

NON-DISCRIMINATION LAWS AND RELIGIOUS SCHOOLS IN AUSTRALIA

ABSTRACT

This article examines extent to which Australian religious schools should be exempt from non-discrimination laws that apply to other schools. Religious schools are common in Australia and attract significant government funding. The question of the extent to which they must comply with discrimination law is therefore a significant issue of public policy that impacts on the education of a substantial portion of Australian children and the employment opportunities of teachers and other school employees. The first section of the article outlines some of the types of discrimination which religious schools may wish to engage in; the second discusses some arguments for and against permitting such discrimination. The third section examines the way in which the laws and practices in various Australian jurisdictions allow religious schools to engage in particular forms of discrimination. The article concludes by arguing that some degree of permissible discrimination may be necessary to assist religious schools to maintain their distinctive character, but that wide exemptions to discrimination laws (such as those seen in some Australian States) are not appropriate.

I INTRODUCTION

Religious schools play a complex role in religiously pluralistic societies. The existence of a range of religious schools with some degree of autonomy from state control can be an important aspect of diversity and pluralism. Religious schools maintain a space for parents to choose the values and religious understandings to which their children will be exposed. Their existence helps to prevent the imposition of a uniform state ideology on all children, which at its extreme becomes

* Carolyn Evans is Deputy Director of the Centre for Comparative Constitutional Studies, Melbourne Law School and Leilani Ujvari is a PhD candidate at Melbourne University. This article is part of a broader project being conducted by Carolyn Evans and Beth Gaze on an ARC funded Discovery Grant dealing with Religious Freedom and Non-discrimination. Our thanks to Tiffany Wong for her research assistance.

indoctrination that may turn children against parents and their beliefs.¹ At the same time, religious schools can also raise significant problems for societies that take pluralism and human rights seriously.² As a recent UNICEF study reported:

[F]ormal education can shape the understandings, attitudes, and ultimately, the behaviour of individuals. If it is true that education can have a socially constructive impact on intergroup relations, then it is equally evident that it can have a socially destructive impact.³

Without some degree of state control, religious schools risk becoming educationally deficient;⁴ preparing children only for religious life rather than assisting them with other important aspects of education that would permit them to participate fully in the economic and social life of the state.⁵ They may become enclaves of religious hatred or intolerance or promote values incompatible with a secular society, undermining important social values or legal norms. Peter Buckland argues that:

Education systems and schools ... are frequently a contributory factor in conflict. Inadequate education provision; racial, ethnic, or other forms of discrimination; distorted curricula; and frustrated expectations exacerbate existing social tensions or may themselves generate new sources of tension in societies.⁶

With too much state control, however, there is a danger that such schools will lose their unique qualities and, along with them, their appeal to parents whose religious

¹ See, eg, the Supreme Court of the United States decision in *Wisconsin v Yoder*, 406 US 205 (1972): ‘Schools must avoid not only being a source of indoctrination, but also destroying the students’ private beliefs.’ See also Kenneth Karst, ‘Law, Cultural Conflict and the Socialisation of Children’ (2003) 91 *California Law Review* 967, 995.

² See, eg, Thomas Geigerich, ‘Freedom of Religion as a Source of Claims to Equality and Problems for Equality’ (2000) 34 *Israel Law Review* 211, 224, who argues that principles of liberty and equality have both a symbiotic and an antagonistic relationship with religious freedom.

³ Kenneth D Bush and Diana Saltarelli (eds), *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children* (2000) 9.

⁴ See, eg, a discussion on evolution versus creationism in Michael Bachelard, ‘At the crossroads?’ *The Age* (Melbourne), 25 February 2008, 9. See also Marjorie George, ‘And Then God Created Kansas? The Evolution/Creationism Debate in America’s Public Schools’ (2001) 149 *University of Pennsylvania Law Review* 843, 847; Ellen Yonts Brownfield ‘The First Amendment Implications of Teaching the Theory of Evolution and Creationism in Public Schools’ (2007) 36 *Journal of Law and Education* 141, 148.

⁵ See discussion in the following sections regarding the educational requirements of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) (‘CRC’) art 29.

⁶ Peter Buckland, *Reshaping the Future: Education and Post-conflict Reconstruction* (2005) 9.

beliefs or values may not always sit comfortably with those taught in secular schools.⁷

The best balance between state control and school autonomy is a complex one, spanning a range of issues from curriculum to assessment, discipline, uniforms and the composition of the student and teacher groups.⁸ This article addresses one particular aspect of the balance between control and autonomy: the extent to which religious schools should be exempt from non-discrimination laws that apply to other schools and institutions.

The first section will outline some ways in which religious schools may wish to discriminate; the second discusses some arguments for and against permitting such discrimination. The third section examines in some detail the way in which the laws and practices in various Australian jurisdictions allow religious schools to engage in some forms of discrimination. Religious schools are common in Australia and attract significant government funding. The question of the extent to which they must comply with discrimination law is therefore a significant issue of public policy that influences the education of a substantial portion of Australian children and the employment opportunities of teachers and other school employees. The article concludes by arguing that some degree of permissible discrimination may be necessary to assist religious schools to maintain their distinctive character, but that wide exemptions to discrimination laws (such as those seen in some Australian states) are not appropriate.

II RELEVANT TYPES OF DISCRIMINATION

A *Discrimination on the basis of religion*

There are a number of circumstances in which religious schools might wish to act in a manner that would ordinarily be prohibited by non-discrimination principles. They may wish to have a student body that is exclusively or predominantly made up of students who share the same religion. For example, the Catholic Education Office Melbourne (CEOM) directs:

Catholic schools are expected to maintain and/or work towards the highest possible level of Catholic enrolment. Many schools already have a very high level of Catholic enrolment and those schools should ensure that they

⁷ Thus the Australian Congregation for Catholic Education proclaims: [T]he Catholic school is not simply an alternative to a Government school. It is different because it is Catholic: it must offer the authentic Catholic vision. [...] This is its right and its duty. See Catholic Church Congregation for Catholic Education, *The Religious Dimension of Education in a Catholic School: Guidelines for Reflection and Renewal* (1988) n. 34, para 6.

⁸ It is also a sub-set of a much wider and complex debate about the extent to which the tolerant must tolerate the intolerant: see Martha Minow, 'Tolerance in an Age of Terror' (2007) 16 *Southern California Interdisciplinary Law Journal* 453, 458.

continue with appropriate strategies to maintain that level and increase it if possible.⁹

The target is set at 90 per cent Catholic and non-Catholic Eastern Church enrolments.¹⁰ To this end, the CEOM lists a ‘hierarchy of priorities’ for consideration of enrolment applications. Baptised Catholic children who are members of the designated local parish communities are given first preference, followed by baptised Catholic children who attend other Catholic schools or who have siblings attending the relevant school. Children of other Christian traditions and of other faiths follow, with priority given to children from non-Catholic Eastern Churches.¹¹

Similarly, at the Jewish King David School in Melbourne, while students of other religious backgrounds are accepted, enrolment priority is given to children whose parents are members of affiliated religious congregations, alumni or staff, or who have siblings currently enrolled at the school. A somewhat different approach is taken by the Massada College in Adelaide which, although it does not publish an enrolment policy, advertises itself as ‘the only school in Adelaide that provides a Jewish education ... [t]he education curriculum and the social foundations on which the school is run adhere to... the spiritual observation of Judaism.’¹² While the school is open to children of any or no religious affiliation, approximately 80 per cent of the student population is Jewish.¹³ Such an arrangement does not, however, necessarily require discrimination in favour of co-religionists (as the position of the Catholic Church does) but may simply be the result of Jewish parents being more attracted to Jewish education than non-Jewish parents.

Religious schools may also wish to hire only teachers who share the same religion. Speaking about Catholic education in Melbourne, Pope John Paul II proclaimed that staff in religious schools shared in the Church’s mission of ‘proclaiming the good news of salvation’, their professionalism as teachers involving tasks linked to their Baptism and to their own commitment in faith.¹⁴ While some schools may wish to only employ co-religionists, it is more common that religious schools may wish to ensure that those who will have certain responsibilities such as the principal and

⁹ Catholic Education Office, Melbourne, *CEOM Policy 2.4: Enrolment for Schools in the Archdiocese of Melbourne* (2007) <<http://web.ceo.melb.catholic.edu.au/index.php?sectionid=450>> at 7 May 2009, Appendix 3.

¹⁰ Ibid.

¹¹ Ibid Appendices 1 and 2, s 3.

¹² The King David School, *The King David School: A Unique School of Thought* (2006) The King David School <<http://www.kds.vic.edu.au/>> at 7 May 2009. Unlike Catholic schools, Jewish schools in Australia do not fall under the auspices of a central Jewish educational authority; rather, each school is governed by the traditions of the particular Jewish denomination under which it is established. There is therefore no central enrolment policy for Jewish schools.

¹³ Massada College Inc., *Our School: A Jewish School for Adelaide* (2006) Massada College <<http://www.massada.sa.edu.au/jewishschoolforadelaide.asp>> at 7 May 2009.

¹⁴ Pope John Paul II, *The Pope in Australia: Collected Homilies and Talks* (1986).

deputy principal, religious education teachers or clergy attached to the school are practising members of the same religion.¹⁵

B *Discrimination required or inspired by religious teachings*

A religious school may wish to segregate on non-religious grounds. Most commonly this takes the form of educating girls and boys separately – either in completely different schools or in different streams in the same school. Sometimes this may be justified on purely educational or social-emotional basis, but at other times the justification for sex segregation is at least in part because of religious mandates around the separation of the sexes or to minimise the opportunities for sexual behaviour that is against the teachings of the religion.

Other forms of non-religious segregation are also possible, such as a school that wishes to discriminate (for religious reasons) on the basis of race.¹⁶ However, in Australia this issue is not of particular significance.

C *Discrimination on the basis of a conflict with religious teachings*

Religious schools may wish to be able to exclude both students and teachers who they see as breaching religious orthodoxy, for example by excluding unmarried female teachers who become pregnant or students or teachers who are gay, lesbian or in de facto relationships.¹⁷ While the first two forms of discrimination generally take place at the point of admission of students or hiring of staff, this final kind of discrimination may also occur at a later point, such as when a teacher or student falls pregnant, ‘comes out’ or enters a de facto relationship.

Not all religious schools wish to discriminate on all of the bases identified above; some do not wish to discriminate at all. However, many Australian religious schools do wish to be able to discriminate on at least some of these bases, and have actively opposed non-discrimination laws that limit their capacity to do so.

¹⁵ For example, Bishops in New South Wales are calling for a greater effort from teachers and staff to abide by Catholic teachings and a new evangelism in local schools, focusing on the Catholic identity and lifestyle: ‘[W]e have to concentrate on having teachers who’re Catholic, qualified to teach religious education and their witness to the Catholic faith in the daily life of these schools.’ See ABC News, *Catholic Schools Urged to Focus More on Catholicism* (2007) ABC News <<http://www.abc.net.au/news/stories/2007/08/08/1999228.htm>> at 7 May 2009.

¹⁶ *Bob Jones v United States*, 461 US 574 (1983).

¹⁷ For an excellent analysis of discrimination by religious schools on the grounds of student or staff homosexuality and pregnancy (including interviews and case study examples), see Deb Wilkinson, Richard Denniss and Andrew Macintosh, *The Accountability of Private Schools to Public Values*, The Australia Institute Discussion Paper No 71 (2004) 21–36.

III ARGUMENTS IN FAVOUR OF ALLOWING RELIGIOUS SCHOOLS TO DISCRIMINATE

What arguments then can religious schools put forward to justify their exemption from non-discrimination laws? The key arguments in favour of exemptions for religious schools focus around religious freedom and diversity.

A *Religious freedom*

The *International Covenant on Civil and Political Rights* guarantees everyone ‘the right to freedom of thought, conscience and religion.’¹⁸ It also requires that State Party ‘respect the liberty of parents... to ensure the religious and moral education of their children in conformity with their own convictions.’¹⁹ Under the *Convention on the Rights of the Child*, State Parties ‘undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents ...’²⁰ Article 14 of the Convention explicitly recognises the right of the child to ‘freedom of thought, conscience and religion.’²¹ It also reiterates the ‘rights and duties of parents ... to provide direction to the child in the exercise of his or her right.’²² These conventions contain a prima facie assumption that a child’s religion is (or should be) related to, or identical to, that of his or her parents.²³ While the Convention allows parents to direct their children toward particular religious beliefs, it also requires parents to provide guidance and direction ‘in a manner consistent with the child’s evolving capacities’²⁴ and to allow their children to express their views and to give these views ‘due weight in accordance in accordance with the age and maturity of the child.’²⁵ Leaving aside the complexities that arise when there is not agreement between parents and children, it is clear that international human rights law protects freedom of religion for both adults and children.

¹⁸ *International Covenant on Civil and Political Rights* (1966) opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1) (*ICCPR*).

¹⁹ *Ibid* art 18(4).

²⁰ *Convention on the Rights of the Child* (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2) (*CRC*).

²¹ *Ibid* art 14(1).

²² *Ibid* art 14(2). See also art 5, which contains a general requirement for State Parties to ‘respect the responsibilities, rights and duties of parents ... to provide ... appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.’

²³ On the question of the relationship between children’s beliefs and those of their parents, see Margaret F Brinig, ‘Children’s Beliefs and Family Law’ (Research Paper No 07-43, Notre Dame Law School, 2007).

²⁴ *CRC*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 5, 14(2).

²⁵ *Ibid* art 12(1).

Religious freedom has both an individual and a collective aspect.²⁶ The capacity of people who share the same religion and belief to come together to develop and deepen their faith is a manifestation of religious freedom. This, too, is a right preserved under the *ICCPR*, which explicitly states that the right to freedom of religion includes ‘freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’²⁷ The transmission of religious beliefs, values and practices to children is an important aspect of the continuing existence of religious communities.²⁸ Raising children within a religious tradition does not necessarily require religious schools, but religious schools can allow for a more complete immersion in the traditions and practices of a particular religion. This will most clearly be the case when some degree of religious homogeneity and faithfulness to the teaching of the religion can be achieved within the school – this is a reason for wishing to discriminate in favour of co-religionists and for excluding those who do not adhere to the teachings of the religion.²⁹

B *The protection of minorities*

Religious schools can be particularly important for religious minorities who may be concerned with maintaining their religious integrity in a society – and sometimes a

²⁶ See discussion by Geigerich, above n 2, 229. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) art 14(b): ‘Every person has the right to freedom of thought, conscience, religion and belief, including—the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.’

²⁷ *CRC*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 18(1).

²⁸ See, eg, Catholic Education Office, Melbourne, above n 9: ‘Catholic education is intrinsic to the mission of the Church. It is one means by which the Church fulfils its role in assisting people to discover and embrace the fullness of life in Christ ... As a result, formation and education in a Catholic school must be based on the principles of Catholic doctrine ...’ See also Leibler Yavneh College, *About Yavneh*, Leibler Yavneh College (Melbourne) <<http://www.yavneh.vic.edu.au/about/index.php>> at 7 May 2009 — ‘Our extensive formal and informal Jewish Studies program ... helps to educate the whole child as a proud and knowledgeable Jew and Australian, so that our students are inspired with a love of Torah, Israel and their heritage and a belief in their destiny as Jews in a modern, sophisticated world’; Leibler Yavneh College, *Curriculum*, Leibler Yavneh College (Melbourne) <<http://www.yavneh.vic.edu.au/curriculum/index.php>> at 7 May 2009:

‘[T]he direction of our learning programs is based on presenting an integrated approach fostering an understanding and practical application of Jewish observance and values, Hebrew language and General Studies. Each child participates in the total spectrum of learning experiences, graduating with a strong Jewish identity.’

²⁹ See, eg, Catholic Education Office, Melbourne, above n 9: ‘To support the view that Catholic schools are primarily for Catholic children, this policy and accompanying procedures establish an expectation that schools will work towards and/or maintain the highest possible level of Catholic enrolment.’

mainstream school system – that does not understand or respect their way of life.³⁰ By limiting the intake of students exclusively or predominantly to co-religionists, they are able to conduct religious education programmes, religious practices and observances freely and without being limited by the presence of those who do not share their religion. This in turn can allay what Kenneth Karst terms:

[P]arental fear: the fear that the child will reject the authority of beliefs that the parent considers fundamental; the fear that child will engage in behaviour that the parent's culture considers immoral; and, perhaps most troubling, the fear that the child may come to self-identify with a group that the parent sees as culturally Other.³¹

Schools 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.³² 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 – a common phenomenon in predominantly Christian countries like Australia. 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 in a minority within the broader community.

C *Discrimination to reiterate religious values*

The religious freedom argument outlined above also extends beyond merely preferencing co-religionists and supports some other types of discrimination as well.

³⁰ See Rebecca Senescall and Yuko Narushima, 'Backlash over New Islamic School' *Sydney Morning Herald* (Sydney), 6 November 2007, *Brisbane Times* (Brisbane), 6 November 2007: Responding to a religious backlash in relation to the proposed building of an Islamic school in Cambden, Queensland, a spokesman for the Qu'ranic Society said: 'People fear what they don't yet understand... There's nothing at all for people to be afraid of any more than they need to be afraid of Catholics or Jews or Protestants.'

³¹ Karst, above n 1, 989. See also Brinig, above n 23, 4: 'Catholics have long believed that children who attend Catholic schools are more apt to remain Catholic for life and to contribute more to the Church. But whether it is development of a personal faith, introduction to a Catholic peer group, or exposure to the Catholic tradition is less obvious.'

³² See, eg, Raymond Chow, 'Inciting hatred or merely engaging in religious debate?' (2005) 30 *Alternative Law Journal* 120, 120–1: 'Religious hate speech also isolates Arab Muslim Australians from public life. Victims alter their lifestyles, particularly in the areas of school and work, to avoid the terrorising effect of religious vilification.'

If a religion teaches that a particular form of behaviour is a serious wrong, then hiring and continuing to employ members of staff who engage in that behaviour creates a real tension in the school. Educationalists refer to the importance of the ‘unwritten curriculum’ – the values and attitudes that are implicitly or expressly adopted by the school leaders and teachers. Religious schools maintain that it is unreasonable to expect them to hire teachers whose lifestyle implicitly conveys the message that the teachings of the religion about that lifestyle are wrong. CEOM policy relating to the employment of staff, for example, is explicit in its expectation that all staff employed in a Catholic school (whether Catholic or not) will *inter alia*:

(a) By their teaching and other work, and by personal example, strive to help students to understand, accept and appreciate Catholic teaching and values; [and]

(b) Avoid, whether by word, action or public lifestyle, influence upon students that is contrary to the teaching and values of the Church community in whose name they act.³³

This view is not restricted to Catholic schools. A reporter for *The Age* queried Christian Schools Australia head Stephen O’Doherty and Abdul Karim Galea of the Council of Islamic Schools about the hypothetical situation of a teacher declaring their homosexuality. O’Doherty replied that it “may become an issue for their employment” because a homosexual ‘can’t teach a Christian view about sexuality and marriage’, while Galea conceded a gay teacher would be “an anomaly... We would have a problem with it because the Koran does teach against homosexuality”.³⁴ Several Muslim schools in Australia also require students and staff, regardless of their personal religion or religious convictions, to observe relevant religious dress codes.³⁵

Acceptance by schools of alternate lifestyles, whether by staff or students, could cause confusion and cognitive dissonance among children and alienate parents who might well have chosen the school in large part because they wish to see their religious values respected in practice as well as in theory. Marjorie George notes the concern of many parents about sending their children to public schools: ‘In addition to being concerned about their children’s classroom education, parents are also concerned about violence, premarital sex, and drug use.’³⁶ Some parents believe

³³ Catholic Education Office, Melbourne, *CEOM Policy 2.2: Guidelines Relating to the Employment of Staff* (2002) <<http://web.ceo.melb.catholic.edu.au/index.php?sectionid=40>> at 7 May 2009.

³⁴ Bachelard, above n 4.

³⁵ Bachelard, above n 4: At the two Islamic schools *The Age* newspaper journalist visited, there were both non-Muslim and Muslim teachers, though female teachers, Muslim or not, were required to wear headscarves. According to Galea, this creates ‘an Islamic environment’, which makes parents ‘feel comfortable’.

³⁶ George, above n 4, 843–4.

(rightly or not) that religious schools offer a safe haven where their children's moral development occurs in line with their religious values.³⁷

D *Diversity and choice*

Finally, allowing religious schools exemptions from non-discrimination laws allows them to maintain their distinctive character and creates a more diverse school sector. As long as there is a strong, healthy, properly funded secular school system then parents who feel strongly about issues of non-discrimination will be able to send their children to a school where those values are respected. If different religious schools use different forms of exemption to create a range of schools, then parents have greater choice. Moreover, society has a bulwark against over-reaching governments who attempt to impose uniform values or a homogenous worldview through the school system. If religious schools cannot stand at least a little to one side of the prevailing social norms, then they run the danger of merely becoming agents of the state and losing their distinctive value.³⁸ Responding to legislative proposals to remove exemptions allowing religious schools to expel gay or pregnant students, Cardinal George Pell rejected calls to bring Catholic schools in line with the values of the general community: 'Nobody is forced to send their children to Catholic schools. Parents send children to Catholic schools because they know they will get a certain set of values there.'³⁹ As long as such religious schools are voluntary and there is a viable alternative to them in the secular, public sphere then there is an argument that allowing them exemptions from discrimination law allows for greater diversity in the sector and greater choice for parents and children.

IV ARGUMENTS AGAINST RELIGIOUS EXEMPTIONS FROM NON-DISCRIMINATION LAWS

There are, however, significant arguments against allowing religious schools an exemption from non-discrimination laws.

³⁷ Ibid 845: 'Increasingly, a variety of people are suggesting that problems outside the classroom are due to a lack of morality among young people and communities are turning to religion to provide a solution.' See also ibid 858–60.

³⁸ See, eg, Brendan Trembath, *Push for Greater Catholic Identity in Schools* (2007) ABC News <<http://www.abc.net.au/news/stories/2007/08/08/2000031.htm>> at 7 May 2009: Bishop David Walker says it is true that non-Catholic students add to the cultural diversity of schools, though he would like to see all Catholic schools have more of a Catholic identity — 'One of the reasons why we run our schools is to provide education within the context of a faith commitment.' See also the response by The Bishop of the Wagga Wagga Diocese, Gerard Hanna, to the growing numbers of non-Catholic enrolments in Catholic Schools: 'That's not a bad thing, we're just saying to some extent, that changes the nature of the school...': ABC News, *Schools Look to Enhance Catholic Identity* (2007) ABC News <<http://www.abc.net.au/news/stories/2007/08/08/1999364.htm>> at 7 May 2009.

³⁹ ABC News, *Pell Defends Catholic Schools' Right to Discriminate* (2004) ABC News <<http://www.abc.net.au/news/stories/2004/05/18/1110803.htm>> at 7 May 2009. The Archbishop of Sydney defended the right of religious schools to discriminate, claiming it is integral to religious freedom in Australia.

A *Tolerance and understanding of others*

It is important to note that the rights of parents under the *Convention on the Rights of the Child* are not absolute. The Convention stresses that in all actions concerning children, including those undertaken by public or private institutions, administrative authorities and legislative bodies ‘the best interests of the child shall be a primary consideration.’⁴⁰ The question therefore arises as to whether allowing religious schools to exclude students or staff of whose religion, race, gender or lifestyle the school disapproves, thereby denying students the opportunity to meet and make friends with people from other religions or to hear the viewpoints of those who have different beliefs to their own, is in the best interests of the child. In particular, laws that permit children to spend their formative years in an environment that is mono-religious or demonises alternative lifestyle choices may communicate to those children that this type of religious exclusivity is legitimate or even appropriate, and ill-prepare them for the realities of a multi-religious democratic society.

A further concern in terms of creating a religiously exclusive student body is that such a student body may be less tolerant of religious or lifestyle differences. This stands in stark contrast to the requirement in Article 29 of the *Convention on the Rights of the Child* that the education of the child shall be directed to, inter alia:

the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations’, and ‘the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.’⁴¹

There is also the possibility that exempting religious schools from otherwise applicable non-discrimination principles may adversely impact the way their students view or engage with people of other faiths or beliefs, in contravention of the latter’s rights to equality and non-discrimination.⁴² Under the *International Covenant on Civil and Political Rights*, freedom of thought, conscience and religion may be subject to ‘such limitations as are prescribed by law and are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.’⁴³ Moreover, ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by

⁴⁰ *CRC*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

⁴¹ *CRC*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 29(1)(b), 29(1)(d).

⁴² See, eg, Professor Terry Lovat of the University of Newcastle, cited in ‘God in the Classroom’, *Sydney Morning Herald* (Sydney), 23 June 2003, 21: ‘The values being pursued by religious schools are sometimes very positive and in other cases very one-sided and possibly even based on prejudice and religious bigotry.’

⁴³ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

law.⁴⁴ Consequently, the need to ensure the equal rights of all people, and to prevent discrimination, may place limits on those expressions of religious freedom that threaten these. It is, of course, entirely possible that students well-versed in their own religious traditions may be as open (or even more open) to developing good relations with people from other religions than those who have been schooled in a multi-religious or secular environment, however there is also a risk that this will not be the case. A key difficulty in adequately assessing this issue is that while several studies have been conducted on the effects of segregation based on gender, race or disability,⁴⁵ there is a significant gap in the literature on the impact of ‘religious segregation’ in schooling.

B *Protecting the importance of discrimination law*

In relation to other types of discrimination, those who oppose exemptions point to the fact that religious institutions, including schools, are usually supposed to adhere to the general law. As leading US constitutional scholar Cass Sunstein puts it: ‘it is generally accepted that most ordinary law, both civil and criminal, is legitimately applied to religious organizations.’⁴⁶ He goes on to explore what he terms the puzzle of the Asymmetry Thesis that holds that while all the ordinary laws about such things as murder, cruelty to animals and inflicting emotional distress are assumed to apply to religious groups, sex discrimination laws are not.⁴⁷

Those opposed to exemptions for religious groups may legitimately question this asymmetry. 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.

⁴⁴ Ibid art 20(2).

⁴⁵ See, eg, Nancy Levit, ‘Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools (2005) *University of Illinois Law Review* 455; Wendy Kaminer, ‘Educational and Social Scientific Perspectives on All-Female Education’ (1997–98) 14 *New York Law School Journal of Human Rights* 211; Galen Sherwin, ‘Single-Sex Schools and the Anti-Segregation Principle’ (2005) 30 *New York University of Law and Social Change* 35; Verna Williams, ‘Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender’ [2004] *Wisconsin Law Review* 15; Roslyn Arlin Mickelson, ‘The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools’ (2003) 81 *North Carolina Law Review* 1513.

⁴⁶ Cass R Sunstein, ‘On the Tension between Sex Equality and Religious Freedom’ (Public Law Working Paper No 167, The University of Chicago, 2007) 1.

⁴⁷ Ibid.

Religious freedoms and the principles of non-discrimination serve to maintain equality and peaceful co-existence amongst people with different beliefs and characteristics.

C *Harmful personal and economic effects of discrimination laws*

Discrimination, no matter what the grounds, also has harmful economic and personal effects on the people subjected to the discrimination. Religious schools are significant players in the education market. In Australia, for example, approximately 33 percent of students are enrolled in non-government schools. Around 20 percent of Australian students attend Catholic schools whilst another 13 percent attend Independent schools, the majority of which have some form of religious affiliation.⁴⁸ If a teacher is in a position where a wide variety of religious groups may wish to discriminate against her (for example, because she is an unmarried mother) then her employment opportunities can be greatly curtailed. Teachers who are sacked or students who are expelled from religious schools because their behaviour was not compliant with religious teaching suffer personal humiliation and financial loss; their severing from the school can be an occasion of dissent and controversy within the broader school community.

D *Diversity without discrimination*

Finally, the strength of the argument from diversity is questionable. Religious schools may be distinctive in a whole range of ways that do not require them to discriminate.⁴⁹ They may express their unique world views in aspects of the curriculum (including but not limited to religious education), in their uniform policy, in the kind of food that they offer from the canteen, in their inclusion of religious rituals and practices in the usual routine of the school and the extra-curricula activities they offer. Discrimination laws do not necessarily have to be sacrificed in order for diversity to be maintained. This is a particularly important point, as the argument from diversity is a far-reaching one with the potential to undermine much of the progress made by discrimination laws. Cultural or religious necessity is one of the most common grounds for resisting discrimination laws and schools are not the only religious institutions that attempt to benefit from religious exemptions.⁵⁰

⁴⁸ Australian Bureau of Statistics, *Schools, Australia, 2006 National Schools Statistics Collection* (2006).

⁴⁹ This argument is akin to Jack Donnelly's arguments regarding human rights and cultural relativism more generally: Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, 2002).

⁵⁰ See, eg, Kate Uebergang, 'Church Loses Bid for Faithful', *Herald Sun* (Melbourne), 26 November 2005, 5. The Victorian Civil and Administrative Tribunal rejected a bid by a church founded charity (which helps local families hit by poverty, substance abuse, illness and unemployment) to advertise for staff who are baptised, practising Christians 'walking in daily fellowship with Jesus'. In seeking to employ a manager and volunteer counsellors who had 'publicly confessed Jesus Christ as both saviour and lord of their lives' and had been baptised, Mornington Baptist Church

V AUSTRALIAN DISCRIMINATION LAW AND RELIGIOUS SCHOOL EXEMPTIONS

Each state and territory in Australia has at least one legislative instrument prohibiting certain kinds of discrimination in school admissions and/or employment. Commonwealth statutes also prohibit specific forms of discrimination. Schools generally fall under the jurisdiction of state and territory laws, but some educational institutions are subject to Commonwealth law and it is thus discussed here for the sake of completeness.

The preceding sections considered four broad circumstances in which religious schools may wish to discriminate in their enrolment and employment policies and practices. A discussion of relevant legislation follows.

A *Student enrolments*

Australian State and Territory legislative provisions relating to school enrolments and discrimination are reasonably comparable. Provisions in all states and territories render it unlawful for an educational authority to discriminate against a person: first, by deciding who should be admitted as a student; secondly, by refusing or failing to accept a person's application for admission as a student; and thirdly, on the terms or conditions on which it is prepared to admit the person as a student.⁵¹ Most jurisdictions also contain specific exemptions for religious educational institutions, although the circumstances in which schools may discriminate tend to vary. Racial discrimination is unequivocally prohibited under Commonwealth legislation;⁵² Victoria is the only Australian State that exempts religious schools from the general prohibition against racial discrimination.⁵³

1 *Religion and religious beliefs*

There is no Commonwealth legislation prohibiting religious discrimination within religious schools. The *Racial Discrimination Act 1975* (Cth) states that it is:

unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.⁵⁴

Community Caring argued employees and volunteers represented the church and should represent its values.

⁵¹ See, eg, *Equal Opportunity Act 1995* (Vic) s 37(1).

⁵² *Racial Discrimination Act 1975* (Cth) s 9(1).

⁵³ *Equal Opportunity Act 1995* (Vic) s 38.

⁵⁴ *Racial Discrimination Act 1975* (Cth) s 9(1).

Exclusion or refusal of employment on the basis of race, even if motivated by religious belief, is prohibited under the Act. The Act also prohibits discrimination on the basis of ethnicity. In some circumstances, the prohibition of racial or ethnic discrimination provides a degree of protection to some religious groups.

Discrimination on the grounds of ethnicity (or even ethno-religious origin, as in NSW), however, does not make it unlawful to discriminate on the basis of religion. In the case of *A obo V & A v Department of School Education*⁵⁵, for example, the New South Wales Administrative Decisions Tribunal considered whether discrimination on the grounds of religion was made unlawful by the *Anti-Discrimination Act 1997* (NSW) which added 'ethno-religious origin' to the definition of race in the Act. The Tribunal concluded that the purpose of the amendment was to qualify certain ethno-religious groups as a race and not to extend the Act to include discrimination on the basis of religion; inclusion of a prohibition against discrimination on the grounds of ethno-religious origin did not render discrimination on the grounds of religion unlawful.⁵⁶ However certain groups where religion plays a part in the creation of the group, such as Jews and Sikhs, have been accepted as being racial or ethnic groups for the purpose of the legislation.⁵⁷ This approach demonstrates both the insufficient coverage of discrimination on religious grounds and also the considerable difficulty in distinguishing when discrimination on ethnic or religious grounds.⁵⁸

Explicit protection against discrimination on the basis of religion (or religious belief) by educational institutions is provided in six Australian jurisdictions: Queensland⁵⁹, Tasmania⁶⁰, Victoria,⁶¹ Western Australia,⁶² the Northern Territory⁶³ and the Australian Capital Territory.⁶⁴ Neither South Australia nor New South Wales prohibit religious discrimination in school enrolments, however the New South Wales *Anti-Discrimination Act 1977* was amended to include 'ethno-religious origin' within the definition of 'race', bringing Jews, Sikhs and Muslims within

⁵⁵ [1999] NSWADT 120.

⁵⁶ Note however that this case involved a claim against a government school — not a religious school. The discrimination alleged was the holding by the school of Christmas and Easter activities and the reciting of a school prayer — essentially, the imposition/exposure of Christian religious practices on non-Christian students.

⁵⁷ *Jones v Scully* (2002) 120 FCR 243, 272; 'Middle Eastern Muslim' is a 'race' within the definition of s 4 of the *Anti-Discrimination Act 1977* (NSW) as ethno-religious origin: *Haider v Combined District Radio Cabs Pty Ltd trading as Central Coast Taxis* [2008] NSWADT 123.

⁵⁸ Katherine Gelber, 'Hate Speech in Australia – Emerging Questions' (2005) 28 *University of New South Wales Law Journal* 861, 862–3.

⁵⁹ *Anti-Discrimination Act 1991* (Qld) ss 7, 38, 39.

⁶⁰ *Anti-Discrimination Act 1998* (Tas) ss 16, 22(1).

⁶¹ *Equal Opportunity Act 1995* (Vic) s 37.

⁶² *Equal Opportunity Act 1984* (WA) s 61.

⁶³ *Anti-Discrimination Act 1992* (NT) s 29(1) and (2)

⁶⁴ *Discrimination Act 1991* (ACT) s 18.

its ambit.⁶⁵ Proposals for similar amendments in Western Australia and South Australia, however, were rejected.⁶⁶

Despite express legislation prohibiting religious discrimination in the five States and Territories identified above, most of these jurisdictions provide exemptions for religious educational institutions. In Victoria,⁶⁷ Queensland⁶⁸ and the Northern Territory,⁶⁹ the exemption is relatively simple: if an educational authority operates, or proposes to operate, an educational institution ‘wholly or mainly’ for students of a particular religion, people who are not of that religious belief may be excluded. The exemptions in the ACT⁷⁰ and Western Australia⁷¹ are narrower: in the ACT, the educational institution must be conducted ‘solely’ for students having a religious conviction other than that of the applicant; while in Western Australia only educational institutions that are conducted ‘in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’ may discriminate on the basis of religion. Moreover, the Western Australian *Equal Opportunity Act 1984* renders lawful such discrimination only where it is done ‘in good faith’ and ‘in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.’⁷² These requirements arguably render it more difficult for an educational institution to discriminate against students in Western Australia than in other jurisdictions such as Victoria.⁷³ The Tasmanian *Anti-Discrimination Act 1998* stands out as a clear exception to the general trend in Australian anti-discrimination law in the field of education as it grants no exemption to religious schools to discriminate on the basis of religion.

2 *Sex and lifestyle (including homosexuality, pregnancy and marital status)*

The Commonwealth *Sex Discrimination Act 1984* prohibits discrimination by an educational authority against a person on the ground of the person’s sex, marital status, pregnancy or potential pregnancy as a basis for a refusal or failure to accept

⁶⁵ *Anti-Discrimination Act 1977* (NSW) s 17(1) and (2).

⁶⁶ Equal Opportunity Commission of Western Australia, *Racial and Religious Vilification Consultation Paper* (2004); Attorney-General’s Department of South Australia, *Discussion Paper: Proposal for a New Law Against Religious Discrimination and Vilification* (2002). Both papers are cited by Dermot Feenan, ‘Religious Vilification Laws — Quelling Fires of Hatred?’ (2006) 31 *Alternative Law Journal* 153.

⁶⁷ *Equal Opportunity Act 1995* (Vic) s 38.

⁶⁸ *Anti-Discrimination Act 1991* (Qld) s 41(a).

⁶⁹ *Anti-Discrimination Act 1992* (NT) s 30(2).

⁷⁰ *Discrimination Act 1991* (ACT) s 46.

⁷¹ *Equal Opportunity Act 1984* (WA) s 73(3).

⁷² *Equal Opportunity Act 1984* (WA) s 73(3).

⁷³ Cf *Goldberg v G Korsunski Carmel School* (2000) EOC § 93-074. In this case, even though a Jewish school had discriminated against a potential student on the basis of his religion, it was held that the discrimination was done in good faith and therefore did not breach the provisions of the *Equal Opportunity Act 1984* (WA).

the person's application for admission as a student, or in the terms or conditions on which it is prepared to admit the person as a student.⁷⁴

The Act contains two exceptions to these prohibitions that may be used by religious schools. First, the prohibition against sex discrimination in enrolments does not apply to educational institutions 'conducted solely [or, in the case of tertiary institutions, 'mainly'] for students of the opposite sex to the sex of the applicant.'⁷⁵ Religious schools constituted as single sex educational institutions may therefore refuse applications for enrolment by students of the opposite sex, although it is unclear whether the exemption applies to segregating male and female students in different streams at the *same* school. They may also refuse employment to teachers of the opposite sex. Secondly, the prohibition does not apply to religious educational institutions where such discrimination is designed to avoid offending religious sensibilities. The Act provides that, the general prohibitions notwithstanding, it is not unlawful for an 'educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'⁷⁶ to discriminate against another person 'on the ground of the other person's marital status or pregnancy in connection with the provision of education or training'⁷⁷ if the discrimination occurs 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'⁷⁸ Thus religious schools may exclude, segregate or attach conditions to the enrolment of students whose 'marital status or pregnancy' threatens 'the religious susceptibilities of adherents of that religion or creed.'

The prohibitions in other Australian jurisdictions in relation to refusing or failing to accept a person's application for admission as a student, or in the terms on which a religious school is prepared to admit the person as a student are generally comparable, although the availability and extent of exemptions vary. South Australia,⁷⁹ Queensland,⁸⁰ the Northern Territory⁸¹ and Victoria⁸² all provide exemptions to the prohibition on discrimination on the ground of sex for educational institutions established 'wholly or mainly' for students of the one sex. The exemptions in Western Australia,⁸³ Tasmania,⁸⁴ and the Australian Capital Territory⁸⁵ are narrower: the school must be conducted 'solely' for students of the opposite sex to that of the applicant. New South Wales grants the widest exemption,

⁷⁴ *Sex Discrimination Act 1984* (Cth) s 21(1).

⁷⁵ *Sex Discrimination Act 1984* (Cth) ss 21(3)(a), (b).

⁷⁶ *Sex Discrimination Act 1984* (Cth) ss 38(1) (employment), (3) (enrolment).

⁷⁷ *Sex Discrimination Act 1984* (Cth) s 38(3).

⁷⁸ *Sex Discrimination Act 1984* (Cth) ss 38(1) (employment), (3) (enrolment).

⁷⁹ *Equal Opportunity Act 1984* (SA) s 37(3)(a).

⁸⁰ *Anti-Discrimination Act 1991* (Qld) s 41(a).

⁸¹ *Anti-Discrimination Act 1992* (NT) s 30(1).

⁸² *Equal Opportunity Act 1995* (Vic) s 38.

⁸³ *Equal Opportunity Act 1984* (WA) s 18(3).

⁸⁴ *Anti-Discrimination Act 1998* (Tas) s 27(1)(b) (the Act refers to one-gender schools rather than using the language of solely, but the effect is the same).

⁸⁵ *Discrimination Act 1991* (ACT) s 46.

granting all private educational authorities unfettered discretion to discriminate on the basis of sex.⁸⁶

In addition, some exemptions are given to religious schools with respect to students' sexual identities or activities. While discrimination on the basis of sexuality, pregnancy or marital status is generally prohibited in all Australian jurisdictions, the specific grounds upon which religious schools may discriminate, and the circumstances in which they may do so, vary significantly. As noted above, in Commonwealth legislation, the exemption in favour of religious schools applies only to students' marital status or pregnancy, and must be exercised by religious educational authorities only to avoid harming the religious susceptibilities of adherents of its particular religion or creed.

The Victorian *Equal Opportunity Act 1995* and the Australian Capital Territory's *Discrimination Act 1991* both prohibit discrimination on a number of grounds, including: age, breastfeeding, gender identity, impairment, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation or personal association (whether as a relative or otherwise) with a person who is identified by reference to any one of the above attributes.⁸⁷ The exemption granted to religious schools under both legislative instruments is in quite different terms to that contained under the Commonwealth *Sex Discrimination Act 1984*, rendering lawful 'discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.'⁸⁸ In the ACT, the discrimination must also be 'in good faith'. Similarly, the Western Australian *Equal Opportunity Act 1984* allows educational institutions 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' to lawfully discriminate against current or prospective students in relation to sexual orientation, gender history, marital status, pregnancy and family responsibilities if the discrimination occurs 'in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.'⁸⁹

The South Australian *Equal Opportunity Act 1984* proscribes the same types of discrimination as its Victorian, ACT and Western Australian equivalents,⁹⁰ but the exemption is narrower: it applies only 'where an educational or other institution is administered in accordance with the precepts of a particular religion,' and exempts only 'discrimination on the ground of sexuality, or cohabitation with another person of the same sex as a couple on a genuine domestic basis, that arises in the course of the administration of that

⁸⁶ *Anti-Discrimination Act 1977* (NSW) s 31A(3)(a).

⁸⁷ *Equal Opportunity Act 1995* (Vic) s 6; *Discrimination Act 1991* (ACT) s 7.

⁸⁸ *Equal Opportunity Act 1995* (Vic) s 77; *Discrimination Act 1991* (ACT) s 33(2).

⁸⁹ *Equal Opportunity Act 1984* (WA) s 73(3).

⁹⁰ *Equal Opportunity Act 1984* (SA) s 37(1).

institution and is founded on the precepts of that religion.⁹¹ Moreover, unlike the Commonwealth *Sex Discrimination Act 1984*, it does not expressly include pregnancy as a lawful ground for discrimination.

Freedom for religious schools to restrict enrolments is broadest in New South Wales, where the exemption from general anti-discrimination principles is unfettered (that is, it does not need to be exercised in good faith or in accordance with religious tenets) for all private educational authorities in relation to 'sex, marital status... transgender or homosexuality.'⁹² The strongest protection against sex and lifestyle discrimination is found in Queensland and Tasmania and the Northern Territory which only have exceptions for sex, religion and impairment. Legislation in these States prohibit discrimination on the basis of, inter alia, sexual orientation, relationship status, pregnancy, lawful sexual activity, gender identity, parental status or family responsibilities without the exemptions given in other States to religious schools.

The net result of Australian equal opportunity and anti-discrimination legislative instruments is that, other anti-discrimination provisions notwithstanding, nearly all jurisdictions allow religious schools to discriminate, under certain circumstances, on the basis of religion (or religious conviction) and gender. Protection against discrimination on the grounds of sex life (including homosexuality, pregnancy, marital status) is the least consistent, ranging from none to full discretion for religious schools, and in some instances, allowing exemptions in accordance with genuine religious beliefs. Discrimination on the basis of race by religious schools is only protected in Victoria.

B *Employment of staff*

In no religious or other institution in any of the States or Territories is discrimination on the ground of race permitted with respect to employment. Discrimination on other bases is also prohibited, but religious schools have wide exemptions to lawfully discriminate on a number of grounds. The discretion accorded religious schools varies between jurisdictions, both in the types of discrimination which are permissible and the explicitness of the exemptions.

1 *Religion and religious beliefs*

The only Australian jurisdictions that expressly and unequivocally permit religious schools to discriminate against acting or prospective members of staff on the basis of religious belief or activity are Tasmania and Northern Territory⁹³. In Tasmania, such discrimination is lawful only if 'the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment' or if it 'is in order to

⁹¹ *Equal Opportunity Act 1984* (SA) s 50(2).

⁹² See *Anti-Discrimination Act 1977* (NSW) ss 31A, 38K, 46A, 49ZO.

⁹³ *Anti-Discrimination Act 1992* (NT) s 37A; *Anti-Discrimination Act 1998* (Tas) s 51.

enable, or better enable, the educational institution to be conducted in accordance with the tenets, beliefs, teachings, principles or practices' according to which it is conducted.⁹⁴ In the Northern Territory, the discrimination need not be in furtherance of an occupational requirement to be lawful, but it must be 'in good faith' and in order to 'avoid offending the religious sensitivities of people of the particular religion.'⁹⁵

New South Wales provides a blanket exemption to the anti-discrimination prohibitions in relation to any 'act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'⁹⁶ It is unclear whether religious schools fall within this definition of a religious body, given that the preceding parts of the section deal with the ordination or appointment of priests and ministers of a religious order, the training and training of persons seeking to be ordained or appointed as priests or ministers of a religious order, and the appointment of any other person in any capacity by a body established to propagate religion.⁹⁷ Moreover, private educational institutions, which include religious schools, are expressly exempt from other anti-discrimination provisions (but not those relating to religion) under a different section of the Act.⁹⁸ A proposed legislative amendment to expressly exclude educational institutions and the provision of social, charitable or welfare services from the meaning of 'religious body' was rejected by the New South Wales legislature in 2005,⁹⁹ leaving the question open.

The remaining jurisdictions variously allow religious schools to discriminate on any ground except race in accordance with, or to avoid injuring the religious susceptibilities of adherents of, the relevant religion or creed,¹⁰⁰ and in some cases requiring good faith in avoiding this injury.¹⁰¹ While religion and religious beliefs and practices are not expressly included as permissible grounds for discrimination, these clearly fall within the possible parameters of these exemptions as attributes that could cause harm to or conflict with religious susceptibilities or work requirements. The exemptions in these

⁹⁴ *Anti-Discrimination Act 1998* (Tas) s 51.

⁹⁵ *Anti-Discrimination Act 1992* (NT) s 37A.

⁹⁶ *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁹⁷ *Anti-Discrimination Act 1977* (NSW) ss 56(a), (b), (c) respectively.

⁹⁸ *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).

⁹⁹ Anti-Discrimination Amendment (Equality in Education and Employment) Bill 2005 (NSW).

¹⁰⁰ See *Discrimination Act 1991* (ACT) s 33(1); *Equal Opportunity Act 1984* (WA) s 73(1); *Equal Opportunity Act 1995* (Vic) s 76. Note: Section 77 of the *Equal Opportunity Act 1995* (Vic) also makes lawful 'discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.'

¹⁰¹ See *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73; and *Anti-Discrimination Act 1991* (Qld) s 25(3).

jurisdictions are also sufficiently wide enough to embrace discrimination on the basis of sex, sexual identity or activity, pregnancy, relationship or marital status, or any other ordinarily prohibited ground.

2 *Sex and lifestyle (including homosexuality, pregnancy and marital status)*

The Commonwealth *Sex Discrimination Act 1984* prohibits discrimination by an educational authority ‘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’ against a current or potential employee in relation to offers, terms or conditions of employment; promotions, training and other benefits; and penalties or dismissal.¹⁰² It also exempts educational institutions ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’¹⁰³ from this general prohibition if the discrimination occurs ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.’¹⁰⁴ Consequently, religious schools may refuse to employ, attach conditions to or terminate the employment of staff whose ‘sex, marital status or pregnancy’, threatens ‘the religious susceptibilities of adherents of that religion or creed.’

New South Wales is the only jurisdiction in which private educational authorities, including religious schools, are expressly exempt from anti-discrimination laws in relation to sex and marital status.¹⁰⁵ Exemptions from anti-discrimination law in relation to transgender or homosexuality is also expressly conferred upon religious educational institutions in New South Wales,¹⁰⁶ while those in the Northern Territory¹⁰⁷ and South Australia¹⁰⁸ may lawfully discriminate on the basis of ‘sexuality’ and ‘sexuality, or cohabitation with another person of the same sex as a couple on a genuine domestic basis’ respectively. In South Australia, the discrimination is lawful only for educational institutions administered in accordance with the precepts of a particular religion, and only where the discrimination is founded on the precepts of that religion.¹⁰⁹ Similarly, in the Northern Territory, the discrimination is lawful only for educational institutions operated in accordance with the doctrine of a particular religion where the discrimination is in good faith to avoid offending the religious sensitivities of people of the particular religion.¹¹⁰

Freedom for religious schools to discriminate generally on the basis of other aspects of sexuality, such as gender identity, marital status, relationship status, homosexuality, pregnancy or breastfeeding in the field of employment, is available

¹⁰² *Sex Discrimination Act 1984* (Cth) ss 14(1), (2), 38.

¹⁰³ *Sex Discrimination Act 1984* (Cth) s 38(1).

¹⁰⁴ *Sex Discrimination Act 1984* (Cth) s 38(1).

¹⁰⁵ *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c).

¹⁰⁶ *Anti-Discrimination Act 1977* (NSW) ss 49D(3)(c), 49ZH(3)(c).

¹⁰⁷ *Anti-Discrimination Act 1992* (NT) s 37A.

¹⁰⁸ *Equal Opportunity Act 1984* (SA) s 50(2).

¹⁰⁹ *Equal Opportunity Act 1984* (SA) s 50(2).

¹¹⁰ *Anti-Discrimination Act 1992* (NT) 37A.

in all other Australian States and Territories except for Tasmania. These exemptions, whose parameters and requirements vary in each jurisdiction, are the same ones discussed earlier in relation to religious discrimination. That is, the discrimination must be (a) in accordance with, or to avoid injuring the religious susceptibilities of adherents of, the relevant religion or creed,¹¹¹ and (b) in some cases requiring good faith in avoiding this injury¹¹²

Overall, the exemptions relating to religious schools and discrimination in employment differ in each Australian jurisdiction. Commonwealth legislation does not permit discrimination on the basis of religion, however discrimination on the bases of sex, marital status and pregnancy are permitted where the discrimination occurs in good faith to avoid harming religious sensibilities. Tasmania, Western Australia, Queensland, the Northern Territory and the Australian Capital Territory permit discrimination only where a ‘genuine occupational requirement’ or ‘good faith’ test is made out. Victoria and South Australia allow for slightly broader exemptions, permitting discrimination provided it is in accordance with the relevant religious beliefs, principles or precepts of the religious institution. Neither Act, however, expounds upon precisely what constitutes ‘relevant beliefs, principles or precepts’, and case law provides little guidance on the matter.

The broadest exemptions are conferred in New South Wales, where discrimination is permitted on the basis of religion, sex, marital status, disability, and transgender or homosexuality even if the discrimination does not relate to the precepts of a particular religion – the minimum requirement in all the other Australian jurisdictions. One explanation for this is that the New South Wales exemptions stand alone in referring to ‘private educational authorities’, while all other jurisdictions expressly refer to ‘religious institutions’. The question of whether religious schools in New South Wales fall within the ambit of ‘religious bodies’, and are therefore permitted to discriminate on the basis of religion or religious beliefs, activities or practices remains ambiguous.

Exemptions from anti-discrimination laws are narrowest in Tasmania, where religious schools may discriminate on the ground of religion alone.

C *Analysis of Current Discrimination Laws*

The exemptions for religious schools with respect to both student enrolment and employment demonstrate the attempt by legislatures to take into consideration the importance of both religious freedom and equality. The precise balance struck differs between jurisdictions, which is not necessarily problematic in a federation,

¹¹¹ See *Discrimination Act 1991* (ACT) s 33(1); *Equal Opportunity Act 1984* (WA) s 73(1); *Equal Opportunity Act 1995* (Vic) s 76. Note: Section 77 of the *Equal Opportunity Act 1995* (Vic) also makes lawful ‘discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.’

¹¹² See *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73; and *Anti-Discrimination Act 1991* (Qld) s 25(3).

but the reasons for the distinctions are not well articulated. There is a danger that the breadth of the exemptions can depend on the political weight that religious groups in particular States have rather than more principled rationales.

The capacity of religious schools to discriminate on the basis of religious belief is well-established and utilised by a variety of religious groups within all States except Tasmania (where the issue is still bitterly contested by some religious bodies). The capacity to create student bodies with some degree of religious homogeneity arguably has the highest claim to being important to maintain religious freedom and the least negative proven consequences in terms of undermining discrimination laws and equality more generally. The weight of the claims for non-discrimination principles in employment is more significant, particularly given what a significant portion of the market for teachers is made up of religious schools. This perception is reflected in the discrimination laws of most jurisdictions where greater restrictions are placed on the capacity of schools to discriminate on the basis of religion through requirements such as proof of 'genuine occupational requirement'. Such a limited restriction may permit discrimination in certain critical roles, but not widespread discrimination. However, exemptions based on the need to 'avoid injuring the religious susceptibilities of adherents', used in a number of jurisdictions, is rather vague and provides little guidance to either religious schools or their potential employees (particularly in cases where a religious community may be divided on issues, such as whether having a gay or lesbian teacher working in the school is appropriate). Religious freedom does not normally protect religious 'sensibilities' and this type of exemption is questionable both in terms of legal clarity and the principled justification supporting it.

Discrimination on the basis of sex has generally not been debated in terms of particular religious beliefs in Australia, where the debate has instead tended to focus on whether single sex education leads to better or worse education and social outcomes for girls and boys. All of the jurisdictions discussed allow schools to operate for members of a single sex only, whether for religious reasons or not. Some allow sex discrimination in addition by schools for religious reasons. It is not clear that such additional exemption is either necessary or justified.

Finally, the area of discrimination on the basis of such attributes as homosexuality, marital status, and pregnancy have proved the most controversial. While creating a school where people share the same religious heritage is not necessarily a rejection or criticism of those from other backgrounds or religious beliefs, the reasons for discrimination on the grounds of lifestyle are usually directly linked to the belief that such lifestyles are less morally worthy than heterosexuality within marriage (or celibacy outside it). Exemptions for religious schools on these grounds are therefore both more tightly connected to religious doctrine and practice than some other grounds, but also more directly undermine equality and tolerance. The same problematic language of 'religious sensibilities' is used in several jurisdictions and the diversity of approaches in the different States is evidence of the political complexity of this issue.

CONCLUSION: LEGAL RESPONSES

Both religious freedom and freedom from discrimination are important social values and neither should be lightly disregarded, but when religious schools want exemptions from discrimination law that applies to other schools, they are in clear tension. In the words of Shelley Wessells:

The conflict between the two principles has frustrated courts, religious groups, and nondiscrimination proponents. What should courts do when religious groups cry foul at a law that says their free exercise rights do not extend to their religious beliefs requiring discrimination? Or, conversely, what should courts do when other groups cry foul at a law exempting religious groups from nondiscrimination requirements that they must meet?¹¹³

The correct resolution will, of course, depend on the features of the particular society, as well as the (often unstated) assumptions of various proponents about which value should prevail. Reid Mortensen considers the principle of non-discrimination an expression of pluralism, arguing that the latter logically dictates limits to the former. While recognising the difficulties of differentiating and segmenting public and private discrimination, he nonetheless advocates a degree of autonomy for religious groups to experiment with, and live out, different values.¹¹⁴ Others begin from the premise of equality or non-discrimination as the basic norm and argue that religious pluralism is only valuable insofar as it does not threaten these values.

The greater and more real the choice given to parents and children to avoid religious schools, the more justifiable exemptions are, although the tension cannot be resolved simply by a matter of individual choice.¹¹⁵ There must be a significant number of high quality secular schools available to cater for parents and children who do not wish to have a religious education and who support education in a non-discriminatory environment before it can be said that there is a real choice of schools. Where religious schools dominate education or dominate high-quality

¹¹³ Shelley K Wessells, 'The Collision of Religious Exercise and Governmental Nondiscrimination Policies' (1989) 41 *Stanford Law Review* 1201, 1203. See also Martha Minow, 'Should Religious Groups be Exempt from Civil Rights Laws?' (2007) 48 *Boston College Law Review* 1, 2: 'Even those who disagree about the answer can agree upon the question: how can a pluralistic society commit to both equality and tolerance of religious differences?'

¹¹⁴ Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality — Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland' (2003) *Queensland University of Technology Law and Justice Journal* 332.

¹¹⁵ According to one conception of free choice, 'an individual's choice has what can be called a commitment function: one is asked to choose one of several alternative institutions, such as a particular school or enterprise, and this preference signals a willingness to accept that institution's decision about the place that freedom of religion occupies in its activity': Sheldon Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of Religion' (2007) 70 *The Modern Law Review* 713, 714.

education in a country then parents may feel pressured to send their children to such institutions. In those circumstances, there may be greater justification for stronger state control of such schools. If religious schools provide a significant percentage of the education that is given to children or if the lack of funding for secular schools means that many children have no real alternative but to attend a religious school, then closer state control may well be appropriate.¹¹⁶

In countries such as Australia there are good arguments for allowing religious schools to discriminate in favour of co-religionists – at least until such time as there is evidence of the damaging effects of such education rather than conjecture about it. The religious exclusivity can be seen in a positive sense of creating a community of common interest rather than rejecting or reviling those who do not share the same religion. Concerns that this may lead to religious intolerance may be better dealt with in a more nuanced way such as through building relationships with other schools or education about other religions.¹¹⁷ In Victoria, for example, a new initiative backed by the Catholic Education Office, Australian Catholic University and the Islamic-run Australia Intercultural Society is promoting the development by Christian and Muslim high school teachers of a shared curriculum to overcome religious stereotyping and promote tolerance among students.¹¹⁸ This is indicative of the fact that religious schools can and often do welcome ways of building better understanding between their students and students from other religions.

More problematic are laws that allow for discrimination on bases such as sex, sexuality, marital status and (where such exemptions exist) race. Societies that commit to principles of non-discrimination and which aim for equality need to take those values seriously and to be particularly careful about sending a message to children that these are optional or relatively trivial concepts. As Thomas Geigerich argues, ‘the freedom of religion cannot be considered more important than other fundamental rights... all of which emanate from the same basic notion of human dignity.’¹¹⁹ No doubt it does cause some discomfort and confusion within religious schools when the application of non-discrimination principles results in a conflict between the official teachings of the religion and the behaviour of students and staff, but the sacking of staff or expulsion of students also causes conflict in the school.

It does not logically and necessarily follow that because the official teaching of a religion holds that orthodoxy condemns a particular behaviour, all of the followers of the religion share the same viewpoint. Children may be distressed when a popular teacher is forced to leave the school for failure to comply with religious tenets that the students may themselves be questioning. Parents may be divided over whether

¹¹⁶ See discussion in Wilkinson, Denniss and Macintosh, above n 17, 47.

¹¹⁷ See, eg, Chow, above n 32, 121, who suggests the creation of interfaith programs to ‘provide an open space through which people from different backgrounds can learn about and become familiar with each others’ cultural and religious differences.’

¹¹⁸ Dewi Cooke. ‘Teachers in Bid to Boost Religious Tolerance’, *The Age* (Melbourne), 12 April 2008, 9.

¹¹⁹ Geigerich, above n 2, 217.

an excellent school principal should be forced out of office because he is discovered to be having an affair. So it is not the case that allowing for exemptions will cure all of the problems of conflict and tension over discrimination in schools. Indeed, it may be helpful for children and young people to learn to live in communities where there are people who do not always comply with the religious teachings that the child may adhere to, but who are none the less valued members of the community. This can be an important part of breaking down prejudice and intolerance.

Resolving competing legitimate claims between religious freedom and non-discrimination norms is a complex and controversial enterprise, particularly when the education of children is at stake. In Australia, religious schools play a valuable role in fostering children's religious and cultural identities and in creating a more diverse school sector. Such schools are deserving of some protection of their distinctive worldview, but such protection is nonetheless consistent with the idea that they should be subject to more aspects of discrimination law than is currently the case in Australia.