach were not relevant for employment decisions.¹⁹¹ The authors reported that

[s]everal of the schools in the sample said that they celebrated diversity, including with respect to sexuality, and thus a staff member was welcome if they were the best qualified person for the job. There was no attempt by the school to hide the fact of that diversity. In one case this extended to a school chaplain who was gay, a fact which was known to the school community. While a couple of families left the school in protest at this development, the overwhelming majority of families were supportive — in part because they had chosen this school because of its liberal approach to religious issues.¹⁹²

The Uniting Church, which manages many schools throughout Australia, is an example of a religious organisation that would be unlikely to rely on the grounds protected under the general exception approach. This was clearly expressed by Reverend Elenie Poulos, the national director of Uniting Justice Australia (the policy and advocacy unit of the Uniting Church), who observed that

¹⁹¹ For a detailed discussion of the actual views of the principals and others in positions of authority in religious schools in Australia see Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 401–422.

¹⁹² Ibid 411 (citations omitted). A number of additional examples of this kind of approach by religious schools are provided by the authors, see, eg, ibid 411–4.

[f]or some churches, freedom of religion does not mean the freedom to discriminate. Across many church agencies, a commitment to non-discriminatory employment is keenly observed in the employment of teachers, ground staff, nurses or social workers. This commitment arises from some of the core principles of Christian faith. In the eyes of God, everyone is of value; everyone is precious.¹⁹³

Some Jewish schools are also likely to adopt this approach as indicated by Len Hain, executive director of the Australian Council of Jewish Schools, who stated that

[w]hile Jewish schools jealously guard against any incursion into our ability to teach the Jewish religion in a manner consistent with its tenets, and consider those tenets and that ability fundamental to our existence ... we do not see any practical limitation, or the imposition of any practical burden on that ability from the amendments deleting the specific exclusions to the Anti-Discrimination Act [provided to religious schools].¹⁹⁴

A similar approach could also be expected to be taken by some Anglican schools considering the public statements of leaders of the Anglican Church. The Anglican Bishop John McIntyre, for example, stated that it was

bizarre that the followers of Jesus Christ would oppose, and ask for exemptions from, a legal instrument that has at its heart a declaration of the dignity and value of every human life and the basic rights of every person. Jesus of all people, would champion an affirmation of fundamental human rights, which especially benefits marginalised groups in society and those least able to protect themselves. But it is even more perplexing than that. In Victoria, the churches are arguing for the continued right to be exempted from obligations under the Equal Opportunity Act that would require them to uphold universally recognised human rights in matters of employment by church organisations.¹⁹⁵

¹⁹³ Elenie Poulos, 'Injustice not an article of faith for all churches', *The Sydney Morning Herald* (Sydney), January 21 2013 <<http://www.smh.com.au/opinion/politics/injustice-not-an-article-of-faith-for-all-churches-20130120-2d13c.html>>.

¹⁹⁴ Josephine Tovey, 'Schools defend right to expel gays', *The Sydney Morning Herald* (Sydney), 7 July 2013 <<http://www.smh.com.au/nsw/schools-defend-right-to-expel-gays-20130706-2pirh.html>>.

¹⁹⁵ John McIntyre, 'A betrayal of the faith', *The Age* (Melbourne), 29 September 2009 <<http://www.theage.com.au/opinion/society-and-culture/a-betrayal-of-the-faith-20090928-g95o.html>>.

3.3.3 DISAGREEMENT WITHIN RELIGIOUS SCHOOLS REGARDING THE DOCTRINES OF THE RELIGION

Even at those schools based on religions that could be expected to rely on the protections provided by the general exception approach there will be principals who will make employment decisions that are inconsistent with the ethical teachings of the religion. A principal of a Christian school, for example, may disagree with the denomination's position on sexual ethics and willingly employ a person in a same-sex or non-marital sexual relationship on the basis that the person will be competent to fulfill the technical aspects of the job. In regards to the potential influence the employee may have on students and other employees the principal may conclude there will be little significant impact, or even be of the view that employing the person will play a positive role in demonstrating to those attending the school the loving and committed nature of relationships that do not conform to that Christian denomination's views on sexual ethics.

The existence of such an approach was supported in the study by Evans and Gaze who reported widespread disagreement among principals of various religious schools with the teachings of the religion on which the school was based. Some of these principals indicated they disagreed with the teachings of the religion, often would not rely on any protections provided under anti-discrimination legislation, and were critical of the protections even being provided to the schools.¹⁹⁶ Evans and Gaze noted that the

[d]ifferent views on the appropriate reach of the anti-discrimination laws occurred not only between different religions or denominations but also within them. The Anglican schools that we interviewed, for example, represented both some of the most diverse and the most religiously homogeneous in the sample. Even among Catholic schools, whose religious hierarchy has fairly clear and express views on the appropriate role for anti-discrimination law, there were two interviewees who were opposed to the Church's viewpoint.¹⁹⁷

¹⁹⁶ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 401, 411–3, 417.

¹⁹⁷ Ibid 421.

3.3.4 A LACK OF APPLICANTS WITH GOOD MISSION FIT FOR EMPLOYMENT POSITIONS

Religious schools may encounter situations where a suitably qualified and experienced person is required for an employment position but the only applicants who are suitable have poor mission fit. In these situations the principal would need to weigh the importance of filling the role versus the possibility that employing a competent person with poor mission fit may have a significant adverse impact on the religious identity and commitments of the school. Many principals in this position would decide to employ a person in the role if the importance of filling the employment position is sufficiently high and they are confident the applicant will not undermine the school's religious commitments. The reality that religious schools hire employees from a range of faith backgrounds was emphasised by the Victorian Independent Education Union, which stated that

[c]lose to 29 000 teachers work in Victorian non-government schools, and some 13 000 are employed in various support roles. We are looking at a workforce of about 42 000. Due to the sheer volume of staff needed, it is simply not possible to employ those staff along denominational lines only ... there is a diverse range of employees working in schools — staff in de facto relationships, non-Jewish staff working for Jewish schools, non-Catholics working in Catholic schools, and non-Christians working in Christian schools.¹⁹⁸

3.3.5 POLITICAL AND SOCIAL PRESSURE TO NOT RELY ON THE PROTECTIONS

Religious schools will often not rely on the protections due to the possibility that it may cause adverse publicity resulting in employees and students leaving, or not applying to join the school, and members of the community deciding not to donate their time and money to the religious school. Such a situation occurred in NSW where the principal of a Catholic primary school refused to admit a child as the

¹⁹⁸ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union) 3.

child's mother was in a lesbian relationship. The bishop of the diocese disagreed with the decision and intervened to force the primary school to offer a place to the child.¹⁹⁹ It is likely that a key reason why the bishop knew about the primary school's decision and intervened in the way that he did was due to the adverse publicity generated by the school's decision.

It should also be acknowledged that social pressure can also operate to make it more likely that a person with a particular attribute will be excluded from a religious school. Pressure from the religious members of staff or from adherents of the wider religious community may be exerted on a principal to rely upon the protections provided by the general exception approach to make an adverse employment decision when the preferred approach of the principal would have been to hire or retain the employee.

3.3.6 RELIGIOUS SCHOOLS UNAWARE OF RELEVANT ATTRIBUTE OR CONSIDER IT A PRIVATE MATTER

In many situations the relevant attribute of the employee—such as their marital status or sexuality—will not be known by anyone within the religious school (or at least not known by the principal of the school). Consequently, there will be no possibility of the person being refused employment or dismissed due to the attribute. Furthermore, many principals of religious schools who are aware that an employee has an attribute covered by the general exception approach will not make an adverse employment decision so long as the employee does not actively publicise their status in the school. The existence of such an approach was supported in the Discrimination and Religious Conviction report, which found that many principals would not consider issues such as those relating to sexuality and marital status to be a significant factor in making an employment decision so long as the teacher did not openly contradict the school's values. One principal interviewed for the report stated that:

Of course I am concerned about moral issues, but then I don't go around finding out which members of my staff are living with other people. Mind you, I wouldn't have

¹⁹⁹ Amos Aikman, 'Lesbian parents reject Catholic primary school ', *The Australian* (Online), 15 December 2011 <<http://www.theaustralian.com.au/national-affairs/state-politics/lesbian-parents-reject-school/story-e6frgczx-1226222311363>>.

much choice if there was a scandal, not that I've had any parent complain to me in all the years I've been teaching here. Some principal[s] carry on about it, but what right have we to cast the first stone?²⁰⁰

Further support for this kind of approach was provided by Evans and Gaze who found that 'as long as gay or lesbian teachers or those who were in a sexual relationship with someone who was not their partner were discreet, the school principals believed that their private lives should remain private and were not grounds for termination of employment'.²⁰¹

This approach adopted by some principals can be criticised on the grounds that it may be contrary to a person's dignity to require them to hide an important part of their identity. Nevertheless, in regards to a determination of the likely impact of the general exception approach the relevant point is that when such an approach is adopted a person will not be denied an employment position or other employment benefit on the basis of a particular attribute.

3.3.7 MANY RELIGIOUS SCHOOLS ADOPT A COMPASSIONATE APPROACH TO THEIR EMPLOYEES

Another important factor is that many religious schools are based on religions that require adherents to treat all individuals with love and respect regardless of their individual characteristics, and to be particularly caring for the vulnerable in society. Also a common element of many of these religions is that all individuals are fallible and have their own particular challenges in remaining fully committed to the theological and ethical commitments of the religion. Consequently many religious schools would be willing to employ and continue employing someone whose conduct is not in line with the religion so long as they do not actively promote their conduct or publicly claim that the doctrines of the school's religion are wrong.

Further support for the compassionate nature of those working for religious schools can be provided by the studies and projects that these schools undertake to improve

²⁰⁰ Sheen, above n 55, 422.

²⁰¹ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 412.

their ability to more effectively care for the diverse range of staff and students under their care. For example, a report by Fr Peter Norden, a Catholic priest, entitled ‘Not So Straight: A National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students’ was published in 2006 with the evident aim of improving the quality of care Catholic schools are providing to gay students.²⁰² At the end of Norden’s report there are 21 recommendations for improving the ability of Catholic schools to meet the needs of same-sex attracted persons including that ‘each Catholic secondary school should seek to create an inclusive and supportive environment in which staff and students feel confident to explore issues of identity, difference and similarity ... [and that] Catholic secondary schools [should] implement a pastoral care program that reflects the Church’s positive teaching on the pastoral care of homosexual persons’.²⁰³

3.3.8 COMMITMENT TO A BROAD EDUCATION AND BUILDING A JUST SOCIETY

Many religious schools are fundamentally committed to working with all members of the community to build a just society, and would be willing to employ a variety of different individuals to assist their staff members and students develop a better understanding of the diversity that exists in the community. For example, many religious schools have a strong commitment to inter-faith dialogue and would consider having some staff members of different religions a useful way of furthering this dialogue. Bishop Christopher Prowse made this point on behalf of the Catholic Bishops of Victoria in his evidence to the Scrutiny of Acts and Regulations Committee stating that

[w]e allow and gratefully accept people from different religious backgrounds, as long as they do not upset the threshold, as it is a Catholic community and there has to be a threshold level where the majority of people are Catholic, otherwise it would undermine our vision. In every community I think we will find people from not only different cultures but also different faiths. They are very welcome; indeed they help with the inter-

²⁰² Peter Norden, 'Not So Straight—a National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students' (Ignatius Centre for Social Policy and Research, 2006) <<http://www.nordendirections.com.au/presentations/NSS.pdf>>.

²⁰³ Ibid 57.

religious dialogue imperative that is now becoming not just something on the periphery but towards the centre of a healthy society. They make good healthy Catholic communities healthier, and that will continue.²⁰⁴

Considering all the factors discussed above there are persuasive reasons for concluding that many religious schools do not rely upon the protections available to them when making employment decisions. Consequently, it is likely that the number of individuals who actually suffer from an adverse employment decision would be much less than might be expected based only on the number of individuals employed in non-government schools. Nevertheless, as there is convincing evidence from case law, lobbying activities of parties and reports on the operation of religious schools that a significant number of adverse employment decisions are being made it is important to assess the nature of the harm that these decisions may be causing individuals to experience.

4 THE NATURE OF THE HARM SUFFERED

Discrimination can gravely harm an individual causing them to experience major physical, emotional, psychological and social harm. Discrimination in an employment context can be particularly harmful as the employment position may be of fundamental importance to a person's financial and emotional well-being. Bell J in *Lifestyle Communities* expands on the harms of discrimination warning that discrimination can cause an individual to

experience emotional pain, distress and a grievous loss of personal dignity and self-worth. It makes the individual feel less than the valuable human being they are. It undermines their sense of personal autonomy and their capacity for self-realisation. Depending on its nature, unequal treatment can also have serious, and even traumatic, physical, social or economic consequences for the individual and their families. Most of all, it corrodes the dignity which is the essence of their humanity.²⁰⁵

²⁰⁴ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 6 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

²⁰⁵ *Lifestyle Communities* [2009] VCAT 1869 [109].

The major harm that can be caused to an individual from an employer relying on protections such as those provided in the general exception approach is demonstrated in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* ('*Strydom*').²⁰⁶ The case involved a Christian arts academy that terminated the employment of a music teacher when it was discovered that he was living in a same-sex relationship. Basson J considered it significant that the teacher was not required to teach religious material or be involved in any formal religious activities, that he was a member of a different Christian denomination, and that the respondents were unable to prove that he was employed to be a Christian role model. Consequently, his Honour held that it 'would not have been devastating to the church to keep the complainant on in his teaching position ... [and] if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the Constitution that they not discriminate'.²⁰⁷ Basson J ordered the church leaders to pay compensation and make an unconditional apology. On the importance of the right to religious liberty in comparison to the harm that the man suffered from the employment decision Basson J stated:

the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining on in his position as a lecturer of music. On the other hand, the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination ... his dignity was impaired when his contract was terminated on the basis of his sexual orientation ... he suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house.²⁰⁸

The grave nature of the harm that can be caused to individuals denied employment by religious schools is potentially a major criticism of the protections provided under the general exception approach. The significance of this criticism can usefully be discussed according to the harm that can be caused to a person's dignity, and the other types of harm that a person can suffer from an adverse employment decision.

²⁰⁶ [2009] 4 SA 510.

²⁰⁷ Ibid [23]–[24].

²⁰⁸ Ibid [25], [33].

4.1 THE ADVERSE IMPACT ON A PERSON'S DIGNITY

As stressed by Bell J in *Lifestyle Communities* one of the main ways in which a person can be harmed from discrimination is through the adverse impact that the conduct can have on their dignity. On the importance of the protection of dignity in the context of anti-discrimination legislation Iacobucci J in *Law v Canada (Minister of Employment and Immigration)* explains that

[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups.²⁰⁹

Critics of provisions that allow religious schools to make employment decisions on the basis of attributes such as gender, sexuality and marital status claim that the provisions permit discriminatory practices that constitute a profound violation of the dignity of those who are excluded. The harm to dignity may not just be suffered by those directly affected by the employment decision, but by all members of the community—especially those with the particular attribute—when they learn that the State has provided religious schools with legal protections to allow them to exclude individuals with that attribute from employment positions at their schools. Thus Lee Rhiannon argues that when

someone misses out on a job, or is abused or not served in a shop because of their sexuality, or disability or gender, our society suffers. The dignity and humanity of those who are discriminated against suffers. The dignity and humanity of those who perpetrate the discrimination suffers. In fact, the dignity and humanity of all of us suffers.²¹⁰

²⁰⁹ [1999] 1 SCR 497 [53].

²¹⁰ Lee Rhiannon, 'Anti-Discrimination Amendment (Equality in Education and Employment) Bill' (Speech delivered at the Parliament of New South Wales) Sydney, 22 March 2004.

Bilchitz expands on the dignity argument in the context of discrimination arguing that when a person is dismissed the loss of employment

is not the only harm involved. Discrimination on the basis of the prohibited grounds harms the dignity of the individual concerned ... Employment is of course connected to a person's sense of dignity and thus losing one's job on discriminatory grounds may indeed cause a crisis of self-worth. Yet, the dignity claim goes beyond this: it is about the exclusion of individuals from the community in question on the basis of a central element of their identity, and the stigma that this causes. It involves fundamentally a failure to treat individuals as ends in themselves. It involves reducing individuals to a particular characteristic and taking decisions that have a detrimental impact upon them simply because of this characteristic.²¹¹

In defence of the general exception approach there are a range of responses that can be made to the claim that the approach fails to adequately respect human dignity. One response is to argue that the protection of the dignity of persons is not of overriding importance and so long as religious schools are clearly adhering to a religious commitment then the State should not intervene. Considering the importance of religious schools to many religious communities and the central role that employment decisions play in maintaining a school's religious identity, the operation of religious schools should not be impaired in an attempt to protect persons from the harm they may suffer to their dignity when they are adversely affected by the employment decisions of religious schools. This kind of approach is taken by Woolman, an atheist academic, who despite stating that decisions by religious groups to exclude individuals from their organisations on grounds such as sexuality are 'morally repugnant' argues that

[s]o long as church rules clearly preclude openly gay and lesbian members of the church from participating in public practices in the church, neither our courts nor our state has any business using such blunt cudgels as the right to dignity to reinstate an openly

²¹¹ David Bilchitz, 'Should Religious Associations Be Allowed to Discriminate?' (2011) 27 *South African Journal of Human Rights* 219, 233.

lesbian organist so that she might teach in a faith-based school and be remunerated for her efforts.²¹²

A stronger argument is that adequate protections for the employment decisions of religious schools are necessary to protect the dignity of other individuals who may be adversely affected by the inability of religious communities to establish schools that faithfully adhere to the commitments of their religion. As discussed in Chapter 2, religious schools can play an essential role in the life of religious communities through delivering religious education, providing an opportunity for adherents to engage in charitable work, and operating as a centre for the religious community to socialise and cooperate in resolving common challenges. All the points that Iacobucci J makes about the harm that can occur when human dignity is not adequately protected can be claimed to occur when the State fails to adequately protect the rights of religious individuals including harm to self-respect and self-worth, and an undermining of the religious person's physical and psychological wellbeing. Furthermore, the gravity of this violation of human dignity is arguably much greater than for those who may be excluded by employment decisions of religious schools. Persons excluded from employment at religious schools may be able to secure employment elsewhere, while laws that remove the ability to select employees for mission fit can undermine the ability to create authentically religious schools and thereby deprive religious adherents of the benefits provided by religious schools—benefits that cannot be obtained by the religious adherents from an alternative source. On the possible failure to adequately protect the human dignity of religious persons Moon states:

When the state treats an individual's religious practices/beliefs as less important or less true than the practices of others, or when her/his religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of her/his views and values but as a denial of her/his equal worth or desert – as unequal treatment that affects her/his dignity.²¹³

²¹² Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal of Human Rights* 280, 282, 304–5.

²¹³ Richard Moon, 'The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools' in David Rayside and Clyde Wilcox (eds), *Faith, Politics, and Sexual Diversity in Canada and the United States* (UBC Press, 2012) 324.

Perhaps the strongest argument against the attempt to criticise the general exception approach on the basis of human dignity is that the ambiguous concept of dignity can be used to support a variety of different, often conflicting, claims, which demonstrates that it is of limited value in assessing the merits of any approach to regulating the employment decisions of religious schools. The limited value of the concept of dignity in determining when distinctions made by individuals and groups should be considered to be inappropriate has been widely recognised. For example, in *Christian Education South Africa* the Constitutional Court of South Africa discussed its usefulness in regards to the conflict between the different rights relied upon by the parties. Sachs J held that

[t]he overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated. On the one hand, the dignity of the parents may be negatively affected when the state tells them how to bring up and discipline their children and limits the manner in which they may express their religious beliefs. The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting.²¹⁴

Similarly, the Canadian Supreme Court in *R v Kapp*, a case addressing the validity of fishing licences granted exclusively to indigenous groups, claimed that although dignity was the guiding principle for all rights, not just the right to equality, the concept of dignity was so ambiguous that it should not be considered to be of practical value in determining when differential treatment was inappropriate.²¹⁵ The Court held that

[t]here can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity ... But as critics have pointed out, human dignity is an abstract and subjective notion that ... cannot only become confusing

²¹⁴ [2000] 4 SA 757 (Constitutional Court) 14–5.

²¹⁵ [2008] 2 SCR 483 [21]–[22].

and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be'.²¹⁶

For these reasons it is difficult to conclude that appeals to the concept of dignity can provide any significant support to those who are critical of the protections provided to religious schools.²¹⁷

4.2 THE EXTENT OF THE PHYSICAL AND MENTAL HARM SUFFERED

An alternative criticism of the general exception approach focuses on the non-dignitary harm suffered by those excluded. An adverse employment decision can cause an individual and their dependants to suffer substantial emotional, psychological, social, financial and even physical harm. This harm suffered by vulnerable persons can be magnified when they realise that the State instead of establishing legal protections to help them avoid harm has instead enacted laws allowing religious schools to make adverse employment decisions.

It is important to note that many individuals who experience an adverse employment decision will not suffer significant harm due to a range of factors including having a high level of resilience and the limited importance of the particular employment position being of limited importance to their financial and psychological wellbeing. However, as can be seen in *Strydom*, some individuals who are denied employment will go on to suffer serious financial, psychiatric and physical harm from the event. Furthermore, even those who do not lose their employment can still suffer emotional

²¹⁶ Ibid [21]–[22]. See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655 for a comprehensive account of the history of the concept of dignity and a critical analysis of its utility.

²¹⁷ These criticisms of the usefulness of arguments based on dignity should not lead to a conclusion that the concept is of no value in equality jurisprudence. Sandra Fredman, for example, argues that the concept of dignity can play a valuable role in creating a 'substantive underpinning to the equality principle [that] makes it impossible to argue that the principle of equality is satisfied by 'equally bad' treatment or by removing a benefit from the advantaged group and thereby 'levelling down'. Equality based on dignity must enhance rather than diminish the status of individuals': Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 21. Fredman further argues that dignity can be useful in both helping law makers determine when the scope of the protection provided by the right to equality should be expanded to include additional attributes, and in determining whether the right to equality has been violated in areas such as sexual harassment where there may be no obvious comparator to use to determine if a violation has occurred: *ibid* 21–3.

and psychological harm through being forced to hide an important part of their identity to secure and retain employment with a religious school. As Mortensen states:

As a cost of employment in the religious school gays, lesbians and people in de facto relationships are legally encouraged to suppress knowledge within the school of their private lives ... it is hard to see that gays, lesbians and people in de facto relationships will remain happy with an arrangement that preserves their most intimate relationships as a love that dares not speak its name.²¹⁸

If adverse employment decisions by religious schools were causing many individuals to suffer major harm then this would be a significant criticism of the general exception approach. However, there are various factors that indicate that the kind of harm suffered in *Strydom* may be uncommon.

Many of the religious schools that want legal protections for their employment decisions are based on religions where love and respect for all persons without exception is considered to be a spiritual requirement. The study conducted by Fr Peter Norden on how Catholic schools can more effectively care for same-sex attracted students is a good example of this approach.²¹⁹ The caring environment of these schools would play a significant role in reducing the risk that employees with particular attributes might be harmed by an adverse employment decision. For example, a principal who concludes that a particular employee is acting in a way that is incompatible with the school's religion might have an informal discussion with the school teacher to request that they modify their behaviour, and if this is not successful, could negotiate a mutually agreeable solution for the employee to obtain employment at another organisation. Evans and Gaze provide evidence for the existence of such an approach in their empirical study in which they reported that 'it was clear that 15 of the 27 interviewees usually tried to resolve the dispute informally through discussion and negotiation. Thus, although there were many examples given during the interviews that could have given rise to formal

²¹⁸ Mortensen, above n 105, 332.

²¹⁹ See Norden, above n 202.

discrimination claims, these were generally settled outside the formal system'.²²⁰ The caring nature of religious schools was also emphasised by Bishop Christopher Prowse in his evidence to the Victorian Scrutiny of Acts and Regulations Committee when responding to a question regarding the issue of gay employees working for Catholic schools. Bishop Prowse stated:

The Catholic Church's attitude to these important areas is well known. We would not want to have working under our employ people who are undermining our ethos and the general direction in which we move, which we say comes from our religious theological basis in the scripture and tradition and the way it is articulated in our times through the bishops and particularly the Pope. So the undermining of that would be seen in a very negative light. However, we are not ethical or moral policemen and we do not go around pointing the finger at people. We are a very compassionate community. I think we do that very well despite the stereotypes the place is under sometimes.²²¹

Furthermore, the theological views of the religions on which various religious schools are based are normally well known. Even in situations where a school's theological views are not well known employees are often advised of the school's commitments before and during employment through discussions with school authorities and from policy documents that detail the school's religious commitments and the relevant expectations that the school has of their staff members. The Catholic Archdiocese of Brisbane, for example, in a public document entitled 'Statement of Principles for Employment in Catholic Schools' explains that 'each staff member has an indispensable role to play in contributing to Catholic education. It is required of all staff members employed in Catholic education that they recognise and accept that the Catholic school is more than an educative institution as it is a key part of the Church, an integral element of the Church's mission'.²²² This kind of approach is also adopted in the employment policy of the Calvary Chapel Christian School based in NSW, which states that '[a]ll staff of Calvary Chapel Christian School must

²²⁰ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 420–1.

²²¹ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 4 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

²²² Catholic Education Archdiocese of Brisbane, *Statement of Principles for Employment In Catholic Schools*.

support and demonstrate through their daily lives, the school's Statement of Faith. As a Christian school, we employ staff who profess the school ethos and demonstrate the same beliefs, thus are practicing Christians'.²²³ Similarly, the employment policy documents of Bethany Christian School in South Australia state that these 'documents reflect the School's understanding of the lifestyle and values which staff members of the School, regardless of their role, are required to respect and maintain at all times'.²²⁴

Knowledge about the school's requirement that employees act in a way that is compatible with the school's religion likely plays a significant role in reducing the harm that can be caused by a general exception approach. Individuals who disagree with the views of the school's religion will often not even apply for the position, and would rather apply for work at government schools (constituting two-thirds of all schools) or at non-government schools that are either secular or have theological views that the individuals support.²²⁵ A person who does decide to work for the school will be aware that a failure to conform to the school's religious views could jeopardise their school employment. If the person does not disclose relevant information to the school, or decides to act in a way that the school regards as unacceptable, then the employee's decision to accept the risk of any harm that they might experience from an adverse employment decision is relevant to determining the acceptability of the school's conduct. Furthermore, an employee in this position at least has the benefit of knowing in advance that they are endangering their employment, which may play a role in reducing any harm they suffer from an adverse employment decision, especially as it will likely result in some employees ensuring that they have replacement employment in the event that the school does decide to terminate their employment.

It should also be noted that adverse employment decisions made by religious schools may increase the harm suffered by individuals. For example, if a religious adherent is employed in a school based on their religion and is dismissed because they are in a same-sex relationship then they may experience this not only as a rejection of their

²²³ Calvary Chapel Christian School, *Employment Guidelines* (2013).

²²⁴ Bethany Christian School, *Equal Opportunity Policy* (2014)

<<http://www.bethany.sa.edu.au/assets/files/BCS%20Equal%20Opportunity%20Policy.pdf>>.

²²⁵ Australian Bureau of Statistics, above n 4.

sexuality and the worth of their relationship, but also as a rejection by their religious community. Such harm is likely to be exacerbated when the person belongs to a small religious community and the reason for their dismissal becomes widely known throughout the community. In such a circumstance it is much more likely that a person will suffer serious harm from the school's decision—including the possibility of substantial, long term mental harm similar to that suffered by the complainant in *Strydom*.

The various factors discussed above indicate that many individuals are unlikely to be significantly affected by an adverse employment decision by a religious school and will often be able to obtain alternative, fulfilling employment. However, cases like *Strydom* indicate that some individuals will suffer substantial financial, mental and physical harm on grounds typically protected by equality legislation (such as gender, sexuality and marital status). Considering that the general exception approach is allowing religious schools to make employment decisions that are likely to be causing at least some individuals to suffer substantial harm, and many more individuals to experience minor, but still significant, emotional and financial distress, it appears that critics of the protections provided to religious schools have some justification in arguing that the protections are violating the right to equality. Consequently, it is necessary to consider whether there are any aspects to the right to equality that can justify the protections provided in light of the harm being caused.

5 THE MERITS OF THE GENERAL EXCEPTION APPROACH

Any law that allows a group to manage its membership according to a particular attribute can cause persons lacking that attribute to suffer harm through being excluded from the group. The harm caused to others should not be considered to be an adequate justification to repeal the law so long as the merits of retaining the law are sufficiently strong.

The general exception approach may be supported by the right to equality on the grounds that religious individuals can claim protection from the State on the basis that religion is an attribute protected by the right to equality. Alternatively, the

general exception approach could be justified on the more specific basis that it is a special measure.

5.1 THE RELIGIOUS DIMENSION OF THE RIGHT TO EQUALITY

Religion is an attribute that is protected in the same way that other attributes such as gender and marital status are protected under international human rights instruments. For example, Article 26 of the *ICCPR* states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion* ... or other status'.²²⁶ Similarly, under Article 2 of the *International Covenant on Economic Social and Cultural Rights* an obligation is imposed on States to protect rights contained in the Covenant 'without discrimination of any kind as to race, colour, sex, language, *religion* ... or other status'.²²⁷

Demonstrating appropriate respect for the right to equality does not just involve removing laws and eliminating practices that overtly impose a detriment on someone because of a protected attribute. A State genuinely committed to the right to equality will provide comprehensive protection for individuals belonging to a protected group, and support them individually and collectively in understanding and affirming their attribute. A key way that the State can achieve this is through allowing these individuals to establish supportive organisations, and permitting them to manage group membership so that the organisations remain committed to supporting the individuals.

This commitment to allowing individuals with a range of protected attributes to create and manage supportive organisations has already been adopted by the State.

²²⁶ *ICCPR* art 26 (emphasis added).

²²⁷ *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 2(2) (emphasis added). See also *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 1, 24; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) arts 3, 19; above n art 2; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 2–4.

Under the Act, for example, a registered club established with the principal object of providing benefits to a particular race is able to exclude persons not of that race from becoming members of the club.²²⁸ This protection is provided to clubs irrespective of whether the racial group on which the club is established has historically suffered from discrimination.²²⁹ A similar protection is also provided under the Act to registered clubs where membership of the club is only available to a particular gender.²³⁰ Furthermore, the *Equal Opportunity Act 2010* (Vic) provides protection for the employment decisions of political parties stating that '[a]n employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment'.²³¹

In addition to the exceptions specified in anti-discrimination legislation specific exemptions from the operation of anti-discrimination provisions can be granted to organisations. The ADB, for example, granted an exemption from the Act to an arts organisation to allow them to consider the race of the applicants in making employment decisions so that they could employ Indigenous staff members.²³² A similar commitment was also demonstrated by the Victorian Civil and Administrative Tribunal, which granted an exemption from the *Equal Opportunity Act 1995* (Vic) to allow a gay club to refuse entry to persons who did not identify as homosexual males so that the club could preserve its distinct identity and create an environment where it could meet the needs of its patrons.²³³

A State committed to equality should be similarly committed to protecting religious individuals and the organisations that they create in a manner that is sensitive to the diversity that exists within the different religious worldviews. On the need for States to adopt such an approach Arcot Krishnaswami, the then UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

²²⁸ *Anti-Discrimination Act 1977* (NSW) s 20A(3).

²²⁹ *Ibid* s 20A(3).

²³⁰ *Ibid* s 34A(3).

²³¹ *Equal Opportunity Act 2010* (Vic) s 27.

²³² Anti-Discrimination Board of New South Wales, *Current section 126 exemptions* (7 October 2014) <http://www.antidiscrimination.justice.nsw.gov.au/adb/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.html>.

²³³ *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 916; *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2010] VCAT 2005.

noted that ‘since each religion or belief makes different demands on its followers, a mechanical approach to the principle of equality which does not take into account the various demands will often lead to injustice and in some cases discrimination’.²³⁴ Similarly, Sachs J in *Christian Education South Africa* argued that ‘[t]o grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views ... the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect’.²³⁵ Considering the importance of this point the comments of Heiner Bielefeldt, the United Nations Special Rapporteur on Freedom of Religion or Belief, are also noteworthy:

members of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their conscientious convictions. Such measures of ‘reasonable accommodation’, which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination from which members of minorities typically suffer even in liberal democracies that are devoted to the principle of neutrality in questions of religion and belief.²³⁶

An example that demonstrates the need to adopt this approach to protecting the equality rights of religious citizens is a law that penalises all citizens who fail to wear helmets while riding a motorcycle. Some religious adherents would have no difficulty in complying with this law, while other religious adherents would be unable to comply with the law on religious grounds—for example, Sikh males who consider themselves to be under a religious obligation to wear a turban.²³⁷ A State committed to equality should respect religious adherents who could not ethically comply with this law, and amend the law to protect this aspect of their worldview unless there were exceptional grounds that justified not doing so.

²³⁴ Australian Christian Lobby, Submission No 92 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012, 6.

²³⁵ *Christian Education South Africa* [2000] 4 SA 757 (Constitutional Court) [42].

²³⁶ Heiner Bielefeldt, 'Freedom of Religion or Belief—A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 24–5.

²³⁷ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 88.

A key way in which many religious persons fulfill their religious commitments is through creating religious organisations, such as religious schools, to learn more about their faith, fulfill religious obligations, and discuss various challenges that the religious community might be facing. If the State allows individuals with a common attribute, such as gender, race or sexuality, to legally form supportive organisations and exclude from membership or employment within the group those who do not share the attribute, or who are not committed to the purposes of the group, then it should be willing to do the same for individuals who share the same worldview. A failure to enact laws to provide the same level of protection to religious organisations can appropriately be understood as a violation of the right to equality. As Iain Benson notes:

religion is an equality right itself and religious people are entitled to non-discriminatory treatment in terms of their religion as well, so placing equality and non-discrimination over against religion or placing some forms of non-discrimination (say, sexual orientation) as things more important than the religious person's freedom against non-discrimination is an error – though an all too common one.²³⁸

The provision of legal protections for an indigenous school so that it could employ indigenous staff members in order to help the school more effectively protect and promote indigenous culture, history and religion would likely be widely supported by members of the community. If in future decades there is no longer any significant difference between indigenous and non-indigenous persons in terms of health, education, employment and other social markers, there would likely still be strong support for the indigenous school and its ability to preferentially hire indigenous employees in order to protect the unique cultural and religious aspects of the indigenous community. The level of support would likely remain high even if it were shown that the protections provided were causing non-indigenous persons to suffer physical and mental harm from adverse employment decisions. A State genuinely committed to respecting the right to equality should show the same level of support to religious groups that want to establish and effectively manage a religious school to meet the particular needs of their community.

²³⁸ Iain Benson, 'Taking Pluralism and Liberalism Seriously: the Need to Re-understand Faith, Beliefs, Religion and Diversity in the Public Sphere' (2010) 23 *Journal of the Study of Religion* 17, 31.

5.2 RECOGNISING THE PROTECTIONS PROVIDED TO RELIGIOUS SCHOOLS AS SPECIAL MEASURES

A special measure can be understood as an act of a State or non-State actor that has the effect of providing a benefit to individuals belonging to a group that has historically suffered from discrimination.²³⁹ It is widely accepted that the provision of this additional assistance—not available to those who do not belong to the group—does not constitute discrimination. For example, section 8 of the *Charter of Human Rights and Responsibilities 2006* (Vic) focuses on equality before the law and states that ‘[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination’.²⁴⁰ Similarly, an act is not unlawful under the *Disability Discrimination Act 1992* (Cth) if it is reasonably intended to ‘ensure that persons who have a disability have equal opportunities with other persons’.²⁴¹ The non-discriminatory nature of special measure was emphasised by Crennan J in *Jacomb v Australian Municipal Administrative Clerical and Services Union* who declared that ‘a person taking a special measure is not discriminating against others because such measures are designed to ensure genuine equality’.²⁴²

Religious groups that have a long history of suffering disadvantage from harm inflicted on them from outside the religious community can legitimately call upon the State to adopt special measures to assist them in overcoming any ongoing difficulties they are experiencing due to the historic injustices they have suffered. This additional protection—which could include providing the religious group with sufficient freedom to select and manage employees for any schools they manage—would be appropriate even if it resulted in others suffering harm through being denied a benefit due to the special measure—such as by being excluded from a school managed by the religious group.

²³⁹ *Gerhardy v Brown* (1985) 159 CLR 70, 131 (Brennan J). For a detailed discussion of special measures in an Australian context see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (The Federation Press, 2nd ed, 2014) 534–561.

²⁴⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

²⁴¹ *Disability Discrimination Act 1992* (Cth) s 45(1)(a).

²⁴² [2004] FCA 1250 [47].

Jewish religious groups, for example, could legitimately ask the State for special assistance to allow them to maintain their religious identity considering the disadvantage Jewish religious groups have suffered, and continue to suffer, in countries throughout the world. Although Jewish persecution has been far less serious in Australia than elsewhere, Jews have experienced various forms of hardship in Australia including being denied employment, prohibited from becoming members of various institutions, and being exposed to criticism and ridicule by various Australian newspapers, journals and members of the community.²⁴³

As most religious groups in Australia would not legitimately be able to claim a history of persecution, any support available on this ground is limited to those members of religious groups who have genuinely suffered significant past and ongoing disadvantage. For those religious groups that have suffered it is appropriate for the State to provide additional assistance to them, which could legitimately include legal protections for the groups to establish and manage religious schools so that an authentic religious environment is created within them to assist the group in meeting the particular needs of adherents of the religious group.

5.3 THE LEVEL OF SUPPORT PROVIDED BY THE RIGHT TO EQUALITY

The provision of some level of protection for the employment decisions of religious schools can clearly be supported by the right to equality on the understanding that religion is an attribute protected by the right to equality. However, the protections provided by the general exception approach cannot be supported on this ground as a substantial part of the protection provided is non-religious in nature. As discussed in Chapter 2, the protections are provided to all ‘private educational authorities’ rather than specifically religious schools. Furthermore, the protections are provided to all religious schools even those based on religions that do not need protection for their employment decisions. Finally, the protections provided to religious schools apply to all employment positions and includes all attributes of employees except for race,

²⁴³ Anti-Defamation Commission, *History of Antisemitism in Australia—Antisemitism in Colonial Australia* (2008); Jeremy Jones, *Report on Antisemitism in Australia, November 2011* (2011) Australia/Israel & Jewish Affairs Council <<http://www.aijac.org.au/news/article/report-on-antisemitism-in-australia-november-2011>>.

age and a person's responsibilities as a carer. However, many religious schools may only need protections for some employment positions and only on a few grounds.

Considering that a substantial part of the general exception approach protects non-religious schools and employment decisions of religious schools that are non-religious in nature, it cannot be considered to be supported by the right to equality in its religious dimension. Consequently, the claim that the harm caused by the general exception approach can be justified on the grounds of equality as an appropriate measure to promote equality cannot be accepted. However, an equality argument could support a more limited approach that restricts the protections provided to religious schools to the particular needs of religious groups.

6 CONCLUSION

There are persuasive reasons to consider that the harm caused by the general exception approach—in terms of both its scope and gravity—may be substantially less than could be expected given the number of persons employed at non-government schools. However, there are reliable sources of evidence, including court decisions, media reports and the lobbying efforts of activists, which indicate that significant harm is being caused by religious schools relying on the protections provided for their employment decisions.

The harm that is being caused by the protections provided to religious schools could be justified on the grounds of equality as an appropriate measure to promote equality for religious groups. However, the general exception approach cannot be supported by the right to equality in its religious dimension as a substantial part of the protections provided are non-religious in nature. Nevertheless, a more limited approach that restricts the protections provided to religious schools and employment decisions that are justified by the school's religion could be supported by the right to equality.

It is important to note that there are a variety of other issues discussed in Chapter 1 that need to be considered in determining the best model to adopt in the area. It may be the case that some, or all, of these other considerations are more supportive of the

current approach than alternatives such as the inherent requirement test and the opt-in model. These issues are considered in detail in Chapter 6. However, considering that the general exception approach does not receive substantial support from either the right to religious liberty or the right to equality it is appropriate to consider the merits of alternative models. The next chapter focuses on the inherent requirement test and addresses the merits of this approach to regulating the employment decisions of religious schools.

CHAPTER FOUR

THE SUITABILITY OF THE INHERENT REQUIREMENT TEST

1 INTRODUCTION

Under the inherent requirement test an adverse employment decision is not discriminatory if there are aspects of an employment position that are an ‘inherent requirement’ of the position and the person was unable to fulfill those requirements. In the context of religious schools, the inherent requirement test would allow adverse employment decisions to be made on the basis of a range of attributes but only when conformity to the religion is an inherent requirement of an employment role and an attribute of a person prevents them from fulfilling that requirement.

Due to the wide range of positions that religions adopt on various issues and the different approaches religious schools have to incorporating religion within their schools, it is not possible to enact legislation that specifies the inherent requirements of employment positions for all religious schools. Consequently, inherent requirement provisions typically establish a general test for determining the inherent requirements of employment positions, and require courts to determine on a case by case basis the inherent requirements of various employment positions at religious schools and whether the person who suffered the detriment was able to meet those inherent requirements.²⁴⁴

An example of an inherent requirement test can be provided by an approach that was recently taken in Victoria. Before the section was amended to remove the inherent requirement test, section 83 of the *Equal Opportunity Act 2010* (Vic) read as follows:

83 Religious schools

²⁴⁴ If an inherent requirement test were introduced in NSW it is likely that the NSW Civil and Administrative Tribunal would hear the matter, and that few cases would actually be heard before a court. However, for the sake of convenience when discussing any forum in which a discrimination matter would be heard the term ‘court’ should be understood as also referring to the NSW Civil and Administrative Tribunal.

- (1) This section applies to a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.
- (2) Nothing in Part 4 applies to anything done (except in relation to employment) on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution that—
 - (a) conforms with the doctrines, beliefs or principles of the religion; or
 - (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.
- (3) Nothing in Part 4 applies to anything done in relation to the employment of a person by a person or body to which this section applies where—
 - (a) conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position; and
 - (b) the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement.
- (4) The nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement for the purposes of subsection (3).²⁴⁵

If the inherent requirement test were introduced in NSW it is likely that this would be done through repealing the exception for private educational authorities in the Act and inserting provisions similar to sections 83(3) and 83(4). If the test were introduced in this way then a person would commence proceedings against a religious school in the same manner outlined in Chapter 1 for current discrimination complaints in NSW. The only additional step would be that the ADB and the Administrative and Equal Opportunity Division of the Civil and Administrative Tribunal would need to consider whether to accept the religious school's claim that a

²⁴⁵ With a change of government the legislation was subsequently amended to remove the 'inherent requirement' test by deleting subsections (3) and (4) and the phrase 'except in relation to employment' in subsection (2): *Equal Opportunity Amendment Act 2011* (Vic) s 19.

religious component was an inherent requirement of a particular employment position, and if so, whether the complainant was able to meet those requirements.

This chapter focuses on assessing the merits of introducing an inherent requirement test into NSW that would be similar to the test introduced into Victoria. The approach is evaluated with a specific focus on the right to religious liberty, the right to equality and the practical difficulties an inherent requirement test might encounter in operation. A determination of the advantages and limitations of the inherent requirement test provides an important insight into the key features that any model that regulates the employment decisions of religious schools should possess, and by doing so helps in demonstrating the superiority of the opt-in model compared to alternative possible approaches. The final section of the chapter addresses the merits of the religious sensitivities test. As the test is widely used throughout Australia it is appropriate to assess its merits, and it is convenient to discuss it after consideration of the inherent requirement test considering the similarities between the two models.

2 THE MERITS OF THE INHERENT REQUIREMENT TEST

A central argument in favour of the inherent requirement test is that compared to the general exception approach it provides a much more limited protection for the employment decisions of religious schools. The limited scope of the protections substantially reduces the number of individuals who can be adversely affected by religious schools while still allowing religious schools to be established and operated by religious communities. The inherent requirement test arguably produces a result that demonstrates appropriate respect for both the right to equality and religious liberty.

2.1 THE PROTECTIONS ARE ADAPTED TO THE NEEDS OF RELIGIOUS SCHOOLS

A major problem with the general exception approach is that legal protections are provided to religious schools that do not need or want the protections, and to non-religious schools that cannot justify receiving the protections (at least not on the grounds of religious liberty). Under the inherent requirement test the protections are

only provided to religious schools—as indicated by the above example from Victoria—rather than to some broader category such as private educational authorities.

As mentioned in Chapter 2, many religious schools do not want any protections under anti-discrimination legislation as they are managed by religious groups that understand that their religion does not consider variations in attributes such as gender, sexuality and marital status to be significant. Considering the views of these religious schools, it is likely that under the inherent requirement test a court would find that these schools are legally unable to make employment decisions on these grounds. Such an outcome would result in a significant reduction in the provision of unnecessary protections to religious schools that do not want these protections and also reduce the scope for the protections to be fraudulently abused. For example, a principal who decided not to hire a woman for an employment position involving religious leadership on the grounds of her gender would be acting unlawfully if the school's religion is committed to gender equality in all roles including those relating to religious leadership.

A further, and more controversial, aspect of the inherent requirement test is that courts are provided with the role of determining the validity of a religious school's claim that religious compatibility is an inherent requirement of a particular employment position. Dr Helen Szoke, the Chief Executive of the Victorian Equal Opportunity and Human Rights Commission, explained that under the inherent requirement test religious schools

will have to show how belonging to a particular religion is relevant to the job they are trying to fill ... In the case of religious education teachers or chaplains, this will be clear. However, in the case of office staff or the maths teacher it will need to be made explicit how religion is relevant to the job.²⁴⁶

The involvement of the courts in determining the inherent requirements of an employment position is considered by many proponents of the inherent requirement

²⁴⁶ 'Gay rights groups angry at Victorian equal opportunity laws allowing discrimination', *Herald Sun* (Melbourne), 27 September 2009 <<http://www.heraldsun.com.au/news/victoria/gay-rights-groups-angry-at-victorian-equal-opportunity-laws-allowing-discrimination/story-e6frf7kx-1225780078806>>.

test to be one of its major advantages on the understanding that most employment positions within religious schools—such as teaching positions for non-religious subjects, administrative and maintenance positions—are not typically religious. Rayner, for example, notes that

[r]eligious bodies argue that limiting blanket exemptions will destroy religious freedoms ... [the exceptions are] defended on the basis that any service can be a religious vocation and that a 'religious environment' requires certain purities of everyone in employment. With respect, it is difficult to see the relevance of the beliefs or lifestyles of, say, a cleaner, gardener or clerk, in an independent, para-religious school.²⁴⁷

Similarly, Kirby asserts that 'discrimination on religious grounds should not be tolerated where the conduct impugned is irrelevant to the practice or propagation of a religion ... it scarcely seems justifiable to confine staff in the college kitchen to members of the religion, unless they are obliged to observe religious rituals in the preparation of food'.²⁴⁸ While the Australian Gay and Lesbian Rights Lobby emphasising the value of the inherent requirement test over the general exception approach argues that it is

impossible to see how an exception that allows religious bodies to discriminate in the appointment of persons in any capacity - regardless of whether this relates to the performance of religious duties and regardless of whether a particular practice, attribute or religious belief is a genuine occupational qualification - could be said to be related to the freedom of belief.²⁴⁹

Some supporters of the inherent requirement test also find it difficult to understand how a religious school can justify making an adverse employment decision against someone who may act contrary to the teachings of religion in their private life, but do not actively contradict the religion's teaching in the school environment. Such a view

²⁴⁷ Moira Rayner, 'Limiting discrimination won't harm religious freedoms', *Eureka Street* 13 August 2009 <<http://www.eurekastreet.com.au/article.aspx?aeid=15737>>.

²⁴⁸ Michael Kirby, 'Religious Liberty in Multicultural Australia: Past Tolerance - Present Indifference - Future Problems' (Paper presented at the International Religious Liberty Association, Fiji, 1993) <http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol29/1013-Religious_Liberty_in_Multicultural_Aus_-_Past_Tolerance_-_Present_Tolerance_-_Present_Indifference_-_Future_Problems.pdf> 20.

²⁴⁹ Gay and Lesbian Rights Lobby Inc, Submission to the Attorney General's Department, *Law Reform Commission Report 92 (1999) Review of the Anti-Discrimination Act 1977 (NSW)* (2000) 13.

was adopted by Debra James, General Secretary of the Victorian Independent Education Union, who stated:

But does the cleaner have to be a practising Catholic or a practising Jew or a practising Christian? Does the maths teacher? Does the phys. ed. teacher? A person with a private lifestyle that is known by some in the school to be contrary to the teachings of the church, but is not a public lifestyle to students, a person who is otherwise exemplary in their conduct and behaviour, who is not actually agitating for an alternative lifestyle to their students — why is it that that person, if their personal situation were found out, could be in a position of being terminated in their employment or injured in some way in their employment?²⁵⁰

2.2 THE REDUCED POTENTIAL FOR PERSONS TO BE HARMED BY EMPLOYMENT DECISIONS

The substantial reduction of the scope of the protections provided to religious schools under the inherent requirement test is one of its major advantages compared to a general exception approach. The limited scope of the protections would greatly reduce the number of persons who could be adversely affected by the employment decisions of religious schools, which would likely assist a substantial number of individuals avoid the serious physical and mental harm that can be suffered from adverse employment decisions.

A further advantage claimed for the inherent requirement test is that it would reduce the undesirable stress some employees of religious schools can be placed under if they have particular attributes that allow an adverse employment decision to be made against them whenever the school considers it to be appropriate. The undesirable position of some employees in religious schools was noted by the Victorian Scrutiny of Acts and Regulations Committee in its Options Paper, which stated that submissions sent to it advised that protections provided to religious schools in anti-discrimination legislation are

²⁵⁰ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 4 (Debra James, Victorian Independent Education Union).

often applied inconsistently, so that teachers are in a state of uncertainty about whether the rules will be enforced against them. Such arbitrariness is arguably unacceptable in governing work in the modern world, and would tend to support the argument that the exceptions should be restricted where possible to positions for which the need is actually established.²⁵¹

When a court declares that mission fit is not an inherent requirement for a particular employment position at a school then the individuals who fill that role will have the benefit of knowing that they cannot be disadvantaged on these grounds. The benefits of the court decision arguably could also extend to persons in similar roles in other religious schools, especially those based on the same or a similar religion, as the school authorities may consider it unwise to claim that there is a religious component for a particular employment position when a similar claim has been rejected by a court.

2.3 THE RELIGIOUS LIBERTY OF RELIGIOUS SCHOOLS IS APPROPRIATELY PROTECTED

Although more limited protections are provided to religious schools under the inherent requirement test, an appropriate respect for religious liberty is arguably still demonstrated as religious groups are still able to establish religious schools in fulfilment of their obligations to teach their religious beliefs (especially to children of religious adherents) and to engage in charitable works. Furthermore, the government is in no way restricted from providing financial and non-financial assistance to religious schools under the inherent requirement test.

It is also important to note that the burden placed on religious schools in complying with the model will often be insignificant as in many situations it will be straightforward for religious schools to demonstrate why a religious component is an inherent requirement of particular employment positions. A substantial number of religious schools, for example, would set aside time during the school term for

²⁵¹ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 125.

religious ceremonies for the benefit of students and employees of the school. If the position of the school's religion was that these ceremonies can only be performed by persons of a particular gender then it is very likely that a court would hold that this is an inherent requirement of the position.

Furthermore, under the inherent requirement test a religious school would still be able to regulate the conduct of its staff to ensure that its employees act respectfully towards the religious commitments of the school. An employee who is openly critical of the school's religious commitments and actively lobbies for change could be disciplined, or even dismissed. In support of this aspect of the inherent requirement test James argued that:

[t]hose who seek to retain the exceptions say their hands will be tied as employers in dealing with employees who, for example, proselytise or advocate practices contrary to the teachings of a religion. Our members are well aware of their obligations to their employers. Every employee should be aware of their obligations to their employer; the obligation of fidelity; these things that come with the common law contract of employment. Wearing a T-shirt that supports abortion is obviously not going to go down well in a Catholic school, and it would be an employee who, with peril, would take such an action; in that case the person would be making their own decision about doing that. It must be possible for those employers to be protected.²⁵²

2.4 THE LIMITATIONS OF AN INHERENT REQUIREMENT TEST

Few would dispute that the adaptability of the inherent requirement test has the significant advantage of allowing the protections provided under anti-discrimination legislation to be adapted to the particular needs of each school. The adaptable nature of the test avoids the undesirable situation encountered with the general exception approach of providing schools with protections that cannot be justified on the ground of religious liberty or equality. However, there is a substantial dispute about the claim that a further advantage of the approach is that it will require religious schools

²⁵² Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 4 (Debra James, Victorian Independent Education Union).

to satisfy a court that a religious component is an inherent requirement of a position and that the complainant was unable to fulfill that requirement. The remainder of the chapter focuses on two major concerns about the inherent requirement test: that it will likely fail in operation to adequately respect the importance of mission fit for the operation of religious schools, and that courts will experience substantial difficulties in applying the inherent requirement test to religious schools.

3 THE IMPORTANCE OF MISSION FIT FOR RELIGIOUS SCHOOLS

The mission fit of employees can be of central importance to the operation of many religious schools. For some religious schools employment positions are considered to be religious vocations making it essential that an employee has good mission fit. Even when most, or even all, employment positions are not considered to have the characteristic of a religious vocation, the mission fit of employees is still critical considering the central role staff members can play in assisting religious schools achieve their religious objectives and in creating an authentic religious environment within the school.

3.1 EMPLOYMENT POSITIONS AT RELIGIOUS SCHOOLS CAN BE RELIGIOUS VOCATIONS

Many of the individuals who work for religious schools do not consider their role as simply an employment position, but rather they understand it as a type of religious vocation that that they have been called by God to fulfill. Durie explains as follows:

For a secular person, teaching mathematics has nothing to do with religion. However, for a religious person – and indeed for a religious organisation – all actions can be considered to be worship. What distinguishes many religious organisations is that they see their whole activity as a corporate act of worship, done in devotion and service to God, in accordance with the doctrines and principles of their faith. One reason they want to employ people of faith is that they want the whole organisation to corporately serve God through its activities. The secular judges regard faith as an essentially

personal and individual affair, and cannot understand this perspective because their religious worldview cannot comprehend it.²⁵³

The case of *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* ('*Hosanna-Tabor*') decided by the United States Supreme Court provides a good example of a religious community that considers that teaching positions—even when they involve teaching non-religious subjects—can be a religious vocation.²⁵⁴ In *Hosanna-Tabor* a school classified its school teachers into 'called' and 'lay' teachers. Called teachers, who were given the title 'Minister of Religion, Commissioned', were regarded as having been called to their vocation by God and were required to meet certain religious requirements, including completing a course of theological study, and having their position approved by the religious congregation. 'Lay' teachers were not required to be trained by the Church, or even to be Lutheran, and were appointed for one-year renewable terms.²⁵⁵ Both categories of teachers generally performed the same duties, although lay teachers were hired only when called teachers were unavailable.²⁵⁶

The respondent, Cheryl Perich, was a called teacher and taught a variety of subjects including maths, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and religious exercises each day, attended a weekly school-wide chapel service, and led the chapel service about twice a year.²⁵⁷ Perich went on disability leave after developing narcolepsy and the school decided to offer her the option of being released from her 'call'.²⁵⁸ Perich refused and after a series of exchanges the relationship deteriorated resulting in the congregation rescinding her 'call' and dismissing her from employment.²⁵⁹

The Supreme Court held that the dismissal was valid and not in violation of laws prohibiting disability discrimination as it was covered by the 'ministerial exception'—a constitutional prohibition on government limiting the freedom of

²⁵³ Mark Durie, *Equal Opportunity Law Revisited* (17 April 2010) St Mary's Vicar's Blog <http://stmarysvicar.blogspot.com.au/2010_04_01_archive.html>.

²⁵⁴ 132 S Ct 694 (2012).

²⁵⁵ *Ibid* 699–700.

²⁵⁶ *Ibid* 700.

²⁵⁷ *Ibid*.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*.

religious groups to make employment decisions relating to their ministers.²⁶⁰ Despite Perich teaching a variety of non-religious subjects, her role being very similar to that of lay teachers, and her formal religious duties only occupying approximately 45 minutes of the work day, the Supreme Court held that due to the process she underwent in becoming a called teacher, that she held herself out as a minister of the Church, and her additional religious duties it was appropriate for her to be classified as a religious minister and so covered by the exception.²⁶¹ The Court concluded their judgment stating that ‘[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’.²⁶²

The scope of the ministerial exception was also addressed by the US Court of Appeals for the District of Columbia Circuit in *EEOC v Catholic University of America*.²⁶³ In the case the Court held that a religious sister teaching theology at the Catholic University of America could not rely on legislation prohibiting gender discrimination to contest a decision by the University to deny her tenure.²⁶⁴ The Court found that her role was covered by the ministerial exception and consequently held that State intervention in the employment decision would be in violation of the free exercise clause of the US Constitution.²⁶⁵ Importantly, the Court affirmed that a broad understanding should be adopted regarding who should be regarded as a minister in a religious institution declaring that ‘the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission’.²⁶⁶

These cases are useful demonstrations of how employment positions at religious educational institutions can appropriately be considered to be religious vocations. Laws that limit or remove the freedom of these religious groups to appoint persons to

²⁶⁰ Ibid 701, 710.

²⁶¹ Ibid 707–710.

²⁶² Ibid 710. Relying on the ruling in *Hosanna-Tabor* the United States Court of Appeals subsequently held that a music director at a Catholic Church was a ‘minister’ for the purposes of the ministerial defence and so was unable to rely on anti-discrimination legislation to pursue a claim against the Church: *Cannata v Catholic Diocese of Austin*, 700 F 3d 169 (5th Cir, 2012).

²⁶³ 83 F3d 455 (1996).

²⁶⁴ Ibid 470.

²⁶⁵ Ibid 460–467.

²⁶⁶ Ibid 463.

employment positions as the religious group considers appropriate according to their religious convictions can be a major violation of their right to religious liberty. Under the inherent requirement test this may occur if a court concludes that an employment position at a religious school is essentially non-religious even if the religious groups considers these employment positions to be religious vocations. Such an outcome is especially likely in relation to employment positions that many individuals would consider to be non-religious such as an administrative assistant, a teacher of mathematics or English, or a maintenance officer.

3.2 THE CENTRAL ROLE OF EMPLOYEES AT RELIGIOUS SCHOOLS

The ability to select employees according to their mission fit is important for religious schools for many of the same reasons that it is important for any organisation. Employees with good mission fit will likely be more effective in their employment roles as they will often have a more detailed understanding of, and commitment to, the organisation's values and objectives, a higher level of motivation, a greater willingness to work longer hours, and a desire to remain as an employee of the organisation for a longer period of time. These qualities in employees are important not just to religious schools but to all organisations.

Mission fit, however, is particularly important for religious schools considering their focus on religious education and formation. A central reason why religious schools are established is to assist students and others involved with the school to learn about the religion, appreciate its merits, and develop the character necessary to live an ethical, fulfilling life as understood by that religion. Employing persons with good mission fit is essential to achieving this goal as such employees will often have a detailed understanding of, and commitment to, the religion, which will play a key role in helping the school achieve its religious objectives.

The view that religious schools should be able to select employees for mission fit for employment positions involving school leadership (such as the principal), religious education and positions involving the performance of religious ceremonies and other rituals is widely held. Such an approach is supported by strong proponents of the inherent requirement test who consider that courts should recognise a religious

component as being an inherent requirement for these positions.²⁶⁷ The Victorian Independent Education Union, for example, stated in its submission to the Victorian government's inquiry into the merits of exceptions in the *Equal Opportunity Act 1995* (Vic) that anti-discrimination legislation 'should permit a church to discriminate only in limited circumstances namely in relation to the ordination of religious officials, such as priests or rabbis and probably also in the employment of religious education teachers and faith leaders depending on the circumstances'.²⁶⁸

However, considering the central importance of religious education and formation to many religious schools it is important that religious schools can also employ individuals for both teaching and non-teaching employment positions according to their mission fit. The need to have a broad discretion regarding employment decisions for a range of employment positions is essential considering the impact that all employees can have on a school's ability to achieve its religious objectives.

3.2.1 THE IMPORTANCE OF MISSION FIT FOR TEACHING POSITIONS

The control teachers have over the formal teaching environment provides them with significant influence in developing the knowledge, skills and character of their students. The religious knowledge and commitment of a teacher with good mission fit will likely make the teacher more effective in presenting the school's religion in an accurate and persuasive manner to the students. Considering this influence it is important that religious schools can employ teachers according to their mission fit to assist religious schools in more effectively achieving their religious objectives.

The importance of a teacher's commitment to the doctrines of a school's religion, especially in regards to the education of students, was addressed by the European

²⁶⁷ See, eg, Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 4 (Debra James, Victorian Independent Education Union).

²⁶⁸ Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 4.

Court of Human Rights in *Fernández Martínez v Spain* ('Martínez'), which concerned the employment of a Catholic priest as a religious education teacher six years after he had decided to marry even though his application to be relieved of the requirement of celibacy had not been approved.²⁶⁹ Although the authorities of the Catholic Church knew about the man's personal situation he was allowed to remain in the role, and the decision to not renew his contract was only made after it became widely known that he was involved in a public campaign against a range of doctrinal issues including mandatory clerical celibacy.²⁷⁰ The Court held that the decision to not renew the applicant's contract was appropriate due to

the special nature of the professional requirements imposed on the applicant stemm[ing] from the fact that they were established by an employer whose ethos was based on religion ... [Moreover] the duty of reserve and discretion was all the more important as the direct recipients of the applicant's teaching were minors, who by nature were vulnerable and open to influence.²⁷¹

The significance of religious education teachers was emphasised in the case on the basis that there is a special bond of trust between religious authorities and religious teachers. The Court argued that this particular relationship 'necessarily gives rise to certain specific features that distinguish teachers of Catholic religion and ethics from other teachers ... [i]t is therefore not unreasonable to impose a heightened duty of loyalty on religious education teachers'.²⁷²

In *William Eduardo Delgado Páez v Colombia* the Human Rights Committee similarly held that religious schools have the freedom to determine whether a religious education teacher should be employed and what they should teach.²⁷³ The Committee held that the decision by a religious school to remove an employee from the position of a religious education teacher for his unorthodox theological positions did not violate either his freedom of religion or his freedom of expression:

²⁶⁹ (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [9]–[10].

²⁷⁰ *Ibid* [10]–[17].

²⁷¹ *Ibid* [87]. The decision was upheld by the Grand Chamber of the European Court of Human Rights in *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014).

²⁷² *Martínez* (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [85].

²⁷³ Communication No. 195/1985, UN Doc CCPR/C/39/D/195/1985 (1990).

With respect to [freedom of religion], the Committee is of the view that the author's right to profess or to manifest his religion has not been violated ... [the State can] allow the Church authorities to decide who may teach religion and in what manner it should be taught ... [similarly] the requirement, by the Church authorities, that Mr. Delgado teach the Catholic religion in its traditional form does not violate [his freedom of expression].²⁷⁴

Individuals concerned about the possible harm that can be caused by religious schools through their employment decisions might argue that employing a person according to mission fit might be appropriate for religious education teachers, but it would be inappropriate for teachers of subjects such as mathematics, geography or physics as it is unlikely that issues of faith and ethics would arise in these classes. Such a position is adopted by Tobin who argues that in relation to discussions of matters involving faith and ethics 'there are very few subjects that would offer such a setting especially in primary schools. It would certainly not arise in any of the key learning areas such as Maths or English — unless the texts being studied gave rise to issues of sexual orientation and marriage'.²⁷⁵

Although it is to be expected that religious issues will mainly be discussed within religious education classes, theological and ethical issues will inevitably arise in a variety of subjects often held to be non-religious. For example, the study of science will often lead to queries regarding the existence of God, and the role God plays, if any, in the natural world; the study of geography can lead to disputes about the proper division of state boundaries between different groups with clear religious identities; the study of history will often cover religiously sensitive topics such as the Reformation or the history of conflicts between religious groups; while the study of literature will often include the presentation of views on theological and ethical issues that have been strongly influenced by the author's religious commitments. On

²⁷⁴ Ibid [5.8]–[5.9]. Although the Human Rights Committee placed importance on the special relationship that existed between the Church and State in Columbia it is unlikely that the Committee would reach a different conclusion in a State without such a relationship considering the centrality of religious education to religious communities and the persuasive influence that decisions such as *Martínez* and *Hosanna-Tabor* would likely have on the Committee.

²⁷⁵ Tobin, above n 149, 41.

the need for broad protections to be provided for the employment decisions of religious schools the Islamic Council of Victoria stated:

It is vital that school boards have the freedom and choice of being able to employ the most appropriate person based on their religious belief, because Islamic values touch almost all of the disciplines taught in school and parents consider teachers to be role models for their children. For example, when the concept of interest is taught in maths and commerce, it must be taught that there are alternative methods of banking because Muslims are forbidden to deal with interest.²⁷⁶

When these issues arise a teacher with a good mission fit will be able to play an important role in persuasively presenting the religion's position and its merits in relation to alternative perspectives that have been adopted on the issue by other individuals in the community. As Spinner-Halev argues:

One could say that a teacher should be hired based on qualifications: a non-Jewish person can certainly be qualified to teach Jewish history or Hebrew, for example. But a school may want more than someone who can teach these subjects well; it may want someone who lives by the religious dictates, someone who can model its commandments and rituals, someone who can discuss what “we do,” and not just what “you do.” So schools ought to be given wide latitude in picking their teaching staff.²⁷⁷

Furthermore, for many teachers at religious schools their duties are much broader than simply teaching Maths or English and include assisting with the operation of religious schools in a variety of ways—many of which will inevitably be of a religious character. Martin Dixon, a Victorian Parliamentarian, in a speech to Parliament explained that one of the key reasons why he considered that the proposed inherent requirement test was flawed was that it failed to appreciate the various ways religion is expressed in the life of religious schools. He argued that

²⁷⁶ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Islamic_Council_of_Australia.pdf>, 5 August 2009 (H Ibrahim and H Gulam, Islamic Council of Victoria) 2.

²⁷⁷ Spinner-Halev, above n 140, 54.

[t]he vast majority of teachers -- and staff, not just teachers -- working in these schools do not simply teach a particular subject. Many other responsibilities within the school and even within the community come with those jobs. An example of this would be a mathematics teacher who also has a home room. Part of the duties of a home room teacher would be to talk to the students about their behaviour, the values and beliefs of the school and also the various activities the school is taking part in and how they refer to the values and beliefs of that school. Classroom teachers and other staff are also required to attend religious ceremonies associated with the denomination of the school. They are expected not only to attend but also to actually plan, organise and take part in those ceremonies. That is another set of duties required just by being part of the staff of a particular school. Staff are required also to take part in assemblies and contribute to them. School assemblies are part of the gathering of that community, where the whole school community gathers and where the core values and beliefs in the faith of that school community are discussed and exhibited. They are an integral part of those school assemblies. Discipline and the values it is based on very much relate to the faith, doctrine and belief of those schools. You cannot divorce yourself from that if you are teaching in one of those schools.²⁷⁸

Although the formal education provided by teachers in the classroom is of significant importance in assisting the religious school fulfil its religious objectives, the influence teachers can have on students and others involved in the religious school through the manner in which they live their lives is likely to be of even greater importance. The capacity of a teacher to act as a religious role model is a key justification for why mission fit should be understood as an inherent requirement for teaching positions at religious schools regardless of the particular subjects that they teach. The significant influence that a teacher can have as a religious role model was emphasised by the Supreme Court of Canada in *Caldwell v St Thomas Aquinas High School*, which confirmed the legality of a decision by a Catholic school to not renew the contract of a teacher of mathematics and commercial subjects for marrying a divorced person in violation of Catholic doctrine.²⁷⁹ The Supreme Court held that

[i]t is a fundamental tenet of the [Catholic] Church that Christ founded the Church to continue His work of salvation. The Church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object

²⁷⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2010, 1112 (Martin Dixon).

²⁷⁹ [1984] 2 SCR 603, 606.

the formation of the whole person, including education in the Catholic faith. The relationship of the teacher to the student enables the teacher to form the mind and attitudes of the student and the Church depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour. The teacher is expected to be an example consistent with the teachings of the Church, and must proclaim the Catholic philosophy by his or her conduct within and without the school.²⁸⁰

Out of all of a school's employees teachers will often have the closest relationships with students due to the substantial amount of time they spend with students, the theological and ethical significance of many of the topics covered in a variety of classes, and the expectation that many schools have that teachers should aim to develop not just the knowledge and skills of their students but also their character. A teacher's genuine commitment to the particular religion expressed in formal and informal discussions and in the example they set by their conduct can play a powerful role in positively influencing the views of students—and others at the school—about the school's religion. Thus Lenta argues that the importance placed on the ability of teachers to act as role models recognises that 'moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous ... teachers teach moral values not didactically, as in the case of arithmetic, but through example'.²⁸¹ Similarly, Parkinson states from a Christian perspective that '[m]odelling Christianity within a faith community is as important as teaching Christianity within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people's lives'.²⁸² The Victorian Scrutiny of Acts and Regulations Committee noted this point by quoting the following submission of the Australian Christian Lobby:

Of particular interest to the Christian community are the exceptions provided that allow for Christian schools to foster an educational environment that reflects the choices made by families to have their relational framework, values and beliefs supported. Teachers

²⁸⁰ Ibid 608.

²⁸¹ Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 126 *South African Law Journal* 827, 853.

²⁸² Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 97.

are more than simply conduits for passing on knowledge from one generation to another. They are also role models, perhaps even more so in a religious school where they are not only teaching the particulars of their subject but also demonstrating the value and relevance of the religion itself. For these reasons, it is directly relevant to their employment that they share and faithfully practice the religious beliefs of the school and can model these to students. The exceptions provided here are central to the argument for the need to protect religious freedom.²⁸³

3.2.2 THE IMPORTANCE OF MISSION FIT FOR NON-TEACHING STAFF MEMBERS

Considering that non-teaching staff positions (other than those involving leadership or religious functions) do not have the same position of authority and ongoing contact as employees in teaching positions many would consider that it would be inappropriate to provide a school with protections for non-teaching positions. Such a position was expressed by Lenta who stated that

the work of teachers in a religious school includes transmitting the beliefs and values of the school, didactically in the case of those involved in religious instruction and by example in the case of all teachers. This is why it is correct to say that the work of typists or janitors is distant from the religious beliefs of the religious association for which they work, but that the activities of teachers of non-religious subjects in a religious school have a close connection to the religious beliefs of the church that runs the school. On this argument, an exemption in respect of all teachers, even those not involved in religious instruction, may be justified, but an exemption in respect of typists and janitors will not be.²⁸⁴

However, mission fit is important not just for teachers but also for non-teaching employees considering the significant role that they can play in assisting religious schools fulfil their religious objectives. A person with good mission fit can be particularly effective in a non-teaching employment position in a religious school due to their understanding of the religion, personal contacts within the religious community, commitment to the religious identity of the school, and ability to assist

²⁸³ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 127.

²⁸⁴ Lenta, above n 281, 855.

with religious education through formal and informal discussions. As with teachers at the school, non-teaching staff members can also make a valuable contribution through acting as role models, especially for students, through being able to demonstrate how a committed religious adherent can express their religious convictions in roles other than those of a teacher. As O'Brien states 'a person who is employed at a school is not just there to teach maths or to cook. They are there as leaders, counsellors, role models, people who guide and shape the ethos of the school'.²⁸⁵ Stephen O'Doherty, the Chief Executive Officer of Christian Schools Australia, in a letter written to Rob Hulls, the former Victorian Attorney-General, emphasised the point as follows:

All staff, 'teaching' and 'non-teaching', act as role models and exemplars to students of the integration of faith and life. It is not only reasonable, but essential therefore, that schools so formed are able to require that staff are adherents of the faith. In common with schools in other settings, our members regard the student as part of a community within which teaching and learning happens in both formal and informal ways. In a faith-based setting belief in the faith is a defining characteristic of that community.²⁸⁶

Non-teaching staff members can be even more effective than teachers in educating others about the religion and inspiring them to lead lives that are more consistent with the religion's teachings. In the empirical study undertaken by Evans and Gaze, for example, a principal of a Christian school reflected on the positive and unique religious impact of a Christian cleaner who 'has a great pastoral heart, has a great gift of pastoring and builds important and very valuable relationships with students, which the teacher, as an authority figure, can't do'.²⁸⁷ Similarly, Robert Johnston from the Australian Association of Christian Schools gave evidence in a public hearing held by the Commonwealth Legal and Constitutional Affairs Legislation Committee that 'a gardener in the school in which I was principal for 27 years ... was a very significant player in terms of some of the pastoral work [at the

²⁸⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 1055 (Michael O'Brien).

²⁸⁶ Letter from Stephen O'Doherty, Chief Executive Officer, Christian Schools Australia to Attorney-General the Honourable Rob Hulls, 25 March 2010, 2-3.

²⁸⁷ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 415.

school]’.²⁸⁸ While Rob Ward, the Victorian State Director of the Australian Christian Lobby, in the evidence he gave in the public hearings held in Victoria by the Scrutiny of Acts and Regulations Committee stated that

one of my children, who shall remain nameless, received greater pastoral care and made a greater connection in some of his struggles through school with the maintenance guy at the school, who is now dead and they named a wing of the school after him. There was a chaplain there, there were teachers there and there was pastoral care, but this maintenance guy connected with one of my children and made a huge difference in their life, because he shared the values of the school.²⁸⁹

3.2.3 THE ADVERSE IMPACT OF EMPLOYEES WITH POOR MISSION FIT

A person who is not an adherent of the religion, or is not living a life that is consistent with the religion’s teachings, can still teach maths or science or perform the technical work of a receptionist or a maintenance officer. However, they are unable to be an effective witness for the religion to the students, other employees, and members of the community involved with the religious school. Some supporters of the inherent requirement test reject this view and argue that the worldview of the teacher or their conduct outside the religious school does not matter so long as they accurately present and support the school’s religion in any situation where it arises within or outside of a classroom setting, and avoid saying or doing anything that contradicts the school’s religious commitments. Along these lines, Michael Gorton, the Chairperson of the Victorian Equal Opportunity and Human Rights Commission, stated

I think there is a big difference between who a person is and what a person does or says. In the context of a religious school which is based around a particular faith, it certainly matters as to what an individual may do or say within that school, if it is derogatory of

²⁸⁸ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 60.

²⁸⁹ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Australian_Christian_Lobby.pdf>, 5 August 2009 (R Ward and M Sneddon, Australian Christian Lobby), 7 (Rob Ward, Australian Christian Lobby).

the faith that the school professes. But that does not say anything about who the person is, and we are talking about amending these provisions so that the mere fact that you are who you are or you have an attribute, should not be sufficient to ground discrimination against you. What you do and what you say might be something that is contrary to the philosophy and policies of the school and can be addressed in that context. We think schools particularly have ample methods to deal with those sorts of issues just in terms of employment contracts and a whole range of other mechanisms. But to continue to allow religious bodies and religious schools to discriminate just on the basis of who a person is before they have done or said anything we think is no longer necessary these days.²⁹⁰

Furthermore, many employees who may not have the best mission fit would still be willing to participate in aspects of the religious life of the school so far as it is permitted by the religious authorities within the school. Thus James argues that:

a maths teacher who is living in a de facto relationship in a Catholic school might be required to participate in school mass and prayer assembly with students and will be able to do so. In these circumstances, the maths teacher will still be able to get the inherent requirements of the job done in that he/she can teach the students maths and participate in the religious life of the school in relation to its students. It would, therefore, be unlawful to refuse to deny that teacher a job simply on the grounds of his/her marital status. Another example would be a Catholic primary school teacher who becomes pregnant and is not married. In this circumstance she will still be able to perform the inherent requirements of the job in that she can teach religious education, attend mass and participate in the religious life of her students. It would therefore be unlawful to refuse to deny that teacher a job simply on the grounds of her pregnancy and marital status.²⁹¹

The difficulty with the views expressed by Gorton and James is that they fail to adequately account for the capacity of all employees to act as role models simply

²⁹⁰ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/4_August_-_Victorian_Equal_Opportunity_and_Human_Rights_Co.pdf>, 4 August 2009 (M Gorton, H Szoke and E Turner, Victorian Equal Opportunity and Human Rights Commission), 6 (M Gorton, Victorian Equal Opportunity and Human Rights Commission).

²⁹¹ Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 12–13.

through the manner in which they live their life. Even if the staff member attempted to support a school's religion while in the work environment their views on various aspects of the religion would inevitably be expressed by their actions, omissions and the statements they make to students, staff members and members of the public. Although one staff member with poor mission fit employed for a short period of time may have little impact on a school, multiple staff members employed over many years could have a significant adverse influence on the ability of a religious school to achieve its religious objectives.

In the context of the teaching environment it is unlikely that a staff member with poor mission fit will be as persuasive as a teacher who is committed to the religion in presenting the perspective of the religion when relevant issues arise in classroom discussions. It is also important to note that requiring a religious school to employ a person who is not committed to the religion but who is the best qualified from a technical perspective will often result in another applicant who was sufficiently qualified and committed to the religion not being employed. In these situations there is a double loss to the religious school's ability to promote their religion through employing someone who is not supportive of the school's religion and failing to employ someone who is supportive and willing to make a significant contribution to the religious objectives of the school.

The claim that James makes that religious schools can include employees with poor mission fit into the religious life of a school is deeply problematic. There may be religious restrictions that prevent participation, or at least full participation, by the employee. Even when such prohibitions do not apply or the person can be accommodated in others ways, involving a person with a different worldview could serve as a distraction from the religious event and a reminder that the claims of the religion are rejected by those outside the religious community.

It is accepted that many would consider that diversity in the staff body is one of the benefits of the inherent requirement test as it may encourage a greater understanding and tolerance for the diversity that exists in the community. This is an important issue and considered in detail in Chapter 6 in relation to the welfare of students at religious schools, respect for multiculturalism and the promotion of human rights

standards. The point being made here is that employing a person who has poor mission fit can impair the ability of the school to effectively develop the understanding and commitment to the religion of those attending the school and to this extent undermines the effectiveness of religious schools in relation to their religious objectives.

3.3 THE IMPORTANCE OF A RELIGIOUS ENVIRONMENT

As the inherent requirement test would likely limit the ability to make employment decisions on the basis of mission fit to employment positions with a substantial religious component—such as senior management positions, religious education teachers and those involved in performing religious ceremonies—religious schools would only be able to employ a person for mission fit for a minority of employment positions. If the staff body consisted of a substantial minority or majority of individuals with different worldviews then it would be difficult for the religious school to create a religious environment where religious adherents were comfortable in organising religious events, discussing religious matters and expressing their opinions on various theological and ethical issues relevant to their religion in a group setting. Such a result is likely to occur when a religious adherent realises that there are individuals within the staff body who are unfamiliar with the teachings of the religion and may have theological or ethical views that strongly conflict with those promoted by the religion. For example, Jewish employees at a Jewish school may be reluctant to freely discuss religious and ethical issues relating to Israel in a staff function containing non-Jewish employees who may have strong views that are critical of the actions of the Israeli government or even the existence of Israel.

Moreover, if a substantial number of employees at a religious school have poor mission fit then the school's identity as an institution that respects and adheres to the teachings of the particular religion can be undermined. For example, if a majority of staff members at a school based on a religion with mandatory dietary restrictions do not adhere to any of the restrictions in the food they consume then the credibility of the school as an authentic religious institution is undermined. The ongoing employment of the staff members by the religious school may even contribute to a view that the dietary restrictions are an optional, or even obsolete, practice of the

religion. If a religious school's identity as an authentic religious community is weakened then the incentive for religious adherents to become involved in the religious school as a way of expressing, developing and promoting their religious beliefs decreases. Such an outcome can be particularly harmful to a religious school when it causes religious adherents to be unwilling both to work for the school, either as an employee or a volunteer, and to send their children to the religious school because they are no longer confident that their child will receive a formation that is consistent with their religion. This point was emphasised in relation to religious organisations in general by Bishop Christopher Prowse in the hearings conducted by the Victorian Scrutiny of Acts and Regulations Committee where he stated that

weakening or eliminating the religious exemptions would, in effect, force the secularisation of service delivery by religious agencies. The likely effect of such proposals would be a profoundly negative effect on two fronts. It would go to the heart of the religious motivation that leads people to be involved in ownership and governance and as an employee or volunteer. It would also go to the heart of the motivation that leads people, whether Catholic or not, to prefer the services of many Catholic providers. The popularity of Catholic providers is, I suggest, largely attributable to the mission and witness those providers demonstrate in what they do, how they do it and why they do it.²⁹²

In some cases religious schools can lose their religious identity and become indistinguishable from government schools and non-religious private schools. Although many factors can contribute to a school losing its religious identity, including changes in the wider culture and a decline in religiosity within the religious group, a factor that is likely to have a major influence—considering the central role employees play in religious schools—is the employment of a high percentage of staff members committed to an alternative worldview. Such a result may cause religious communities to be reluctant in the future to invest the substantial resources required to establish new schools due to the risk that they may soon lose their religious identity. The relevant religious community may even decide to close the religious

²⁹² Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 3 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

school or request that it no longer identifies itself as representing the particular religion on the basis that it is harming the public image of the religion to have such a school associated with it.

An example of such an outcome is the educational institution known as the Pontifical Catholic University of Peru. The employees of the University had reached a variety of conclusions on ethical issues that were significantly different to the official teachings of the Catholic Church.²⁹³ After attempts to encourage the University to more closely adhere to Catholic teachings failed, Church officials requested that the University stop using the terms 'Pontifical' and 'Catholic' to describe the institution.²⁹⁴ Similar action has been taken against higher educational institutions in other countries. In the United States, for example, authorities of the Catholic Church issued public statements that Marist College, Nazareth College, Saint John Fisher College and Marymount Manhattan College were no longer to be considered as Catholic institutions.²⁹⁵

Smaller religious schools will likely be particularly adversely affected by the inherent requirement test as their limited resources would make it less able to afford to defend any legal action taken against them. Consequently, they will be under significant pressure to avoid claiming mission fit is a requirement for employment roles that do have a substantial religious component but not to such a degree that the school would be confident that a court would find in their favour. Furthermore, the smaller size of the staff body would likely mean that employing staff members with poor mission fit would have a more substantial impact on the religious culture of the school compared to larger religious schools that may be part of an association of schools based on the same religion.

It is important to note that many religious schools do not want to create a staff body consisting solely of adherents of that religion. Many religious schools consider it

²⁹³ Philip Pullella, 'Pontifical Catholic University Of Peru Stripped By Vatican Of Right To Call Itself Catholic', *Reuters* (Online), 21 July 2012 <http://www.huffingtonpost.com/2012/07/21/vatican-censures-leading-_n_1691532.html>.

²⁹⁴ *Ibid.*

²⁹⁵ Association of Students at Catholic Colleges, 'New York Archdiocese Says Marist College "No Longer Catholic"', *Catholic Culture* (Online), <<http://www.catholicculture.org/culture/library/view.cfm?recnum=4674>>.

desirable to have staff members with a variety of different worldviews and attributes considering that it provides many benefits including preparing students and others involved with the school to interact respectfully with the diversity that exists in the community. On the value of employing a diverse staff body, a principal of an Anglican school stated:

One thing that is certain is that the 18 year olds that leave here are going to mix and move within a fairly diverse community as soon as they leave school and where they have had the opportunity perhaps to confront a variety of worldviews, if not specifically of lifestyles, their education is going to be more rounded than had they say been educated in a school where all the staff was Anglican.²⁹⁶

This viewpoint was also expressed by some of the Catholic principals who were interviewed for the Discrimination and Religious Conviction report. The ADB stated that '[d]espite the high proportion of Catholics on their staffs, most of the principals said that they preferred to see a balance in the teaching staff between the older and younger, male and female, inexperienced and experienced, and Catholic and non-Catholic teachers'.²⁹⁷ A similar situation was found in the Evans and Gaze study with one principal stating that 'there's a richness for more young people to have a multi-faith environment'.²⁹⁸

However, the problem with the inherent requirement test is that it is the courts, and not the religious schools, that are given the power to determine whether a religious component is an inherent requirement for a particular employment position. Often the decision will be made by a judge who has only briefly heard evidence on the matter, has only a superficial understanding of the relevant factual and theological issues, and due to their limited knowledge is unable to accurately appreciate the impact their decision may have on the religious culture of the school.

The reality that religious schools often select persons for employment positions despite them not having a strong mission fit raises an interesting issue. Supporters of

²⁹⁶ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 416.

²⁹⁷ Sheen, above n 55, 414.

²⁹⁸ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 419.

the inherent requirement test use these employment practices as evidence that mission fit is not important for many employment positions at religious schools as the schools are able to operate effectively with such persons as employees. James, for example, argued that

there is a diverse range of employees working in schools — staff in de facto relationships, non-Jewish staff working for Jewish schools, non-Catholics working in Catholic schools, and non-Christians working in Christian schools. The schools have not fallen over, as the religious authorities would put to this committee. They do not fall over because they currently employ non-Catholic staff or non-religious staff.²⁹⁹

The diverse employment practices of religious schools should not be seen as evidence of the limited importance of mission fit for employment positions at religious schools. As discussed, a person's mission fit is important for a religious school as it allows them to play a more effective role in religious education, to act as a positive role model for students and others involved with the school, and to promote the identity of the school as an authentic religious institution. A person with poor mission fit may be able to effectively perform the technical aspects of various employment positions, but they will be limited in their ability to contribute to these religious aspects of the employment role, and may even have a detrimental impact on them. A religious school still committed to its religious identity may employ someone with poor mission fit due to operational necessity or because they consider that some diversity in the staff body will not have a significant adverse impact on the religious environment of the school. However, these decisions by religious schools should not be considered to be evidence that mission fit is not important for teaching and non-teaching employment positions at religious schools.

The appropriateness of such an understanding in relation to the employment practices of religious schools is supported in relation to other organisations established to support particular groups. For example, it is arguable that being a woman should not be held to be an essential requirement of a counselling position in a domestic

²⁹⁹ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 3 (Debra James, Victorian Independent Education Union).

violence centre caring for women abused by men considering a person of either gender can perform the technical role of a counsellor. However, considering that female victims of domestic violence will often be reluctant to trust men due to their previous encounters with violence from men it is reasonable to conclude that in light of relevant social factors the government should permit the centre to treat gender as an inherent requirement for these roles. This conclusion should not be undermined simply because the centre fills counselling roles with some men due to difficulties in finding suitably qualified and experienced women to fill the role, or because they consider that employing a few men at the centre will not significantly impair the centre's ability to create an environment in which women who have been abused feel safe and supported.

3.4 THE ABSENCE OF EMPIRICAL EVIDENCE ON THE IMPORTANCE OF MISSION FIT

Religious schools are criticised for claiming that they need to be able to hire both teaching and non-teaching staff members without providing adequate empirical evidence to justify their alleged need. In *Garrod v Rhema Christian School*, for example, the legality of a decision by a religious school to dismiss a teacher who engaged in an extra-marital affair was upheld.³⁰⁰ However, the decision-makers in the case stated that

much depends on whether [the] role model theory actually has an effect on students, particularly given the external forces that inevitably impinge on their consciences. No evidence of... studies was introduced, counsel preferring to rely mainly on logical and impressionistic argument. Nor was any evidence introduced of the force of the connection claimed between teachers' personal and occupational lifestyles.³⁰¹

Similarly, Tobin emphasised in relation to claims made by supporters of Catholic schools that:

³⁰⁰ *Garrod v Rhema Christian School* (1991) 15 Canadian Human Rights Reporter D/477 [1]–[3], [94].

³⁰¹ *Ibid* [89]–[90].

no empirical evidence was provided by the Catholic Church to establish that a receptionist can, as a matter of fact, influence the formation of a child with respect to the kind of marital (or sexual) relationship that a child will ultimately choose to enter. Second, it assumes that staff members will be active in promoting their marital status and sexual orientation to students. Again no empirical evidence is provided to support this claim. Indeed the evidence that is available suggests that staff conceal their sexual identity or marital status from school communities because of the fear of censure or dismissal. Moreover, intuitively it is difficult to envisage staff adopting such an approach given that a person's marital status and sexual orientation are not matters which are likely to arise in the day to day operation of a school. Third, it implies that the very existence of a staff member who is in a defacto relationship – or for that matter, is gay, lesbian or a single parent – will somehow contaminate the religious identity of the school. This is despite evidence that there are many Catholic schools within Victoria where the employment of such individuals as a member of staff had no impact on the religious identity of the school let alone the existence or functioning of the school.³⁰²

The criticism that religious schools often lack empirical evidence to support their claims regarding why they need protections under anti-discrimination legislation raises an important point. It would naturally be helpful if religious groups were able to provide comprehensive evidence that a failure to provide them with the ability to select employees for mission fit substantially undermined their ability to provide an environment supportive of the religion on which they were based. This is particularly the case considering critics of the protections can provide some objective evidence of individuals who have suffered adverse consequences from the protections especially from those who have been deprived of positions of employment.³⁰³

Some evidence in support of the claim made by proponents of religious schools can be provided in relation to the religious educational institutions that were previously religious but have over the years become increasingly secularised to the extent that the religious group which established them requests that they no longer publicly identify themselves as belonging to the religion.³⁰⁴ Such evidence is helpful but more detailed empirical evidence would clearly be desirable to support the need for

³⁰² Tobin, above n 149, 42–3 (citations omitted).

³⁰³ See, eg, *Thompson v Catholic College, Wodonga*, *Griffin v Catholic Education Office*, and *Goldberg v G Korsunski Carmel School* at [3.3.1] in Chapter 3.

³⁰⁴ Examples of this are the Pontifical Catholic University of Peru, Marist College, Nazareth College, Saint John Fisher College and Marymount Manhattan College discussed above at [3.3].

adequate protections for religious schools. However, it is very difficult to obtain quality evidence in relation to the need of religious schools in this area. A major concern that religious schools have about employing a person who is not committed to their worldview is that their involvement in the religious school would have an adverse impact on the religiosity of students, staff members and others involved with the religious school. However, an extensive range of experiences within and outside a religious school will play a role in determining a person's religiosity. It would be very difficult to obtain evidence that supports a claim that a decision by a religious school to employ some teachers unsupportive of the institution's religion caused particular students or staff members to leave their faith. Similarly, there is unlikely to be an immediate substantial impact on a school's religious culture from a decision to hire people uncommitted to the school's religion, rather the impairment of the school's religious culture will more likely occur gradually over many years.

It is also important to note that supporting claims less on the basis of empirical evidence and more on the basis that they are reasonable and supported by human experience is not only an approach adopted by advocates of the importance of mission fit for all employment roles at religious schools. Many critics of religious schools often make claims regarding the adverse impact of the operation of these schools and the minimal impact that will occur if the protections are removed, but often fail to support their claims with objective evidence. For example, supporters of the inherent requirement test frequently claim that requiring religious schools to employ a more diverse staff body will not undermine the operation of religious schools without providing empirical evidence to support their claims.³⁰⁵

Similarly, in *Strydom*, Basson J in defence of his judgment in favour of the music teacher dismissed by the religious arts academy stated that 'the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal'.³⁰⁶ However, such a claim was beyond the competency of Basson J as his familiarity with the operation and religious culture of the arts

³⁰⁵ An example of such an approach is provided by the views expressed by Rayner, Kirby and the Australian Gay and Lesbian Rights Lobby at above nn 247–249 and accompanying text. See also Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 12–13.

³⁰⁶ *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2009] 4 SA 510 [25], [33].

academy could only have been superficial. Also no empirical evidence was provided by Basson J to support the claim that finding a violation of the right to equality in these circumstances would only have had a minimal impact on the operation of the arts academy.

Furthermore, while critics frequently demand detailed evidence to be provided in support of the need for protections for the employment decision of religious schools, they are not similarly demanding in relation to protections requested by other groups. For example, if an indigenous group claimed that it needed to establish a school for the indigenous community and wanted the ability to hire both teaching and non-teaching indigenous employees it is unlikely that many of these critics would similarly demand extensive objective evidence that employing a non-indigenous person would undermine the school's objectives. Those critical of providing protections for the employment decision of religious schools seem to be inappropriately devaluing the importance of the right to religious liberty compared to other human rights despite international human rights instruments unambiguously declaring religious liberty to be a right of fundamental importance.

3.5 THE LIKELY INTERPRETATION OF THE INHERENT REQUIREMENT TEST

The view that the inherent requirement test will fail in operation to adequately respect the importance of mission fit for the operation of religious schools is based on the understanding that a strict interpretation of the meaning of 'inherent requirement' will be adopted by the courts so that a religious component will not be an inherent requirement for most employment positions at religious schools. However, the possibility that the inherent requirements of a position can extend beyond a person's ability to perform the merely technical aspects of an employment role is well established. Such a view was approved by the High Court of Australia in *Qantas Airways Ltd v Christie*, which considered the meaning of an 'inherent requirements' provision in the context of a rule adopted by some countries that prohibited from their airspace planes flown by persons who had reached 60 years of

age.³⁰⁷ On the appropriate approach to adopt in determining the ‘inherent requirements’ of an employment position Brennan CJ held that

[t]he question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.³⁰⁸

Confirmation of the appropriateness of this approach was provided in *X v The Commonwealth*, a case that addressed whether a soldier with HIV was able to meet the inherent requirements of his employment.³⁰⁹ On the scope of the inherent requirement test McHugh J stated that

the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment ... [t]hat is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. ... in determining what the inherent requirements of a particular employment are, it is necessary to take into account the surrounding context of the employment and not merely the physical capability of the employee to perform a task.³¹⁰

Gummow and Hayne JJ similarly supported the adoption of a broad approach to the inherent requirement test. Their Honours argued that

it is necessary to identify not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on. Those circumstances will often include the place or places at which the employment is to be performed and may also encompass other considerations. For example, it may be

³⁰⁷ (1998) 193 CLR 280, 292.

³⁰⁸ Ibid 284.

³⁰⁹ (1999) 200 CLR 177, 177.

³¹⁰ Ibid 187–9.

necessary to consider whether the employee is to work with others in some particular way.³¹¹

The view that it is appropriate to take into account more than merely the functional aspects of a role in relation to employment with religious organisations is also supported by the European Council Directive 2000/78/EC. A Council Directive is a legislative act of the European Union which requires member States to implement measures to amend national laws to conform to the Council Directive, but which allows each member State to determine for itself the appropriate measures to introduce to achieve the required conformity. On the relevance of religion to employment roles in religious organisations the Council Directive states that

in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos ... [p]rovided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.³¹²

Further support for the possibility that courts would adopt a broad approach to the meaning of 'inherent requirement' in religious organisations may also be provided in the actual wording of the provisions used to introduce the inherent requirement test. For example, section 83(4) of the *Equal Opportunity Act 2010* (Vic) required that '[t]he nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement' for employment positions at religious schools. If a similar provision were introduced into NSW it would provide support to

³¹¹ Ibid 208.

³¹² *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16, art 4(2).

courts in holding that mission fit is an inherent requirement for a wide range of employment positions at particular religious schools.

Considering these sources, it is possible that courts when considering the scope of the inherent requirement provisions could adopt a broad approach to its coverage and consistently uphold claims made by religious schools that mission fit is an inherent requirement of most, if not all, of the employment roles at their schools. However, it is unlikely that such a broad approach to the inherent requirement test would be adopted in NSW. The inherent requirement test is an approach that is being strongly promoted by individuals who consider that a narrow approach to the scope of the inherent requirement test should be adopted that would focus exclusively on the technical requirements of most employment positions at religious schools. This can clearly be observed by the examples such individuals use of employment positions for which they consider mission fit should be irrelevant including teachers of non-religious subjects, administrative positions and maintenance staff.³¹³

Even if a narrow approach to the inherent requirement test were not clearly expressed in the legislation introducing the test it is likely that courts would interpret any ambiguities in such a way that a narrow approach was adopted. Such an outcome is likely as courts when considering how to interpret any ambiguity contained in the inherent requirement provision will be strongly influenced by the support for a narrow approach that will likely be found in various extrinsic materials including the second reading speech of the Minister introducing the inherent requirement test and the various reports of parliamentary inquiries produced before the test was implemented. The Victorian parliamentarian, Jill Hennessy, for example, stated the following about the merits of the inherent requirement test:

where an attribute such as religious adherence was relevant -- where it was an inherent requirement of a position that a person have a particular religious adherence -- then discrimination, where it was reasonably required, would be lawful. However, in circumstances where discrimination was not reasonably required it would not be lawful. An example might be that for a gardener working in a religious school it would not be an

³¹³ See the quotes of Rayner, Kirby and the Australian Gay and Lesbian Rights Lobby at above nn 247–249 and accompanying text.

inherent requirement of the role for them to be an adherent to the particular religious principles or philosophy of that school, whereas it might be so for a religious education teacher at the school.³¹⁴

Additional support for the merits of a narrow approach being adopted in relation to the scope of the protections is provided by the approach adopted in the UK, which is likely to play an influential role in forming the views of some Australian parliamentarians. In the exception provided to religious organisations under the *Equality Act 2010* (UK) there is an ambiguity surrounding the scope of the phrase ‘for the purposes of organised religion’. However, strong parliamentary support for a narrow interpretation of the scope of this provision is demonstrated by the Explanatory Notes, which state that the exception applying to ‘employment for the purposes of an organised religion ... is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion ... [t]he requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext’.³¹⁵ Additional support is provided by the statements from UK parliamentarians such as Baroness Royall of Blaisdon who stated that ‘[i]t is certainly not our intention that the exception should apply to employees such as administrative staff, accountants, caretakers or cleaners . . . In addition, the exception would not apply to most staff working in press or communications offices’.³¹⁶

A narrow approach had already been adopted to similar legislative protections existing before the enactment of the *Equality Act 2010* (UK) was adopted. For example, in *R (Amicus MSF Section) v Secretary of State for Trade and Industry*, the court addressed the legality of exceptions to the operation of legislation prohibiting discrimination on the grounds of sexual orientation according to whether it was consistent with European Council Directive 2000/78/EC and the European Convention on Human Rights.³¹⁷ Richards J held that employment as a teacher in a faith school would likely not be covered by the phrase ‘for purposes of an organised

³¹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2011, 1449–50 (Jill Hennessy).

³¹⁵ Explanatory Notes, *Equality Bill 2010* (UK) [790]–[796].

³¹⁶ United Kingdom, *Parliamentary Debates*, House of Lords, 25 January 2010, vol 716 col 1216 quoted in Sandberg, above n 40, 176.

³¹⁷ [2004] EWHC 860 [4].

religion’.³¹⁸ This narrow scope of the protections provided to religious schools in the United Kingdom is likely to be influential in guiding some Australian politicians and judges in determining the appropriate approach to adopt in regulating religious schools in Australia.

There is also support in case law in Australia that a narrow approach should be adopted in relation to the religious component of employment positions. Some support for advocates of a narrow approach could be provided by *Walsh*, which held that the Society had discriminated on the ground of religion by requiring a person to be Catholic if they held the position of President.³¹⁹ The complainant was successful in the discrimination complaint as the employment role was not considered to have had a sufficiently religious content despite it being a leadership position with religious duties in an organisation with spiritual aims. The Tribunal concluded that the Society was unable to rely on an exception for religious bodies and that being Catholic was not a genuine occupational requirement of the employment role.³²⁰ The Tribunal held that

the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, [does not mean] that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves ‘religious observance or practice’.³²¹

Further support for proponents of a narrow approach can be provided by *Hozack v Church of Jesus Christ of Latter Day Saints* (‘*Hozack*’).³²² The case concerned the legality of a decision to dismiss a member of the Church working as a receptionist at the Church’s national office after she breached an express term of her employment contract that required her to comply with the doctrines of the religion.³²³ The complainant breached this term of the contract by entering into a sexual relationship

³¹⁸ *Ibid* [95]; [116]; [121].

³¹⁹ *Walsh* [2008] QADT 32 [125]–[127].

³²⁰ *Ibid* [70]–[78]; [79]–[126].

³²¹ *Ibid* [77].

³²² (1997) 79 FCR 441, 442–3.

³²³ *Ibid* 442–3.

while she was separated but not divorced from her spouse, and by refusing to agree with Church leaders that her conduct was inappropriate.³²⁴

The essential issue for the case was whether dismissing the complainant on the ground of religion was a valid reason connected with ‘the employee's capacity’ or ‘based on the operational requirements of the undertaking’.³²⁵ The court adopted a narrow approach to the meaning of ‘operational requirement’ holding that adherence to the religion’s doctrine could not be considered an operational requirement as the Church employed non-adherents in various employment roles, the role of a receptionist was not ‘a position from which anyone would normally expect any particular leadership or example’, and employment positions such as a receptionist are not intrinsically religious in nature.³²⁶ Similarly, the term ‘capacity’ was narrowly construed to refer only to the functional requirements of an employment position with the court stating that ‘Ms Hozack was not a minister of her religion. No one doubted her ability to do her work as a receptionist. Her “capacity” ... was not wanting’.³²⁷

Even if a broad interpretation were adopted resulting in the courts regularly deferring to the claims of religious schools that mission fit is an inherent requirement of all of their employment roles, it is likely that the proponents of an inherent requirement test would intervene and amend the legislation. A failure by proponents to intervene to ensure a stricter approach was taken would result in the inherent requirement test failing to produce the desired result of limiting the protections to those roles that are considered by the proponents to be substantially religious.

Considering these factors if the inherent requirement test were introduced into NSW it is likely that a strict approach would be adopted in the legislation introduced by Parliament or through the interpretation of any ambiguities in the legislation by the courts. Such an interpretation would impair the religious identity of many schools,

³²⁴ Ibid.

³²⁵ *Workplace Relations Act 1996* (Cth) s 170DE(1). The court held that the Church was able to rely on a defence requiring them to demonstrate that they had acted “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”; however, this religious susceptibilities defence did not apply to a complaint made under section 170DE(1): *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441, 446.

³²⁶ *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441, 452.

³²⁷ Ibid 452–3.

undermine their ability to provide effective religious education and formation, and violate the religious liberty of those schools that understand that at least some of their employment positions are religious vocations.

4 THE DIFFICULTIES COURTS WILL FACE IN APPLYING THE INHERENT REQUIREMENT TEST

A major advantage claimed for the inherent requirement test is the flexibility it provides to courts to take into account the unique circumstances of the employment position and the religious school in determining the appropriate outcome. The judge who hears a claim made against a religious school will be able to assess whether it is acceptable for the religious school to claim that mission fit is an inherent requirement of the employment position considering the nature of the school and the religion on which it is based. The flexibility of the inherent requirement test can be seen as achieving a fair balance between the interests of the complainant and the religious school by allowing the inherent requirement claim to be assessed by independent decision makers. The Victorian Scrutiny of Acts and Regulations Committee in the Options Paper discussed the benefits of the inherent requirement test in these terms:

The inherent requirements analysis would enable a proper assessment of the nature of the requirements for the particular job, and in many cases the question will be whether the occupant's religion is relevant to the particular employment position. An administrative officer or secretary is not in the same position as a teacher. While a maths teacher is not in the same position as a teacher of religious education, they may be a significant role model, depending on the nature of the religious organisation operating the school. An inherent requirements exception would enable these judgments to be tailored to the situation in question rather than made available on a blanket basis that ends up being too wide and undermining the equality rights of staff more than is necessary.³²⁸

Although there may be some advantages to assigning judges the role of determining the merits of a religious school's claims regarding the religious nature of employment positions there are some significant problems involved in requiring

³²⁸ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 127.

courts to determine theological issues. A major concern is that the test requires courts to resolve theological issues that a secular body should not be required to determine. This view that secular courts should not address theological issues regardless of the theological competency of particular judges is considered in Chapter 5 focusing on the merits of the opt-in model. A further substantial problem with requiring courts to determine theological issues is that courts will likely experience many practical problems in applying the inherent requirement test when they attempt to determine the entity responsible for the adverse employment decision, the religion on which the decision was allegedly based, and the relevant ‘doctrines, beliefs or principles’ that should be understood as forming a part of the religion. This section evaluates the merits of these concerns.

4.1 THE ALLOCATION OF RESPONSIBILITY FOR THE EMPLOYMENT DECISION

A preliminary step for a court in determining the merits of a defence based on the inherent requirement test would be to identify the school and the persons or bodies that established, directed, controlled or administered the school. In many situations this will not be difficult, but in other cases it may be a highly complex issue for a court to resolve. As Evans notes: ‘complications arise because many religious entities have complex administrative and legal structures, that may not be “bodies” in the legal sense, and which can make it difficult to identify who the respondent should be in any discrimination claim’.³²⁹

A useful example that demonstrates the difficulties that courts can face in determining the relevant entities is the *Wesley Mission* case.³³⁰ *Wesley Mission* was appealed and reheard multiple times before it was finalised with the courts experiencing great difficulty in determining the appropriate respondents in the matter.³³¹ The initial finding of the Administrative Decisions Tribunal (ADT) on the

³²⁹ Evans, above n 67, [4.4.1].

³³⁰ *Wesley Mission* [2010] NSWADT 293.

³³¹ The decision in *Wesley Mission* was preceded by *OV v OW v QZ* [2006] NSW ADT; *OV v QZ (No.2)* [2008] NSWADT 115; *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5; *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155.

appropriate respondents was appealed, on appeal their finding was set aside, and even after the matter returned to the ADT the resolution of the issue of the appropriate respondents still resulted in the ADT devoting half of their judgment to the issue.³³² Admittedly, the determination of how the law should operate in relation to complex organisations is a common task for courts. However, few of the proponents of the inherent requirement test would realise how complex this initial step in applying the test could be if the inherent requirement test were to be introduced.

Once the relevant persons or bodies have been identified another issue may arise in relation to the further requirement that the school be an educational institution conducted in accordance with religious doctrines, beliefs or principles. A complainant may argue that a school cannot rely on the inherent requirement defence as the school is essentially a non-religious commercial enterprise conducted according to secular considerations.

An argument along these lines was successfully made by the complainant in *Cobaw*. There were a range of grounds on which Christian Youth Camps Ltd could have been found to be a religious organisation including that it was established by the Christian Brethren, there were multiple references to it being a Christian organisation in both structure and function in its constitution, the common religion of staff members was Christian Brethren and staff members were required to subscribe to a statement of faith.³³³ Despite these factors, Hampel J held that the respondent was not a body established for religious purposes as religion was rarely, and sometimes not at all, mentioned on their website or on their promotional material and strategic planning documentation.³³⁴ Furthermore, the accommodation facilities were often used for secular purposes as non-religious groups could use the facilities without religious supervision or being required to incorporate a religious component into their activities.³³⁵

³³² *OV v QZ (No.2)* [2008] NSWADT 115 [6]–[67].

³³³ *Cobaw* [2010] VCAT 1613 [231]–[255].

³³⁴ *Ibid* [240]–[254].

³³⁵ *Ibid*. This finding was confirmed in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 [158], [230]–[254] (Maxwell P); [441] (Redlich JA).

Similarly, in *Walsh* the attempt by the St Vincent de Paul Society to rely on a provision that excluded the operation of the *Anti-Discrimination Act 1991* (Qld) for religious bodies was unsuccessful. The Tribunal held that the organisation is

a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) is a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. That is not enough, in my opinion, to make the Society a religious body.³³⁶

Although *Cobaw* and *Walsh* dealt with the religious identity of organisations providing accommodation and charitable services, a similar argument could be made that in a discrimination action against a particular school that it should not be able to rely on the defence as it is not conducted in accordance with religious doctrines, beliefs or principles. Such an argument could be supported through focusing on the extent, if any, that a school mentions religion on its website, in its promotional material and annual reports, the lack of religious commitment among staff members and students, any decisions made to hire out its facilities to non-religious groups during school vacations, and in the general operation of the school.

While such an argument could be raised in a discrimination complaint against a religious school it is unlikely to be an issue that courts will be required to frequently resolve. For most schools based on a religion there will normally be sufficient religious components incorporated into their structure and operation to satisfy the requirements that the school is conducted in accordance with a religion. Furthermore, if a religious school has become secularised then it is unlikely that the authorities of the religious school would want to rely on the inherent requirement defence for their employment decisions. However, some situations may arise where school authorities of a secularised school do attempt to justify an employment decision that was made on the basis of a relevant attribute through relying upon the protections provided to religious schools. In these cases a further challenge that courts would have to face in applying the inherent requirement test is whether the claim made by the school

³³⁶ *Walsh* [2008] QADT 32 [76].

authorities that their school is religious can be accepted considering that the school is substantially secular in operation.

4.2 THE IDENTIFICATION OF THE RELIGION OF THE SCHOOL

Another essential task for a court applying the inherent requirement test is to determine whether the school is based on a religion, and if so, the religion of the school or other relevant body controlling the school. In most situations this will not be difficult due to the school having a simple organisational structure controlled by a religious organisation that clearly identifies as belonging to a particular religious tradition. For example, courts will have little difficulty in concluding that a school that is part of the Catholic school system is based on Catholicism.

However, for many other schools the courts will face a significantly more difficult task in determining the religion on which the court should hold that the school is based. If a school simply identifies its religion using a broad label—such as Christian or Jewish—then a court will be faced with a dilemma. One approach would be to hold that the school is a generic Christian or Jewish school. However, considering the great diversity of beliefs within the Jewish and Christian religions such an approach would create difficulties for the court when trying to determine the religious ‘doctrines, beliefs or principles’ of the school. Alternatively the court could conduct a more detailed analysis of the school’s origins, history, marketing material, staffing profile, and any other relevant issue to allow the court to situate the school within a particular denomination or branch. Sometimes such a detailed review will overwhelmingly support a particular conclusion, while in other situations there may be conflicting documents and evidence from key witnesses leaving the court with the difficult task of determining in which particular religious group or sub-group the school should be situated.

This difficulty was confronted in *Wesley Mission* as the Christian organisation attempted to rely on a provision in the Act that provides a defence to an act of a religious organisation ‘that conforms to the doctrines of that religion or is necessary

to avoid injury to the religious susceptibilities of the adherents of that religion'.³³⁷ The respondent provided a number of different descriptions of their religion, but the ADT held that the respondent was claiming that their religion was 'the religion of the Uniting Church as practised by Wesley Mission'.³³⁸ The ADT rejected the respondent's claim and held that the Act did not recognise Christian denominations and that the relevant religion for the purposes of the Act was Christianity, but that even if the Act did recognise denominations the relevant religion was the 'religion of the Uniting Church' and that the further specificity claimed by the respondent could not be accepted.³³⁹ On appeal the Tribunal's approach was rejected and the Appeal Panel held that the relevant religion for the purposes of the provision was Wesleyanism, a term the Appeal Panel used to refer to the more precise religious beliefs of the respondent.³⁴⁰ On a further appeal to the NSW Court of Appeal the use of the label 'Wesleyanism' or any religious label was considered inappropriate with their Honours holding that the preferable approach was to simply focus on the religious commitments of the respondent at the time of the decision to not provide foster care services.³⁴¹ When the matter was reheard by the ADT detailed evidence was given about the respondent's religious beliefs at the time of the decision, the influence of the teachings of John Wesley, and the position of the respondent's religious commitments within the broader Uniting Church.³⁴² The case is a useful example of how the apparently simple task of determining an organisation's religion can in reality be a complex and time consuming endeavour for the court and parties.

4.3 THE DETERMINATION OF THE DOCTRINES OF THE RELIGION

If the inherent requirement test were implemented it would require a court to address a range of theological issues including the validity of the religious school's claims that a particular doctrine, belief or principle was a part of their religion, whether the religious commitment could validly be held to be an inherent requirement of a particular employment position, and why the particular attribute(s) of the

³³⁷ *Anti-Discrimination Act 1977* (NSW) s 56(d).

³³⁸ *OV v QZ (No.2)* [2008] NSWADT 115 [88].

³³⁹ *Ibid* [89]–[121].

³⁴⁰ *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57 [18], [40].

³⁴¹ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 [53]–[55].

³⁴² *Wesley Mission* [2010] NSWADT 293 [18]–[20].

complainant meant that they were unable to conform to that requirement. Requiring courts to engage in this kind of analysis is problematic as judges will often lack the necessary knowledge and training to properly understand the religious sources of authority and the acceptable methods for their interpretation. As the development of expert knowledge of any religion will often take years to develop, a court will be in a position of hearing (often conflicting) lay and expert evidence regarding the nature of the religion and having to reach a conclusion regarding the actual position of the religion on the basis of a superficial understanding.

Even in the rare situations where judges do have expertise in a particular religious tradition, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of the religion. Expecting judges to provide certainty regarding the actual position of a religion on a particular theological issue is not just inappropriate for a secular body but also unrealistic considering that there may be an ongoing conflict between religious experts on the correct theological position.

The US Court of Appeals for the District of Columbia Circuit addressed the substantial difficulties such cases can create for courts in *EEOC v Catholic University of America*.³⁴³ Particular emphasis was placed on the difficulties the Court would encounter in assessing the conflicting theological evidence regarding the lecturer's qualifications given by eighteen witnesses in the case including fourteen who were clergy or members of a religious order.³⁴⁴ The Court quoted with approval a statement of the trial judge who stated that '[t]here are such competing expert opinions as to the quality and, necessarily, the religious substance of [the appellant's] writings in this record. I find and conclude that it is neither reasonably possible nor legally permissible for a lay trier of fact to evaluate these competing opinions on religious subjects'.³⁴⁵

The inappropriateness of requiring secular courts to address theological issues was also emphasised in *Watson v Jones*, a US case addressing a contractual and property

³⁴³ (1996) 83 F3d 455. For the details of the case see above fn 263 and accompanying text.

³⁴⁴ *Ibid* 465.

³⁴⁵ *Ibid*.

dispute between adherents of a Presbyterian Church.³⁴⁶ On the comparative incompetence of secular courts to determine theological issues compared to the relevant religious authorities Justice Miller appropriately stated that different religious bodies

each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.³⁴⁷

For those religions with a decentralised approach to religious authority where there is a greater focus on individual adherents determining for themselves the correct interpretations of holy texts and other religious sources the task of determining the religion's teachings on a particular issue will create even greater challenges for the courts. Durie comments on these challenges stating that 'for some "religions" this will be a big ask ... A lot of people will be interested to discover from our courts' rulings what is the doctrinally correct Anglican, Baptist, Unity Church or Lutheran position on gay marriage'.³⁴⁸ He expands on the difficulties that he considers courts will face in determining the actual teaching of a religion:

Suppose, for example, that a local Anglican parish sacks a lay employee because of their extramarital sexual relationships (gay or heterosexual), but another parish in the same denomination has no problem with employing people in this very same circumstance. This issue comes to VCAT [Victorian Civil and Administrative Tribunal], or ultimately to a higher court, and testimony is given on the doctrines of 'the religion'. The evidence is divided. One side cites the views, say, of Bishop Shelby Spong, whilst another quotes, say, Archbishop Akinola, Primate of Nigeria. Lengthy submissions are presented on the teachings of the Bible, and how these should be interpreted. The judge will be asked to make a ruling on what are the 'doctrines, beliefs or principles' of 'the religion' ... The judge will find this more than a bit odious. Perhaps the denominational head could be

³⁴⁶ 80 US 679, 714–7 (1871).

³⁴⁷ Ibid 729.

³⁴⁸ Durie, above n 253.

asked for an official view. At this point, all hell breaks loose in the denomination, as both sides of the controversy start fighting their theological battles in the public media.³⁴⁹

A related concern is that courts might use the views of other religious adherents as evidence to reject the validity of the religious understanding of the respondent in a discrimination complaint, especially in situations where the judge considers that they all belong to the same religion. The legitimacy of such a concern is supported by *Wesley Mission* in relation to the attempt by the adoption agency to rely on the statutory defence for conduct that was ‘necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.³⁵⁰ In the case the Tribunal held that the religion on which the adoption agency was based was Christianity and that due to widespread disagreement within Christianity on the significance of homosexuality the adoption agency could not rely on the protection.³⁵¹ The Tribunal further held that even if it were appropriate to regard the religion of the adoption agency as Uniting Church, rather than a generic Christianity, the same result applied due to similar disagreements over the issue of homosexuality occurring within the Uniting Church.³⁵² In support of this further finding the Tribunal referred to the practice of a different religious group noting that

a designated agency operated by the Uniting Church (not Wesley Mission) has authorised as ‘authorised carers’ persons who are openly homosexual and placed children in their care. There is no evidence that this has caused injury to the religious susceptibilities of the members of the Uniting Church.³⁵³

A similar situation occurred in *Hall (Litigation Guardian of) v Powers* involving a male student applying for an injunction to restrain his Catholic school from preventing him attending the school prom with his male partner.³⁵⁴ The Catholic bishop with supervisory authority over the school provided evidence to the court that acceding to the plaintiff’s ‘demand would have given his intended behaviour the imprimatur of both the Principal and the School Board, contrary to the teachings of

³⁴⁹ Mark Durie, *Reflections on the Proposed Victorian Equal Opportunity Bill 2010* (15 March 2010) St Mary's Vicar's Blog <http://stmarysvicar.blogspot.com.au/2010_03_01_archive.html>.

³⁵⁰ *Anti-Discrimination Act 1977* (NSW) s 56(d).

³⁵¹ *OV v QZ (No.2)* [2008] NSWADT 115 [142].

³⁵² *Ibid* [143].

³⁵³ *Ibid*.

³⁵⁴ (2002) CarswellOnt 1752 [1]–[5].

the Catholic Church'.³⁵⁵ MacKinnon J noted that the 'Bishop's affidavit asserted that it was "an authentically Catholic position". But the evidence before me indicates it is not the only Catholic position nor is there any evidence that it is the majority position'.³⁵⁶ His Honour decided to grant the injunction relying in part upon the 'diversity of opinion within the Catholic community on pastoral care regarding homosexuality'³⁵⁷ and that the documentary evidence did not establish 'that same sex dancing is sinful or sexual under Catholic dogma. Rather, the catechism calls for non-discrimination and mentions nothing about same sex dancing'.³⁵⁸

A further difficulty that would arise from the inherent requirement test is that religious groups can change their views on the significance of various attributes. In particular, many Christian denominations underwent profound changes in their social teachings in the twentieth century with many adherents of different denominations rejecting previous theological positions and deciding that according to a correct interpretation of the Bible there are no significant theological or ethical differences between persons on the grounds of attributes such as gender or sexuality. Indeed, this change in the ethical beliefs of community members—both religious and non-religious—is often used as a major justification for amending anti-discrimination legislation and other similar legislation to more accurately reflect a contemporary understanding of morality. Michael Gorton, the Chairperson of the Victorian Equal Opportunity and Human Rights Commission, made such an argument in the evidence he gave in the public hearings held by the Scrutiny of Acts and Regulations Committee into anti-discrimination legislation in Victoria stating that '[i]t is important to note that there have been some incredible changes in community values and community expectations over the last 15 years ... We note the changes in the attitude of some of the churches, for example, in relation to the religious exemptions over that period of time'.³⁵⁹

³⁵⁵ Ibid [30].

³⁵⁶ Ibid.

³⁵⁷ Ibid [45].

³⁵⁸ Ibid [49].

³⁵⁹ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/4_August_-_Victorian_Equal_Opportunity_and_Human_Rights_Co.pdf>, 4 August 2009 (M Gorton, H Szoke and E Turner, Victorian Equal Opportunity and Human Rights Commission), 2 (Michael Gorton, Victorian Equal Opportunity and Human Rights Commission).

A relevant example to demonstrate the difficulties that a change in theological views can have is a situation where the near universal view of adherents of a particular religious group is that only men can perform religious ceremonies and teach religious education in the schools established by the religion. A female applicant is unhappy about being denied an employment position as a religious teacher at the school, but her complaint is rejected by the courts as the position regarding gender is held to be a belief of the religion. However, some adherents of the religion begin to challenge this belief and are successful in slowly changing the views of the majority of the community. Female applicants periodically launch legal challenges against the position of the school, and courts are faced with the difficult task of determining when the belief can no longer be appropriately held to be a part of the religion. Particular difficulties would be faced in situations where the overwhelming majority of adherents no longer consider gender to be a significant factor, but a minority of believers who continue holding this belief are the ones holding leadership positions and controlling the religious group's assets. A court would have to resolve the complex issue of deciding whether to favour the majority of the adherents or the minority who have the leadership roles, financial control of the relevant organisations, and the weight of tradition in support of their position.

The reverse of this situation could also occur where a minority of adherents of a religious group believe gender to be significant for religious leadership positions, and over time their view becomes the one held by a majority of adherents. Such a situation is not fanciful as often those religious adherents who have traditional views on issues such as gender and sexuality have a much higher birth rate than those adherents who do not consider the variations in these attributes to be significant. For example, the more traditional Haredi Jews, a minority in most Jewish communities, typically have a much higher birth rate than other Jewish groups and are rapidly increasing as a percentage of the Jewish population.³⁶⁰ Not only would such a change in a religious community pose similar problems for a court as the previous situation, but it would also pose problems for employees at religious schools whose

³⁶⁰ Matti Friedman, 'Haredim birthrate presents problems', *The Washington Times* (Washington), 18 January 2011 <<http://www.washingtontimes.com/news/2011/jan/18/haredim-birthrate-presents-problems/?page=all>>.

employment positions could become increasingly insecure as the viewpoint about the significance of gender increases in popularity within the religious community.

The difficulty of deciding the theological position that can properly be attributed to a religion was confronted in *Wesley Mission*. The respondent argued that the relevant doctrine for the religious susceptibilities test was the belief that monogamous heterosexual marriage is both the norm and ideal of the family.³⁶¹ However, in light of the considerable diversity of opinions regarding sexuality among adherents of Christianity, and more specifically the Uniting Church, the Tribunal held that this could not be held to be a doctrine of the Christian religion, nor could the theological views of the respondent be evidence of the existence of the doctrine as it was not possible to regard the respondent's views as those of the religion of the Uniting Church.³⁶² This conclusion was overturned on appeal and when the matter was reheard the ADT focused specifically on the religious beliefs of the respondent and held that a valid defence applied to the claim as the respondent's position that they were unable to provide foster care services to a gay couple conformed to a doctrine of their religion.³⁶³

Another case that illustrates some of the challenges courts can encounter when they attempt to determine the doctrines of a religion is *Griffin*. The Commissioner of the Australian Human Rights Commission rejected the Catholic Education Office's evidence obtained from Catholic experts who supported the theological appropriateness of the employment decision by the NSW Catholic Education Office to refuse classification of the applicant as a teacher in Catholic schools on the basis of her activism for gay rights.³⁶⁴ Instead the Commissioner, after referring to various Catholic documents, held that being a lesbian and an activist against discrimination was not inconsistent with Catholic teaching, that there was no evidence that she was engaging in homosexual activity, and therefore there were no grounds to hold that she did not meet the inherent requirements of a teaching position.³⁶⁵ Furthermore, any injury caused to religious adherents by the Catholic Education Office employing

³⁶¹ *OV v QZ (No.2)* [2008] NSWADT 115 [122].

³⁶² *Ibid* [127]–[132].

³⁶³ *Wesley Mission* [2010] NSWADT 293 [18], [34].

³⁶⁴ *Sidoti*, above n 170, 16–19.

³⁶⁵ *Ibid*.

Ms Griffin would not be relevant as ‘it would be not an injury to their religious susceptibilities but an injury to their prejudices’.³⁶⁶

The decision of the Commissioner to reject the submissions of Catholic experts regarding the theological appropriateness of the CEO’s decision indicates some of the problems that can arise when courts are required to determine the doctrines that should be assigned to religions. The Commissioner in the case was clearly familiar with the various official documents of the Catholic Church, and consequently was able to reach an informed conclusion about the merits of the theological submissions. However, his decision to prefer his own understanding of the doctrines of Catholicism and their relevance to the case resulted in the undesirable situation of a secular body rejecting the views of expert theologians of a religion and determining for itself the doctrines that should and should not be ascribed to the religion. The approach adopted by the Commissioner led Evans to describe the case as ‘a startling decision, particularly the notion that a secular body is competent to determine the real teachings of a Church’.³⁶⁷

Another example of the problems that can be encountered when courts attempt to assess whether a particular belief can legitimately be held to belong to a certain religion is the case of *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* (*Catch the Fire*).³⁶⁸ The case involved a complaint made by the Islamic Council of Victoria that comments made by Pastor Daniel Scot at a seminar organised by Catch the Fire Ministries breached the *Racial and Religious Tolerance Act 2001* (Vic).³⁶⁹ The judge in the case decided to evaluate whether particular claims made by Christian pastors about Islam were accurate.³⁷⁰ The attempt by the judge to determine which beliefs could legitimately be held to belong to a particular faith was widely criticised including by some of the judges who heard the matter on the appeal to the Victorian Supreme Court.³⁷¹

³⁶⁶ Ibid 22.

³⁶⁷ Evans, above n 67, 37 n 161.

³⁶⁸ [2004] VCAT 2510 (22 December 2004).

³⁶⁹ Ibid [33]–[81].

³⁷⁰ Ibid [383]–[395].

³⁷¹ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [36]. For another example of a case involving judges rejecting the understanding of religious adherents that a particular view is a doctrine, belief or principle of their religion, see, *Cobaw* [2010] VCAT 1613 [263]–[307].

4.4 THE IMPACT OF THE OPERATION OF COURTS ON THE RIGHT TO RELIGIOUS LIBERTY

Requiring courts to decide on whether a particular religious doctrine can appropriately be ascribed to a religion can validly be seen as violating the right to religious liberty by interfering with an essential right of religious communities to determine for themselves the correct interpretations of their sources of religious authority. The inherent requirement test could further violate the right to religious liberty due to the pressure that it will place on religious communities to limit the religious freedom of their members. If theological disagreements between members of a religious community are used by courts to justify rejecting a claim by a religious body concerning the inherent requirements of an employment position then it may put pressure on the religious community to be less tolerant of diversity in religious views among religious adherents.

The inherent requirement test could also encourage religious schools to strengthen their religious identity through employing fewer, if any, employees of different faiths, and to integrate the religion more fully into every teaching and non-teaching role to avoid courts relying upon a diverse staff body or a lack of substantial religious content in employment positions as evidence to reject a claim by the religious school regarding the inherent requirements of employment positions. Consequently, the introduction of the inherent requirement test might, instead of encouraging diversity, tolerance and respect for minorities, actually lead to the opposite result by producing religious schools that have less diversity among their employees and are even more committed to emphasising the particular religious commitments of the school.

The inherent requirement test may also increase the level of stress placed on persons working for religious schools. One of the potential advantages of the inherent requirement test is that a court decision can provide clarity regarding the religious content of an employment position so that a person working in that employment position will know whether the inherent requirement defence can be used to justify an adverse employment decision made against them. However, it is also important to note that the inherent requirement test can create uncertainty in relation to the employment positions that have not been judicially considered. Considering that the

inherent requirements of most employment positions will not be considered by courts many employees at religious schools will have to work in an environment where they will never know whether a religious school will be able to rely on the defence to justify an adverse employment decision made. On the rarity of litigation in relation to the regulation of religious groups the Victorian Scrutiny of Acts and Regulations Committee stated in relation to the Victorian anti-discrimination legislation that

[d]espite its 30 years of existence, few of the exception provisions in the Act have been clarified through litigation. This throws great importance onto the legislative drafting of the exceptions, as it is likely that they will have to be given effect without assistance from interpretation by a court.³⁷²

Furthermore, the uncertainty regarding the outcome of a court hearing on the impact of an inherent requirement provision in a particular situation will make many individuals who suffer from an adverse employment decision reluctant to commence or continue with a discrimination complaint. The reluctance to pursue a discrimination complaint is likely even in situations where the legal costs are met by the government as complainants will still often experience significant hardship including emotional distress, harm to reputation and a loss of income.

A further issue of concern in relation to religious liberty is that a court decision to reject the theological claims of a religious group on the basis that it is part of a broader religious group that disagrees with those claims could create a powerful incentive for the smaller religious group to formally separate from the larger religious group in order to protect its religious freedom. Thus Durie argues that the inherent requirement test

could have the effect of pressuring denominations to be less diverse in their theology: otherwise they might only receive the 'lowest common denominator' exception, which will be the minimum needed by their least rigorous adherents. The legal processes triggered off by the new Act [introducing an inherent requirement test] could increase

³⁷² Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 15.

pressures on denominations like the Anglicans or the Uniting Church to divide rather than continue to tolerate their internal theological diversity.³⁷³

Such an argument should not be considered merely speculative as many religious groups are undergoing a period of intense, even hostile, debate regarding the significance of factors like gender, sexuality and marital status. Additional pressure from State action focused specifically on these issues would be unwanted by many adherents and would likely increase the chances of formal division occurring.

Considering the various issues that courts will have to address in applying the inherent requirement test, religious schools will rarely be in a position where they will be confident that a court will uphold a claim that mission fit is an inherent requirement of a particular employment position. The uncertainty regarding the likely outcome of a court hearing will place pressure on religious schools to adopt a restrictive approach in relation to the employment positions claimed to have a religious component in order to avoid devoting substantial resources to defending a discrimination complaint that may result in a court finding in favour of the complainant. The pressure to adopt a restrictive approach in relation to the inherent requirements of employment positions—with the accompanying loss to the school's ability to provide effective religious education and formation—will likely be particularly felt by schools managed by smaller religious communities as their limited resources will make them even less able to meet the costs involved in unsuccessfully defending a claim for discrimination. McConnell warns of the dangers of excessive judicial review of the employment decisions of religious organisations arguing that if

difficult personnel decisions are subject to constant judicial second-guessing, the risks of liability and the financial and morale costs of litigation are sufficient in themselves to substantially erode autonomy rights. The mere threat of litigation may thus be sufficient to chill [the] exercise of legitimate autonomy rights. Clear standards that adequately protect autonomy rights are therefore imperative.³⁷⁴

³⁷³ Durie, above n 349.

³⁷⁴ Michael McConnell, 'Fernández Martínez v Spain—Written Comments of Third-Party Interveners—Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center'

The possibility that providing courts with a role in determining theological issues might have an adverse impact on the operation of religious groups was recognised by the United States Supreme Court in *Amos*. On the potential adverse impact Justice White stated that

it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.³⁷⁵

Along similar lines Justices Brennan and Marshall argued that

[w]hile a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.³⁷⁶

5 APPROPRIATELY RESPECTING THE RIGHT TO EQUALITY AND RELIGIOUS LIBERTY

The inherent requirement test for religious schools can also be criticised for failing to appropriately respect the right to equality. As discussed in Chapter 3 regarding the merits of the general exception approach, religious individuals and groups can support their claims through relying upon the right to equality on the basis that religion is frequently included as one of the grounds on which discrimination is

<<http://religiousfreedomnews.org/wp-content/uploads/2013/01/Third-Party-Comments-in-Fernandez-Martinez-v-Spain-Final.pdf>> 10.

³⁷⁵ *Amos* (1987) 483 US 327, 336 (citations excluded).

³⁷⁶ *Ibid* 343–4.

prohibited under various international human rights instruments. Therefore religious groups can legitimately claim that the State should provide religious organisations with the same protection that the State provides to other organisations where membership is based on other attributes such as gender, sexuality, political opinions or race.³⁷⁷ The implementation of the inherent requirement test for religious schools can be understood as a violation of the right to equality as similar approaches are not taken to organisations established on other grounds. As Parkinson notes from a Christian perspective:

The issue for Christian schools is not the right to ‘discriminate’. That puts the issue in negative and pejorative terms. The core claim is a right of positive selection. Christian schools and organisations only ask to be treated equally with other employers that may have legitimate reasons for wanting to appoint only those with certain characteristics relevant to the identity of the organisation. It is quite understandable that gay bars might prefer to appoint only gay staff, that Thai restaurants might prefer to have Thai employees, and that government ministers would want to staff their offices with people sympathetic to the values of their political party. Recognition of minority group rights on an equal footing is another version of equality. A right of positive selection is rather different from discrimination. It is easy to see the problem if a restaurant advertised for staff of any nationality, so long as they were not Thai. That would be discriminatory. However, it is quite different if a Thai restaurant advertises for Thai staff. Selection based in part on a characteristic which is relevant to the employment is not discriminatory.³⁷⁸

An indigenous employment rights group, for example, should be able to decide not to hire a qualified non-indigenous lawyer as their legal officer even though the person’s legal qualifications and experience are adequate. Such a decision should be supported by the State and community members if it is important that the applicant be indigenous so that they can understand and integrate an indigenous perspective into the legal work they do and in the wider contribution they make to the culture and operation of the indigenous organisation. In this situation, it is important that the appropriate applicant have both adequate technical competence and an indigenous identity for the same reasons as discussed for religious groups—assisting the

³⁷⁷ For examples of groups that have received protections under anti-discrimination legislation to assist them in managing group membership see above nn 228–233 and accompanying text.

³⁷⁸ Parkinson, above n 282, 94.

organisation more effectively achieve its objectives, helping to meet the particular needs of its members, and ensuring that the identity of the organisation is not undermined.

The introduction of the inherent requirement test for religious schools when there are strong legal protections for the employment decisions of various non-religious groups can appropriately be regarded as a failure to respect the right to equality and religious liberty. The relevance of the strong protections provided to other groups was relied upon by the Anglican Diocese of Sydney, which argued that

organisations that have been established for particular legitimate purposes ought to be able to positively select staff who share their values and beliefs who will further their purposes. This is uncontroversial in other areas of society. An environmental group would not be expected to employ people who do not believe in climate change and a political party would not be expected to employ staff who do not share its ideology, whether in a front-line position or otherwise.

The former Victorian Attorney-General Robert Clark when introducing the bill to remove the inherent requirement test for religious schools similarly addressed the issue by emphasising the inappropriateness of the law providing strong legal protections for the employment decisions of political parties while implementing the inherent requirement test for the employment decisions of religious schools. Clark stated that an inherent requirement provision

means that while a religious school, for example, may be able to recruit religious education staff who support the school's beliefs, the school would not be allowed to take support for the school's beliefs into account in recruiting any other staff. This restriction on the freedom of faith-based organisations under the 2010 act is in stark contrast to the position for political organisations. The 2010 act imposes no such 'inherent requirement' test on political organisations. Political parties will continue to be free, as they should be, to take political beliefs into account in recruiting staff. It would be absurd to suggest that a political party should be forced to employ staff who actively opposed what that party stood for. Such a law would make it virtually impossible for political parties to operate.

Yet the inherent requirement test in the 2010 legislation, if it were to come into operation, would impose such an obligation on faith-based organisations.³⁷⁹

The introduction of an inherent requirement test for religious schools is not consistent with the right to equality. Religion is clearly included as one of the grounds protected by the right to equality and a decision to implement an inherent requirement test for the employment decisions of religious schools and not for non-religious organisations is inconsistent with the right to equality.

6 THE MERITS OF A RELIGIOUS SENSITIVITIES TEST

The inherent requirement test addresses a range of issues that are relevant to an assessment of the merits of alternative approaches. Consequently many of the limitations of the inherent requirement test also apply to alternative court based approaches that could be adopted to regulating religious schools in NSW. In particular, it is important to note that these limitations apply to the religious sensitivities/susceptibilities test considering that it is currently used to regulate the employment decisions of religious schools by the Commonwealth, the Australian Capital Territory, Western Australia, the Northern Territory and Victoria (a jurisdiction that replaced an inherent requirement test with a religious sensitivities test).³⁸⁰ Furthermore, the ongoing popularity of using a religious sensitivities test to regulate religious schools is demonstrated by the decision of the Commonwealth government to remain with a ‘religious sensitivities’ test in the bill it introduced to consolidate Commonwealth anti-discrimination legislation.³⁸¹ The test is also used in NSW in an exception provided to religious bodies for any act that is ‘necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.³⁸²

Considering the widespread support for the approach it is appropriate to discuss the drawbacks of implementing a religious sensitivities test in NSW in the event that the

³⁷⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2011, 1365 (Robert Hulls).

³⁸⁰ *Sex Discrimination Act 1984* (Cth) ss 38(1)–(2); *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of ‘discrimination’); *Age Discrimination Act 2004* (Cth) s 35; *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b); *Discrimination Act 1991* (ACT) ss 33(1)–(2); *Equal Opportunity Act 1984* (WA) s 73(1)–(2); *Anti-Discrimination Act 1996* (NT) s 37A; *Equal Opportunity Act 2010* (Vic) ss 83(1)–(2).

³⁸¹ Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 33(4).

³⁸² *Anti-Discrimination Act 1977* (NSW) s 56(d).

inherent requirement test is held to be inadequate. A typical formulation of the religious sensitivities test provides protections to decisions of religious institutions that are made ‘in good faith to avoid offending the religious sensitivities of people of the particular religion’.³⁸³ It should also be noted that a religious sensitivities test is supplemented in some Acts with a provision that allows an educational authority to make a decision that conforms with the doctrines, beliefs or principles of the religion.³⁸⁴

Due to the nature of a religious sensitivities test (including when it is combined with the additional protection for decisions that conform with the doctrines, beliefs or principles of the religion) a court will encounter many of the same challenges they would encounter with the inherent requirement test. These challenges include difficulties associated with the allocation of responsibility of an employment decision to one or more parties, the identification of the religion on which the school is based, a determination of whether the school is conducted in accordance with the doctrines of the religion, and an evaluation of the significance of changes occurring within religions and religious schools on the ongoing applicability of previous court decisions. The test may also similarly fail to show appropriate respect for religious liberty and the right to equality on the basis that other groups are provided with more comprehensive legal protections for their employment decisions.

6.1 THE IMPROPER FOCUS OF A RELIGIOUS SENSITIVITIES TEST

A religious sensitivities approach can also be criticised on the grounds that the protection of ‘religious sensitivities’ or ‘religious susceptibilities’ is not the central concern of religious adherents. As Evans notes ‘vague terms, such as “religious susceptibilities”, ... are only loosely connected with religious freedom’.³⁸⁵ The various quotes from supporters of religious schools contained in this chapter

³⁸³ *Anti-Discrimination Act 1996* (NT) s 37A(b).

³⁸⁴ *Equal Opportunity Act 2010* (Vic) s 83; *Age Discrimination Act 2004* (Cth) s 35. *Jubber v Revival Centres International* [1998] VADT 62 provides an important example explaining why a religious body would want the protection provided by both tests. The Victorian Anti-Discrimination Tribunal held that a Christian denomination called ‘Revival Centres International’ that had adopted a policy to exclude from Church services any male attendees wearing earrings was unable to defend the policy through relying on a religious sensitivities defence as there was insufficient evidence before the Tribunal in this respect, but could successfully rely on the alternative defence that the policy conformed to the doctrines of the religion: [1]–[5].

³⁸⁵ Evans, above n 67, 40.

demonstrate that religious adherents want to be able to make employment decisions for their religious schools that they consider they are required to make according to their religion and that will help them to create an environment within the school that assists with the religious education and formation of students, employees and other individuals involved with the school.³⁸⁶ A religious sensitivities test, however, suggests that the central reason in providing protections to religious schools is to preserve religious adherents from any emotional harm that they are liable to suffer from conduct that may injure their religious sensitivities. Furthermore, the language of religious sensitivities may fail to adequately recognise the importance of protecting religious liberty by suggesting that such protections are provided not due to religious liberty being a right of fundamental importance, but rather because religious adherents need to be protected by the State because their religious beliefs have made them unusually susceptible to emotional harm from particular situations.

6.2 AN INAPPROPRIATE LEVEL OF GOVERNMENT SUPERVISION OF RELIGIOUS SCHOOLS

A further problem with a religious sensitivities test is that it will likely result in either insufficient or excessive government involvement in assessing the validity of a claim that an employment decision was required due to the school's religion. One approach to a religious sensitivities test involves the courts normally deferring to the understanding of religious school authorities regarding the meaning of religious sensitivities for their religion and the appropriateness of measures taken to ensure that they were not injured. Such an approach may be adopted in NSW if the government introduced a provision similar to the one applicable to religious bodies under the Act that provides a defence for a decision that 'conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.³⁸⁷ This defence was relied upon by the respondent in *Wesley Mission* and resulted in the court adopting a deferential approach to the religious group holding that the respondent could rely upon the defence on the basis of evidence provided by the Chief Executive Officer of Wesley Mission, especially

³⁸⁶ For relevant quotes on the reasons why supporters of religious schools seek adequate protections for the employment decisions of religious schools see above nn 276–289 and accompanying text.

³⁸⁷ *Anti-Discrimination Act 1977* (NSW) s 56(d).

his statement that if Wesley Mission were ‘required to appoint homosexual foster carers, this would make our provision of foster care services unacceptable to those who support the ethos of Wesley Mission’.³⁸⁸

Although the court adopted a deferential approach in *Wesley Mission* it was open to it under the test to embark on a more interventionist approach. For example, in an earlier hearing of the matter a different court had considered the meaning of the terms ‘injury’ and ‘necessary’ and held that it is ‘common ground that “injury” requires more than mere offence ... and “necessity” connotes a higher test than merely convenience or reasonableness’.³⁸⁹ While in *Hozack* the court held that it was ‘necessary that avoidance of injury to religious susceptibilities be the [respondent’s] object. Action aimed at the avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to “injury” to religious susceptibilities, would not suffice’.³⁹⁰ Relying on these decisions the court could have held that it would only allow the defence if the respondent were able to meet these higher standards. However, instead of taking such a position the court found that the defence was available to the respondent on the basis that a decision to provide the service would have been unacceptable to supporters of the respondent.³⁹¹

The approach to regulating the employment decisions of religious schools that was ultimately adopted in *Wesley Mission* is inappropriate as it is excessively deferential to the theological claims of religious schools. If religious schools can justify their conduct through providing evidence from some religious adherents that they would have been offended or found the school’s conduct to be unacceptable if a particular employment decision was not taken then in the vast majority of situations a religious school will be able to successfully rely on the defence to defeat a discrimination complaint. The merits of such a deferential approach to the claims of religious schools can be criticised on many of the grounds applicable to the general exception approach especially that it fails to adequately protect the interests of those adversely affected by the employment decisions of religious schools.

³⁸⁸ *Wesley Mission* [2010] NSWADT 293 [18], [34].

³⁸⁹ *OV v QZ (No.2)* [2008] NSWADT 115 [135].

³⁹⁰ *Hozack* (1997) 79 FCR 441, 444.

³⁹¹ *Wesley Mission* [2010] NSWADT 293 [18], [34].

An alternative approach that could be adopted to a general sensitivities test involves courts playing an active role in determining whether a religious school satisfies the elements of a religious sensitivities defence. Such an approach would be particularly likely if the religious sensitivities test introduced were to follow the test adopted in Victoria that was deliberately drafted to include the phrase ‘reasonably necessary’ to provide courts with the role of independently determining whether the employment decision was required.³⁹² This was made clear by the former Victorian Attorney-General Robert Clark who stated that the ‘words “reasonably necessary” import an objective standard into this provision — it will not be enough that a person considered that the discrimination was reasonably necessary to avoid injury if the discrimination is not, on a reasonable judgement, necessary for that purpose’.³⁹³

This kind of approach suffers from similar problems to the inherent requirement test as it requires secular bodies to address complex theological issues and attempt to determine the appropriateness of the school’s conduct in the context of the school’s religious commitments. If a religious sensitivities test were introduced in NSW a court that did not defer to the evidence provided by religious groups would likely be required to address a range of theological issues. These issues would likely include a determination of the doctrines of the religion,³⁹⁴ the religious sensitivities that could reasonably be claimed to exist, the injury that may have been caused to those religious sensitivities if the employment decision was not made, and whether it was reasonably necessary for the school to have made the employment decision as there were no alternative options that could have allowed it to satisfactorily achieve the objective aimed at by the employment decision.

A religious sensitivities test could also cause courts to encounter the same difficulties involved with the inherent requirement test regarding the significance to attribute to mission fit for teaching and non-teaching employment positions especially in relation to whether the employment decision was reasonably necessary taking into account the religious content of the employment position and the nature of the particular

³⁹² *Equal Opportunity Act 2010* (Vic) s 83(2).

³⁹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2011, 1363 (Robert Clark).

³⁹⁴ If a general sensitivities test were to be introduced into NSW a formulation such as ‘doctrines, tenets, beliefs and principles’ may be more likely to be adopted than simply ‘doctrines’ after the decision in *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 in which the term ‘doctrines’ was narrowly defined: see above n 53.

religious school. The result in *Griffin* where the Commissioner rejected the views of the respondent's theological experts and determined for himself the religious beliefs and resulting sensitivities that were to be appropriately attributed to the religion provides a useful example of the problems that can be encountered when a court decides to play an active role in determining whether a religious organisation can reasonably rely on a religious sensitivities defence.³⁹⁵

6.3 THE UNCERTAIN MEANING OF 'RELIGIOUS SENSITIVITIES'

A court adopting an active role in applying a religious sensitivities test may also encounter significant difficulties in attempting to determine the meaning of 'religious sensitivities'. In *Cobaw*, Hampel J held that in determining the meaning of 'religious sensitivities' that the

sensitivities which must be considered are the religious sensitivities of the adherents of the religion. It is not the subjective sensitivities of one person, but the sensitivities common to adherents of the religion. The sensitivities are the common religious sensitivities. This may be contrasted with, for example, the social or cultural sensitivities of adherents of the religion.³⁹⁶

Although this definition may help in clarifying the focus of the inquiry there remain significant problems with determining the meaning of the phrase. A major concern is that there would rarely be a significant focus, if any, within a religious community on determining the 'religious sensitivities' of adherents of the religion—a situation that creates substantial difficulties for courts in attempting to accurately apply a religious sensitivities test due to the lack of useful documentary evidence that could be relied upon. The limitations of the test were clearly expressed by the advocacy group Liberty Victoria who described it as 'impossibly vague, subjective and of uncertain meaning'.³⁹⁷ Similarly, in the appeal from the Tribunal's decision in *Cobaw*, Maxwell P stated that the 'phrase 'injury to religious sensitivities' presents obvious difficulties of interpretation. It is not a phrase in ordinary parlance and what might

³⁹⁵ For additional information on *Griffin* see above n 364 and accompanying text.

³⁹⁶ *Cobaw* [2010] VCAT 1613 [329].

³⁹⁷ Liberty Victoria, Submission to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, February 2012, 6.

constitute a ‘religious sensitivity’, or what might constitute ‘injury’ to such a sensitivity, is not self-evident’.³⁹⁸

This can be contrasted with terms such as ‘doctrines’, ‘beliefs’ or ‘principles’ of a religion on which there would normally be an extensive amount of material considering the fundamental importance of such issues to the existence and operation of religions. Although courts can hear evidence from religious adherents during court proceedings on the appropriate meaning to be given to ‘religious sensitivities’ the absence of focus within religious communities on determining the meaning of the phrase, with the accompanying lack of documentary evidence, can create significant uncertainty regarding the likely operation of a religious sensitivities test.

The uncertainty regarding the meaning courts will attribute to ‘religious sensitivities’ and how they will resolve the other theological issues that they will be required to address may cause a religious sensitivities test to operate in the same undesirable manner as the inherent requirement test. In particular it will likely place pressure on religious communities to be stricter in adhering to religious doctrines, and less tolerant of diversity in religious opinions, so as to increase the likelihood that they will be able to successfully rely on a religious sensitivities defence to defeat a claim that an adverse employment decision was unlawful. It may also adversely affect the interests of employees at religious schools as it will not be possible for them to accurately determine the range of employment decisions that a court will decide are covered by the religious sensitivities defence. As with the inherent requirement defence such uncertainty regarding the likely outcome of a court hearing may deter many individuals from pursuing a discrimination complaint against a religious school.

Considering that a religious sensitivities test will have many of the same disadvantages of the inherent requirement test and that the protection of ‘religious sensitivities’ is only of limited relevance to the right to religious liberty, a religious sensitivities test should not be regarded as a superior alternative to either the general exception approach or the inherent requirement test.

³⁹⁸ *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 [296].

7 CONCLUSION

The specific focus of this chapter has been on the advantages of the inherent requirement test, and the merits of the various criticisms that are made of such a test on the basis of the right to religious liberty, the right to equality, and the practical difficulties that might be encountered in the implementation of such a test. The inherent requirement test has some significant advantages over the general exception approach especially as it appropriately limits protections provided under anti-discrimination legislation to religious schools and only to those religious schools that want protections for their employment decisions. However, the claim that is often made by proponents of the inherent requirement test that a further advantage of the approach is that it requires religious schools to prove that religious compatibility is an inherent requirement of particular employment position should not be accepted as a significant benefit of the approach. This aspect of the inherent requirement test substantially violates both the right to religious liberty and the right to equality.

The right to religious liberty is not appropriately respected under the inherent requirement test as it would undermine the freedom of religious schools in NSW to employ individuals who are supportive of their religious commitments. This freedom to hire individuals with good mission fit is of central importance to the operation of some religious schools considering that employment positions at these schools can be regarded as religious vocations by religious groups. Furthermore, all teaching and non-teaching employees at religious schools can play a significant role in determining the religious culture and identity of schools and in influencing the religious commitment of students, staff and other persons involved in the schools.

Requiring courts to determine the validity of a religious school's claim results in further violations of the right to religious liberty. Judges will rarely have an adequate theological understanding of the relevant religion, and, even when they do, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of the religion.

There are further problems that can be caused by the inherent requirement test, especially the pressure that it can place on religious groups to respond to the legal threat by becoming more doctrinally orthodox, and even dividing from a larger religious group that permits theological diversity. Additionally, the failure to adequately respect the freedom of employment of religious schools can appropriately be understood as a violation of the right to equality considering the State provides more substantial legal protections for the employment decisions of other groups constituted on a range of other grounds.

Although these are significant criticisms of the inherent requirement test, it is important to note that there are many other factors that need to be considered in order to reach an informed conclusion about the merits of the inherent requirement test including a range of other rights such as the rights of minorities, children and parents. These issues are considered in detail in Chapter 6, which focuses on the merits of the inherent requirement test, the general exception approach and the opt-in model in relation to the remaining considerations discussed in the introduction.

This chapter has highlighted some important advantages of the inherent requirement test that should be taken into account in determining the merits of the opt-in model. In particular the chapter has emphasised the importance of ensuring that any approach adopted to regulating the employment decisions of religious schools appropriately limits the scope of the protections provided to no more than the extent justified by rights such as the right to religious liberty. Furthermore, any model for regulating religious schools needs to provide the State with a significant role in monitoring the conduct of religious schools to ensure that they are not abusing the protections provided under anti-discrimination legislation. The assessment of the inherent requirement test has also demonstrated the importance of ensuring that any approach adopted does not either substantially undermine the ability of religious schools to select employees for mission fit or impair the religious freedom of religious communities, especially in relation to their role of providing the conclusive determination of the nature of their religious commitments.

CHAPTER FIVE

THE ESSENTIAL ELEMENTS OF THE OPT-IN MODEL

1 INTRODUCTION

Under the opt-in model religious schools can register with the ADB to obtain the protections for employment decisions that the school authorities consider are necessary to safeguard the religious identity and commitments of the school. The registration process would require the religious school to indicate their religion, the particular attributes on which the employment decision may need to be made in order to protect the religious commitments of the school (for example, race, gender, sexuality, marital status, etc), and whether the school wants all, or only some, of the employment positions to be covered by the protections provided under anti-discrimination legislation.

A key feature of the opt-in model is that the registration system is optional. The religious schools that want protections under anti-discrimination legislation are required to register, while other religious schools that do not want any protections are not required to take any action. A religious school that has registered for protections can opt-out of the protections or reduce or expand the extent of the protections at any time. Any religious school that registers for protections is required to provide the ADB with a document indicating the grounds on which they have sought protections and explaining their understanding of why their religious commitments require them to make employment decisions taking these grounds into account. The religious school and the ADB must ensure that this document is available for members of the public to access from their websites and from the premises of the school.

Registration provides protection to religious schools for employment decisions made on the basis of the specified attributes if the authorities of the religious school believed in good faith that it was important to make the decision due to the religious commitments of the school. The protections cover any decision relating to employment including the decision to employ, manage, and dismiss an employee on the basis of an attribute specified in the registration document. If an employment

decision is covered by the protections obtained through the registration process then a person adversely affected by the decision cannot use the employment decision to support a discrimination complaint against the religious school.

This chapter provides a detailed discussion of some of the key elements of the opt-in model and includes at various parts an explanation regarding why the opt-in model is likely to be superior to both the general exception approach and the inherent requirement test. The final part of the chapter discusses the merits of the opt-in model in relation to the right to equality and religious liberty. Chapter 6 focuses on the merits of the three models in relation to a number of considerations that have not yet been considered, but which are relevant to any determination of the most appropriate approach to adopt in regulating the employment decisions of religious schools in NSW.

2 A BROAD APPROACH TO THE NATURE OF RELIGIOUS SCHOOLS

Under the opt-in model any school based on a religious or a non-religious worldview after registering with the ADB can legally make employment decisions on the basis of an employee's mission fit. The opt-in model does not just provide the protections to schools founded on established religions, but also respects minority or new religions and other belief systems that can legitimately be considered to be non-religious worldviews. However, the opt-in model rejects the approach currently taken in NSW to provide legal protections for any non-government school established on any non-religious ground. As discussed in Chapter 2, the broad nature of such protections cannot be supported on the basis of rights such as religious liberty, and if adopted for the opt-in model would inappropriately increase the likelihood that the protections would be abused. The protections provided by the opt-in model are only available to those schools based on either a religion or on a non-religious worldview—that is, a system of beliefs about reality and ethics that is of such fundamental importance to adherents that the worldview is of a quasi-religious nature. On the appropriateness of recognising non-religious worldviews as religions Shah, Franck and Farr state:

Even where people are not religious in a conventional sense, they frequently have deeply held convictions about ultimate reality. Perhaps they believe that all of life is somehow sacred. Perhaps they are deeply convinced that every person has a god-like freedom and dignity. Perhaps they believe that a benevolent, pervasive force or spirit suffuses the universe. In any case, such convictions are deeply held. And they are religious.³⁹⁹

An example of non-religious worldviews that could be considered to have obtained this status could be the worldview of humanists who have formed a group that is committed to explicit philosophical principles including the non-existence of God, the dignity of the human person, and the importance of showing profound respect for non-human life. If such a group wanted to establish a school based on their worldview then it is to be expected that they would want the ability to select employees for mission fit and hire employees who adhere to, or at least respect, their core principles. Such a group would likely register their school for protections as an inability to take into account an applicant's religious and political beliefs could substantially undermine the ability of the school to hire employees who are able to effectively educate and inspire students and other individuals within the school according to the school's worldview.⁴⁰⁰

The importance of respecting both religious and non-religious worldviews has been recognised in Australian law. Of particular relevance is the adoption of this approach in a range of anti-discrimination Acts, which use the inclusive phrase 'religion or creed' in regulating the employment decisions of religious schools.⁴⁰¹ On the scope of the term 'creed' Madgwick J in *Hozack* held that 'if there be an institution conducted in accordance with the tenets of what, as a matter of "arid characterisation", could be called a "creed" and which opposed established religions,

³⁹⁹ Timothy Shah, Matthew Franck and Thomas Farr, *Religious Freedom: Why Now? Defending an Embattled Human Right* (The Witherspoon Institute, 2012) 76.

⁴⁰⁰ Admittedly, under the current approach adopted in NSW there would be no need for registration as the Act does not prohibit discrimination on the grounds of religious belief or political opinion. However, considering that these grounds are commonly prohibited by anti-discrimination legislation in other jurisdictions it is possible that the Act could be amended to include these grounds creating a need for such groups to register for protection to allow their schools to fulfill their objectives.

⁴⁰¹ *Sex Discrimination Act 1984* (Cth) s 38(1); *Equal Opportunity Act 1984* (WA) s 73(1); *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination'); *Discrimination Act 1991* (ACT) s 33(1)(b); *Fair Work Act 2009* (Cth) s 351(2)(c).

its adherents too would be entitled to the same broad protection [as that provided to religious institutions]’.⁴⁰²

This kind of approach has also been adopted by the United States Supreme Court. In *United States v Seeger* the Court was required to determine if three persons with a conscientious objection to military service were able to rely upon an exception granted to persons on the grounds of ‘religious training and belief’, which Congress had defined as belief in ‘relation to a Supreme Being involving duties superior to those arising from any human relation’.⁴⁰³ The Court held that it was important to adopt a broad approach to the worldviews included in the exemption and held that the applicants qualified for the exemption as their beliefs occupied the same place in their life ‘as an orthodox belief in God holds in the life of one clearly qualified for exemption’.⁴⁰⁴ Importantly, one of the applicants, Seeger, was included within this protection even though he was uncertain about the existence of a Supreme Being.⁴⁰⁵

This broad approach was reaffirmed by the United States Supreme Court in *Welsh v United States*, which involved an applicant who also had a conscientious objection to military service.⁴⁰⁶ The Court held that the applicant qualified for the exemption even though he considered (at least during the early stage of proceedings) that his worldview was not religious.⁴⁰⁷ On the limited relevance of the applicant stating that his beliefs were non-religious the Court declared that

very few registrants are fully aware of the broad scope of the word "religious" ... and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon

⁴⁰² *Hozack* (1997) 79 FCR 441, 445. A similar approach has been adopted in legislation enacted in other jurisdictions. In the United Kingdom, for example, ‘religion’ is defined in section 2(3)(a) of the *Charities Act 2006* (UK) as including ‘(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god’.

⁴⁰³ 380 US 163, 164, 173 (1965).

⁴⁰⁴ *Ibid* 184, 187–8.

⁴⁰⁵ *Ibid* 185–7.

⁴⁰⁶ 398 US 333, 335 (1970).

⁴⁰⁷ *Ibid* 341–2.

reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were “certainly religious in the ethical sense of the word”.⁴⁰⁸

It is accepted that there are significant difficulties in proposing criteria that can clearly distinguish between non-religious worldviews and specific commitments that are not aspects of a worldview, and that difficult cases will inevitably arise where the appropriate classification of a conviction will be uncertain. In such circumstances the appropriate approach will normally be for the registration of the school to be accepted considering that the registration can always be subsequently reviewed by the State if it becomes apparent that the school cannot legitimately be considered to be based on a religious or non-religious worldview.

The inclusion of non-religious worldviews within the ambit of protection provided by the right to religious liberty is appropriate on at least four grounds.

Firstly, adherents of non-religious worldviews often demonstrate a commitment to their worldview that is as comprehensive as that of the most devoutly religious person. Adherents of non-religious worldviews often consider their beliefs to be as important to their existence as those of adherents of religious worldviews, and can often be similarly committed to avoiding any conduct that involves violating their philosophical commitments. For example, for many adherents of Communism their worldview is central to their existence, their perception of reality, and their understanding of their ethical obligations. In important aspects the conduct of many Communists has been similar to that of adherents of various religious worldviews including in their reverence for the founders of their worldview, in their commitment to detailed and demanding ethical codes, and in their willingness to submit to torture

⁴⁰⁸ Ibid 341. It should be noted that this inclusive approach to the scope of religious liberty did not receive majority support in the subsequently decided case of *Wisconsin v Yoder*, 406 US 205 (1972) where the majority held that a conviction that is ‘philosophical and personal rather than religious ... does not rise to the demands of the Religion Clauses’: 216. However, the decision on this aspect of this case was not unanimous with Douglas J specifically affirming the broad definition of ‘religion’ adopted in *United States v Seeger* and *Welsh v United States* stating that ‘I adhere to these exalted views of “religion” and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race’: 249. Also the inclusive approach to religious liberty has recently been affirmed by other cases in the US. For example, a federal district court in Oregon held, in addressing whether a prisoner could establish a humanist study group, that secular humanism was a religion for the purposes of the Establishment Clause: *American Humanist Association v United States* (D OR, Oct 30, 2014).

and execution for their beliefs.⁴⁰⁹ The appropriateness of recognising non-religious belief systems as worldviews worthy of substantial respect by the State has been recognised by the European Commission of Human Rights, which held that Communism was a belief system protected by the right to religious liberty.⁴¹⁰

Secondly, no adherent of a particular worldview (either religious or atheist) can refer to any philosophical concept or scientific finding that demonstrates why their answers to some of the most important philosophical issues relating to worldviews are more likely to be correct than all other worldviews. Examples of these kinds of philosophical issues include issues such as the existence and nature of God, the importance of human life compared to non-human life, sexual ethics, the ethical use of force, and the comparative importance of different human rights.⁴¹¹ Proponents of a particular approach will not only be unable to conclusively demonstrate the validity of the approach, there is also likely to be further uncertainty regarding what qualifies as evidence and how much evidence is required to demonstrate that the criteria have been satisfied. The inability of any individual or group to demonstrate that their worldview is more likely to be correct compared to all other worldviews is a key reason why the State should be committed to respecting all religious and non-religious worldviews. If no individual or group can show that their worldview is more likely to be correct then the State has no objective reason for providing particular protection for some worldviews and not others.

Thirdly, the extensive variety in religious worldviews makes it difficult to produce a widely accepted definition of religion consisting of criteria that could be used to justify excluding non-religious worldviews on the basis that they are somehow significantly different from religious worldviews. One approach would be to define religion in a way that would be acceptable to adherents of the Abrahamic faiths such as Judaism, Christianity and Islam, and to claim that features common to these

⁴⁰⁹ See Communist Party USA, *Our Ideas* (4 June 2005) <<http://www.cpusa.org/our-ideas/>>; Fenggang Yang, 'Religion in China under Communism: A Shortage Economy Explanation' (2010) 52(1) *Journal of Church and State* 3, 14.

⁴¹⁰ Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Council of Europe, 2012) 16.

⁴¹¹ It is accepted that there could be some disagreements between worldviews on these kind of issues where all, or some, of the claims could be amenable to being tested empirically. For example, the theological claim of a particular worldview that water after being blessed by a holy person had divine healing powers and would consistently cure a particular disease. Such a claim could be assessed scientifically and evaluated on the evidence obtained.

religious traditions can be used to distinguish religious worldviews from non-religious worldviews. However, many worldviews that are considered to be religions have a substantially different understanding of central concepts such as God and the beliefs and practices required to establish an appropriate relationship between the adherent and the divine. Latham CJ addressed the difficulty directly in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* stating:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. [The right to religious liberty] must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds.⁴¹²

An indication of the problems that can be encountered in attempting to define religion is provided by the centuries old question regarding whether Confucianism should be considered as a religion or an ethical code due to features of the worldview such as an absence of any general recognition of a personal deity and its comparative lack of institutional organisation. A useful illustration of the difficulties States have encountered in defining Confucianism is provided by the approach taken by Indonesia which passed various laws in the twentieth century both accepting and rejecting Confucianism as a religion.⁴¹³ Considering the diversity of religious worldviews and the consequent difficulty that States have in being able to propose a workable definition of religion that encompasses religions such as Confucianism it is

⁴¹² (1943) 67 CLR 116, 123. For additional information on the difficulties involved in establishing a legal definition of religion, see, eg, Gabriël Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195, 212–3.

⁴¹³ Heriyanto Yang, 'The History and Legal Position of Confucianism in Post-Independence Indonesia' (2005) 10(1) *Marburg Journal of Religion* 1, 2–7.

difficult to justify excluding non-religious worldviews that are foundational to an individual's existence and constitutive of their understanding of reality and ethics from the ambit of protection provided by the right to religious liberty.

Fourthly, a State is under an obligation under international law to demonstrate respect for both religious and non-religious worldviews. For example, the Human Rights Committee held that the right to religious liberty includes both religious and non-religious worldviews and that States are obliged under Article 18 of the *ICCPR* to fulfill their obligations to protect religious liberty according to this broad interpretation of the right.⁴¹⁴ In their General Comment 22 the Committee stated:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. 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. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.⁴¹⁵

3 THE ROLE OF THE STATE IN ASSESSING THE APPROPRIATENESS OF EMPLOYMENT DECISIONS

Under the opt-in model the executive plays the key role in ensuring that the protections provided to religious schools are not abused.⁴¹⁶ If a particular religious school registers for broader protections than what can be justified by the school's religion then the executive has the power to modify or remove the registration of the religious school through enacting a statutory rule. It is expected that the power to prohibit religious schools from obtaining the protections would rarely be used. However, it would be useful in a range of situations including when it appeared that

⁴¹⁴ Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion (Art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

⁴¹⁵ *Ibid* [2].

⁴¹⁶ As the opt-in model provides protection to both religious and non-religious worldviews any subsequent reference to religion or religious schools should be understood as also referring to non-religious worldviews and schools based on these worldviews.

a school was promoting hatred or violence or was attempting to fraudulently abuse the protections. The deregistration power would also be useful for the protection of students and employees at religious schools in situations where it became clear that the conduct of a particular religious school was harming their psychological or physical wellbeing. Deregistration from the protections would also be another option available to the State in attempting to reform a school, and would be a less drastic measure compared to other options available to the State such as denying the school funding or closing down the school.

As the executive could only modify or remove the registration of a religious school through enacting a statutory rule, Parliament would also be provided with a role in relation to whether a school should be denied particular protections for its employment decisions. In NSW, statutory rules can be disallowed by either House of Parliament so any decision by the executive to deny a particular school protection would be subject to Parliamentary oversight.⁴¹⁷ Further protection is provided through the requirement that the executive must normally produce a Regulatory Impact Statement before making a statutory rule, which is a public document covering a variety of matters including the objectives of the statutory rule, the availability of alternative options to achieve the objectives, and the proposed approach the government will adopt in relation to community consultation regarding the merit of the statutory rule.⁴¹⁸

Under the opt-in model the role of courts would be restricted to determining whether a school is based on a religious or non-religious worldview, whether the grounds on which the employment decision was made was protected under the school's registration, and whether the school authorities believed, in good faith, that it was important to make the employment decision due to the religious commitments of the school. If the person adversely affected by the employment decision is successful in convincing the court that the school is not based on a worldview, that the employment decision was based on a ground not protected by the registration, or that the authorities did not consider that the decision was required due to the school's religious commitments then the protections would not apply to that decision and the

⁴¹⁷ *Interpretation Act 1987* (NSW) s 41.

⁴¹⁸ *Subordinate Legislation Act 1989* (NSW) s 5, sch 2.

complainant would be able to access the standard remedies available under the Act. In the majority of cases it is to be expected that the school authorities would easily be able to provide sufficient evidence to prove their genuine belief that it was important to make the employment decision in question, yet the possibility of court review of the decision on this ground would be important to reduce the likelihood of the protections being abused.

An example where the protections could be abused would be in a situation where a religious school obtains registration on particular grounds and then subsequently loses its religious identity over a number of years. The absence of any review mechanism for employment decisions would allow persons to still be excluded on particular grounds even though the decisions were no longer being made on the grounds that the decisions were important due to the religious commitments of the school. The example demonstrates the importance of court involvement as in such a situation the justification for the protections has been undermined as it is no longer supported by a range of rights, especially the right of religious freedom.

Under the opt-in model courts do not have a role to play in determining whether a particular theological or ethical view should be considered to be part of a religion, nor do they play a role in deciding whether the school authorities had an adequate basis for considering that it was important that the employment decision was made to protect the religious commitments of the religious school. Providing these roles to courts often requires them to become involved in issues beyond their scope of expertise such as whether a particular claim can legitimately be considered to be part of a religion, the importance and religious nature of various teaching and non-teaching positions within religious schools, and the impact of employing a person who is not committed to the religion on the religious school's ability to remain faithful to its religious commitments and develop a supportive religious environment.

There are a number of reasons why this allocation of roles between the three arms of government is superior to alternative possibilities. There are various difficulties involved in relying on courts including that courts have to wait until the matter is raised with them, they will typically have less time and financial resources to devote to investigating the issues, and they will be limited in their ability to receive

submissions from experts and other members of the public on the legitimacy of the claims made by the religious school. It is preferable that the executive, under the supervision of the legislature, is given the central role in determining whether a school should lose its protections under anti-discrimination legislation due to the greater resources available to the executive, its ability to play a more active, ongoing role in ensuring that the protections are not abused by schools, and the likelihood that any decision made will more closely reflect the range of community views on the issue considering the greater number and diversity of individuals involved in decisions made by the executive.

It is arguable that another advantage to assigning the executive to play the key role in the issue is that they are more democratically accountable to the community. If they make a decision that is considered inappropriate by the community then they can be held responsible for it at the next election. However, the merits of this argument would likely be strongly contested considering that many would consider that the lack of direct accountability to the people is one of the key reasons why significant human rights conflicts should be resolved by the courts as they can focus solely on the merits of the issue and not have their judgment inappropriately influenced by considerations relating to re-election.

An alternative way in which the opt-in model could be structured would be to allow religious schools to register for any protections they consider necessary without any government review of the registration decision, while retaining court oversight of religious schools to ensure that their employment decisions are made in good faith. Such an approach has not been adopted as it fails to impose sufficient safeguards to ensure that religious schools do not abuse the protections. The supervisory function given to the executive under the proposed model would allow it to play an essential role in minimising the extent to which protections obtained through registration are abused. If a religious school makes a claim for protection on grounds that a majority of adherents of that religion consider to be unjustified then this would likely result in significant criticism of the school's decision from both within and outside of the religious community, which may lead to the school modifying its registration or the executive intervening to deny the school protection on that ground.

A key aspect of the opt-in model is that the State should normally defer to religious adherents regarding the philosophical and ethical commitments of their religion, and should avoid becoming involved in a theological assessment of whether a particular claim made by a religious adherent is actually justified by the sources of authority for the religion. The State should also show substantial respect for claims made by religious adherents that their particular religion requires a specific cultural environment in which their religious obligations can be adequately met.

Although there should be considerable deference shown by the State to religious adherents regarding their commitments, there is a need for the State to be involved in a limited way to ensure that the right to religious liberty is not abused through fraudulent claims. The ability of the executive to modify or remove the protections provided to religious schools is the central measure to ensure schools do not abuse the protections provided. A further safeguard is that religious school authorities can be required to prove to the courts that they believed in good faith that it was important to make the employment decision considering the religious commitments of the school. In the vast majority of cases this should not be a difficult burden for the school authorities to discharge as they will normally be able to rely on documentary evidence and support from other adherents to sufficiently demonstrate the sincerity of their religious convictions and their belief that it was important to make the relevant employment decision considering these convictions.

In determining the sincerity of a person's belief the courts should avoid taking excessive measures to ensure that the school authorities are sincere in their claim. Instead the courts should simply focus on determining whether the person has an honest belief that it was important to make the employment decision due to the religious commitments of the school. The Canadian Supreme Court addressed this issue in *Syndicat Northcrest v Amselem* ('*Syndicat Northcrest*'), a case concerning an attempt by the managers of an apartment complex to prevent a Jewish person from annually building a hut (a succah) on their balcony for a nine day period in order to fulfil a religious obligation.⁴¹⁹ On the appropriate approach that should be adopted by courts Iacobucci J held that

⁴¹⁹ [2004] 2 SCR 551.

the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings. Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony ... as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.⁴²⁰

The role given to the courts under the opt-in model should significantly reduce the likelihood that individuals will abuse the protections provided through fraudulent claims. Such an outcome is particularly likely due to the ability of courts to require school authorities to provide evidence of the sincerity of their religious beliefs and to demonstrate that the school authorities believed in good faith that it was important to make the particular employment decision due to the religious commitments of the school.

4 THE REGISTRATION PROCESS PROVIDES PROTECTIONS FOR EMPLOYMENT DECISIONS ON ANY GROUND

Under the opt-in model a school can register for protections for employment decisions on any ground and for any employment position at the religious school. Critics would likely consider it to be controversial that registration could provide religious schools with such broad protections. In particular, some could be expected to argue that even if most of the grounds commonly protected by anti-discrimination legislation should be included there should no exception on the ground of a person's race. Such an argument was made by the Anglican Diocese of Sydney in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

There is almost universal acceptance within the community that all forms of discrimination on the grounds of race which cause detriment are wrong. It is therefore appropriate that a broad approach be taken to the matters that may constitute racial discrimination rather than limiting it to particular areas and activities. There are sincerely held differences of opinion in the community on matters of sexual practice. There is no

⁴²⁰ Ibid [52]–[53].

where near universal acceptance that it is wrong to discriminate on the grounds of sexual orientation, gender identity or marital status in all contexts.⁴²¹

However, it is important to recall that what supporters of religious schools are seeking is not the ability to impose a detriment on a person on the basis of a particular attribute. They are seeking the ability to create an authentically religious environment to assist the school in its ability to provide an effective religious education and formation. The majority of the judges in *JFS* who found against the religious school made this clear in their judgments emphasising that they were not holding that those involved with the decision to exclude the student from enrolling in the school were acting inappropriately.⁴²² Lord Phillips stated that '[n]othing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of JFS in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are 'racist' as that word is generally understood'.⁴²³ This point was also made by the Australian Christian Lobby in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

[t]hose exercising their freedom of religion do not seek to discriminate on the basis of sexual orientation or gender identity but rather seek to employ staff most suited to the religious environment of the employer. What is sought is freedom to positively select individuals for employment on the basis of the particular religion of the employer, as appropriate to support the religious aims of the religious body.⁴²⁴

Furthermore, under the opt-in model regulations can always be introduced to temporarily or permanently deny a religious school the benefit of protections for their employment decisions. Consequently, if a religious school's views on race or any other attribute are inappropriate then the government is able to intervene to deny

⁴²¹ Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 2 February 2012, 10.

⁴²² For an overview of the facts and decision in *JFS* and a general discussion of the merits of allowing religious schools to make employment decisions on the basis of race see above nn 107–111 and accompanying text.

⁴²³ *JFS* [2009] UKSC 15 (16 December 2009) [9].

⁴²⁴ Australian Christian Lobby, Submission No 92 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012, 15.

them the protection to make employment decisions on the basis of specific attributes. Such intervention would be appropriate if a group that considered particular races to be inferior attempted to establish a religious school and registered for protections. A further safeguard is provided by the courts whose role it is to determine whether the worldview is a religion and whether the school authorities believed, in good faith, that it was important to make the relevant employment decision due to the school's religious commitments. A racist group attempting to abuse the protections could always be challenged in court and may be unlikely to satisfy the court that these elements have been satisfied.

5 THE DETAILS REGARDING THE REGISTRATIONS OF RELIGIOUS SCHOOLS ARE PUBLICLY ACCESSIBLE

Another important aspect of the opt-in model is that the details concerning whether a religious school has registered for protections, the grounds on which the protections have been provided, and an explanation regarding why they consider these protections to be necessary would be in the public domain and accessible online or in hardcopy by members of the public from the religious school and the ADB. Such an approach has already been adopted in South Australia,⁴²⁵ and was supported by the Senate Legal and Constitutional Affairs Legislation Committee in its review of the draft consolidation bill of Commonwealth anti-discrimination legislation and the Law Institute of Victoria in a policy document prepared for the Victorian election in 2014.⁴²⁶ Furthermore, the NSW government already requires non-government schools to prepare policies on areas such as student welfare, discipline and anti-bullying and to disclose the policies to the public.⁴²⁷

The requirement for religious schools to produce a public document of this nature would have a number of advantages. Persons considering applying for employment at a particular religious school would be able to access the document to determine the

⁴²⁵ *Equal Opportunity Act 1984* (SA) s 34(3).

⁴²⁶ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 96; Law Institute of Victoria, *Call To Parties State Election 2014 Key Issues* (2014) <<http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/CallToTheParties2014>>.

⁴²⁷ Teaching and Educational Standards NSW Board of Studies, *Registered and Accredited Individual Non-government Schools (NSW) Manual* (2014) 45.

grounds, if any, on which the religious school has sought protections. This would be of value in assisting potential applicants make informed decisions regarding whether they want to apply to work for the religious school, and help avoid the situation encountered in *Thompson* where the applicant was not aware before she started her employment that adherence to the ethical beliefs of the school was considered to be an essential element of her employment by the school authorities.⁴²⁸ If the registration of the school includes a ground that may be relevant to the potential applicant then they are able to make an informed decision as to whether they want to continue with the application knowing that the principal of the school will have the ability to make an adverse employment decision on that ground.

The requirement to register for specific protections and produce a public document explaining why the school is registering for anti-discrimination legislation protections on particular grounds could also assist applicants in understanding how a religious school is likely to rely on the protections. For example, an Orthodox Christian school would likely register for anti-discrimination legislation protection on the grounds of gender as they consider particular religious leadership roles can only be performed by men and so would want protection for employment positions at the school that involve conducting religious ceremonies. However, such a school may not want these protections to apply to other employment roles and so a public document detailing their religious commitments would be helpful to women considering applying to the school as it would provide them with a detailed understanding of how a school intends to rely on the protections.

A public document addressing the protections provided to a religious school and the need to have these protections would also be useful for the courts as a religious school would find it difficult to justify the good faith requirement of the protections if their decision contradicted their commitments expressed in the public document. For example, if the Orthodox school indicates in the public document that it considers gender to be significant for employment positions involving religious worship but not for teaching and non-teaching roles then it would be likely that a court would reject a religious school's attempt to rely on the protections to justify an employment decision that excluded a woman from a teaching and non-teaching role

⁴²⁸ For additional information on the case see above nn 168–169 and accompanying text.

on the basis of her gender. Similarly, the requirement to produce a public document justifying a school's need for the protections would assist the executive in determining whether to remove particular protections from a religious school.

The requirement for a religious school to produce a public document may also improve community cohesion as protections granted to individuals and groups under anti-discrimination legislation can be viewed with hostility by other members of the community not covered by the protections. Under the general exception approach—and other similar approaches where protections are automatically granted—religious schools are not required to explain to the community their need for protections for their employment decisions. The requirement under the opt-in model for religious groups to produce a document explaining their need for these protections could serve the valuable role of defusing community tension through educating community members about the particular challenges and commitments of the religious group and the reasons why their schools need protections for their employment decisions. The message contained in the documents produced by religious schools is likely to be in the form of desiring to create an authentic religious community, rather than an expression of hostility or contempt towards certain individuals or groups. The likelihood of schools adopting this approach is supported by the study conducted by Evans and Gaze where the authors stated that in none of their interviews

did the interviewee speak with hostility or contempt for people from other religions. Instead, the desire to have solely coreligionists as staff members was at least expressed in positive terms as the desire to create a community of shared values, rather than negative terms as the desire to exclude others who are undesirable, wrong-minded or less worthy.⁴²⁹

Furthermore, the public nature of the registration system and the ability of religious schools to modify or withdraw from any protections granted might stimulate debate within religious communities about whether particular protections are actually required by the religion. Such debate could lead to some religious communities reflecting more deeply on whether their commitments are authentic expressions of

⁴²⁹ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 415.

their religion, and if so, how best to explain those commitments to those who adopt different conclusions. The flexibility of the registration system would also be useful for religious communities that have revised their theological understanding of the significance of particular attributes. Christian denominations, for example, that conclude that there is no significant theological difference between different genders or sexualities would be able to modify their registration to ensure the protections more closely comply with their new theological understanding.

6 THE MERITS OF THE OPT-IN MODEL

The optional nature of the opt-in model, the flexibility of the registration process and the supervisory role played by the executive and the courts are some of the key reasons why the opt-in model is a superior approach compared to the general exception approach and the inherent requirement test. The opt-in model also more appropriately respects religious liberty and the right to equality, allows courts to avoid addressing complex theological enquiries, and provides important evidence on the scope of the protections provided under the opt-in model.

6.1 A MORE APPROPRIATE RESPECT FOR RELIGIOUS LIBERTY

A major problem with the general exception approach is that it provides protections to non-government schools, whether they are religious or non-religious, on most grounds covered by the Act, and for all employment positions regardless of whether such protections are desired by schools. As with the inherent requirement test, the opt-in model demonstrates appropriate respect for both the right to religious liberty and equality through restricting the protections to religious schools and through adapting the protections provided to the actual needs of religious schools. However, the opt-in model also avoids two of the major flaws of the inherent requirement test: inadequate protection of a school's ability to select for mission fit, and the involvement of courts in complex legal and theological issues.

The opt-in model demonstrates appropriate respect for the importance of allowing religious schools to select teaching and non-teaching employees according to their mission fit through allowing religious schools to determine for themselves the

grounds and the employment positions where mission fit is relevant and to register for protections accordingly. Providing this role to religious schools rather than to courts avoids the problem involved in a court based approach where many teaching and non-teaching employment positions may be held to not have a sufficiently significant religious component to justify excluding individuals with poor mission fit from employment.

The capacity to periodically amend the nature of the registration is an important feature of the opt-in model that ensures that a school's ability to select employees for mission fit is appropriately protected. The ability to alter the scope of the registration is important considering that views regarding the significance of attributes can change within religious groups, and anti-discrimination legislation can be amended to cover additional grounds that may be significant to some religious schools. The possibility of an expansion in coverage is particularly likely in NSW considering that the Act currently does not prohibit a range of grounds that are prohibited by anti-discrimination legislation in other Australian jurisdictions. The *Equal Opportunity Act 2010* (Vic), for example, prohibits a variety of additional grounds including employment activity, lawful sexual activity, physical features, political belief or activity, and religious belief or activity.⁴³⁰ The ability to amend the nature of the registration would allow religious schools to adapt the protections provided through the registration process to ensure that their ability to select employees for mission fit is adequately protected.

A legitimate concern about the opt-in model is the likelihood that some religious schools may attempt to claim additional protections that cannot be justified according to the school's religion. However, the public nature of the registration process would significantly reduce the likelihood of this occurring as the details of the school's registration would likely be closely examined by community members—both within and outside of the religious group—and by the executive, which would place pressure on religious schools to avoid making claims for protections that could not be justified.

⁴³⁰ *Equal Opportunity Act 2010* (Vic) s 6.

6.2 COURTS ARE NOT REQUIRED TO RESOLVE THEOLOGICAL ISSUES

A further benefit of the opt-in model is that it does not require courts to address a variety of challenging legal and theological issues including the identity of the controlling entity of the school, the school's religion and the beliefs that should be attributed to the religion. As registration with the ADB would provide a religious school with protections for its employment decisions there would normally be no need to determine the individuals or bodies that control the religious school.⁴³¹ There would also be no need to engage in a detailed analysis of the school's religion as the registration document would indicate the school's religion and clearly state the protections that the school authorities consider necessary.

The situation under the opt-in model approach is substantially different to that which would exist under the inherent requirement test. Courts in applying the inherent requirement test would often be required to address a range of theological issues including issues such as the doctrines to be attributed to a religion, the religious content of an employment position, the theological significance of individual attributes, and whether those attributes prevent a person from being able to fulfil the inherent requirements of an employment position. Some of the practical difficulties that courts can encounter when required to definitively determine these theological issues were illustrated in Chapter 4 with cases such as *Griffin*, *Wesley Mission*, *EEOC v Catholic University of America* and *Catch the Fire*.⁴³²

A further criticism of courts addressing theological issues is that it is fundamentally inappropriate for a secular court to be placed in a position where it is required to provide a legal resolution of issues that are essentially theological. The requirement for a secular court to address these issues can be seen as an unjustifiable interference by the State with the right to religious liberty of the adherents of the school's

⁴³¹ A situation could arise where the control of a religious school was claimed by multiple parties and there was a dispute regarding the appropriateness of the school registering for the protections or registering for protection on particular grounds. Although such a situation is likely to be rare it could be resolved by the courts in the same way that they would resolve any dispute regarding who has ownership and control over any legal entity.

⁴³² For further information on these cases see above nn 170–2, 175, 263–266, 368–371 and accompanying text.

religion. The inappropriateness of courts attempting to resolve theological issues was emphasised by the United States Supreme Court in *Serbian Eastern Orthodox Diocese v Milivojevich* when it refused to intervene in a decision made by church authorities to dismiss a bishop and reorganise a diocese.⁴³³ The Court held that attempting to determine whether the decision was theologically justifiable would

entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But ... religious controversies are not the proper subject of civil court inquiry, and ... a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.⁴³⁴

A similar position was adopted in *EEOC v Catholic University of America* where the United States Supreme Court held that State involvement in the decision to not grant tenure to the theology lecturer was not only in violation of the freedom of religion clause but also the non-establishment clause.⁴³⁵ The Court found that being required to evaluate the merits of the evidence provided by different theological experts required the Court to play an inappropriately intrusive role in the operation of the religious group and was in violation of the right to religious liberty.⁴³⁶ On the appropriate approach that courts should adopt when confronted with theological issues *Iacobucci J in Syndicat Northcrest* held that

claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make ... the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual. Secular judicial

⁴³³ 426 US 696, 724–5 (1976).

⁴³⁴ *Ibid* 713. Importantly, in the case the Supreme Court did not reject the possibility that court review of the validity of the conduct of a religious body would be appropriate in situations involving fraud or collusion: 713. Such a position is consistent with the role provided to the judiciary under the opt-in model that allows courts to assess whether the employment decision was made in good faith due to the school’s religious commitments.

⁴³⁵ (1996) 83 F3d 455, 467.

⁴³⁶ *Ibid* 466–7.

determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.⁴³⁷

The merits of such an approach was affirmed in *R v Secretary of State for Education and Employment (Respondents) ex parte Williamson (Appellant)*, which involved the House of Lords rejecting a claim by parents and teachers of Christian schools that a legal prohibition on corporal punishment violated their religious liberty.⁴³⁸ On the importance of courts not playing a substantive role in determining the religious beliefs of adherents Lord Nicholls stated that

[w]hen the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith ... But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion.⁴³⁹

Providing courts with a role in determining whether a theological or ethical view is part of a particular religion involves a profound violation of the right to religious liberty. The adherents within a religious group should be recognised as the only individuals who can determine the content of their religion. The State has a legitimate role to play in regulating the expression of religious beliefs to the extent that is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁴⁴⁰ However, providing courts with a role in determining the beliefs of religious groups is inconsistent with a State's obligation to respect the right to religious liberty. The limited role of the courts under the opt-in

⁴³⁷ [2004] 2 SCR 551 [43], [50].

⁴³⁸ *R v Secretary of State for Education and Employment (Respondents) ex parte Williamson (Appellant)* [2005] UKHL 15 (24 February 2005) [52], [86].

⁴³⁹ *Ibid* [22]. For a general discussion of the historical and contemporary aspects of the understanding that the State should be limited in addressing theological issues see generally Durham Jr and Scharffs, above n 68, 1–76; Ahdar and Leigh, above n 68, 23–84.

⁴⁴⁰ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

model in this respect is a significant advantage of the model compared to the inherent requirement test.

6.3 AN APPROPRIATE RESPECT FOR THE RIGHT TO EQUALITY

As the ability to select employees for mission fit is already provided to a variety of different groups constituted on grounds such as race, gender and sexuality, a significant argument in favour of the opt-in model (as well as the general exception approach) is that it better respects the right to equality compared to the inherent requirement approach. Under the opt-in model once a religious school has been registered they can make employment decisions on the basis of mission fit in the same way as many other groups. However, as discussed in Chapter 4, the inherent requirement test can impose substantial limitations on the operation of religious schools that are not imposed on other groups protected under anti-discrimination legislation.

The opt-in model could be criticised for failing to adequately respect the right to equality as it does impose additional regulations on religious schools not imposed on other groups. However, this differential treatment can be justified on account of the scope of the protections provided to religious schools considering that there are more than 1000 non-government schools in NSW employing more than 40,000 individuals.⁴⁴¹ The capacity for such a large number of people to be adversely affected justifies the State playing a greater role in regulating religious schools to ensure that they do not abuse the protections provided to them. It could also be argued that the additional features of the opt-in model are important safeguards to implement in regulating all groups, and that the preferable approach to adopt in ensuring equal treatment of groups is to amend the legislation to use the opt-in model for regulating all groups.

A further benefit of the opt-in model is that it avoids the undesirable situation that would be created through implementing the inherent requirement test where neither

⁴⁴¹ National Catholic Education Commission, *2011 Annual Report* (Canberra, 2011) 29–31, Non-government Schools Guide, *The NSW Schooling System* <<http://www.privateschoolsguide.com/schooling-in-nsw>>.

the religious school nor its employees are certain about their legal position. Once a religious school has registered for protections it will be able to make employment decisions on the grounds of mission fit without fear of litigation. Providing this confidence to religious schools is desirable to ensure that they are not inappropriately discouraged from attempting to build authentic religious communities—a particular problem for smaller religious schools that have limited resources to defend discrimination actions.

The opt-in model would also benefit employees as they will know in advance the position of the religious school. If the school has not registered for protections then a person will know that the school cannot make an adverse employment decision on various grounds. Furthermore, if a school has registered for protections then an employee will know that the school considers these grounds significant and so can decide to seek employment elsewhere, or work for the school knowing that an adverse decision may be made on those grounds and with the benefit of this knowledge take financial and non-financial steps to reduce the adverse impact of such a decision if it is ever made.

The opt-in model could be criticised for allowing religious schools to make adverse employment decisions on all grounds for all employment positions, which could result in a much larger number of individuals being harmed by adverse employment decisions compared to an inherent requirement test. However, there are some important factors that indicate that the difference in the extent of harm suffered by individuals from adverse employment decisions might not be as significant as could be expected. Some religious schools will not register for any protections, other religious schools that do register for protections may rarely (if ever) rely upon them in making employment decisions, while other schools may rely upon them in a nuanced way that minimises the harm caused by adverse employment decisions.⁴⁴² The possibility of the executive intervening to remove or modify the protections would also place ongoing pressure on religious schools to not abuse the protections,

⁴⁴² For a discussion of a range of reasons why religious schools might not rely on the protections provided under anti-discrimination legislation or rely on them in a manner that minimises the amount of harm individuals will suffer from an adverse employment decision see above nn 190–204 and accompanying text.

and to ensure that when they do rely on the protections they do so in a way that is respectful of any persons who may be adversely affected.

Considering all of these factors the extent and nature of any harm caused by the opt-in model might be significantly less than could be expected. The nature of the harm would also be similar to that caused by protections provided to other groups, and can be supported on the basis that the harm suffered by those excluded from different groups can be justified on the basis of rights such as the right to equality and religious liberty (and a range of other rights and considerations discussed in Chapter 6).

6.4 PROVIDES USEFUL EVIDENCE IN ASSESSING THE IMPORTANCE OF THE PROTECTIONS

A further advantage of the opt-in model compared to the alternative models is that it would produce valuable evidence indicating the number of religious schools that want protections and the particular type of protections sought. This evidence would be useful to government bodies, non-government organisations, and a wide range of individuals. The information would be particularly useful to persons considering whether they want to send their children to the school, attend the school themselves, donate money to the school, or volunteer their time to help the school. The information would also be relevant in relation to the human rights education of students and others attending religious schools. If particular religious schools have sought protections on various grounds it could highlight to government and non-government organisations that it would be useful to focus human rights education campaigns specifically on these schools to ensure that those attending the schools appreciate the importance of respecting the diversity of persons that exist in the community.

7 CONCLUSION

The opt-in model is superior to both the general exception approach and the inherent requirement test in appropriately respecting both the right to equality and religious liberty. The model avoids a major problem of the general exception approach of

providing excessive protections to religious schools. Under the opt-in model the protections provided are limited to schools based on religious or non-religious worldviews and are adapted to the particular needs of each religious school substantially reducing the scope of individuals who could be harmed from an adverse employment decision. The opt-in model also has important safeguards to prevent religious schools abusing the protections provided to them especially the public nature of the registration process and the significant supervisory role of both the executive and the judiciary.

The opt-in model is also superior to the inherent requirement test as it demonstrates a more appropriate respect for the right to religious liberty. The flexible nature of the registration process permits religious schools to register for the protections they need to employ persons with good mission fit, while also allowing the registration to be easily amended to account for any theological changes that may occur within particular religious groups. The model also appropriately avoids violating the right to religious liberty by not providing courts with the role of determining the doctrines of religious groups. Furthermore, as a range of other groups constituted on various grounds are provided with strong protections under anti-discrimination legislation, the opt-in model also demonstrates a more appropriate respect for the right to equality through avoiding approaches to regulating religious schools that have the potential to substantially undermine the ability of religious schools to fulfill their religious objectives.

This chapter specifically focused on providing a detailed account of the opt-in model and assessing its merits in relation to the right to equality and religious liberty. Although the opt-in model has many advantages over the general exception approach and the inherent requirement test on the grounds of religious liberty and equality, it is necessary to consider the merits of the three models in relation to the remaining criteria discussed in Chapter 1. The next chapter assesses the superiority of the opt-in model over the competing models in relation to these criteria.

CHAPTER SIX

THE APPROPRIATE REGULATION OF THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

1 INTRODUCTION

The main focus of previous chapters has been on the merits of the three models in relation to the rights to religious liberty and equality and the practical difficulties that might arise from the implementation of the different models. This chapter focuses on assessing the merits of the three models according to the remaining eight criteria: the welfare of children, the rights of parents and minorities, the right to privacy, freedom of association, respect for multiculturalism, the promotion of human rights standards and the compliance cost of the different models.

2 THE WELFARE OF CHILDREN AT RELIGIOUS SCHOOLS

The welfare of children who attend religious schools is an issue of great importance in determining the most appropriate model considering that in 2011 there were 1.2 million students attending non-government schools.⁴⁴³ As indicated in Chapter 1, this number is likely to significantly increase in the future as non-government schools are becoming increasingly popular in Australia with the percentage of students attending non-government schools rising from 31% in 2001 to 34.6% in 2011.⁴⁴⁴

The importance of the State taking effective measures to protect children from harm is strongly emphasised in international human rights instruments. The *Convention on the Rights of the Child*, for example, declares that States must take all necessary 'measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.⁴⁴⁵ Even more relevant to the operation of religious schools is

⁴⁴³ Australian Bureau of Statistics, above n 4.

⁴⁴⁴ Ibid.

⁴⁴⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 19(1).

the *1981 Declaration*, which states that ‘[p]ractices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development’.⁴⁴⁶

Any school—whether religious or non-religious—has the capacity to cause significant physical and emotional harm to students through exposing them to social rejection and isolation, discrimination and even violence from students, staff members and other individuals involved with the school. However, religious schools can be criticised for exposing children to at least two additional sources of harm. Firstly, the theological positions of some religious groups may expose students with particular attributes to a greater risk of mental harm compared to students without those attributes. Secondly, some religious schools may undermine human rights education through promoting ethical views to students (and others involved in the school) that are inconsistent with widely accepted human rights standards. This section considers whether the religious commitments of some religious schools may be harming their students, while the possibility that religious schools are undermining human rights standards is considered later in the chapter in the section on human rights education.

2.1 RELIGIOUS SCHOOLS MAY BE HARMING CHILDREN

A major concern about the operation of religious schools is that the theological views of some religious groups that manage schools may be contributing to a school environment that is harmful to students. Some schools, for example, are based on religions that teach that those who do not believe in the school’s religion are acting unethically, that a person’s gender is fixed, and that sexual activity can only ethically occur between a man and woman in a marriage recognised as valid by the religion. A student may suffer significant mental and physical harm through attending such a school if the teachers, students and other religious adherents within the school are critical of the student due to their religious beliefs, sexuality, gender identity, or family situation.

⁴⁴⁶ *1981 Declaration* art 5(5).

Some support for the harm that religious schools may be causing students to suffer is provided by the Evans and Gaze study where the authors reported that some principals of religious schools were not supportive of students or staff members who became pregnant outside of marriage or who were openly gay or lesbian.⁴⁴⁷ Three principals, for example, informed the authors that a student who became pregnant would probably be unable to continue attending the school although it might be possible for the school to provide her with homework and personal tuition so she could complete her education.⁴⁴⁸

Further support for the view that some religious schools may be causing harm to students and staff members is provided by a study undertaken by Hillier, Turner and Mitchell on the well-being of same-sex attracted young people in Australia.⁴⁴⁹ The authors advertised the study through various media seeking persons aged between 14 and 21 who identified as having a same-sex attraction who would be willing to anonymously fill out a questionnaire regarding their attitudes and experiences as a person with a same-sex attraction.⁴⁵⁰ Although the study did not have questions specifically aimed at religion after reviewing the views expressed by the 1749 persons who completed the questionnaire the authors noticed that religion (typically Christianity—an unsurprising result considering it has the most adherents in Australia) was often mentioned by respondents as a factor that contributed to the emotional harm they experienced due to their same-sex attraction.⁴⁵¹ After analysing the information in the questionnaires the authors concluded that

[y]oung people who were Christians, who attended Christian schools and/or belonged to Christian families ... were forced to choose between their sexuality and their religion. In many cases the rejection of their sexuality and the embracing of their religion resulted in young people hating and harming themselves. Leaving their faith for many was a painful

⁴⁴⁷ Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 409–11.

⁴⁴⁸ Ibid 410.

⁴⁴⁹ Lynne Hillier, Alina Turner and Anne Mitchell, 'Writing Themselves in Again: 6 Years On—The 2nd National Report on the Sexuality, Health & Well-being of Same Sex Attracted Young People in Australia' (Australian Research Centre in Sex, Health & Society, 2005) <http://www.glhv.org.au/files/writing_themselves_in_again.pdf>.

⁴⁵⁰ Ibid 5–9.

⁴⁵¹ Ibid 11, 76–8.

but necessary road to recovery – a sad loss for the church and a survival choice for the young person.⁴⁵²

The potential for students to suffer serious emotional and physical harm through attending particular religious schools may be increased due to the protections provided to religious schools for their employment decisions. The protections allow schools to preferentially employ staff members who have a strong commitment to the school's religion and who may be openly critical of individuals who do not conform to the doctrines of the school's religion. A substantial number of employees committed to the school's religion could result in students being repeatedly exposed over many years to the teachings of the school's religion that are critical of their particular situation.

The protections also allow religious schools to deny employment to individuals on a range of grounds, which could send a powerful message to students concerning the unacceptability of particular individuals and their conduct. Moreover, denying employment to individuals with various attributes can deprive students of the benefits of a diverse range of role models. A transgender teacher, for example, could play a valuable role in both supporting transgender students at the school and educating students and others at the school about the nature of gender and the possibility of a person identifying as belonging to various genders (or identify as gender neutral or as belonging to a non-traditional gender identity).⁴⁵³ Similarly, a gay student in a religious school could receive much needed support and encouragement if the school employed a gay teacher in a loving, same-sex relationship.

The Victorian Gay and Lesbian Rights Lobby emphasised the problematic aspects of the protections in terms of student welfare in their submission to the Victorian

⁴⁵² Ibid ix.

⁴⁵³ The legal and policy considerations concerning gender identity were recently considered by the NSW Court of Appeal and the High Court of Australia, which held that individuals in deciding upon their own gender identity should not be required to identify themselves as either 'male' or 'female': *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145 [200]; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 [46].

government's proposed reform of anti-discrimination legislation.⁴⁵⁴ The Lobby argued that

a climate of homophobia, such as is created by the hostility of some religious bodies to homosexuality, leads to a higher prevalence of depression, self-harm and suicidal ideation (and attempts) among SSA [same-sex attracted] young people. These harms to health are caused both by direct propagation of teachings harmful to SSA children, and also by the failure of their schools to permit, let alone encourage, a fair representation of healthy role models of lesbians and gay men among the staff.⁴⁵⁵

Specific criticism was directed at the legal protections provided for the employment decisions of religious schools by the Rainbow Network, a Victorian organisation of community and school staff who work with gay, lesbian, bisexual, transgender and intersex young people.⁴⁵⁶ The Rainbow Network stated that the protections

create a climate in Catholic schools where same sex attracted young people can feel isolated and unsupported ... [and] illustrate to young same sex attracted people that being gay or lesbian may make you an undesirable employee, it might be difficult to find employment as [a] gay or lesbian adult, coming out is to be discouraged, and keeping a large part of your personality and identity invisible is the safest thing to do. For students with gay or lesbian parents the existence of [legislative protections for the employment decisions of religious schools] can also indicate that there is something immoral or inappropriate about their parents and their family structure. Further the implication of [the protections is] that if you identify as Catholic or Christian and same sex attracted, it is difficult to reconcile one aspect of your personality and self with the other.⁴⁵⁷

Further emotional harm may be suffered by students when they realise that the State instead of enacting legal measures to produce a more supportive environment within religious schools provides legal protections to religious schools to exclude persons from employment on grounds such as their sexuality, gender identity and marital status. On the harm that can potentially be caused to these students through the

⁴⁵⁴ Victorian Gay & Lesbian Rights Lobby, 'Submission to SARC re Equal Opportunity Bill 2010' (2010) <<http://equallove.org.au/submissions/vglrl-submissions/item/vglrl-submission-to-sarc-re-equal-opportunity-bill-2010>> 3–4.

⁴⁵⁵ Ibid.

⁴⁵⁶ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Options Paper* (2009) 124.

⁴⁵⁷ Ibid 123–4.

State's ongoing commitment to protect the ability of religious schools to select for mission fit Tobin argues that

[t]he maintenance of a legal regime that sanctions discrimination against such students and the individuals who teach them on the basis of their sexual orientation contributes to a social and cultural environment in which their sexual orientation is devalued or forced to be concealed. It certainly does nothing to affirm and support their sexual identity. Life is already hard enough for children and young people but to delegitimise their sexual orientation or home life, in the case of single or unmarried parents, creates an inconsistency with the positive obligation to provide children with an effective right to enjoy equality and the protection of their best interests.⁴⁵⁸

If religious schools are causing students to suffer significant harm and the protections provided under anti-discrimination legislation are contributing to this harm then this would provide strong support for removing or limiting the protections. On this basis it would appear that the inherent requirement test out of the three models best satisfies the criteria of safeguarding the welfare of children as it would significantly reduce the number of employment positions that religious schools could fill on the basis of mission fit, while still permitting schools to fill significant leadership and religious teaching roles with committed religious adherents. Such a result could reduce the harm suffered by these vulnerable children as there would be a less religious—or at least a more diverse—environment at the school, a greater chance of suitable role models being available for the diverse student body, and a more limited State affirmation of these religious schools. However, there are good grounds to contest the claims that religious schools are causing harm to students, that the anti-discrimination legislation protections are playing a significant role in causing this harm, and that the best way to address any harm being caused is to remove or limit any legal protections provided for the employment decisions of religious schools.

2.2 THE LACK OF EVIDENCE THAT THE PROTECTIONS ARE HARMING CHILDREN

A major challenge that critics of religious schools encounter is the inability to

⁴⁵⁸ Tobin, above n 149, 34 (citations omitted).

support their criticisms with relevant empirical evidence. It is not an effective criticism of religious schools to provide studies of the significant harm suffered by persons on account of attributes such as their gender identity, sexuality or religion and then claim that religious schools and the protections provided under anti-discrimination legislation have played a significant role in producing this harm. Instead critics need to support their arguments with studies that actually support a causative link between particular students studying at religious schools and suffering harm that they would not have suffered if they had been at a different school or if the school that they had attended had been unable to select employees for mission fit. Even more useful would be studies that focused on whether there was any difference in health outcomes for students in jurisdictions that adopted a particular approach to providing protections for religious schools under anti-discrimination legislation, such as the general exception approach, and then changed the provisions to a different approach, such as the inherent requirement test. Studies such as these would provide strong evidence regarding the extent of the harm, if any, that is being caused by religious schools and their employment decisions.

After an extensive review of numerous articles, books and submissions by critics of the protections provided to religious schools under anti-discrimination legislation no empirical study of the impact on student welfare of different approaches to regulating the employment decisions of religious schools could be located. Such studies may exist, but if so it is surprising that they have not been relied upon considering the strong commitment some critics have to ensuring the protections provided to religious schools under anti-discrimination legislation are repealed, or at least, limited. The lack of empirical evidence is a significant problem for determining the extent of any harm that is being caused by the legal protections provided to religious schools, and consequently which of the three models best promotes student welfare.

If such studies did exist they might support the views of critics that religious schools are causing significant harm to students and protections for employment decisions only exacerbate this harm by allowing religious schools to fill employment positions with persons compatible with the school's religion. Alternatively the results could show that students rarely suffer any significant emotional or physical harm from learning about the teachings of the school's religions or through studying in an

educational environment formed by that religion. Such studies could even show that many religious schools (even those with teachings that are critical of particular attributes and behaviour) are delivering a better outcome in terms of student welfare than non-religious schools. Such a result could occur due to factors such as the core message of the religions on which many religious schools are based is that respecting and caring others is central to living an ethical life, and that all individuals are faced with challenges in living an ethical life and that the appropriate response to this is compassion rather than judgement.

The existence of a compassionate approach taken by the authorities of some religious schools towards staff and students on grounds such as sexuality is supported by the study conducted by the Catholic priest, Fr Norden.⁴⁵⁹ The study was based on consultations with more than 40 principals of Catholic schools, 15 senior staff members in Catholic Education Offices, 12 senior teaching and administrative staff members, 15 welfare staff coordinators and 12 graduates of Catholic schools.⁴⁶⁰ Fr Norden stated that

[s]tudents who are same sex attracted represent a group of students within the secondary school context ... [who] have particular needs. These needs must be recognized and respected to enable these students to participate and fully engage in a safe school environment ... the recognition that there are same sex attracted students in every secondary school in Australia, and most likely in every classroom or sporting team or activity group, means that an environment [needs to be] established that respects diversity and refuses to tolerate behaviour that communicates or perpetuates disrespect or ignorance.⁴⁶¹

Norden noted that a number of Australian Catholic secondary schools are ‘already actively engaged in educating their students about the issues surrounding same-sex attraction’ and that a ‘whole of school resource kit for implementing a comprehensive approach to support same-sex attracted students and challenge homophobia ... [had] been successfully implemented in numerous Catholic

⁴⁵⁹ Norden, above n 202.

⁴⁶⁰ Ibid 16–7.

⁴⁶¹ Ibid 21.

secondary schools'.⁴⁶² The study included case studies from the interviews conducted by Norden, which indicate that a compassionate approach is adopted by many principals and teachers at Catholic schools. Some of the actions of Catholic school employees reported in the study included employees correcting students using homophobic language, explaining to students the importance of adopting a caring and inclusive approach to persons of different sexualities, and discussing strategies with parents for promoting a safe school environment that is respectful of a diverse student body.⁴⁶³ Additional support for the compassion nature of some religious schools is also provided in the study by Hillier, Turner and Mitchell in which some respondents reported receiving support from staff members and students at Christian schools. For example, a lesbian student stated that '[t]he first person I talked to [about being a lesbian] was our school chaplain (although I'm an atheist) and he was great'.⁴⁶⁴

It should also be noted that religious schools are already subject to extensive legal regulation under criminal and civil law to ensure that the school environment is safe for staff members, students and others involved with the school. Under the *Education Act 1990* (NSW), for example, in order to obtain the registration that it needs to continue operating a non-government school must ensure that 'a safe and supportive environment is provided for students by means that include ... school policies and procedures that make provision for the welfare of students'.⁴⁶⁵ To assist non-government schools comply with these requirements the Board of Studies provides detailed guidelines that emphasise the obligation of non-government schools to provide an environment where students are safe from physical and emotional harm, support students in their social, academic, physical and emotional development, and develop policies and programs for students to develop a sense of self-worth and foster personal development.⁴⁶⁶ A non-government school that is found to have breached its obligations to promote the welfare of its students is subject to a range of sanctions including deregistration resulting in the closure of the school.⁴⁶⁷

⁴⁶² Ibid 26, 32.

⁴⁶³ Ibid 44–55.

⁴⁶⁴ Lynne Hillier, Alina Turner and Anne Mitchell, above n 78. See, also, Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 409–11.

⁴⁶⁵ *Education Act 1990* (NSW) s 47(g)(i).

⁴⁶⁶ Board of Studies, above n 427, 33–34.

⁴⁶⁷ *Education Act 1990* (NSW) ss 59(1)–(3), 65(1)–(3).

2.3 AN ASSESSMENT OF THE MODELS IN RELATION TO THE WELFARE OF CHILDREN

Due to the lack of empirical evidence on the impact on student welfare of different approaches to regulating the employment decisions of religious schools it is difficult to provide a strong conclusion on which model best supports the welfare of children. However, out of the three models it is reasonable to conclude that the general exception approach provides the least protection for student welfare considering the protections are automatically provided to all employment positions at religious schools and the absence of any mechanism to ensure that religious schools do not abuse the protections provided.

Compared to the general exception approach the inherent requirement test should be regarded as providing strong protection for the welfare of children. The probability that courts would adopt a narrow interpretation of the test would mean that most employment positions would be open to a diverse range of employees who could play a valuable role in promoting the merits of different ethical views and through serving as positive role models for vulnerable students. However, the inherent requirement test lacks the advantages of a high level of public scrutiny of employment decisions and ongoing government regulation of religious schools central to the opt-in model that would significantly help ensure that the protections provided to religious schools are not abused to the detriment of student welfare.

The opt-in model should be regarded as providing similarly strong protection for the welfare of children as that provided by the inherent requirement test. The requirement under the opt-in model for schools to produce a public document explaining the need, if any, to make particular employment decisions on the basis of mission fit could help students understand that the aim of the protections is not to exclude individuals but to provide religious schools with the ability to include persons who can help build an authentic religious culture within the school. Furthermore, the ability of the executive to modify or remove the legal protections provided to religious schools could easily be exercised if the environment within a particular school was causing vulnerable students to suffer physical harm or

psychiatric illnesses. The ability of the executive to remove the legal protections could also play a valuable role in encouraging religious schools to ensure that the staff members they are employing are supportive of student welfare and are presenting the teachings of the religion in a way that is as supportive as possible of the diverse range of students under their care.

3 THE RIGHTS OF PARENTS

Religious parents often have a strong commitment to ensuring that their children are educated in a supportive religious environment where they are able to receive an authentic religious education and formation. The provision of such an education is a central concern for religious parents as they understand that developing their children's religious knowledge and character is essential to their children's welfare through assisting them to live an ethical and fulfilling life in a manner that is consistent with the doctrines of the religion. Another major factor explaining the commitment of religious parents is their understanding that they are under an obligation to provide an effective religious education to their children. Ahdar and Leigh explain that religious parents 'have a God-given mandate and duty (for which they will be accountable to God) to provide an intellectual and moral framework for the development of their children'.⁴⁶⁸

Considering the great importance that many parents attach to the religious education of their children it is not surprising that the rights of parents regarding religious education is extensively recognised by international human rights instruments. The *Universal Declaration of Human Rights* states that '[p]arents have a prior right to choose the kind of education that shall be given to their children'.⁴⁶⁹ The religious dimension of this right is emphasised in the *ICCPR*, which explicitly affirms that parents have the right 'to ensure the religious and moral education of their children in conformity with their own convictions'.⁴⁷⁰ Similarly, the *1981 Declaration* affirms that '[e]very child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents ... and shall not be

⁴⁶⁸ Ahdar and Leigh, above n 68, 249.

⁴⁶⁹ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 18(3).

⁴⁷⁰ *ICCPR* art 18(4).

compelled to receive teaching on religion or belief against the wishes of his parents'.⁴⁷¹

The rights of parents regarding the religious education of their children have similarly been affirmed by the decisions of national courts. In *Pierce v Society of Sisters*, for example, the US State of Oregon enacted legislation that required parents of children between the ages of eight and sixteen years to send their children to be educated in the public school system.⁴⁷² The importance of parental rights was a major justification that the United States Supreme Court relied upon in declaring that the legislation could not be enforced holding that it 'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children'.⁴⁷³ The Court emphasised that the 'child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations'.⁴⁷⁴ In the later case of *Wisconsin v Yoder*, which confirmed that Amish parents were not required to send their children to public school beyond the eighth grade, the United States Supreme Court explained that the phrase 'additional obligations' included the 'inculcation of moral standards, religious beliefs, and elements of good citizenship'.⁴⁷⁵ The rights of parents in relation to the education of their children was also affirmed in *Martínez* where the European Court of Human Rights held that requiring the Catholic religious teacher to be loyal to the Catholic faith was acceptable as its 'aim was to preserve the sensitivity of the general public and the parents of the school's pupils'.⁴⁷⁶

⁴⁷¹ 1981 Declaration art 5(2). The rights of parents regarding the religious education of their children are also affirmed in other international instruments including Article 2 of the First Protocol of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009), Articles 14(2) and 29(2) of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), and Article 13(3) of the *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

⁴⁷² 268 US 510, 530 (1925).

⁴⁷³ *Ibid* 534.

⁴⁷⁴ *Ibid*.

⁴⁷⁵ 406 US 205, 233 (1972).

⁴⁷⁶ (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [87]. For an overview of the facts of this case see above n 269–272 and accompanying text.

Importantly, the affirmation of parental rights in Paragraph 2 of Article 5 of the *1981 Declaration* concludes with the phrase ‘the best interests of the child being the guiding principle’⁴⁷⁷ clearly indicating that parental rights are no more absolute than any of the other rights relevant to the appropriate regulation of religious schools. Such a position was affirmed by the United States Supreme Court in *Prince v Massachusetts*, which upheld a conviction of an adult who allowed her niece to distribute religious material on public streets under adult supervision.⁴⁷⁸ On the limited nature of parental rights the Court stated that ‘neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae*, may restrict the parent's control’.⁴⁷⁹

On one view of the relevance of the rights of parents it can be argued that all three models adequately respect parental rights. All models allow religious schools to be established and even the inherent requirement test allows religious schools to select employees for mission fit for some employment positions. Therefore under all of the models students can learn in detail about their parent’s religion at religious schools, participate in religious ceremonies and fulfill any other religious commitment specific to that religion.

Although all models permit some religious individuals to be employed, a major criticism of the inherent requirement test is that it will likely limit the ability of religious schools to select employees for mission fit for most employment positions. On the significance of this point in the context of parental rights, the former Victorian Attorney-General Robert Clark when introducing a bill to remove the inherent requirement test for religious schools in Victoria stated that ‘restrictions on the ability of faith-based organisations to employ staff who support the values of the organisation ... would dramatically undermine the rights of parents to send their children to schools that are able to provide the values-based education their parents are seeking for them’.⁴⁸⁰

⁴⁷⁷ *1981 Declaration* art 5(2).

⁴⁷⁸ 321 US 158, 171 (1944).

⁴⁷⁹ *Ibid* 166. The phrase ‘*parens patriae*’ is Latin for ‘parent of the nation’ and refers to the power of the State to intervene in the lives of its citizens to ensure the welfare of individuals who are unable to adequately care for themselves (such as children).

⁴⁸⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2011, 1363 (Robert Clark).

A major flaw of the inherent requirement test is that it fails to take into account the important role that all employees have in educating students about the religion and providing students with appropriate role models for how to live the religious faith. A religious school that is restricted in its ability to employ and manage persons according to their mission fit can be significantly impaired in its attempt to develop an authentic religious culture within the school that is capable of educating and inspiring students about the school's religion. On the adverse impact these restrictions can have on parental rights the Catholic Education Commission of Victoria argued that they

would limit the ability of Catholic schools to prevent or stop staff from contradicting Catholic beliefs and principles ... this would infringe Catholic schools' ability to maintain the sense of community and unity, family values, moral fortitude and personalised and nurturing character, which is presently sought by parents, in exercise of their right to have their children educated ... in accordance with their religion.⁴⁸¹

Considering the inherent requirement test will likely reduce the number of employment positions within religious schools that can be specifically filled by a person with appropriate mission fit it is likely that religious school authorities will find it more difficult to create a strong religious environment within the school, which may undermine the ability of religious schools to provide a religious education and formation for their students. Nevertheless, as religious schools can still be established and some employment positions can be filled with a committed religious person it is preferable to view the inherent requirement test as providing moderate, rather than strong, protection for parental rights regarding the religious education of their children. Due to the limited nature of government involvement in the employment decisions of religious schools under the general exception approach it should be concluded that this model provides strong support for parental rights. The opt-in model similarly should be regarded as providing strong support for parental rights, even though there may be situations where the executive would intervene to limit the protections for particular religious schools that could have the effect of undermining the quality of religious education provided by those schools.

⁴⁸¹ Catholic Education Office, Archdiocese of Melbourne, Submission No 472 to the Scrutiny of Acts and Regulation Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995*, 1 July 2009, 10.

4 THE PROTECTION OF MINORITIES

The importance of the State protecting minority groups is extensively recognised at international law. For example, the *ICCPR* states that ‘[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.⁴⁸² Particular emphasis is given to the rights of a child belonging to a minority group in the *Convention on the Rights of the Child* which declares that children belonging to an ethnic, religious or linguistic minority ‘shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language’.⁴⁸³ Specific attention is given to the right of minorities to establish schools in the *Convention Against Discrimination in Education*, which states that it is ‘essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language’.⁴⁸⁴ While the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities recognises that

[p]ersons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination ... Persons belonging to minorities have the right to establish and maintain their own associations ... Persons belonging to minorities may exercise their rights ... individually as well as in community with other members of their group, without any discrimination.⁴⁸⁵

⁴⁸² *ICCPR* art 27.

⁴⁸³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 30.

⁴⁸⁴ *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) art 5(1)(c).

⁴⁸⁵ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 1–3.

The relevance of the rights of minorities to an assessment of State measures adopted in relation to religious schools was affirmed by the Human Rights Committee in *Waldman v Canada* in which the Canadian government was held to be in violation of the *ICCPR* for funding a separate schools system for Roman Catholics and not providing similar support to other religious groups.⁴⁸⁶ Importantly, in a concurring opinion Scheinen stated that as the funding of Roman Catholic schools in Ontario was a ‘historical arrangement for minority protection’ one of the considerations that needed to be taken into account in assessing the merits of the funding arrangement was the extent to which the funding arrangement itself could be justified as a measure aimed at protecting minority rights.⁴⁸⁷

In determining the merits of the models in relation to their promotion of the welfare of minority groups it is useful to begin with a discussion of how religious schools can be of assistance to minority religious groups before assessing the merits of the different models in relation to their effectiveness in promoting the welfare of a range of different minority groups.

4.1 THE APPROPRIATE DEFINITION OF A RELIGIOUS MINORITY GROUP

Most religious groups will be minorities in their country and consequently entitled to significant protection from the State on the basis of their minority status. Even in countries where a majority of persons describe their religious beliefs using the same term there are likely to be divisions among the religious commitments of these persons of such significance that it is appropriate to regard them as separate religions. An example of such a situation can be provided in Australia. The 2011 Australian Census determined that approximately 61% of Australians identify as

⁴⁸⁶ Human Rights Committee, *Views: Communication No. 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) [10.1]–[11].

⁴⁸⁷ *Ibid* [4] (Scheinen). Relevantly the other members of the Committee acknowledged ‘the author’s arguments that the same facts also constitute a violation of articles 18 [the right to religious freedom] and 27 [the rights of minorities], read in conjunction with article 2(1) [equal enjoyment of *ICCPR* rights] of the Covenant’. However the Committee stated that ‘in view of its conclusions in regard to article 26 [right to equality], no additional issue arises for its consideration under articles 18, 27 and 2(1) of the Covenant’: *Ibid* [10.7]. However, as Ghanea notes ‘the assessment of the Committee seems to have largely taken on consideration of Article 27 in all but name’: Nazila Ghanea, ‘Are Religious Minorities Really Minorities?’ (2012) 1(1) *Oxford Journal of Law and Religion* 5768.

Christian.⁴⁸⁸ However, as there are major theological differences between the different denominations of Christianity each denomination can appropriately be regarded as a separate religion. Such an approach was taken by the NSW Supreme Court in *Wesley Mission*, which held that the religious adoption organisation's 'doctrines and beliefs were those of the Methodist Church, derived from the teachings of John Wesley' rather than a generic non-denominational Christianity.⁴⁸⁹ Adopting the approach of the NSW Supreme Court every religious group in Australia can be considered to be a minority group in terms of their numerical position, and so may be entitled to claim protection from the State on the basis of their minority status.

It is important, however, to note that simply because a religious group is a numerical minority in a country does not mean that it will automatically qualify as a minority group that will be able to claim for itself the protections available under international human rights instruments. As stated by the Office of the High Commissioner for Human Rights: 'There is no internationally agreed definition as to which groups constitute minorities ... the existence of a minority is a question of fact'.⁴⁹⁰ Although no definition is universally accepted, a widely accepted definition of a 'minority group' was proposed by Francesco Capotorti, Special Rapporteur of the United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities, who defined a 'minority group' as

a group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁴⁹¹

⁴⁸⁸ Patricia Karvelas, 'Christianity down, Hinduism up, 2011 Census shows', *The Australian* (online), 21 June 2012 <<http://www.theaustralian.com.au/national-affairs/christianity-down-hinduism-up-2011-census-shows/story-fn59niix-1226404138531>>.

⁴⁸⁹ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 [35].

⁴⁹⁰ Office of the High Commissioner for Human Rights, *Minorities under international law—Who are minorities under international law?* (2013) <<http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx>>.

⁴⁹¹ Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Document E/CN.4/Sub.2/384/Add.1-7 (1977) quoted in Office of the United Nations High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, UN Doc HR/PUB/10/3 ' (2010) <http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf>.

Relying on this definition some might argue that Anglicans and Roman Catholics should not be regarded as religious minorities as they are not in a ‘non-dominant position’ considering factors such as their significant cultural presence, considerable financial resources, and substantial population size.⁴⁹² However, considering that there is a high proportion of nominal adherents in both Christian denominations and that neither religious group is in a controlling position in relation to the State it is difficult to conclude that either of these groups should be denied protection provided to minority groups on the understanding that they are in a ‘dominant position’ within the State. Nevertheless, it is appropriate to take into account the comparative position of each religious group within a State to determine the level of support that a particular religious group is entitled to receive on the basis of minority rights. It would normally be appropriate for a State to provide greater support for a very small religious group considering the threats faced by it are likely to be more significant than those faced by larger, more established religious groups that will often be more capable of defending their own interests.

4.2 THE IMPORTANCE OF RELIGIOUS SCHOOLS TO RELIGIOUS MINORITIES

Religious schools can play an important role in protecting the interests of minority groups. Religious schools, argues Ghanaea, can assist religious minorities with the ‘enjoyment of religious culture’, act as ‘positive measures of protection’, allow for ‘the effective participation of religious minorities in decisions that affect them’ and promote the ‘survival and continued development of the cultural, religious and social identity’ of religious minorities.⁴⁹³ Religious schools can assist religious minorities in these ways through the essential role they play in educating religious adherents—especially the children of religious adherents—about the religion and associated cultural elements, and in establishing and strengthening social bonds between religious adherents. Furthermore, religious schools can provide employment for

⁴⁹² The Australian Bureau of Statistics records that in 2001 approximately 3.8 million Australians identified as Anglican and 5 million Australians identified as Catholic out of a population of 18.7 million: Australian Bureau of Statistics, *Religious Affiliation* (24 January 2007) <<http://www.abs.gov.au/ausstats/abs@.nsf/46d1bc47ac9d0c7bca256c470025ff87/bfdda1ca506d6cfaca2570de0014496e!OpenDocument>>.

⁴⁹³ Ghanaea, above n 150, 67.

members of the minority community in teaching and non-teaching roles, which is particularly important in countries where there are high levels of religious discrimination. Religious schools can also be centres where members of the religious community are able to fulfil their religious commitments and discuss and celebrate the historical and cultural elements of their religion. Religious schools will often be of critical importance to small religious communities based in hostile social environments where religious schools may be the only place—other than the family home and place of worship—where individuals are able to receive an effective religious education and formation. In support of the important educative and supportive role religious schools can play in assisting children of minority groups Evans and Ujvari argue that

[s]chools made up predominantly of co-religionists may also offer some protection to children from minority groups who are subjected to bullying or harassment on account of their religion in mainstream schools. Even when children from minority religions are not subjected to intentionally harmful treatment, they may find it difficult to find a mainstream school where their religious needs are understood and met. Jewish school children may have difficulty with schools that hold social or fundraising events on Friday nights or Saturdays ... Muslim children may have difficulty with a canteen that does not serve halal food or where wearing a headscarf marks them as an outsider and culturally 'different' to the majority of their schoolmates. Indeed, one of the motives for religious groups to create religious schools is to create schools where their religious needs are well understood and respected in practice and where their children can be part of the mainstream school community, even if they are a minority within the broader community.⁴⁹⁴

In order that religious schools are able to effectively support minority religious communities it is important that they have the freedom to select employees for mission fit who will be able to deliver an effective religious and cultural education to those attending the school, inspire individuals to adhere more closely to the doctrines of the religion, and contribute to an environment within the school that is an authentic expression of the religious and cultural aspects of the minority group. Removing or undermining this freedom in relation to employment will likely impair

⁴⁹⁴ Carolyn Evans and Leilani Ujvari, 'Non-discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31, 38.

the ability of religious schools to effectively preserve and promote the religious and cultural identity of the minority group.

Both the general exception approach and the opt-in model provide substantial freedom to minority religious groups to manage religious schools in a manner that is effective in meeting the various needs of the religious communities. The inherent requirement test cannot be considered to be as supportive of minority religious groups due to the adverse impact that the inherent requirement test can have on the operation of religious schools. However, the inherent requirement test could be justified on the alternative ground that it protects individuals from different minority groups from suffering harm from adverse employment decisions. The minority status of these individuals could be due to attributes such as their gender identity, sexuality, religion or marital status.

Although all three approaches can be supported on the basis that they assist in protecting the interests of individuals belonging to minority communities the inherent requirement test should be regarded as the least preferable model on this ground. The test would likely substantially impair the operation of religious schools and undermine the unique educative, social, and spiritual benefits they provide to their religious communities. This is particularly harmful to religious minorities as the benefits provided by their schools cannot be obtained from government schools or religious schools based on another faith. Such a situation does not apply to individuals belonging to other minority groups as they will be able to enrol as students or obtain employment at government schools, other religious schools, or establish their own schools with policies that are supportive of their particular minority group. Consequently, it is reasonable to conclude that minority rights are better protected under the general exception approach and the opt-in model compared to the inherent requirement test.

5 THE RIGHT TO PRIVACY

The right to privacy plays a valuable role in protecting spaces in the community where individuals have freedom to express their views, discuss what is important to them, and act as they desire without having to be concerned that the State or other

individuals will intervene and hold them accountable for their views or conduct. The obligation of States to protect the right to privacy is clearly supported at an international level. Article 17 of the *ICCPR*, for example, states that ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation ... Everyone has the right to the protection of the law against such interference or attacks’.⁴⁹⁵

The importance of ensuring that anti-discrimination legislation respects the private sphere was affirmed by the New South Wales Law Reform Commission in a review of the Act. The Commission stated:

the distinction between the public and the private areas of life should be maintained and ... the ADA [*Anti-Discrimination Act 1977* (NSW)] should operate only in the public area. This conclusion is not simply a pragmatic limitation on legal intervention in private affairs, but follows from the underlying political and philosophical principles which justify the existence of the ADA. Once it is accepted that a legitimate purpose of the ADA is to protect freedom of political and religious belief, the Act is extending its protections beyond inherent characteristics to the protection of factors which are, at least in part, the product of private choice. That protection ... recognises a sphere of privacy.⁴⁹⁶

5.1 RELIGIOUS SCHOOLS AS PRIVATE INSTITUTIONS

The current approach adopted in NSW specifically provides protections for employment decisions to educational institutions if they satisfy the definition of a ‘private educational institution’.⁴⁹⁷ The terminology used suggests a central rationale for the protections being provided is that religious schools (and their employment decisions) are private in nature and are entitled to significant protection from the State on those grounds. Ahdar and Leigh observe that the right to privacy has been used to support the employment decisions of religious schools noting that the essence

⁴⁹⁵ *ICCPR* art 17(1)–(2).

⁴⁹⁶ NSW Law Reform Commission, above n 147, [4.17].

⁴⁹⁷ *Anti-Discrimination Act 1977* (NSW) s 4(1).

of the argument is that '[s]ince a religious institution operates in the private sphere of life, it is permitted to select employees according to its beliefs'.⁴⁹⁸

If the right to privacy is relevant to the operation of religious schools then the broad nature of the protections provided under the general exception approach and the opt-in model should be recognised as providing strong support for the right to privacy. The inherent requirement test should be regarded as the least respectful as it requires the State to intervene in the internal life of the religion and the school in order to determine the doctrines of a school's religions, whether particular employment positions have a religious component to them, and whether a particular person can be considered to be compatible with that religious component.

The legitimacy, however, of viewing religious schools as part of the private sphere is doubtful. As Spinner-Halev observes: 'it is not always clear what should be considered public and private. Is a private school private, or does it serve a public function and must be considered a public institution for policy reasons?'⁴⁹⁹ To answer the question posed by Spinner-Halev, there are strong policy reasons for concluding that the right to privacy should be regarded as being of little, if any, relevance to an assessment of the appropriate approach to adopt in regulating religious schools under anti-discrimination legislation. The compulsory nature of education and the extensive legal regulation of religious (and non-religious) schools by the government are substantial arguments against understanding religious schools as private organisations. The provision of government funding by itself should not deprive an organisation of any protection available under the right to privacy. However, it is appropriate to consider it a factor in favour of concluding that an organisation is not private. A further argument against viewing religious schools as private institutions is their potential to cause substantial harm to the community especially if the schools are failing to adequately educate their students, refusing to employ or enrol individuals on various grounds, or if they are promoting violence, hatred or other inappropriate views.

⁴⁹⁸ Ahdar and Leigh, above n 68, 360.

⁴⁹⁹ Spinner-Halev, above n 140, 45.

5.2 THE RELEVANCE OF AN EMPLOYEE'S CONDUCT IN THEIR PRIVATE LIFE

Although the right to privacy may not be relevant to a general assessment of the different approaches it would likely be a relevant consideration if it were possible under the models for religious schools to make employment decisions on the basis of an employee's conduct in areas that would be considered to be part of an employee's private life. The relevance of the right to privacy to adverse employment decisions made by religious groups based on an employee's conduct outside of the work environment has been recognised by the European Court of Human Rights.

In *Schüth v Germany* the Catholic Church dismissed an organist after it was revealed that he had separated from his wife and had entered into a sexual relationship with another woman with whom he was expecting a child.⁵⁰⁰ The European Court of Human Rights accepted that when the applicant signed his contract of employment he 'assumed a duty of loyalty towards the Catholic Church that limited his right to respect for his private life to some extent'.⁵⁰¹ However, the Court held that there were a range of important factors that should have been considered in determining whether the employment decision was appropriate including the centrality of issues such as sexuality and family life to the right of privacy, the difficulty the applicant would face in securing similar work as an organist with a non-Catholic employer, and that the applicant had not criticised the Church's doctrines but had simply failed to observe them.⁵⁰² As the Court concluded that the German courts had failed to adequately take account of the relevance of these factors in balancing the competing rights of the Church and the applicant it held that there had been a violation of the applicant's right to privacy.⁵⁰³

Similarly, in *Martínez* the Catholic Church decided not to renew the employment contract of a former priest after it became widely known that he was married with

⁵⁰⁰ (2011) 52 EHRR 32 [32].

⁵⁰¹ *Ibid* [71].

⁵⁰² *Ibid* [71]–[73].

⁵⁰³ *Ibid* [73]–[75]. Cf *Obst v Germany* (European Court of Human Rights, Chamber, Application No 425/03, 23 September 2010) where the European Court of Human Rights held in a case involving similar facts that there was no violation of the right to privacy as the German court had taken account of all relevant factors in upholding the validity of a decision by the Mormon Church to dismiss its European director of public relations for committing adultery: [39]–[53].

children and was involved in a public campaign against a range of doctrinal issues including mandatory clerical celibacy.⁵⁰⁴ The European Court of Human Rights held that the central consideration in the case was whether the applicant's right to privacy had been violated.⁵⁰⁵ In finding that no violation had occurred the Court relied upon a range of factors including the importance of respecting the autonomy of religious organisations, the 'heightened duty of loyalty' imposed on religious education teachers, and that the applicant had remained at a meeting that was critical of Church teaching after becoming aware that the media were present.⁵⁰⁶

Freedom of expression would also be a relevant consideration in assessing the models if they allowed religious schools to take into account an employee's private life in making employment decisions. As with the other rights discussed, the importance of freedom of expression is clearly recognised by a wide range of international human rights instruments.⁵⁰⁷ The European Court of Human Rights addressed the relevance of freedom of expression in *Vallauri v Italy*.⁵⁰⁸ The matter concerned a decision by a Catholic university to not renew the contract of a legal philosophy teacher after authorities of the Catholic Church advised the university that the teacher had views that contradicted Catholic doctrine.⁵⁰⁹ The Court held that as the reasons for the non-renewal of his contract had not been adequately

⁵⁰⁴ (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [10]–[17].

⁵⁰⁵ *Ibid* [60], [93].

⁵⁰⁶ *Ibid* [80], [85]–[86]. Interestingly the Court held that the applicant's argument that the non-renewal of his employment contract was a violation of his freedom of expression did not need to be considered separately as the applicant's complaint could be comprehensively assessed under the right to privacy: [92]–[93]. On appeal the Grand Chamber considered that the right to privacy, religious liberty, freedom of expression and freedom of association were relevant to the matter, but similarly decided that as the essence of the applicant's argument was that his contract was not renewed due to the publicity given to his family situation and his membership of an organisation lobbying for changes to Catholic teaching that the matter could be adequately assessed under the right to privacy: *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014) [108], [154]–[155].

⁵⁰⁷ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 19; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 10; *ICCPR* art 19(2); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 13; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 9(2).

⁵⁰⁸ (European Court of Human Rights, Chamber, Application No 39128/05, 20 October 2009).

⁵⁰⁹ *Ibid* [4]–[11].

communicated to Vallauri his freedom of expression had been violated.⁵¹⁰

On the understanding that the different models would allow religious schools to take into account an employee's private conduct in making employment decisions then the inherent requirement test should be regarded as the model that most appropriately respects the right to privacy and freedom of expression. Under the inherent requirement test it is likely that religious schools would only be able to make employment decisions on the basis of mission fit for a minority of employment positions. Therefore religious schools would be unable to legally make adverse employment decisions against the majority of their employees if their private conduct was not consistent with the religious commitments of the school. Further protection for employees would also be provided through the ability of individuals to challenge a religious school's employment decision and require the religious school to explain to a judge why the employee's private conduct prevented them from fulfilling the religious component of a particular employment role. Considering the broad nature of the protections provided by the general exception approach it cannot be regarded as supporting the right to privacy or freedom of expression in this respect. Similarly, the opt-in model would not provide strong support for the right to privacy or freedom of expression compared to the inherent requirement test unless the executive intervened to reduce or remove the level of protections provided to religious schools.

6 FREEDOM OF ASSOCIATION

The need for the State to show substantial respect for the liberty of individuals to establish and join mutually beneficial associations is affirmed by a wide range of international human rights instruments.⁵¹¹ The *ICCPR* is of particular relevance to an

⁵¹⁰ Ibid [51]–[56]. See, also, *Rommelfanger v Germany* (European Court of Human Rights, Chamber, Application No 12242/86, 6 September 1989) where the European Commission of Human Rights held that a doctor's freedom of expression had not been violated when he was dismissed from employment at a Catholic hospital after he had publicly argued in favour of a position on abortion that was inconsistent with Catholic doctrine.

⁵¹¹ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 20(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 11(1); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 16(1); *ICCPR* art 22(1); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217

appropriate understanding of the freedom of association considering it emphasises both the importance of the freedom and the ability of the State to regulate the operation of associations in appropriate circumstances. Article 22 declares that

[e]veryone shall have the right to freedom of association with others ... No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.⁵¹²

In determining the merits of the different models in relation to freedom of association it is important to have an understanding of the nature and importance of the freedom and why it should receive substantial support from the State. Such an understanding will help in both recognising the important social contribution made by religious schools and evaluating the model that best promotes freedom of association.

6.1 THE IMPORTANCE OF FREEDOM OF ASSOCIATION

The State should be committed to protecting freedom of association considering the essential role associations can play in promoting liberty and individual fulfilment, protecting a range of related rights, supporting cultural diversity and promoting the common good.

6.1.1 THE PROMOTION OF LIBERTY AND INDIVIDUAL FULFILMENT

The State should demonstrate a strong commitment to protecting freedom of association as religious and non-religious organisations provide valuable opportunities for individuals to explore personal interests, increase knowledge and skills, develop their character, expand social networks, and discuss and express their

(entered into force 21 October 1986) art 10(1); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) art 2(4); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 26(1)(a).

⁵¹² ICCPR art 22(1), (2).

opinions. As Lenta states: ‘Associational freedom is an essential part of individual freedom: associations represent the choices of their members about how to live’.⁵¹³ Garnett expands on the importance of associations to individuals arguing that they ‘are not only conduits for expression; they are also the scaffolding around which civil society is constructed, in which personal freedoms are exercised, loyalties are formed and transmitted, and individuals flourish’.⁵¹⁴ While Ahdar and Leigh warn that ‘[t]he things we treasure from civil or intermediate associations generally, and religious groups especially—new ways of thinking, the development of concepts of the good life, the inculcation of virtue, respect, loyalty, sacrifice, and so on—may be jeopardized by state conformity to public juridical norms of behaviour’.⁵¹⁵

The United States Supreme Court emphasised the importance of this aspect of freedom of association in *Roberts v United States Jaycees* (*‘Jaycees’*), a case considering whether a mentoring organisation called the ‘United States Jaycees’ should be permitted to continue as a male only organisation.⁵¹⁶ On the importance of freedom of association the Supreme Court declared that ‘individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty’.⁵¹⁷

6.1.2 THE DEVELOPMENT OF JUST STATES

A further reason why States should support freedom of association is that it may produce more stable, cohesive societies. As Brady states: ‘Autonomous religious groups and other voluntary associations ... play an essential role as spaces for retreat for the losers in democratic political processes, and by doing so, they help to maintain the stability of majoritarian political systems’.⁵¹⁸ While Lenta claims that

⁵¹³ Lenta, above n 281, 832.

⁵¹⁴ Richard W Garnett, ‘Religious Freedom and the Nondiscrimination Norm’ in Austin Sarat (ed), *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* (Cambridge University Press, 2012) 194, 225.

⁵¹⁵ Ahdar and Leigh, above n 68, 390 (citations omitted).

⁵¹⁶ 468 US 609, 612–4 (1984).

⁵¹⁷ *Ibid* 619.

⁵¹⁸ Kathleen A Brady, ‘Religious Group Autonomy: Further Reflections About What is at Stake’ (2006–2007) 22 *Journal of Law and Religion* 153, 203.

States that permit their citizens to live their lives in accordance with their deeply held convictions are more likely to attract gratitude and command support. Sensitivity by the government towards group practices is likely to engender political unity, whereas devaluing citizens' culture and beliefs is likely to be met with resentment and political dissatisfaction. Moreover, the existence of civil institutions that operate in accordance with norms at variance with those reflected in government policy may strengthen democracy by providing a competing source of values and fostering debate.⁵¹⁹

Freedom of association is also an important safeguard against oppressive States, and assists in ensuring that other valuable rights such as freedom of speech are appropriately respected. Along these lines, Gedicks argues that associations 'protect the individual freedom of their members against government encroachment by providing an effective vehicle for challenging government power'.⁵²⁰ Similarly, the United States Supreme Court held in *Jaycees* that '[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed'.⁵²¹ Chaput expands on this point arguing that

[m]ediating institutions such as the family, churches, and fraternal organizations feed the life of the civic community. They stand between the individual and the state. And when they decline, the state fills the vacuum they leave. Protecting these mediating institutions is therefore vital to our political freedom. The state rarely fears individuals, because alone, individuals have little power. They can be isolated or ignored. But organized communities are a different matter. They can resist. And they can't be ignored.⁵²²

6.1.3 THE PROTECTION OF CULTURAL DIVERSITY

Social diversity is also promoted through an appropriate respect by the State for freedom of association as it protects the ability of minorities to form organisations

⁵¹⁹ Patrick Lenta, 'Religious Liberty and Cultural Accommodation' (2005) 122 *South African Law Journal* 352, 353 n 2.

⁵²⁰ Frederick Mark Gedicks, 'Toward A Constitutional Jurisprudence of Religious Group Rights' (1989) *Wisconsin Law Review* 99, 158.

⁵²¹ *Roberts v United States Jaycees* (1984) 468 US 609, 619, 622.

⁵²² Charles Chaput, 'Building a Culture of Religious Freedom', *Public Discourse: Ethics, Law and the Common Good* (Online), 27 July 2012 <<http://www.thepublicdiscourse.com/2012/07/6013>>.

where they can socialise with other members of the minority group, meet the common needs of members, and cooperate in addressing threats to their community. Religious schools are significant institutions that support social diversity through providing essential services to religious communities especially religious education, spiritual activities, and various events where adherents can socialise with other members of the community.

On the importance of this aspect of freedom of association the Supreme Court argued in *Jaycees* that ‘[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity, and in shielding dissident expression from suppression by the majority’.⁵²³ Similarly, Lenta argues that associations should not always be expected to ‘conform to public principles, including non-discrimination, when those principles clash with the convictions of members, and the state should refrain as far as possible from interfering with the internal affairs of associations. This is what the protection of diversity requires’.⁵²⁴

6.1.4 THE PROMOTION OF THE COMMON GOOD

Many associations, including religious schools, make an important contribution to the common good through providing training and opportunities for volunteering to their members so they can effectively assist others in the community in need. These associations help the recipients of the charitable work, assist the members of the organisation develop valuable character traits (such as compassion and altruism), expand social networks and promote good will throughout the community.

In addition to the practical benefits organisations provide through the services they deliver to their members and the wider community, many organisations make important contributions to developing social capital within a State. Social capital was defined by Robert Putnam as the ‘[f]eatures of social life—networks, norms and trust—that enable participants to act together more effectively to pursue shared

⁵²³ *Roberts v United States Jaycees* (1984) 468 US 609, 622.

⁵²⁴ Lenta, above n 281, 833. Although the promotion of diversity is a significant benefit of appropriately protecting freedom of association, the importance of respecting diversity is considered in greater detail in the subsequent section of the chapter addressing the promotion of multiculturalism.

objectives ... [s]ocial capital, in short, refers to social connections and the attendant norms and trust'.⁵²⁵ The World Bank adopts a similar definition stating that

[s]ocial capital refers to the institutions, relationships, and norms that shape the quality and quantity of a society's social interactions' and explains the importance of social capital stating that '[i]ncreasing evidence shows that social cohesion is critical for societies to prosper economically and for development to be sustainable. Social capital is not just the sum of the institutions which underpin a society – it is the glue that holds them together.'⁵²⁶

Associations are a major source of social capital within a State as they play a key role in building and strengthening social networks between individuals. The social capital created by associations, including religious associations, is not only created between the members of the association, but also between members and others in the community assisted by the organisations. Religious schools, for example, can play an important role in building social capital among staff members, students and anyone involved with the operation of the school or who may benefit from the operation of the school (such as through school fundraisers for charities, and sporting and artistic events open to members of the local community).

A failure to provide adequate legal protections so that associations can manage their membership and the conduct of their members has the potential to impair the various benefits associations provide to the community, undermine their objectives and culture, and, in the worst case, cause associations to disband. On the importance of providing appropriate legal protections to associations Woolman states that

[w]ithout the capacity to police their membership policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new

⁵²⁵ Robert Putnam, 'Tuning in and Tuning Out: The Strange Disappearance of Social Capital in America' (1995) 28(4) *Political Science and Politics* 664, 664–5.

⁵²⁶ World Bank, *What is Social Capital* (2011) <<http://go.worldbank.org/K4LUMW43B0>>.

members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, an association's very existence could be at risk. Individuals, other groups or a state inimical to the beliefs and practices of a given association could use ease of entrance into and the exercise of voice in an association to put that same association out of business.⁵²⁷

A State that inappropriately regulates the employment decisions of religious schools can undermine the ability of the school to operate as an authentic religious organisation. Such an outcome would deprive the adherents of the school's religion and the wider community of the benefits that can be provided by religious schools. It can also lead to the religious adherents requesting that the school no longer identify itself as belonging to the particular religion (as occurred with the Pontifical Catholic University of Peru).⁵²⁸ A further possibility is that religious adherents may close religious schools if they are unable to operate them in a manner that is compatible with their religious commitments. The chance of this occurring should not be disregarded as other religious organisations have been disbanded by religious groups after anti-discrimination legislation was enacted that required them to act contrary to their religious commitments. Catholic organisations in the United States and the United Kingdom, for example, decided to either stop providing adoption services or completely shut down rather than comply with legislation that required the organisations to provide their services to same-sex couples.⁵²⁹

6.1.5 THE PROTECTION OF RELIGIOUS LIBERTY

The protection of freedom of association is also an essential aspect of ensuring that the right to religious liberty is adequately protected by the State. The relevance of freedom of association to the protection of the right to religious liberty is recognised

⁵²⁷ Woolman, above n 212, 287.

⁵²⁸ See Chapter 4 [3.3] For additional information on the Pontifical Catholic University of Peru and the request by Catholic authorities that it no longer identify as a Catholic institution for adopting policies contrary to the teachings of the Catholic Church see above nn 293–294 and accompanying text.

⁵²⁹ 'Catholic Charities pulls out of adoptions', *The Washington Times* (Washington), 14 March 2006 <<http://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/>>, William Oddie, 'How many Catholic adoption societies have actually closed down; and how many are now quietly handing children over to gay adoptive parents?', *Catholic Herald* (London), 4 July 2013 <<http://www.catholicherald.co.uk/commentandblogs/2013/07/04/how-many-catholic-adoption-societies-have-actually-closed-down-and-how-many-are-now-quietly-handing-children-over-to-gay-adoptive-parents/>>.

by a range of international human rights instruments and bodies. The *Universal Declaration of Human Rights*, for example, declares that ‘[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, *either alone or in community with others and in public or private*, to manifest his religion or belief in teaching, practice, worship and observance’.⁵³⁰ The European Court of Human Rights addressed the relevance of freedom of association to religious liberty in *Hasan and Chaush v Bulgaria*, in which the Court held that the Bulgarian government had inappropriately intervened in a leadership dispute among Bulgarian Muslims.⁵³¹ The Court affirmed that the protection of the associational dimension of religious liberty is essential to ensuring that the religious liberty of individuals is appropriately respected stating that

the autonomous existence of religious communities is ... at the very heart of the protection which [the right to religious liberty] affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected ... all other aspects of the individual’s freedom of religion would become vulnerable.⁵³²

6.2 THE HARM THAT CAN BE CAUSED BY RELIGIOUS ORGANISATIONS

Although it is important to acknowledge the various benefits that can be provided through freedom of association, it is also necessary to note that not all organisations make a positive contribution to society with some organisations being particularly harmful to the common good. In relation to religious associations Hamilton notes that although religious organizations ‘have the capacity to contribute to increasing social justice ... [and that] [r]eligious organizations can be an important challenge to government... it is simply willful ignorance to believe that they are always benign

⁵³⁰ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 18 (emphasis added).

⁵³¹ (2002) 34 EHRR 55 [125].

⁵³² *Ibid* [62]. See also *Sindicatul “Păstorul Cel Bun” v. Romania* (European Court of Human Rights, Grand Chamber, Application No 2330/09, 9 July 2013) where the Grand Chamber held at [137] that ‘[i]n accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members’.

contributors to society'.⁵³³ Religious organisations, Hamilton argues, are 'no different than large corporations. The whole range of destructive behavior can be seen in both: fraud, extortion, misappropriation of funds, lying, deceit, covering up scandals like child abuse or doctoring financial records for the sake of the organization's image, and the list goes on'.⁵³⁴ Bilchitz expands on the possible harmful impact of religious organisations in the context of discrimination arguing that

discrimination may undermine the very social cohesion of society ... associations such as the Nazi party and exclusionary religious groups may lead to a sense of solidarity amongst members but may be extremely harmful to the project of creating a tolerant, egalitarian, multi-cultural community. A liberal society has a very strong interest in ensuring that the associations that develop within it create an 'overlapping consensus' in favour of values such as dignity, equality and freedom. In turn, allowing discrimination to continue unabated in religious communities may ultimately undermine efforts to create a wider political community founded upon equality and that values diversity.⁵³⁵

It is indisputable that individuals acting through religious organisations have caused enormous harm to many individuals. However, the possibility of the harm that can be caused by religious organisations is the key reason why freedom of association is not an absolute right. The State should show substantial respect to the freedom of association of religious (and non-religious) organisations. However, these organisations can legitimately be regulated, and even abolished, if it is necessary in order to protect the rights of others.

6.3 THE MODEL THAT MOST APPROPRIATELY RESPECTS FREEDOM OF ASSOCIATION

The general exception approach involves a significant violation of freedom of association through excluding the attributes of race, age and a person's responsibilities as a carer from the scope of the protections—an exclusion that can have a substantial adverse impact on the ability of some religious groups to select

⁵³³ Marci A Hamilton, 'Church Autonomy Is Not a Better Path to "Truth"' (2006-2007) 22 *Journal of Law and Religion* 215, 223.

⁵³⁴ *Ibid* 215–6.

⁵³⁵ Bilchitz, above n 211, 222, 240.

their employees for mission fit. The opt-in model also has the potential to severely limit freedom of association in the event that the executive decides to use its power to limit or remove the legal protections provided to a religious school. However, as the general exception approach only limits freedom of association in relation to a few attributes, and it is likely that the power under the opt-in model for the executive to limit or remove the legal protections would only rarely be used it is appropriate to conclude that overall these models show substantial respect for freedom of association.

Whether the inherent requirement test demonstrates an adequate level of respect for freedom of association in the context of religious schools is more problematic. The possibility that the inherent requirement test could violate freedom of association was clearly expressed by the Christian lobby group, Salt Shakers, who argued that

[w]hen religious schools employ staff they operate under the freedom of association - for religious schools this is the ability to employ staff who have a particular belief system and practice. The proposal relating to the 'inherent requirement' test on employment for religious bodies and religious schools is an unreasonable limitation of the freedom of association.⁵³⁶

Such a straightforward conclusion that the inherent requirement test violates freedom of association may not be appropriate. Religious organisations will often contain sub-groups with substantially different theological and ethical views who are in conflict with each other for control of the organisation. Any adverse action taken against any of the sub-groups can be met with claims by those adversely affected that the action violates their freedom of association.⁵³⁷ Bilchitz uses the example of a gay Anglican priest who is dismissed from his position because of his sexuality to explain how the right to association can be used to support different positions. Bilchitz argues that the example

⁵³⁶ Salt Shakers, *Victoria - Equal Opportunity Bill - SARC submissions* (2010) <<http://www.saltshakers.org.au/news/latest-news/606-victoria-equal-opportunity-bill-sarc-submissions>>.

⁵³⁷ Bilchitz, above n 211, 230.

demonstrates the difficulty for the state of avoiding taking sides in such a dispute as well as the clash between the freedom of association of differing groups *within* a religious association. If it were to uphold the dismissal of the priest, it would respect the freedom of association of those who believe that a gay priest may not hold a position within the Anglican church. If it prevents the dismissal, it would be defending the freedom of association of gay Anglicans to belong to the church and hold leadership positions therein. In such circumstances, the question is not one of simply defending the freedom of association of a religious grouping ... there is a rather an internal clash within the group. Courts thus are required to decide upon whose side they should intervene. Both the presumption of equality, and the harmful nature of discrimination ... require the state to favour the group against which discrimination is being perpetrated.⁵³⁸

The argument proposed by Bilchitz would support no protections being provided under anti-discrimination legislation to religious schools. If some kind of protection had to be provided then the inherent requirement test would be preferred as it better respects freedom of association (as understood by Bilchitz) through limiting the ability of a dominant sub-group to exclude members of other sub-groups from most employment positions at religious schools.

Freedom of association, however, would be a right of limited importance if persons who are incompatible with, or disagree with some aspect of, an organisation can call upon the State to intervene to ensure that they are included or can remain in the organisation. The United States Supreme Court in *Watson v Jones* emphasised the inappropriateness of the State intervening to attempt to resolve a controversy within a religious group holding that

[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies,

⁵³⁸ Ibid 230–1.

if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.⁵³⁹

To show appropriate respect for freedom of association the State should avoid intervening in the internal disputes of religious groups as far as possible and allow the religious adherents to determine the issue for themselves. Such a resolution could involve a range of outcomes including some adherents of the religious group deciding to alter their views, the religious group agreeing to formally divide, or the individuals who disagree with the current position of the religious group leaving the religious group and joining another religious community or establishing their own religious association. On the appropriateness of the last option Spinner-Halev argues: ‘The proper liberal response surely is not that the state should pressure or force the group to change its practices, but that the disgruntled members should leave the group and form or join another’.⁵⁴⁰ Similarly, Ahdar and Leigh note:

Freedom to associate with others of like mind necessarily involves freedom to exclude people who do not share the beliefs in question. In a liberal society, those so excluded are free to join other religious groups (or to form their own group) and so this should not be seen as harmful. On the contrary: if the state were to prevent exclusivity through its non-discrimination laws, this would amount to denial of a basic aspect of religious liberty. Paradoxically, perhaps, exclusive societies add to the diversity of society.⁵⁴¹

The State intervening to limit an organisation’s ability to exclude individuals may (or may not) be justifiable on the basis of other rights (such as the right to equality), but allowing individuals to rely on the freedom of association to justify a law that requires an organisation to include or retain a person involves a distorted interpretation of the freedom of association. As the United States Supreme Court stated in *Jaycees*: ‘There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire ... Freedom of association therefore plainly presupposes

⁵³⁹ (1871) 80 US 679, 728–9. See Chapter 4 at [4.3] For an overview of the facts of the case see above n 346 and accompanying text.

⁵⁴⁰ J Spinner-Halev, ‘Liberalism and Religion: Against Congruence’ (2008) 9 *Theoretical Inquiries in Law* 533, 566 quoted in Ahdar and Leigh, above n 68, 390.

⁵⁴¹ *Ibid* 360.

a freedom not to associate'.⁵⁴² Michael McConnell expands on this point in an educational context:

Individual teachers who deviate in theory or practice (or both) from the teachings of the community should not be allowed to use litigation to pressure the community to accept alternative versions of how its beliefs should be taught and exemplified. The rights of such individuals to withdraw and pursue their own beliefs and lifestyles must be respected, but such protection does not include the right to erode religious autonomy and authenticity by coercing the religious community to structure itself and its understanding of how (and by whom) its beliefs should be taught in a manner that is at odds with those beliefs.⁵⁴³

There are further problems with requiring associations such as religious schools to employ individuals with poor mission fit. Such a requirement can have the undesirable consequence of communicating a message to those involved with the school and the outside world that the school does not adhere to the relevant religious teaching (or at least considers that is only of limited importance). For example, under the inherent requirement test a religious school may be required to employ a person in a non-marital sexual relationship that contradicts the teachings of the school's religion. If the staff member's situation became widely known it may lead some to conclude that the school (and possibly the associated religion) is either accepting of such a situation or at least views their situation as not sufficiently serious to justify the school dismissing the person. Even for individuals who understand that under the inherent requirement test the school would legally be unable to deny the person employment, the inclusion of the individual may still involve the school sending the message that the person's conduct is not of sufficient gravity to cause the relevant authorities to modify the structure of the school or close the institution. A step that the authorities may be unwilling to take, not on the basis that employing a person with poor mission fit is not a significant issue, but due to concern for staff members and students, adherents of the religious group and members of the community.

The Supreme Court of the United States in *Boy Scouts of America v Dale* ('Dale') argued that the forced inclusion of a person within a group can send a message to

⁵⁴² (1984) 468 US 609, 623.

⁵⁴³ McConnell, above n 374, 4–5.

those within and external to the group about the organisation's values and objectives.⁵⁴⁴ The case involved a decision by the Boy Scouts to exclude a volunteer scoutmaster who was a prominent gay rights activist on the basis that his leadership role with the Boy Scouts could be understood as sending a message to the community that the Boy Scouts approved of homosexual activity.⁵⁴⁵ The majority of the court held that it was contrary to the policy of the Boy Scouts to promote the acceptability of homosexual activity and consequently upheld the legality of the decision to exclude the scoutmaster on the basis that requiring the association to retain the man as a member 'would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior'.⁵⁴⁶

Another important response to the argument advanced by Bilchitz is the disproportionate impact that this understanding of freedom of association could have on schools based on minority religious groups if it were to be accepted. If a religious school managed by a minority group made an adverse employment decision against someone on the basis that they had poor mission fit then that person—and any of their supporters within the religious school—would normally be able to move to other schools or establish a new school (or even a new religion) that more closely adheres to their own views. However, as discussed above in the section on minority rights, adherents of minority religions are not in the same position as they will be unable to obtain the unique educative and formative benefits provided by their

⁵⁴⁴ 530 US 640, 653 (2000).

⁵⁴⁵ Ibid 643.

⁵⁴⁶ Ibid 653. Cf *Christian Legal Society v Martinez*, 130 S Ct 2971 (2010) concerning a refusal by the Hastings College of Law to refuse to register the Christian Legal Society—and thereby deprive it of financial support and the ability to use some university resources—due to its requirement that members adhere to a Statement of Faith that would have had the effect of excluding a person 'who engages in "unrepentant homosexual conduct" or holds religious convictions different from those in the Statement of Faith': 2974. In a 5-4 decision the majority of the Supreme Court upheld the validity of the College's decision arguing that the College's policy of denying funding to student groups with a restrictive membership policy was a neutral and reasonable policy, and that previous authorities (such as *Jaycees* and *Dale*) were not directly relevant as the Society was merely deprived of access to university resources and could continue to operate within the campus adhering to its restrictive membership policy: 2978; 2981; 2985-6. Interestingly in 2013 the Boy Scouts of America removed their prohibition on openly gay youth serving as Boy Scouts while retaining their prohibition on openly gay adults being members of the organisation: Boy Scouts of America, *Boy Scouts of America Statement* (23 May 2013) <<http://www.scouting.org/sitecore/content/MembershipStandards/Resolution/results.aspx>>. Although some judges would likely consider the change to be significant if the issue were to be revisited by the US Supreme Court, the point the majority of the Court made in *Dale* about the undesirable consequences of forced inclusion of a person within a group remains valid.

religious school from a government school or a school based on another religion. Therefore a legal provision that undermines the operation of schools belonging to minority religious communities will often be a major violation of their freedom of association as it can deprive them of the opportunity to be involved in any schools that are authentic expressions of their religious commitments.

The prohibition under the inherent requirement test against making adverse employment decisions on the basis of mission fit for most employment positions would be a substantial violation of freedom of association that could not be justified through an appeal to a distorted understanding of freedom of association. In contrast to the inherent requirement test, freedom of association is substantially protected by both the general exception approach and the opt-in model as in most situations both approaches involve only a minimal interference by the State in the ability of religious individuals to form educational associations in a manner that complies with their religious commitments.

7 MULTICULTURALISM

The effective promotion of multiculturalism is a major priority for Australian governments. The strong support for multiculturalism is clearly indicated in a policy document approved by the Prime Minister and the Minister for Immigration and Citizenship declaring that the ‘Australian Government is unwavering in its commitment to a multicultural Australia. Australia’s multicultural composition is at the heart of our national identity and is intrinsic to our history and character’.⁵⁴⁷ Considering this commitment to multiculturalism it is important to understand what the government means by the term. The Australian Department of Immigration and Citizenship defines multiculturalism as:

a term which describes the cultural and ethnic diversity of contemporary Australia. We are, and will remain, a multicultural society. As a public policy multiculturalism encompasses government measures designed to respond to that diversity ... The Commonwealth Government has identified three dimensions of multicultural policy: [1]

⁵⁴⁷ Australian Government Department of Immigration and Citizenship, 'The People of Australia—Australia’s Multicultural Policy' (February 2011) 2.

cultural identity: the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion; [2] social justice: the right of all Australians to equality of treatment and opportunity, and the removal of barriers of race, ethnicity, culture, religion, language, gender or place of birth; and [3] economic efficiency: the need to maintain, develop and utilize effectively the skills and talents of all Australians, regardless of background.⁵⁴⁸

It is important to note that the definition recognises a specific religious dimension to multiculturalism. That multiculturalism includes a religious component was emphasised by the Anglican Diocese of Sydney in a submission to the Commonwealth government on anti-discrimination legislation in which the authors stated that they were ‘concerned about an apparent rising expectation that all in society must abide by the liberal values of the majority. Consistent with the Government’s commitment to multi-culturalism, there needs to be space for plurality in terms of moral codes’.⁵⁴⁹ The importance of religious expression to multiculturalism was also affirmed by the European Court of Human Rights in *Moscow Branch of the Salvation Army v Russia*:

The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on [freedom of religion] ... the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society.⁵⁵⁰

As religion is an important part of multiculturalism a State that is committed to promoting multiculturalism needs to demonstrate a commitment to supporting the expression of religion by adherents individually and collectively through the institutions that religious adherents establish.

⁵⁴⁸ Australian Government Department of Immigration and Citizenship, *National Agenda for a Multicultural Australia: What is multiculturalism?*. Although the documents cited were produced by the Commonwealth government no NSW documents were located that indicated that the NSW government adopted a significantly different approach.

⁵⁴⁹ Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 2 February 2012, 9.

⁵⁵⁰ [2007] 44 EHRR 46, [57]–[58].

7.1 THE VALUE OF MULTICULTURALISM

The importance of the State having a strong commitment to multiculturalism is supported on a range of grounds. Multiculturalism can assist individuals develop a better understanding of the cultural beliefs and practices of different groups which can enhance ‘respect and support for cultural, religious and linguistic diversity’.⁵⁵¹ Furthermore, as an individual’s ability to participate in the cultural and religious aspects of their identity can be important to individual fulfilment an appropriate respect for multiculturalism permits individuals ‘to practise and share in their cultural traditions and languages within the law and free from discrimination’.⁵⁵² Multiculturalism can also provide ‘a competitive edge in an increasingly globalised world ... [that can help] create a strong economy, drives prosperity and builds Australia’s future’.⁵⁵³ An appropriate respect for multiculturalism also allows a State to satisfy applicable obligations under international human rights law. Article 27 of the *ICCPR*, for example, imposes obligations on States to support multiculturalism declaring that for States in which ‘ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.⁵⁵⁴

Despite these arguments supporting the merits of multiculturalism there are significant concerns regarding the appropriateness of the State adopting a multicultural policy. Such concerns are being expressed at the highest level of government. For example, the UK Prime Minister, David Cameron, the German Chancellor, Angela Merkel, and the former French President, Nicolas Sarkozy, have all publicly stated that multiculturalism is a failed policy.⁵⁵⁵

One of the major concerns about multiculturalism, argues Triggs, is that the ‘very idea that society can be split up into different groups abiding by different legal

⁵⁵¹ Department of Immigration and Citizenship, above n 545, 2.

⁵⁵² *Ibid* 2.

⁵⁵³ *Ibid* 2, 6

⁵⁵⁴ *ICCPR* art 27.

⁵⁵⁵ John F Burns, ‘Cameron Criticizes ‘Multiculturalism’ in Britain’, *The New York Times* (online), 5 February 2011 <<http://www.nytimes.com/2011/02/06/world/europe/06britain.html>>.

standards challenges the unity and cohesion of a country'.⁵⁵⁶ McCrudden expands on some of the major criticisms stating that multiculturalism

has been criticized from several different angles: that multiculturalism stifles debate, that it has fostered separateness, that it provides encouragement to terrorism, and that it denies economic and social problems associated with particular ethnic groups. Prominent among the criticisms, however, is the view that multiculturalism fosters cultural relativism and that it protects from criticism cultural and religious practices associated with particular ethnic minority groups.⁵⁵⁷

Probably the most effective response to these kinds of criticisms is that there are a variety of ways in which multiculturalism can be understood. One approach, indicated by McCrudden, involves the State providing extensive protections to religious and cultural groups even to the extent that it allows individuals in these groups to engage in conduct that would widely be understood as violating human rights. Such an approach is rejected by the Australian government, which has explicitly adopted a three part response to the harmful consequences that may be produced by some versions of multiculturalism:

[1] multicultural policies are based upon the premises that all Australians should have an overriding and unifying commitment to Australia, to its interests and future first and foremost; [2] multicultural policies require all Australians to accept the basic structures and principles of Australian society - the Constitution and the rule of law, tolerance and equality, Parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes; and [3] multicultural policies impose obligations as well as conferring rights: the right to express one's own culture and beliefs involves a reciprocal responsibility to accept the right of others to express their views and values.⁵⁵⁸

⁵⁵⁶ Roger Trigg, *Equality, Freedom, and Religion* (Oxford University Press, 2012) 7.

⁵⁵⁷ Christopher McCrudden, 'Multiculturalism, freedom of religion, equality and the British constitution: The JFS case considered' (2011) 9(1) *International Journal of Constitutional Law* 200, 204, 207. For a more detailed account of the criticisms aimed at multiculturalism and the merits of these criticisms see, eg, Lauchlan Chipman, 'The menace of multi-culturalism' (1980) 24(10) *Quadrant* 3; Will Kymlicka, 'The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies' (2010) 61(199) *International Social Science Journal* 97; Steven Vertovec, 'Towards post-multiculturalism? Changing communities, conditions and contexts of diversity' (2010) 61(199) *International Social Science Journal* 83.

⁵⁵⁸ Department of Immigration and Citizenship, above n 548.

As the Australian Government's definition makes clear, an attempt to justify an unethical practice on the basis that it is justified according to a particular religious or cultural tradition is incompatible with the Australian Government's understanding—and any reasonable understanding—of multiculturalism. The appropriate approach is one that recognises that cultural diversity can produce many benefits, but it needs to be balanced against other competing interests. A State can be justified in not protecting particular religious or cultural expressions if this is necessary to respect other legitimate social interests. Importantly, such an approach by the State would not be in violation of multiculturalism, but rather in accordance with any proper understanding of the term.

7.2 THE CONTRIBUTION OF RELIGIOUS SCHOOLS TO MULTICULTURALISM

For the various reasons discussed in Chapter 2, religious schools are institutions of central importance to many religious communities and help to sustain the distinctive religious and cultural identity of many social groups. A further benefit of religious schools is that they are active in the community and help to develop mutual respect and understanding between different cultural groups. Many religious schools, for example, have public functions open to all members of the community (such as school fetes, public presentations and drama nights) and also actively promote volunteer work in the community.

Religious schools also play an important role in promoting respect for multiculturalism within religious schools as there is often considerable racial, cultural and religious diversity among staff members and students in many religious schools. Catholic Church officials in Victoria emphasised this in their submission to the Victorian Inquiry into the State's anti-discrimination legislation advising the Victorian government that 19% of students in Catholic schools are non-Catholic.⁵⁵⁹ This diversity would likely play an important role in assisting those at the school develop tolerance and understanding of a variety of different religious and cultural commitments. On the important contribution that both religious and non-religious

⁵⁵⁹ Catholic Church of Victoria, Submission No 663 to SARC, *Inquiry Into Exceptions and Exemptions to the Equal Opportunity Act 1995*, 8 July 2009 quoted in Tobin, above n 149, 28.

schools can make in promoting a successful multiculturalism Dr Ken Boston, a Director-General of the NSW Department of Education, stated that ‘[t]hrough successive waves of immigration dating back to the last century, Australia’s public schools, together with Catholic parish schools, have been without doubt the most important factor in shaping the pluralist, democratic multicultural nation which Australia is today’.⁵⁶⁰

7.3 THE MODEL THAT BEST PROMOTES MULTICULTURALISM

The inherent requirement test could be considered to be more supportive of multiculturalism as it will likely lead to greater religious and cultural diversity within all religious schools as individuals could not be excluded from most employment positions. A major concern about religious schools is that they can provide a limited social experience to their students and staff members through relying on the legal protections provided by approaches such as the general exception approach and the opt-in model to exclude persons who are considered to have poor mission fit. On the dangers of such an approach Wilkinson, Denniss and Macintosh argue that

[t]he creation of schools that are almost exclusively comprised of students and teachers from a single religious or ethnic group leads to a concern that these schools will be unable to promote a real understanding of difference, based on actual engagement with others, and that as a consequence society will become more divided.⁵⁶¹

Adopting the inherent requirement test would result in a more diverse staff body, which could provide those attending religious schools with important opportunities to understand and appreciate the religious and cultural diversity that exists within the community. A more diverse staff body may also assist in countering any inappropriate views that may exist within school communities about individuals on the grounds of attributes such as their gender, sexuality and religion. In particular, religious diversity in the staff body may benefit students at religious schools—especially if their family members and friends are adherents of the school’s

⁵⁶⁰ National Catholic Education Commission, Submission to the Australian Multicultural Foundation—The Contribution of Religion and Religious Schools to Cultural Diversity and Social Cohesion in Contemporary Australia, July 2002, 1–2.

⁵⁶¹ Deb Wilkinson, Richard Denniss and Andrew Macintosh, above n 3, 48.

religion—as it may be one of the few occasions during their childhood where they are able to encounter individuals of different faiths and learn about alternative worldviews.

A major problem with the claim that the inherent requirement test could provide these benefits is that attempts to force the workforce of religious schools to be as diverse as that of government schools and the wider community can undermine rather than encourage cultural diversity. On this point, Parkinson argues that ‘[o]ne way of crushing the diversity that faith-based schools provide is to insist on it. By requiring diversity in the employment of teaching staff within the faith-based school, its distinctive character as a faith-based school is undermined’.⁵⁶² Failing to provide adequate protections for religious schools to make employment decisions on the basis of mission fit undermines their ability to become religiously and culturally distinct institutions and by doing so fails to show appropriate respect for multiculturalism. The possibility that the inherent requirement test could be detrimental to the promotion of multiculturalism was emphasised by Nicholas Kotsiras in the parliamentary debates held in Victoria regarding the merits of implementing the test. Kotsiras stated that the inherent requirement test

is against the principles of multiculturalism, and it should be opposed. We talk about multifaith and about supporting multiculturalism: this goes against the notion of multifaith in Victoria. I hear members opposite stand up, function after function, and talk about supporting our multicultural, multifaith community, yet they bring in this flawed legislation that does the opposite; it restricts religious freedom ... it will do nothing for Victoria, it will do nothing for small business, and it will do nothing for Victoria's multicultural communities.⁵⁶³

A further problem with the inherent requirement test is that the use of legal measures to achieve a more diverse school environment may undermine, rather than promote, mutual understanding and tolerance between individuals of different religious and cultural backgrounds. Studies conducted by Rivka Witenberg, a professor of behavioural science, into the impact of diverse educational environments on racial tolerance are of particular relevance. Witenberg explored the level of racial tolerance

⁵⁶² Parkinson, above n 282, 13.

⁵⁶³ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 1058 (Nicholas Kotsiras).

among school students of diverse backgrounds and found that students demonstrated greater tolerance for Indigenous Australians than they did for students from Asian or English backgrounds despite the students having limited, if any, contact with Indigenous Australians.⁵⁶⁴ The finding led Witenberg to tentatively conclude that

contact does not necessarily promote tolerance and acceptance. Rather it may entrench preconceived attitudes. Thus the notion that contact with people whom we dislike, fear or feel threatened by may eliminate prejudices (induced by the socialisation process) as previous research has suggested may still be valid but this relationship appears to be more complex and need further clarification.⁵⁶⁵

Indeed limiting the ability of religious schools to select employees for mission fit may even be counterproductive. If those involved with the religious schools consider that the diversity in the staff body has been forced upon them and that the diversity is undermining their ability to create schools with authentic religious identities then this may have a substantial adverse impact on the views of adherents of the religious community and be counterproductive to the promotion of respect for diversity.

The general exception approach and the opt-in model provide broad protections to employment decisions allowing religious schools to develop an internal culture that authentically represents and promotes the religious and cultural commitments of the particular group. Some religious schools will rely on the protections to achieve, as far as possible, a staff body that consists only of religious adherents.⁵⁶⁶ These schools can play an important role in promoting multiculturalism as the uniform environment would likely assist in effectively transmitting an understanding of the religious and cultural commitments of the religious group to others involved in these schools. For the students who attend such schools it should be noted that there will be a variety of alternative opportunities available for them to learn about the diversity that exists in the community through employment, online resources, social and sporting activities, and mainstream media. Other religious schools will employ a diversity of employees,

⁵⁶⁴ Rivka Witenberg, 'Do Unto Others: Toward Understanding Racial Tolerance and Acceptance' (2000) 1(5) *Journal of College and Character* 1, 6.

⁵⁶⁵ Ibid.

⁵⁶⁶ The existence of such an approach was confirmed by Evans and Gaze in their study on religious schools: Evans and Gaze, 'Discrimination by Religious Schools: Views From The Coal Face', above n 17, 404–5.

even in circumstances where the school could have refused to employ particular staff members on the grounds of mission fit.⁵⁶⁷ Importantly, the protections provided by both models allow the authorities of these schools to develop a diverse staff body while ensuring that an authentic religious environment within the school is maintained. Consequently, the protections provided by these models allow these schools to promote multiculturalism both through employing staff members with different religious and cultural backgrounds—which can encourage mutual understanding and respect—and also through employing a sufficient number of religious adherents to ensure that an authentic religious culture is maintained so that those involved with the schools can learn about the religious community on which the schools are based.

As both the general exception approach and the opt-in model allow religious schools to develop an authentic religious environment they should be understood as more supportive of multiculturalism than the inherent requirement test, which can fail to adequately respect multiculturalism through undermining the ability of religious schools to become distinctive religious and cultural organisations. In a comparison between the opt-in model and the general exception approach, the opt in model should be regarded as the superior approach considering the Australian government's understanding that respect for human rights is a central aspect of multiculturalism. The automatic and unregulated nature of the general exception approach fails to provide the government with a sufficient role to ensure that religious schools do not abuse the protections provided to them. The opt-in model, however, provides both the courts and the executive with significant legal powers to limit or remove the protections in the event that a religious school is found to be acting in way that fails to adequately respect human rights.

8 HUMAN RIGHTS EDUCATION

The need to promote the importance of human rights to students and others involved with religious (and non-religious) schools is widely acknowledged. Article 26(2) of the *Universal Declaration of Human Rights*, for example, declares that '[e]ducation shall be directed to the full development of the human personality and to the

⁵⁶⁷ Ibid 405–9.

strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups'.⁵⁶⁸ The importance of ensuring that education effectively promotes human rights is further emphasised in a range of other human rights instruments in similar terms including the *International Covenant on Economic Social and Cultural Rights*, the *1981 Declaration*, the *Convention on the Rights of the Child*, and the *Convention Against Discrimination in Education*.⁵⁶⁹

Providing human rights education at schools is one of the most effective ways that a State can fulfill its obligations under international law to educate the community about the importance of understanding and respecting human rights standards. Children and young adults are the ideal focus of human rights campaigns considering they are still in the process of determining their worldview, they normally have more time available to engage with human rights campaigns, and have most of their life ahead of them to influence the world. Additionally, human rights education can be effectively delivered in a school environment considering that most students attend the same institution for many years allowing relevant information to be delivered in a series of sessions over several years and incorporated throughout the curriculum. Also, if human rights education is carried out by teachers at the institution then it is likely to be even more influential considering the high status teachers have within the educational environment due to the authority provided to them by the school, the State, parents, and often the religion on which many schools are based. Moreover, the promotion of human rights at schools can be particularly effective as it will often be possible to expand the focus of any measures implemented to include staff members, parents and other members of the community involved with the school.

8.1 THE EDUCATIVE ROLE OF THE LAW

Religious schools can promote views and practices that are arguably contrary to a

⁵⁶⁸ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 26(2).

⁵⁶⁹ *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 13(1); *1981 Declaration* art 5(2)–(3); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 29(1); *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) art 5(a).

correct understanding of human rights including inappropriate views on the significance of gender, the ethics of non-marital sexual activity, the definition of marriage, and the appropriate scope of religious liberty. Evans and Gaze, for example, argue that

[p]owerful institutions such as religious organizations, which often aim to govern cultural, personal, moral and political actions and behavior, can be influential in perpetuating gender stereotypes that form a basis for sex or sexuality-based discrimination, or promoting inter-religious hostility that gives rise to religious discrimination. A society that has a serious commitment to principles of nondiscrimination cannot, therefore, lightly grant exemptions to non-discrimination laws.⁵⁷⁰

When the State provides protections for employment decisions it can be seen as a public statement either endorsing the values of religious groups, or at least indicating that the values are not sufficiently unacceptable that individuals denied employment by religious groups should be able to obtain a legal remedy. The protections can thus be understood as undermining human rights education through communicating the view to the community that the right to equality is of limited importance and there is something significant about the variations in attributes such as gender, sexuality and marital status that can justify religious schools making adverse employment decisions. On the dangers of providing protections to religious schools Rhiannon warns that ‘schoolyards can be intolerant places and when prejudice is reinforced officially and legally it sends a message to kids that prejudice is legitimate. It institutionalises prejudice and intolerance’.⁵⁷¹ Sunstein similarly argues that the greater willingness of States to modify the operation of anti-discrimination legislation compared to other civil and criminal laws in order to protect religious institutions—a practice that Sunstein refers to as the ‘asymmetry thesis’—can promote the view that equality is a social objective of limited importance.⁵⁷² Evans and Ujvari expand on the harmful message that the protections for religious schools may send:

⁵⁷⁰ Evans and Gaze, 'Between Religious Freedom and Equality: Complexity and Context', above n 92, 44.

⁵⁷¹ New South Wales, *Parliamentary Debates*, Legislative Council, 13 October 2005, 18559.

⁵⁷² Cass R Sunstein, 'On The Tension Between Sex Equality And Religious Freedom' (Public Law and Legal Theory Working Paper Series, University of Chicago Law School, 2007) 13.

Why is it that, for example, a religious school that wanted to demonstrate ritual slaughter of animals for meat would, in Australia, have to comply with animal welfare statutes, but in many states, a religious school that wanted to sack a teacher for having a homosexual relationship could do so without regard to non-discrimination laws that apply to other schools? The message that such exemptions can give is that discrimination is relatively minor in comparison to other forms of harm against which the law protects and from which most religious schools have no exemptions. Law has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value; something which can be avoided if desired.⁵⁷³

Many of these critics would prefer for there to be no protections provided for religious schools. However, if a State were committed to providing some protections then they would likely consider the inherent requirement test to be superior to the alternatives. The reduced scope of the protections provided to religious schools under the inherent requirement test arguably promotes the importance of human rights, especially the right to equality, more effectively than alternative approaches. The restriction of the protections to those employment positions that are inherently religious can also help to promote an understanding that the protections are provided not because rights such as those relating to equality are of limited importance, but because there are other rights that also need to be respected. Furthermore, a religious school with a diverse staff body would be able to more effectively help students and others involved with the school understand, and be respectful of, the diversity that exists within the community.

8.2 THE LACK OF CONSENSUS ON APPLICABLE HUMAN RIGHTS STANDARDS

The claim that the protections provided for the employment decisions of religious schools should be limited or removed as they undermine human rights education is problematic as a failure to provide adequate protections to religious schools could

⁵⁷³ Evans and Ujvari, above n 494, 42.

itself undermine human rights education. If the State were to limit the protections provided then this may fail to adequately promote the importance of a range of rights—such as religious liberty, freedom of association, and the right to equality—through the inappropriate message that the limitations would send to the community.⁵⁷⁴ Furthermore, the limitations would undermine the ability of religious schools to employ individuals with good mission fit who could help students and others involved in the religious school develop an understanding of human rights that is consistent with the school's theological commitments.

Any proposed solution to a situation involving a conflict of different rights will inevitably prioritise some rights over others and allow critics of the solution to claim that it is undermining human rights education through failing to adequately recognise and promote the importance of the rights that were limited. If a particular approach to resolving a conflict involving different rights were widely accepted as the preferable solution then it would be more acceptable to criticise alternative solutions as undermining the promotion of human rights standards throughout the community. However, there is widespread disagreement regarding which approach to regulating religious schools best respects the different rights involved. Consequently a claim that models like the opt-in model or the general exception approach undermine human rights education should be understood simply as one perspective on the appropriate solution to a complex issue involving the balancing of a variety of human rights rather than a consensus that the approaches actually do breach accepted human rights standards.

Even if there were a consensus that approaches like the general exception approach or the opt-in model undermine the effective promotion of human rights this would not necessarily support the adoption of the inherent requirement test. Implementing a model for regulating employment decisions that is strongly opposed by many religious schools could be counterproductive to an attempt to promote human rights standards as it may make a significant number of the individuals attending these religious schools antagonistic to both the staff members who the school has been

⁵⁷⁴ For a discussion of the claim that a failure to provide appropriate protections for the employment decisions of religious schools can violate the right to equality see above nn 226–234 and accompanying text.

forced to employ and the State for adopting a measure that may undermine the operation of their schools. There are other, more effective ways for the government to promote human rights standards—such as media campaigns and providing support to human rights advocacy groups—that do not involve measures that substantially undermine the ability of religious schools to fulfill their religious objectives.

8.3 THE MODEL THAT BEST PROMOTES HUMAN RIGHT EDUCATION

Each of the three models would affect the type of human rights education provided within religious schools and send a message to the community regarding the importance of different human rights. Considering that there currently is no widespread agreement on the correct resolution of the rights conflict involved in providing protections to religious schools under anti-discrimination legislation it is not possible to definitively conclude that any of the three models should be favoured on the basis that it more effectively promotes human rights standards than the alternative approaches.

Nevertheless, there are some significant reasons to consider that the opt-in model should be the preferred model in relation to human rights education until a broad consensus on the correct approach in resolving the conflict of rights is reached. The opt-in model helps to ensure that the right to religious liberty is tailored to the requirements of particular religious schools and so avoids the problems of the general exception approach of providing excessive protections on the basis of the right to religious liberty, which has the risk of sending an inappropriate message to the community that the right to religious liberty is of overwhelming importance compared to other rights. Furthermore, the opt-in model avoids the various problems involved with the inherent requirement test especially the undermining of the religious dimensions of religious schools, which can have the opposite effect of inappropriately sending a message to the community that rights such as religious liberty and freedom of association are of limited importance. Also the requirement imposed on religious schools to produce a public document explaining their need for the legal protections could play a valuable role in explaining to the community that the protections provided can be supported through a range of human rights, and that

the protections are provided not with the aim of permitting schools to exclude individuals, but rather to help schools become authentic religious communities through selecting employees according to mission fit.

9 COMPLIANCE COST

An important consideration in determining the merits of the models is the compliance cost associated with the models incurred both by the State and any parties that might be affected by the models. The compliance cost should not be considered only in terms of how expensive and time intensive a particular model will likely be for the various parties, but also in relation to the emotional costs that the parties will incur in attempting to comply with the model and achieve a desired outcome.

9.1 THE GENERAL EXCEPTION APPROACH

The general exception approach is the model that requires the least amount of effort and resources by the State, the religious school and any persons who might be affected by an employment decision made by a religious school. It will normally be clear that a religious school is covered by the protections granted to private educational institutions and that an employment decision made was not in violation of the Act. Some individuals will be harmed both by the adverse employment decision of religious schools and the lack of a legal remedy—considerations relevant to an assessment of the merits of the general exception approach—however, in terms of compliance cost the burden imposed on individuals is low. In most situations it will be clear that the protections apply allowing both the individual and the religious school to avoid experiencing the emotional harm and financial costs involved with litigation. As litigation between the parties is unlikely there will also be a low compliance cost for the State as it will not be required to fund investigations by the ADB into employment decisions or any subsequent conciliations or court hearings. The inability to locate a single court decision that addressed the protections provided to private educational authorities in the Act despite there being more than 1000 non-

government schools in NSW provides strong support for the conclusion that the general exception approach will have a low compliance cost.⁵⁷⁵

9.2 THE INHERENT REQUIREMENT TEST

In comparison to the general exception approach the inherent requirement test has a high compliance cost. The inherent requirement test will substantially increase the workload of courts through requiring them to hear cases where individuals dispute a religious school's claim that mission fit is an inherent requirement of a particular employment position. Considering the substantial number of submissions to government inquiries from religious individuals and organisations if an inherent requirement test were introduced in NSW many religious schools would claim that mission fit is an inherent requirement for most, if not all, of their employment positions.⁵⁷⁶ On the understanding that there are currently more than 40,000 employment positions at religious schools in NSW it likely that there would be many challenges to claims made by religious schools regarding the inherent requirements of the positions resulting in a very heavy workload for the courts.⁵⁷⁷

It is possible that a court might hold that the systemic Catholic schools could be considered as a single entity so any decision regarding an employment position and the significance of a particular attribute for one Catholic school might resolve the issue for all, or at least most, Catholic schools. However, even if such an approach were taken it would always be possible for Catholic schools or the adversely affected person to argue that there was something distinct about a particular employment position or a particular Catholic school that justifies a different approach being taken for that employment position—an issue that would require a court hearing to definitively resolve.

⁵⁷⁵ Non-government Schools Guide, *The NSW Schooling System*
<<http://www.privateschoolsguide.com/schooling-in-nsw>>.

⁵⁷⁶ For examples of the high number of submissions typically received by government inquiries into how religious schools should be regulated under anti-discrimination legislation see above nn 13–16.

⁵⁷⁷ National Catholic Education Commission, *2011 Annual Report* (Canberra, 2011) 29–31; Non-government Schools Guide, *The NSW Schooling System*
<<http://www.privateschoolsguide.com/schooling-in-nsw>>.

Although a collective approach could possibly be taken in relation to Catholic schools such an approach would not work with the majority of other religious schools that are based on a variety of different religions. Even with those schools based on a particular religion there will still be great diversity regarding the views of adherents on the correct theological positions to adopt—as was clearly seen in *Wesley Mission*.⁵⁷⁸ Every time a person complains about suffering harm from an adverse employment decision a court will be required to address complex, theological issues concerning the school's religion, its doctrines, the relevant features of the employment position and the school, the inherent requirements of the employment position, and whether the relevant attributes of the person prevents them from being able to meet those inherent requirements. As Durie notes: 'In the end, the courts will have to decide, and because their decision will be contingent on the particular doctrines, beliefs and principles of the school, the courts will have to decide on a case-by-case basis'.⁵⁷⁹

Furthermore, many of the decisions will be appealed regardless of the result considering that both sides are likely to be strongly committed to the merits of their position and will often have sufficient resources to support further litigation. Even when a particular case is resolved in relation to a school the decision may need to be revisited in the future for various reasons including a change in the beliefs of the religious group or a change in the organisational structure of the school. For example, if a court decided that mission fit was not an inherent requirement for a particular position, but then the school underwent a restructure that combined that position with another employment position that had clear religious duties the school authorities might again try to rely on an inherent requirement defence to justify making an adverse employment decision in relation to that role. Such a situation could easily result in further litigation and the court would again have to evaluate various issues including the religious content of the new position, whether the restructure was simply done by the school to avoid complying with the court's decision, and whether any such intention on behalf of a school is relevant if the court

⁵⁷⁸ For the difficulties encountered by the courts in attempting to determine the relevant religion in *Wesley Mission* see above nn 350–353, 361–363 and accompanying text.

⁵⁷⁹ Durie, above n 253.

holds that mission fit should be considered to be an inherent requirement of the new employment position.

Considering all these different factors, the introduction of the inherent requirement test will cause the State to incur significant expense through being required to provide adequate facilities and competent decision-makers to resolve the many disputes that are likely to come before the courts. It should be noted that these cases will typically be complex requiring the courts to hear evidence from a variety of witnesses, including theological experts, in order to be in a position to decide whether a religious component should be held to be an inherent requirement of an employment position. If the inherent requirement test is implemented in NSW in the manner discussed then another expense for the government will be from the ADB evaluating the merits of the initial complaint, investigating the meritorious complaints, and attempting to conciliate the matter between the parties. Further costs will likely be incurred due to government funding provided directly or indirectly towards the litigation costs of the applicants. The solicitors for the applicants in *Wesley Mission*, for example, were the Public Interest Advocacy Centre, which is funded ‘primarily from the NSW Public Purpose Fund and the Commonwealth/State Community Legal Services Program’.⁵⁸⁰ Also as religious schools are in receipt of a substantial amount of government funding it is likely that their own litigation costs will also be indirectly funded, at least in part, by the government.

These kind of arguments indicate that the inherent requirement test is likely to have a high compliance cost. There will likely be a substantial expenditure of money and time by the State, religious schools and the individuals complaining about adverse employment decisions. In *Wesley Mission*, for example, the decision not to provide foster care services to the same-sex couple was made in August 2002 and the matter only finally reached a conclusion in December 2010 after numerous tribunal decisions and appeals.⁵⁸¹ Furthermore, there will likely be significant emotional harm suffered by the authorities of the religious school, the complainant, witnesses, and

⁵⁸⁰ Public Interest Advocacy Centre, *Who funds PIAC?* <<http://www.piac.asn.au/about-us/who-funds-piac/who-funds-piac>>.

⁵⁸¹ *OV v OW v QZ* [2006] NSW ADT; *OV v QZ (No.2)* [2008] NSWADT 115; *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5; *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155; *Wesley Mission* [2010] NSWADT 293.

the family and friends of all persons involved in the litigation. There will likely also be reputational damage for the parties involved, which will be significant for the religious school in terms of attracting and retaining quality staff and students, and for the employee in regards to their ability to secure alternative employment in the future.

The significant financial and non-financial costs of litigation can also often result in a situation where the more vulnerable party will simply settle the matter as they lack the resources to endure the costs of litigation. In the context of the inherent requirement test it will often be the complainant who will be in a comparatively weaker position to the religious school. However, there will also likely be many situations where it is the religious school that is the more vulnerable party in the litigation, especially when the complainant has been able to obtain the services of government funded legal centres or legal professionals willing to work on a voluntary basis. A small religious school, for example, will often not have sufficient financial resources to defend themselves in a litigated matter and so will be placed in a position where they may decide not to make the adverse employment decision due to a desire to avoid litigation even in a situation where a court would likely uphold the validity of their decision. This example demonstrates the important point that the disadvantages of the inherent requirement test will often be suffered more by the schools established by the smaller minority religious groups, rather than the more established religious schools of the larger religious groups that will have the financial resources and experience to confidently engage in the litigation process.

The inherent requirement test will also likely have a high non-financial cost for the community considering the ill will that it may produce between the various parties and their supporters. The merits of providing protections for the employment decisions of religious schools is an issue on which the community is divided. It is likely that critics of the protections will be willing to devote significant resources to contesting claims made by religious schools that a religious component is an inherent requirement of particular employment positions. Similarly, it is to be expected that substantial resources will be donated to religious schools from individuals who are supportive of religious schools in general, or the particular religious school that is the subject of litigation. The many court cases that will result—accompanied by

intensive media reporting of the cases—will likely produce significant community division. Along these lines, Durie argued in the context of the proposed introduction of the inherent requirement test in Victoria that the test

will raise the expectations of those who have long been seeking to restrict discrimination by religious bodies. If the Bill is passed, Victoria can expect a fairly active period of complaints and litigation as ambiguities are brought to VCAT [Victorian Civil and Administrative Tribunal] and higher courts for clarification. The months and years ahead will be a time of religious instability and heightened religious tensions.⁵⁸²

9.3 THE OPT-IN MODEL

The opt-in model will likely have a substantially lower compliance cost compared to the inherent requirement test. However, it would be higher than that of the general exception approach. The government would be required to keep a public record of the religious schools that register for protections, the nature of the protections sought, and any changes that religious schools subsequently make to the protections granted. The government would also have to expend significant resources in evaluating the merits of the requests that they would likely receive from members of the public asking the government to exercise their discretionary power to limit or remove legal protections granted to particular schools. An evaluation that in many cases may require the State to conduct an investigation into the operation of religious schools that are allegedly abusing the protections provided to them.

Religious schools would be required to discharge the important but not overly burdensome obligation of registering for the protections, producing a policy statement explaining why the protections are required, and appropriately managing any input from persons within and outside the religious community about the appropriateness of any protections sought. Those who may be adversely affected by employment decisions of religious schools would have to undertake the minor task of determining the nature of the school's registration and reviewing the school's policy statement to determine if the religious school for which they are working, or are seeking to work at, has registered for any protections. As with the general exception

⁵⁸² Durie, above n 349.

approach, there is a low risk that an adverse employment decision will lead to litigation as in most situations it will be clear that it is covered by the protections granted. However, the person adversely affected by the employment decision may consider that the school is not based on a religion, that the principal did not believe in good faith that it was important to make the employment decision due to the religious commitments of the school, or the decision was made on a ground not covered by the protections. In such circumstances there is a significant likelihood that the matter will lead to litigation with the associated cost in money, time and negative emotional experiences for all parties involved.

10 CONCLUSION

No model is preferable to the other models in relation to all of the considerations discussed in this chapter. However, overall more of the considerations favour the opt-in model than the general exception approach or the inherent requirement test. The opt-in model and the general exception approach are preferable to an inherent requirement test in relation to the rights of minority groups, freedom of association, the promotion of multiculturalism, and parental rights in relation to the education of their children. The preferable model between the opt-in model and the inherent requirement test is unclear in relation to the welfare of children, but both models are clearly superior to the general exception approach in this regard. In relation to financial and non-financial compliance costs, the general exception approach would be the preferred model, followed by the opt-in model, while the inherent requirement test would likely have substantial financial and non-financial costs for the government, religious schools, and the individuals harmed by the employment decisions of religious schools. The right to privacy appears to be of little relevance to the appropriate regulation of the employment decisions of religious schools. However, if it were possible for religious schools to take into account the conduct of their employees outside the work environment then the inherent requirement test should be regarded as the model that provides the strongest support for the right to privacy. It is not possible to conclude that a particular model better promotes human rights considering that there is no consensus on which approach is most consistent with human rights standards. However, the adaptability of the opt-in model, the possibility of the executive limiting or removing the legal protections provided, and

the requirement under the model to produce a policy document explaining the need for the protections provide significant support for a conclusion that this approach is preferable to the alternative models considering the appropriately nuanced human rights message that it sends to the community.

CHAPTER SEVEN

THE MERITS OF THE OPT-IN MODEL

It is important that the State appropriately regulates the employment decisions of religious schools considering the substantial importance of religious schools to religious communities. Religious schools are central to the ability of religious communities to provide an effective religious education and formation in a social environment that is supportive of the theological and cultural aspects of the religion. Religious schools can also often play a broader role in supporting religious groups through functioning as community centres where religious adherents can meet for educational, charitable and social purposes. Providing religious schools with the ability to select employees for mission fit is central to the ability of religious communities to establish and manage religious schools that fulfill these functions.

It is also necessary to recognise that religious schools through the employment decisions they make have the potential to adversely affect a substantial proportion of the population. As mentioned in Chapter 1 there are approximately 3000 non-government schools in Australia—the majority being religious—and the long term trend in Australia indicates that religious schools will continue to increase in popularity. A failure to appropriately regulate the employment decisions of religious schools has the potential to cause significant harm to the substantial number of employees working for religious schools who may be deprived of adequate protection under anti-discrimination legislation if the State adopts an excessively deferential approach to the regulation of religious schools. The appropriate regulation of religious schools is also important considering the significant impact they can have on the rights of children, parents and minorities, the right to privacy, freedom of association, and the promotion of multiculturalism and human rights standards.

1 THE LIMITATIONS OF A GENERAL EXCEPTION APPROACH

Considering the importance of appropriately regulating the employment decisions of religious schools the general exception approach is clearly in need of reform. Neither

the right to religious liberty nor the right to equality—two rights central to the merits of the different models—justifies the current approach. The right to religious liberty is commonly used to support the appropriateness of the current approach. However, the protections provided are far in excess of what can be justified on the basis of religious liberty. Under the current approach religious schools in NSW are automatically included in the broad protections provided to ‘private educational authorities’ despite many of the religious schools neither wanting the protections nor being able to justify the need for the protections on the basis of their religious commitments.

Furthermore, no protection is provided to religious schools to make employment decisions on the grounds of race, age or a person’s responsibilities as a carer. Although very few religious groups in Australia are likely to require protections on these grounds an appropriate respect for religious liberty requires the scope of the protections provided to extend to these grounds. The inclusion of the grounds of race in any protections provided to religious schools would be considered by some critics to be particularly controversial. However, as was illustrated in the *JFS* case, an appropriate respect for the operation of religious schools requires race to be included in the scope of the protections provided.

Additionally, there are no provisions in the legislation that provide the executive or the courts with a significant role in ensuring that the protections provided are not being abused by religious schools. Under the current approach even if a religious school makes an adverse employment decision against an employee that is unjustifiable according to the school’s religion the employee would have no ability to seek a remedy under anti-discrimination legislation.

The general exception approach is also frequently criticised on the grounds that it violates the right to equality through allowing adverse employment decisions to be made against a substantial number of individuals on grounds that would otherwise be prohibited. Although there is the potential for many employees to be adversely affected under the general exception approach it is likely that the number of persons who actually are affected is significantly less than might be expected. There are some persuasive reasons for considering that this is likely. Many individuals will simply

not want to work for religious schools. Furthermore, many religious schools do not want any of the protections and so are unlikely to rely on them in their employment decisions. Other religious schools may decide to employ a person due to operational necessity, political or social pressure to not rely on the protections, a commitment to diversity, a compassionate approach to their employees, or simply because they are unaware of the relevant attribute of an employee or consider that it is a private matter.

Despite the likelihood that the reliance on the protections by religious schools is much less than could be expected, there is evidence, especially from case law, media reports and the conduct of activists, to indicate that harm is being caused to some individuals through religious schools making employment decisions that are authorised by the protections. Although the caring environment of many religious schools would reduce the level of harm caused by adverse employment decisions, it is still likely that a significant number of people have suffered substantial financial, emotional and physical harm from employment decisions that are allowed under the protections provided under the general exception approach.

In support of the general exception approach it is important to recognise that simply demonstrating that adverse employment decisions are being made by religious schools on a range of grounds is insufficient to support a conclusion that the approach is in violation of the right to equality. Many other groups—such as those constituted on the grounds of race, gender and sexuality—are provided with similar protections to make adverse employment decisions against persons with poor mission fit, but these protections are not widely regarded as discriminatory provisions that are unacceptable violations of the right to equality. Religious organisations operating schools can legitimately claim that religion is one of the grounds protected in equality provisions contained in international human rights instruments and a proper understanding of the right to equality supports their ability to select employees committed to the religious identity of their schools. Furthermore, some religious groups in Australia may be able to claim that laws protecting the operation of their religious schools are justifiable as special measures aimed at overcoming ongoing disadvantage due to a long history of suffering harm inflicted

on them from outside the religious community. In this respect it is useful to recall the comments of Sachs J in *Christian Education South Africa*:

To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views ... the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect.⁵⁸³

Although it is important to appreciate that providing protections for the employment decisions of religious schools can be regarded as respecting—rather than violating—the right to equality, the general exception approach cannot be supported on this basis. A substantial part of the current approach provides protections for non-religious schools and employment decisions of religious schools that are non-religious in nature. Consequently, the general exception approach cannot be supported by the right to equality in its religious dimension, although a more limited approach to protecting religious schools could be supported on this ground.

2 THE UNSUITABILITY OF THE INHERENT REQUIREMENT TEST

The inherent requirement test has the desirable aim of attempting to better respect the relevant rights involved through providing religious schools with sufficient, but not excessive, protections under anti-discrimination legislation. The approach has the significant advantage of adapting the protections to the requirements of each religious school and so avoids a major flaw of the general exception approach of providing protections to all religious schools even those that do not want some (or any) of the protections available. Furthermore, the inherent requirement test appropriately establishes substantial government oversight of the employment decisions of religious schools to minimise the possibility that the protections will be abused.

Despite the significant advantages of the inherent requirement test it is deeply flawed in its failure to appropriately respect the importance of mission fit for a wide range of

⁵⁸³ [2000] 4 SA 757 (Constitutional Court) [42].

employees at religious schools and due to the substantial challenges that courts will encounter in attempting to apply the inherent requirement test. The mission fit of employees is central to the operation of religious schools considering the essential role that all employees can play in assisting religious schools in providing an effective religious education and formation to students, staff members and others involved with the school. The appropriate mission fit of employees is important for teachers considering that theological and ethical issues can arise in a wide range of subjects (not just in religious education). It is also important for non-teaching employees considering the significant influence that all employees can have in the school environment in developing the knowledge and character of those attending the school. The ability to select employees for mission fit is particularly important for those religious communities that have a broad understanding of religious vocations. As illustrated in *Hosanna-Tabor*, some religious communities consider teaching positions to be religious vocations, even when their roles are primarily focused on teaching non-religious subjects.

As the inherent requirement test is likely to be interpreted narrowly by the courts, religious schools may have their ability to select for mission fit limited to school leadership positions and those positions requiring the employee to participate in religious ceremonies and provide religious education. Such an outcome would gravely undermine the ability of religious schools to provide an appropriate religious education and formation to their students, and would be a major violation of religious liberty for those religious communities who consider that employment positions at schools can be religious vocations. Furthermore, the inability to select employees for mission fit would undermine the identity of many schools as faithful religious institutions and would reduce the incentive of many religious adherents—whether as employees, children, parents or volunteers—to become involved with the religious school as a way of developing, expressing, and promoting their religious beliefs.

The introduction of the inherent requirement test would also present major challenges for the courts required to apply the test. As illustrated in *Wesley Mission*, a determination of the relevant entity that controls a particular religious school can sometimes be a surprisingly difficult and time intensive task for a court to address. Additional difficulties may be encountered by courts in determining the appropriate

religion to attribute to the school. The major challenge that courts will encounter in applying the inherent requirement test is a determination of the doctrines that should be attributed to the religion on which the school is based. Such a task will often require courts to assess expert evidence from a range of religious adherents on theological issues on which there may be widespread disagreement within the religious community. Secular judges will rarely, if ever, have the ability, time and resources to adequately resolve the complex theological disputes that they will encounter. Furthermore, due to the ongoing disputes among religious groups the continued applicability of any court decision would be contestable whenever a significant change in the views of religious adherents occurs. Such a situation would create uncertainty for religious schools and employees regarding their relevant legal position that would only be definitively resolved through further court hearings.

There is also a legitimate concern that judges attempting to resolve these issues may adversely affect the operation of religious groups. Religious schools may be less tolerant of diversity within their staff body due to a concern that their tolerance may be used against them in court proceedings. Furthermore, a court decision to reject the views of a religious group on the basis that it is part of a broader religious group that disagrees with those claims could cause the smaller religious group to formally separate from the larger group to protect its religious freedom. An inherent requirement test may also encourage religious schools to adopt a risk-averse approach and avoid claiming that mission fit is important for a range of employment roles in order to avoid the financial and non-financial costs involved in litigation.

The inherent requirement test may also violate the right to equality. Protections under anti-discrimination legislation are often provided to organisations constituted on grounds such as race, gender and sexuality to allow them to make employment decisions according to a person's mission fit. Implementing an inherent requirement test for religious schools when a similar approach is not adopted for a range of non-religious groups can appropriately be regarded as a failure to respect the right to equality.

Considering the popularity of a religious sensitivities test it is important to recognise that it would encounter many of the same problems as the inherent requirement test.

These problems include failing to adequately respect the right to equality and religious liberty and requiring courts to address complex legal and theological issues that may adversely affect the operation of religious groups. A further problem with the religious sensitivities approach is that the meaning of ‘religious sensitivities’ will often be unclear (even to adherents of the religion), and that it is not a central concern for religious adherents in the context of managing their own schools. Religious adherents are more likely to be interested in ensuring that the State provides them with effective legal protections so that they can make employment decisions on the grounds of mission fit that they consider are necessary to produce authentically religious schools, rather than with the State focusing on attempting to protect their ‘religious sensitivities’. There is also a concern that a religious sensitivities test could result in the courts adopting an overly interventionist or deferential approach to religious groups (as demonstrated in *Wesley Mission*) when the preferable approach is to implement an adequate, but not excessive, level of government supervision to ensure that religious schools do not abuse any protections provided.

3 THE MERITS OF THE OPT-IN MODEL

Considering the significant limitations of both the general exception approach and the inherent requirement test, the opt-in model should be regarded as the superior approach to adopt in regulating the employment decisions of religious schools. As with the inherent requirement test, the opt-in model avoids the major problem involved with the general exception approach of providing all religious schools with the ability to make employment decisions on almost all grounds for all employment positions irrespective of whether particular religious schools want the protections. The registration system central to the opt-in model is more consistent with the right to religious freedom by allowing religious schools to register for the protections they need due to their religious commitments.

As the opt-in model allows the protections to be tailored to the needs of religious schools it would substantially reduce the extent to which employees could be adversely affected by protections granted to religious schools. Many religious schools would not even register, while others would only register for protections on a

few grounds. Furthermore, the public nature of the registration process allows members of the community to identify the school's religious commitments so that they can make an informed decision regarding employment with the school, which is likely to play a significant role in reducing any harm that individuals might suffer from adverse employment decisions.

A further problem with the general exception approach is the lack of adequate government supervision of religious schools to ensure the protections are not abused. The opt-in model effectively addresses this problem through assigning a significant supervisory role to each arm of government. Courts are provided with the important role of reviewing employment decisions to ensure that the school is actually based on a religious or non-religious worldview, that the grounds on which the employment decision was made are included in the school's registration, and that the school authorities believed in good faith that it was important to make the employment decision due to the school's religious commitments. The central role of ensuring the protections are not abused is given to the executive through their ability to modify or remove the protections provided to a religious school. The ongoing ability of the executive to remove a religious school's protections for their employment decisions would likely play a significant role in ensuring that religious schools do not abuse the protections provided. The power of either House of Parliament to override an executive decision to limit or remove a school's protections is an important safeguard to ensure that the executive does not abuse the power provided to it. Finally the ability of individuals within and outside the particular religious school and religious community to easily identify the protections provided to a religious school and to seek redress from the courts and the executive provides community members with the ability to place significant ongoing pressure on school authorities to ensure that they do not abuse the protections provided.

The opt-in model appropriately recognises that religious schools are best placed to understand their religious commitments and the nature of the protections they require for their employment decisions. This approach avoids the problem that will likely be encountered with the inherent requirement test of courts failing to adequately appreciate that for many religious schools the ability to select employees on the basis of their mission fit for a wide range of teaching and non-teaching employment

positions is of fundamental importance to their ability to provide an effective religious education. A further advantage of the opt-in model is that courts are not required to address complex theological issues—a role that is inappropriate for secular courts and a task that will typically be beyond the capacity of secular courts to adequately fulfill.

Out of the three models considered for regulating the employment decisions of religious schools the opt-in model is the approach that best promotes the welfare of students at religious schools. The requirement for religious schools to publicly justify their need for protections would help students understand that the aim of the protections is not to exclude individuals but rather to allow religious schools to employ persons who are supportive of the school's religion so that an authentic religious environment can be created within the school. Furthermore, the ongoing government supervision of religious schools and the ability of the executive to limit or remove the protections provided—features absent from both the general exception approach and the inherent requirement test—would play a valuable role in encouraging religious schools to ensure that the staff members they are employing are dedicated to student welfare and sensitive to the diverse needs of their students. Finally the opt-in model avoids the significant limitation of the inherent requirement test through allowing religious schools to employ individuals committed to the school's religion in a wide range of employment roles that is essential to a religious school's ability to effectively develop a student's understanding and commitment to the religion on which the school is based.

All three models demonstrate significant respect for the rights of parents to have their children educated in conformity with their religious convictions. Under each model it is possible for religious groups to establish religious schools where students can learn about the religion of their parents, participate in religious ceremonies and fulfill any other relevant religious commitment specific to that religion. However, out of the three models the inherent requirement test is the approach that least respects parental rights as it substantially limits the ability of religious schools to employ committed religious adherents, which can significantly weaken the ability of religious schools to provide an effective religious education to students attending the school. Both the general exception approach and the opt-in model provide strong support for parental

rights, although if the executive under the opt-in model decides to intervene in the operation of particular religious schools there may be a significant violation of parental rights if the quality of religious education provided by those schools is impaired.

A similar situation applies in relation to minority groups where the general exception approach and the opt-in model provide strong protection for the rights of religious minorities through the substantial freedom in employment matters provided under both models. The inherent requirement test similarly suffers from the limitation that the inability to employ other persons committed to the school's religion may significantly impair the ability of a religious school to develop an authentic religious culture for the benefit of adherents of the minority religious group. The inherent requirement test would provide greater protection to other minority groups such as those constituted on grounds such as gender identity, sexuality and other minority religions. However, considering that individuals from these and other minority groups would be able to secure employment at other educational institutions, the general exception approach and opt-in model should be regarded as the approaches that more appropriately respect minority rights considering that a failure to adequately protect religious schools would mean that minority religious communities would be completely deprived of the benefit these schools can provide to their community.

The right to privacy should be regarded as having little, if any, relevance to the merits of the models considering the compulsory nature of education, the extensive regulation of other aspects of the operation of religious schools, the substantial funding they receive from the government, and the significant adverse impact religious schools can have on community welfare. However, if it were possible for religious schools to take into account the conduct of their employees outside of the work environment then the inherent requirement test should be regarded as the preferable model. Under the inherent requirement test only a minority of employment positions would likely be covered by the protections and the courts could play an important role in requiring religious schools to justify why the conduct of a particular employee in their private life prevented them from fulfilling a religious condition of an employment position.

Freedom of association is appropriately respected under both the general exception approach and the opt-in model considering the broad nature of the protections provided to religious schools under these models. The general exception approach does limit the protections provided to religious schools on some grounds, while the opt-in model has the potential to seriously undermine freedom of association in the event that the executive limits or removes the protections provided. However, considering the near complete protections provided by the general exception approach and that it is likely that the power of the executive to modify a school's registration would rarely be used under the opt-in model it is appropriate to conclude that both models provide strong support for freedom of association. The inherent requirement test cannot reasonably be considered to be as supportive of freedom of association considering that it requires religious schools to include persons within the school even if school authorities consider that the person has poor mission fit. On this point it is worthwhile repeating the statement made by the United States Supreme Court in *Jaycees*:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁵⁸⁴

Although the inherent requirement test would likely produce a greater diversity in the staff bodies of religious schools it should not be understood as the model that best promotes multiculturalism. The test would likely impair rather than promote cultural diversity as forcing religious schools to hire individuals who are not supportive of the school's religious commitments in a range of teaching and non-teaching roles would significantly undermine the ability of religious schools to develop an authentic religious and cultural environment within the school. As Parkinson noted: 'One way of crushing the diversity that faith-based schools provide is to insist on it. By requiring diversity in the employment of teaching staff within the faith-based school,

⁵⁸⁴ (1984) 468 US 609, 623.

its distinctive character as a faith-based school is undermined'.⁵⁸⁵ The general exception approach and the opt-in model should be regarded as supportive of multiculturalism considering the broad protections both models provide to religious schools to allow them to select employees for mission fit.

Determining which of the three models best promotes human rights standards is an issue that cannot be conclusively resolved considering there is widespread disagreement about which approach to regulating the employment decisions of religious schools is most consistent with human rights standards. Despite this fundamental difficulty there are some significant grounds for concluding that the opt-in model may be the preferable approach. The tailored nature of the protections provided under an opt-in model avoids the problem that may be involved with the general exception approach of communicating the inappropriate view that the right to religious liberty is of such importance that it is appropriate to adopt a legal approach that ensures that it always prevails over other human rights. The opt-in model also avoids the problems encountered with the inherent requirement test of communicating the message that religious organisations are not as worthy of protection as other organisations constituted on grounds such as race, gender and sexuality. Furthermore, the requirement under the opt-in model to produce a public document explaining the need for the protections would likely play an important role in informing the community that the protections provided are not contrary to human rights standards, but rather consistent with a range of important human rights such as religious liberty, the right to equality and freedom of association.

The broad and automatic protections provided to religious schools under the general exception approach means that it has the lowest compliance cost out of the three models for the government, religious schools, and persons adversely affected by employment decisions. The inherent requirement test would be the most resource intensive of the three models as any person who suffers from an adverse employment decision made by a religious school relying on the protections would be able to challenge the decision before a court claiming either that a religious component should not be held to be an inherent requirement of the employment position or alternatively that they were able to adequately meet the requirement. Furthermore, a

⁵⁸⁵ Parkinson, above n 282, 13.

court decision would have limited value as a precedent in guiding judges and assisting parties decide whether to commence or continue litigation due to the significant differences between religions, religious schools and employment positions within those schools. An additional problem would arise if the views of religious adherents change significantly or religious schools are restructured as this could undermine the applicability of previous court decisions and require the parties to relitigate the contested issues.

Although the opt-in model would have a greater compliance cost than the general exception approach it would be substantially less than the inherent requirement test. It is unlikely that the decisions of religious schools will often be challenged in court as in most situations the school will be based on an established religion and it will be clear that the principal of the school believed, in good faith, that it was important to make the employment decision due to the religious commitments of the school. The only resource intensive aspect of the opt-in model would be in relation to the executive, which would need to devote significant resources to reviewing submissions made by members of the community that a religious school was abusing their protections. In rare situations the executive might consider that there are reasonable grounds for suspecting that a religious school is abusing the protections and that it might be appropriate for the religious school's protections to be limited or removed. In such a situation it is likely that the executive would need to devote a substantial amount of resources in conducting an investigation and requesting and reviewing detailed information from the religious school, the aggrieved person and other interested parties to ensure that it was appropriately informed about the conduct of the particular religious school.

A consideration of the ten criteria proposed in the introduction for evaluating the three models leads to the clear conclusion that the opt-in model is the superior approach to adopt in regulating the employment decisions of religious schools. The opt-in model appropriately respects the right to religious liberty through providing religious schools with the ability to make employment decisions on the basis of mission fit so that they are able to provide an effective religious education and formation to their students, staff members and others involved in the school. The model also demonstrates appropriate respect for the right to equality through

providing protections to religious schools that are similar to the protections provided to a diverse range of other groups, while ensuring that the protections provided are tailored to the particular needs of each religious school to minimise the extent to which persons can be adversely affected by a school's employment decisions.

There are only two criteria where the other models are clearly superior: compliance cost, due to the broad and automatic nature of the general exception approach; and the protection of privacy, where the restrictive scope of the inherent requirement test would significantly reduce the possibility that an employee's private life would be legally relevant to an employment decision (but only if under the proposed models it were possible for an employee's conduct in their private life to be considered relevant to employment decisions). For all of the remaining criteria the opt-in model is either the superior approach or satisfies the criteria as well as one of the alternative models.

4 THE IMPLEMENTATION OF THE OPT-IN MODEL

The main focus of the thesis has been on outlining the essential elements of the opt-in model and determining its merits compared to the general exception approach and the inherent requirement test. There are many other important details that would need to be determined before the model could be proposed for adoption in NSW. For example, should the scope of the protections extend to full time, part time, casual and contractual employees? Should the protections only apply to employment positions of a certain duration considering a person employed for a short period of time will be less likely to have an enduring impact on the school's internal culture and general reputation? Should it be possible for a religious school to waive their protections through agreement?⁵⁸⁶ Should a religious school be allowed to take into account an employee's conduct when not working at the school, or should a school be restricted so that it can only base an employment decision on the employee's conduct while in the work environment?⁵⁸⁷ Should a religious school lose its protections in relation to

⁵⁸⁶ See section 25(7) of *Anti-Discrimination Act 1991* (Qld) for an example of anti-discrimination legislation that adopts such an approach to regulating religious employers.

⁵⁸⁷ Some anti-discrimination statutes adopt an approach that an adverse employment decision can only be based on conduct that occurs in the work environment, for example, section 25(3) of the *ibid*.

a particular person if it employs that person with full knowledge of the employee's situation?

There are also many practical details that would need to be determined, such as, whether religious schools should only be required to register once for the protections or whether it is more appropriate to require religious schools to periodically renew their protections, the particular government official who should be provided with the power to modify or remove the protections granted through registration, and the exact wording that should be used in the legislation introducing the test. However, as the focus of the thesis was on whether the opt-in model is appropriate according to a variety of different rights, a general overview of the opt-in model was preferable so that the focus could be on the general merits of the proposed model and not on specific issues that will only become relevant if it is widely accepted that the model is suitable for implementation in NSW.

In determining whether the opt-in model should be introduced it would also be relevant to consider whether the model should replace other protections currently contained in the Act. An obvious issue for consideration would be whether the model should replace the current protections provided to 'private educational authorities' in relation to the admission, management and expulsion of students. This is the same kind of protection as that provided to religious schools in relation to employment decisions except that it only prevents religious schools making adverse decisions against students on the ground of race.⁵⁸⁸ Other areas that may be more appropriately regulated under the opt-in model include the protection provided to institutions of religious training,⁵⁸⁹ religious bodies established to propagate religion,⁵⁹⁰ and other religious organisations—such as religious hospitals, adoption agencies and charities. The opt-in model could also be an appropriate approach for regulating non-religious organisations under anti-discrimination legislation such as organisations established to support and promote the interests of individuals on the basis of their gender, sexuality, gender identity, race or other relevant attribute.

⁵⁸⁸ *Anti-Discrimination Act 1977* (NSW) ss 17, 31A(3)(a), 38K(3), 46A(3), 49L(3)(a), 49ZO(3), 49ZYL(3)(b).

⁵⁸⁹ *Ibid* s 56.

⁵⁹⁰ *Ibid*.

Although the practical issues of implementation and the appropriate scope of the opt-in model are important issues that would need to be resolved before implementing the model they are not issues that need to be addressed in order to determine the merits of the opt-in model. Considering the major limitations of the general exception approach and the absence of any alternative model of sufficient merit, the NSW government should amend the Act to adopt the opt-in model to ensure that the employment decisions of religious schools are appropriately regulated.

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