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MEETING THE CHALLENGES FACING RELIGIOUS SCHOOLS

Jacquie Seemann, 4 October 2017

1 Challenges and competing expectations

1.1 One of the great challenges facing religious schools is balancing the competing expectations and requirements that influence the running of the school. These include:

(a) priorities of the clergy and/or the school lay leadership to have the school community consist of a high level, or even exclusively, of students and teachers of that faith;

(b) the varying expectations of parents, who might place much or little importance on the role of religion in their children's education;

(c) educational authorities, particularly government, which generally prioritise academic results, enrolment numbers, compliance and funding;

(d) discrimination laws, which prohibit discrimination on the basis of religion or on other grounds which may conflict with the priorities of the school; and

(e) the duty of care of schools to students and staff to protect against harassment, vilification and bullying – both at common law and under safety and discrimination legislation.

1.2 How each school approaches this challenge will largely depend on what the school is seeking to achieve from both the religious perspective and the educational perspective. For example, is the school run strictly in accordance with the teachings and doctrines of the particular religion of the school, with all members of the school community expected to support those teachings in their lives and lifestyles, or is the school less concerned with a strict application of that religion and, instead, seeking to promote broader ethical values (including diversity and equality) within a general religious framework? Are parents sending their children to the school because they want them to learn about the religion and be able to practise their religious observances freely, and thus to maintain the same faith and practices as the parents, or because they want their children to identify and strengthen connections with a faith and/or ethnic-based community, or both?

1.3 This paper considers the parameters placed on religious schools by relevant discrimination and other laws, and some of the issues that arise in seeking to balance all these competing expectations.

1.4 It is useful to start by asking what rights Australians have to religious freedoms in the first place? How does the law seek to balance those rights against other rights, like the freedom to be free from unreasonable discrimination in work and employment contexts, and to be kept safe at work? And how can schools shape their thoughts about these issues in light of their own priorities?

2 Freedom of religion in Australia

2.1 Significant work has been done in considering the question of religious freedom in Australia, particularly in the context of schools, by Carolyn Evans of Melbourne Law School and her colleagues[1]. In short, as explained by Evans, there is no clear right to freedom of religion across all jurisdictions, and a number of different international and domestic law principles need to be considered to understand the state of play.

[1] See Evans, C, 'Legal aspects of the protection of religious freedom in Australia', Melbourne Law School, June 2009; Evans, C and Ujvari, L, 'Non-discrimination laws and religious schools in Australia', (2009) 30 *Adelaide Law Review*, p 31; Evans, C and Gaze, B, 'Discrimination by religious schools: views from the coal face', [2010] 34 Melbourne University Law Review, p 392; and Evans, C, *Legal Protection of Religious Freedom in Australia* (2012) Federation Press.

2.2 There are a number of aspects of this issue that must be considered. To summarise Evans' characterisation of those issues[2]:

(a) there is no common law right to freedom of religion;

(b) Australia has signed a number of international treaties that both protect the right to freedom of religion and prohibit discrimination on the basis of religion. In particular, Article 18 of the *International Covenant on Civil and Political Rights* (which is based on but extends the United Nations' Universal Declaration of Human Rights and came into effect in 1976) states:

> *1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and 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.*
>
> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3. Freedom 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.*
>
> *4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The later, non-binding *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* adds the limitation that '*practices 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*'. Australia is also signatory to other international conventions that include an obligation not to discriminate on the ground of religion in implementing measures to protect other rights – see for example Article 2 of the *International Covenant on Economic, Social and Cultural Rights*, which states: '*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*';

(c) international law does not become part of Australian law automatically, but it does:

(i) create obligations that can be enforced by international tribunals, and also gives rights to Australian citizens to seek assistance – for example, non-enforceable opinions of the UN Human Rights Committee;

(ii) influence the interpretation of our legislation and the development of common law principles. There is a common law presumption that parliament does not intend to breach international obligations entered into by the executive[3], and while this presumption can be displaced by a clear statutory intention to the contrary[4], it leaves room, for example, where two interpretations of a statute are possible, to choose the one that is consistent with Australia's international obligations to protect religious freedom; and

(iii) enable the Commonwealth government to make laws to implement treaty obligations, while requiring that those laws be soundly based on the treaties that

[2] Evans, C, 'Legal aspects of the protection of religious freedom in Australia', Melbourne Law School, June 2009, sections 1, 2, 3 and 5.
[3] See eg *Minister for Immigration and Ethnic Affairs v Teoh* (1995) CLR 273 per Mason CJ and Deane J.
[4] *Al-Kateb v Godwin* (2004) CLR 562 per McHugh J at [33], Hayne J at [241] and Callinan J at [297-298].

they seek to implement. However, as set out below, Australia has done very little to implement its treaty obligations to protect religious freedom through its laws;

(d) the Commonwealth Constitution does include a provision (section 116) that the Commonwealth Parliament may not make laws that either prohibit the free exercise of religion or establish a religion. This provision does not restrict State governments (in fact, was intended to leave State governments free to regulate religious affairs if they so chose[5]); and in the case of the Commonwealth only refers to legislation and actions taken under legislation. The few cases that have considered s 116 over time show the courts giving a narrow interpretation of the concepts. Thus:

(i) the courts have held that, to show a prohibited restriction on 'free exercise of religion', the legislation must indicate, probably on its face, a purpose to restrict religious freedom. Thus, it was not a breach of the prohibition on restricting religious freedom to require a person to train for defence work despite a religious conscientious objection; nor was a legal requirement to reveal the contents of a religious confession in breach of the section[6]; and

(ii) in challenges to the funding by the Commonwealth of non-government schools including religious schools in the early 1980s, the High Court held that – unlike the position in the USA – the Commonwealth was not 'establishing a religion' when it funded such religious institutions. While the judgments of the majority differed, they all essentially held that 'establishment' required some form of identification of the religion with the state, with some judges referring to the creation of a 'state religion' or 'state church'[7]; and

(iii) Australia has no national bill of rights that would create a general protection beyond what is set out above – although Victoria and the ACT have human rights Acts that include protection of freedom of religion or belief.

2.3 The question is live in Australian discourse now – in November 2016 the Minister for Foreign Affairs, the Hon Julie Bishop MP, asked the Joint Standing Committee on Foreign Affairs, Defence and Trade to inquire into and report on the status of the human right to freedom of religion or belief. Submissions were originally to close in February 2017, then on 7 August 2017, but the Committee's website says that it is still accepting submissions (it has already received 372). In his submission, Professor George Williams of UNSW notes: *'Australia is exceptional. Indeed, we stand alone in being the only democracy without some form of national bill of rights incorporating protection of freedom of religion. The same problem applies to a number of other rights, including those that underpin our democracy, such as freedom of speech and association. Put simply, Australia does not protect freedom of religion and other rights as is thought appropriate in every other like nation*'[8].

2.4 It follows that religious schools must look for protection of their rights to operate as they wish to either (where relevant) through the state-specific human rights Acts and otherwise through prohibitions of discrimination based on religion – as to which see below.

3 Discrimination laws

3.1 The starting point in Australian discrimination law is, generally speaking, that the law prohibits (renders unlawful) certain types of discrimination based on specific 'grounds' (or 'reasons', or 'attributes') in certain areas of activity, including employment and education.

3.2 For reasons of space, this paper will not analyse the theoretical basis for or model of these anti-discrimination laws in any detail. Rather, it is important to note simply that these laws do exist in

[5] Williams, G, *Submission to Inquiry into the status of the human right to freedom of religion or belief*, 1 March 2017.
[6] See *Krygger v Williams* (1912) 15 CLR 366; *SDW v Church of Jesus Christ of Latter-Day Saints* (2008) 222 FLR 84 at 94-95, *Jehovah's Witnesses Case* (1943) 67 CLR 116 and *Scientology Case* (1983) 154 CLR 120.
[7] *DOGS Case* (1981) 146 CLR 559.
[8] Williams, G, *Submission to Inquiry into the status of the human right to freedom of religion or belief*, 1 March 2017.

part, but somewhat theoretically, to protect rights to various freedoms; but in practice they are designed more directly to avoid harm to those who experience unfair and unlawful discrimination. Such harms might include, for example, economic harm such as the loss of job and/or income; denial of the opportunity to access educational services or benefits; damage to reputation; and/or emotional and psychological pain and suffering. It is against this avoidance of harm principle that the needs and desires of religious schools are measured under discrimination laws.

Discrimination on the ground of religion

3.3 In this context, with reference to religion specifically:

(a) all jurisdictions except New South Wales, South Australia and the Commonwealth expressly prohibit discrimination on the ground of religion[9];

(b) South Australia provides some limited protection, in that it prohibits discrimination on the ground of religious dress or appearance in employment or education[10];

(c) New South Wales prohibits discrimination on the ground of ethno-religious origin (as part of racial discrimination).[11] These provisions are understood to prohibit discrimination against Sikhs and Jews, and it has been held that 'ethno-religious origin' also includes being of Middle Eastern Muslim origin, though not being Muslim generally[12]; and

(d) at Commonwealth level the Australian Human Rights Commission may inquire into discrimination on the basis of religion in employment or occupation.[13]

3.4 Queensland, Tasmania and Victoria also have laws that prohibit vilification of a person or group based on religion, and the Commonwealth *Racial Discrimination Act 1975* and NSW *Anti-Discrimination Act 1977* both prohibit vilification based on race – which again includes ethnicity. There are of course interesting questions as to where genuine criticism of a religion stops and vilification, or incitement to hatred and violence, starts.

Other grounds

3.5 Other prohibited grounds of discrimination that are sometimes relevant to religious schools include:

(a) sex and gender identity/status;

(b) sexuality or sexual orientation; and

(c) marital status.

3.6 Clearly, some religions have strong opinions about the way these issues should be treated – and those opinions do not always accord with the principle that Australian citizens should not be discriminated against on these grounds. Often, there are contrary opinions within religions or at least their denominations. All these issues play out in the way religious schools respond to these issues.

Workplace laws

3.7 The *Fair Work Act 2009* (Cth) also prohibits an employer from taking 'adverse action' (including refusing to employ a person, or dismissing the person) against an employee or prospective employee because of the person's religion, sex or sexual orientation.[14] This provision does not render unlawful any action that is not unlawful under anti-discrimination law in force in the place

[9] *Discrimination Act 1991* (ACT) s 11 (in employment); *Anti-Discrimination Act 1992* (NT) s 19(m); Anti-Discrimination Act (Qld) s7(i); *Equal Opportunity Act 2010* (VIC) s 6(n); *Equal Opportunity Act 1984* (WA) Part IV; *Anti-Discrimination Act 1998* (Tas) s 16(o) and (p).
[10] *Equal Opportunity Act 1984* (SA) s 21.
[11] *Anti-Discrimination Act 1977* (NSW) s 4(1).
[12] *Haider v Combined District Radio Cabs Pty Ltd t/as Central Coast Taxis* [2008] NSWADT 123.
[13] *Australian Human Rights Commission Act 1986* (Cth) ss 3 and 31.
[14] *Fair Work Act 2009* (Cth) s351(1).

where action is taken.[15] Accordingly, these provisions have the effect of generally mirroring anti-discrimination laws in the relevant jurisdiction, although the overlap between them can be complicated and the Fair Work Act can provide additional remedies for people in those jurisdictions where discrimination on the ground of religion is prohibited.

Overview of exemptions

3.8 All jurisdictions provide some exemptions that allow religious institutions to act in ways that would otherwise be unlawful discrimination.

3.9 There is a general exemption that appears in slightly different forms in all jurisdictions. For example, section 56 of the NSW *Anti-Discrimination Act 1977* provides:

> *Nothing in this Act affects:*
>
> *(a) the ordination or appointment of priests, ministers of religion or members of any religious order*
>
> *(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order*
>
> *(c) the appointment of any other person in any capacity by a body established to propagate religion, or*
>
> *(d) any other 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.*[16]

3.10 Other jurisdictions refer to 'religious bodies' and provide similar exemptions.

3.11 This broad exemption may be relevant to schools run directly by churches but may not extend to incorporated organisations set up to run schools that are separate from those schools. However, to attract the exemption, the school would generally still need to show that it was set up to 'propagate religion'. It might be relevant, for this purpose, to check the objects of a school as set out in its Constitution – and these documents are often old and in need of reworking for a number of reasons, one of which may be that the Constitution might not refer to religion in a way consistent with the school's current operation.

3.12 However, a variety of additional exemptions exist in the various jurisdictions that are also of relevance to actions by religious schools. New South Wales has the broadest of these exemptions: it exempts all private educational authorities in relation to many grounds of discrimination. Other jurisdictions contain more narrow exemptions for religious educational authorities engaging in discrimination on particular grounds where the discriminatory action, for example:

(a) conforms to the doctrines, tenets or beliefs of the religion of the school; or

(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

These exemptions are identified throughout the paper where relevant.[17]

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[15] *Fair Work Act 2009* (Cth) s351(2)(a).

[16] See similar provisions in *Sex Discrimination Act 1984* (Cth) s 37(a)-(c); *Discrimination Act 1991* (ACT) s 32(a)-(c); *Anti-Discrimination Act 1992* (NT) s 51(a)-(c); *Anti-Discrimination Act* 1977 (NSW) s 56(a)-(c); *Anti-Discrimination Act 1991* (QLD) s 109(a)-(c)*; Equal Opportunity Act 1984* (SA) ss 50(1)(a), 50(1)(b) and 50(1)(ba); *Equal Opportunity Act 2010* (VIC) s 82; *Equal Opportunity Act 1984* (WA) s 72(a)-(c).
Anti-Discrimination Act 1998 (TAS) s 52.

[17] For a detailed comparison of the exemptions across Australian jurisdictions see Walsh, G, 'The right to equality and the employment decisions of religious schools', (2014) 16 *The University of Notre Dame Australia Law Review,* 107-144.

3.13 The exemptions are frequently the subject of public debate, and there have been several parliamentary inquiries in various jurisdictions, and several proposals for their removal – usually by independent members of parliaments. Clearly, Australians are not united in their views on how religious bodies should be allowed to conduct themselves as employers and educators, and the extent to which they should be permitted to discriminate on various grounds.

4 Other relevant laws

4.1 In navigating their religious way, schools also need to take into account various other sources of law and regulation.

Safety legislation and duty of care

4.2 Work health and safety laws place a duty on schools to ensure, so far as is reasonably practicable, the health and safety of all persons who may be affected by the school's undertaking, including prospective and current staff and students.[18]

4.3 Schools also owe students and staff a duty of care at common law; that is, a duty to ensure that – if there is a significant risk of foreseeable injury to them – that reasonable care is taken to avoid that injury. Because of the special nature of the school/student relationship, the duty in that case is similar, though not identical, to the duty that parents have to their children.

4.4 Both of these types of duties include an obligation to take reasonable steps to prevent students and staff from suffering physical or psychological harm as a result of unlawful discrimination, including harassment, or bullying.

4.5 The broader impact of failing to discharge this duty may be considerable – in the current climate, schools need to be concerned about the alienation of some students due to their sexuality or gender identity, for example.[19]

Educational regulation

4.6 Education legislation in various States prescribes minimum curriculum for all schools, and certain additional requirements for non-government schools that wish to be accredited for the purpose of academic achievements such as the Higher School Certificate (in NSW) and its various equivalents.[20] The requirements of these regulations may conflict with the religious aims of schools in terms of the amount of religious studies that they wish to provide and/or the way they wish certain subject areas to be taught. There is scope to seek exemptions from or modifications to minimum curriculum requirements[21] and in some cases the legislation specifically contemplates this occurring to make a syllabus compatible with a school's religious outlook.[22]

So how does it all work?

4.7 Perhaps not surprisingly, the variety of approaches at law and the interplay between laws leaves some of those charged with the responsibility of running religious schools somewhat confused. In research conducted by Carolyn Evans and Beth Gaze in 2008, 19 out of 27 school principals interviewed said that they knew and understood their legal obligations, but their understanding was

[18] *Work Health and Safety Act 2011* (ACT) s 19; *Work Health and Safety Act 2011* (Cth) s 19; *Work Health and Safety Act 2011* (Qld) s 19; *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety Act 2012* (SA) s 19; *Work Health and Safety Act 2012* (Tas) s 19; *Occupational Safety and Health Act 1984* (WA) ss 19 and 21(2); *Occupational Health and Safety Act 2004* (Vic) ss 21 and 23.
[19] For a further exploration of this issue see David Ford's paper, *Lesbian, Gay, Transgender and Intersex Students* November 2016, http://www.emilford.com.au/imagesDB/wysiwyg/LGBTIStudentsandDutyofCare-November2016PaperbyDavidFord.pdf.
[20] See for example *Education Act 1990* (NSW) ss 8 and 10; *Education and Training Reform Act 2006* (Vic) s4.3.1(6)(b)(i) and *Education and Training Reform Regulations 2007* (Vic) *sch2 item 6.*
[21] See for example *Education and Training Reform Regulations 2007* (Vic) r 52*.*
[22] See for example, *Education Act 1990* (NSW) ss 8(3) and 10(3).

not always accurate; seven acknowledged some uncertainty or confusion about those obligations; and most generally approached the issues of religion, sexuality and marital status with caution.[23]

4.8 In this context, the remainder of this paper considers how these principles and laws are enmeshed, and how they have played out – or might play out – in real situations faced by religious schools.

5 Religion and the enrolment process – who makes the cut, and how may different students be treated?

5.1 As Evans and Gaze note[24], schools are seen by many not simply as a workplace or place of learning but also a community and, from this perspective, enrolment policies become important in deciding who makes up the community and the community's resulting values. The expectation of parents may be that their children will be attending a school with children from families of the same faith. Particularly for families of minority group religions, this may be important to enable children to experience some feeling of belonging, or of being part of a majority, which they do not experience in the wider world where they are a member of an identifiable minority. In this context, schools might choose to have an exclusive faith-based (or religious identity-based) enrolment policy, or a policy that prefers adherents of a particular religion.

5.2 Other schools might choose an open enrolment policy which results in a religiously diverse student group. This brings its own challenges. For example, how does a school avoid segregation and exclusion of non-religious students or students of another religion – if for example the faith of the school strictly prohibits those students from participating in the religious activities of the school? Further, schools may find that lessons involving teachings of their faith are subject to greater scrutiny and resistance from students who do not adhere to that religion, which can create difficulty and disruption in the classroom.

5.3 In addition to balancing these challenges, schools must also ensure that their enrolment policies do not breach discrimination laws.

Relevant exemptions

5.4 A number of jurisdictions contain specific exemptions for applications for admission to any school, college or institution under the direction or control of a religious body.[25]

5.5 This includes:

(a) discrimination on the ground of religion; and

(b) by providing for a single sex school.

Admission based on religion

5.6 For example, the *Discrimination Act 1991* (ACT) does not render unlawful the refusal by a religious educational institution of a person's application for admission as a student on the ground of religion, if that institution is conducted solely for students having a religious conviction other than that of the applicant (section 46).

5.7 Even where there is no specific exemption (such as in NSW), it is generally understood that discrimination on the ground of religion in terms of admission is permissible – in the case of NSW, because the state does not prohibit discriminating on the ground of religion in the first place. However, as a case from the UK shows, there is an alternative argument that could apply in NSW.

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[23] Evans, C and Gaze, B, 'Discrimination by religious schools: views from the coal face', [2010] 34 *Melbourne University Law Review*, p 392 at 419.
[24] Evans, C and Gaze, B, 'Discrimination by religious schools: views from the coal face', [2010] 34 *Melbourne University Law Review*, p 392 at 408.
[25] See *Sex Discrimination Act 1984* (Cth) s 38(3); *Anti-Discrimination Act 1992* (NT) s 30(2); Anti-Discrimination Act 1991 (QLD) s 41; Equal Opportunity Act 2010 (VIC) ss 82, 83; *Equal Opportunity Act 1984* (WA) s 73(3); *Anti-Discrimination Act 1998* (TAS) s51A; *Discrimination Act 1991* (ACT) s 46.

5.8 In *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS*[26], the British Supreme Court ruled that a Jewish school discriminated unlawfully against a boy on the ground of race by denying him admission because his mother is Jewish by conversion, not by birth (i.e. he was not 'ethnically' Jewish). The Jews' Free School (JFS), a secondary school in London, is designated as a Jewish faith school. JFS gave precedence in admission to those children recognised as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR). The OCR only recognises a person as Jewish if:

(a) that person is descended in the matrilineal line from a woman whom the OCR would recognise as Jewish; or

(b) he or she has undertaken a qualifying course of Orthodox conversion.

5.9 Both the father and his child in this case were practising Conservative (non-Orthodox) Jews. The mother was of Italian and Catholic origin and converted to Judaism under the auspices of a non-Orthodox synagogue - so her conversion was not recognised by the OCR. The child's application for admission to JFS was rejected as he did not satisfy the OCR requirement of matrilineal descent. The father challenged the admissions policy of JFS as directly discriminating against his child on grounds of his ethnic origins contrary to section 1(1)(a) of the *Race Relations Act 1976*.

5.10 The majority found that:

(a) the policy was unlawful direct discrimination, because the matrilineal test is a test of ethnic origin – and discrimination that is based upon that test is discrimination on racial grounds under the Act, rather than religion;

(b) the motive for the discrimination and/or the reason why the discriminator considered the victim's ethnic origins significant is irrelevant;

(c) this decision does not mean that no Jewish faith school can ever give preference to Jewish children. However, eligibility must depend on religion not on ethnicity; and

(d) while it may be arguable that an explicit exemption should be provided in order to allow Jewish faith schools to grant priority in admissions on the basis of matrilineal descent - however formulating such an exemption is a matter for Parliament (paragraphs [69]-[70] per Lady Hale).

5.11 By contrast, the minority held that there was no unlawful direct discrimination, but was divided on whether JFS had unlawfully discriminated against the applicant indirectly. In terms of direct discrimination, the minority said that:

(a) to determine the ground on which JFS refused the child's admission, the Court should adopt a subjective approach which takes account of the motive and intention of JFS, the OCR and the Chief Rabbi; and those parties were subjectively concerned solely with the child's religious status, as determined by Jewish religious law; and

(b) the availability of conversion demonstrates that the test applied is inherently of a religious rather than racial character

5.12 On unlawful indirect discrimination:

(a) Lords Hope and Walker found that children who were not of Jewish ethnic origin in the matrilineal line were placed at a disadvantage by JFS's admission policy compared to those who did possess the requisite ethnic origins, but that this policy pursued the legitimate aim of educating those regarded as Jewish by the OCR within an educational environment espousing and practising the tenets of Orthodox Judaism. However, the failure of JFS to consider an alternate, potentially less discriminatory, admission policy

[26] *R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants)* [2009] UKSC 15.

means that the court cannot find that the means which JFS employed were proportionate – i.e. there was unlawful indirect discrimination; but

(b) Lords Rodger and Brown found that the objective pursued by JFS's admission policy – educating children recognised by the OCR as Jewish – was irreconcilable with any approach that would give precedence to children not recognised as Jewish by the OCR in preference to children who were so recognised. The policy was a rational way of giving effect to the legitimate aim pursued and was not disproportionate – i.e. there was no unlawful indirect discrimination.

5.13 The case has been applied and referred to several times, but has never progressed the discussion on a relevant issue.

5.14 In total contrast, in Western Australia, the earlier case *Goldberg v Korsunski Carmel School*[27] found that a policy of the same kind was not unlawful discrimination on the ground of race. In that case, an Orthodox Jewish school was established to provide Orthodox education to Orthodox Jews (that is, those considered Jewish according to Halacha, the Orthodox Jewish law). Students who were not Halachic Jews were permitted to enrol subject to the:

(a) approval of the Rabbi, on the basis that the family would support the school ethos; and

(b) requirement that they could not participate in certain areas of school life.

5.15 As in the JFS case, the mother of the student in this case was not considered to be Halachically Jewish, which meant that the student was not Halachically Jewish. This meant that the student's enrolment would be subject to restrictions. The father argued that this was unlawful discrimination against non-Orthodox Jews on the grounds of religious conviction and race.

5.16 It was held that although the school had discriminated against the student on religious grounds, the discrimination was lawful because the school had acted in good faith 'in favour of the adherents of that religion or creed generally' and had not acted in a manner that discriminated against a particular class or group who were not adherents of that religion or creed (*Equal Opportunity Act 1984* (WA) section 73(3)). The claim regarding racial discrimination was also dismissed because the restrictions imposed on the student – including the activities in which he could participate at the school – were only due to theological, not racial, considerations.

5.17 Only one case[28] has applied *Goldberg*, and again this did not progress the discussion of relevant principle. The questions raised have never been considered by a superior court.

Treatment of students based on sex

5.18 It is accepted in all Australian jurisdictions that some schools are set up only to educate students of one sex. However, how students are treated based on their sex/gender identity is potentially a controversial issue.

5.19 One UK case that cites the JFS case, but makes points relevant to the issue of sex/gender rather than race in the context of religion, is *The Interim Executive Board of X School v. Her Majesty's Chief Inspector of Education, Children's Services and Skills*.[29] The case concerns a report made by the Chief Inspector of Education about an Islamic school, stating that the actions of the school were inadequate and unlawful because, while it admitted boys and girls, it had a policy of segregating them for all purposes within the school; so that the school operated as if it were 'two single sex school on one site'. This appeared to be accepted by the court, which went on to observe that similar policies were also present among the three great Abrahamic religions. However, the issues before the court were whether:

[27] [2000] EOC 93-074.
[28] *Miller v Wertheim* (2002) EOC 93-182; [2001] FMCA 103.
[29] [2016] EWHC 2813 (Admin).

(a) the denial to both sexes of the opportunity to interact and socialise amounted to 'less favourable treatment' under the UK legislation[30]; and

(b) whether the segregation was applied because girls were regarded as inferior to boys.

5.20 On the first issue, the court held that 'less favourable treatment' referred to some denial of an advantage, benefit or choice which would have been afforded to the comparator. In principle, the denial of the choice to interact and socialise with the opposite sex, and the educational benefits which might flow, was capable of amounting to the denial of a 'benefit' or 'facility'. It was an opportunity that reasonable people would value, and there was evidence that pupils at the school regretted its absence. However, the identification of a 'detriment' was not, without more, to be equated with proof of less favourable treatment. In this case, both sexes were being denied the opportunity to interact, socialise and learn with, or from, the opposite sex. It would be artificial to say that the denial to the boys of the opportunity to mix with the girls was somehow different from the opportunity being denied to the girls. However, the court noted that there was a compelling argument that the segregation could not be 'divorced from the historic and current societal treatment of the less powerful group' and that 'segregation has a tendency to promote social and cultural stereotypes about the role of women in society'. Nevertheless, it would only be different if there were some qualitative distinction between male and female interaction, but there was not. On that analysis, it could not be said that one sex was being treated less favourably than the other. In the absence of proof of less favourable treatment, there was no discrimination.

5.21 On the second issue, the court held that segregation was only capable of being seen as a reflection of the attitudes, cultures and practices of the faith groups permitted to do it. It could not be concluded that segregation in the school was in reference to the status of women in the community, which would be too broad a judgment to make in a multicultural society. This is particularly true here where the segregation was elected by the parents. While a number of children had complained about the segregation, none had suggested that it made girls feel or appear inferior. The Inspector's conclusions could only be substantiated if it could be proven that faith schools, in general, segregated sexes because they regarded girls as inferior in society. However, this argument was not made here.

5.22 Accordingly, the court held that the Inspector's report could not be circulated in its current form, and was required to be amended so that it did not state that the segregation policy was inadequate and unlawful.

5.23 While there are no similar cases in Australia, the X School case prompts interesting consideration about how treatment of boys and girls, and for that matter treatment of transgender students, by religious schools might fall foul of discrimination law prohibitions.

6 Staff and their faith – the relevance of religion in the recruitment process

6.1 Staff at any school are required to act as role models for their students. In religious schools, this often means modelling the religious values and beliefs of the school and the way of life that flows from those values and beliefs.

6.2 The position is put strongly by Kevin Donnelly, director of the Melbourne-based Education Standards Institute, as follows:

> *Faith-based schools, by their very nature, are there to uphold and teach the spiritual values and morality embodied in their religion. If freedom of religion is to have any meaning, then it follows that schools should have the power to discriminate in relation to who they enrol and who they employ.*
>
> *… As publicly stated by the Catholic Education Commission of Victoria: 'Our schools promote a particular view of the person, the community, the nation and the world centred on the person and teachings of Jesus Christ, and they form an integral part of the church community in which all generations live, worship and grow together.'*

[30] Sections 13(1) and 23(1) of the *Equality Act 2010.*

> *Those seeking to work or those seeking to enrol children in such schools can be in no doubt as to the religious nature of such schools and that there is a requirement, as members of the school community, to live according to the tenets on which the school is based.*
>
> *And it is wrong to argue that the freedom to discriminate should apply to only those teaching religious instruction in faith-based schools…*
>
> *All subjects, as well as what is known as the hidden curriculum involving a school's institutional practices and culture, contribute to … moral development. It is also true that teachers, regardless of their subject expertise, are role models and can have a significant and lasting impact on their students.*[31]

6.3 Clearly, on a basis such as this, schools often prefer to employ staff of the same faith as the school; but sometimes this is simply not possible. As the Victorian Independent Education Union reported to a parliamentary committee in 2009:

> *[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 amount of staff needed, it is simply not possible to employ those staff along denominational lines only … It is an undisputed fact that there is a diverse range of employees working in schools – staff in de facto relationships, non-Jewish staff working for Jewish school, non-Catholics working in Catholic schools, and non-Christians working in Christian schools.*[32]

6.4 In other cases, schools do not wish to discriminate on the basis of either faith or lifestyle – particularly when staff are not engaged in teaching religious studies. Thus, in surveying the attitudes and practices of schools, Evans and Gaze found that:

> *Several 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.*[33]

6.5 If their recruitment practices are more open or diverse, schools sometimes compensate for this by making staff not of the faith of the school conform to some of the school religion's practices. One example is Muslim schools requiring non-Muslim female teachers to wear a headscarf, in order to create 'an Islamic environment' which makes people feel comfortable' according to the President of the Council of Islamic Schools.[34]

Relevant exemptions

6.6 A number of jurisdictions contain specific exemptions for employment of persons in any school, college or institution under the direction or control of a religious body.

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[31] Donnelly, K, 'Schools practise what they preach', *The Sydney Morning Herald*, 17/1/13; http://www.smh.com.au/federal-politics/political-opinion/schools-practise-what-they-preach-20130116-2ctpf.html.

[32] 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, cited in Walsh, G, ' The right to equality and the employment decisions of religious schools', (2014) 16 *University of Notre Dame Australia Law Review*, 107-144.

[33] Evans, C and Gaze, B, 'Discrimination by Religious Schools: Views From The Coal Face' (2010) 34 *Melbourne University Law Review* 392 at 425.

[34] Bachelard, M, 'At the crossroads?' *The Age*, 25/2/08; http://www.theage.com.au/news/in-depth/at-the-crossroads/2008/02/24/1203788145887.html?page=5.

6.7 For example:

(a) the *Discrimination Act 1991* (ACT) does not render unlawful discrimination on the ground of religious conviction by an educational authority in relation to employment or work in an educational institution conducted by the authority if the duties of the employment or work involve, or would involve, the participation by the employee or worker in the teaching, observance or practice of the relevant religion (section 44);[35] and

(b) the Fair Work Act provisions prohibiting adverse action on the basis of religion do not apply if the discrimination is:

> '*(b) taken because of the inherent requirements of the particular position concerned; or*
>
> *(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:*
>
> *(i) in good faith; and*
>
> *(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed*.'[36]

Cases

6.8 There are surprisingly few decided cases in this area, some under workplace laws and some under discrimination laws. The cases generally deal more with lifestyle issues; although there are at least some media reports of cases in which the issue is faith itself.

6.9 In *Jones v Lee and Guilding*,[37] a principal was summarily dismissed from an English Catholic school for getting a divorce and remarrying an assistant teacher. The court held that the summary dismissal was invalid.

6.10 Similarly, in Australia, in *Thompsons v Catholic College, Wodonga* (1988) EOC 92-217 a teacher was dismissed for being an unmarried mother living in a de facto relationship. On hearing her complaint under the *Sex Discrimination Act 1984* (Cth), the tribunal held that it was never made clear at the time of employment, nor would a reasonable person have been aware, that 'detailed conditions of lifestyle' would be demanded of the teacher. Hence, the religious exemption to the SDA did not apply. The teacher was awarded compensation for unfair dismissal, though not reinstatement.

6.11 In *Griffin v The Catholic Education Office* (1998)[38], Ms Griffin brought a complaint of homosexuality discrimination under relatively toothless provisions of the Human Rights and Equal Opportunity Commission Act 1986 (Cth). These provisions allow a declaration to be made that there has been discrimination, but there is no enforceable remedy. Presumably Ms Griffin used the HREOC Act because (being in NSW) she could not complain of homosexuality discrimination by a private school under the *Anti-Discrimination Act 1977*. Ms Griffin had applied to be a teacher in a Catholic school. Her application was refused by the Catholic Education Office (**CEO**) of the Archdiocese of Sydney and Ms Griffin was unable to teach in any CEO schools in Sydney. The CEO's reasons for refusal were:

(a) Ms Griffin's 'high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association (**GALTSA**) and her public statements on lesbian lifestyles', and

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[35] See similar provisions in *Anti-Discrimination Act 1992*(NT) s 37A; *Anti-Discrimination Act 1991* (QLD)s 25(2), 25(3); *Anti-Discrimination Act 1998* (TAS) s 51(2); *Equal Opportunity Act 2010*(VIC) ss 82, 83; *Equal Opportunity Act 1984* (WA) s 73(1), 73(2); *Australian Human Rights Commission Act 1986* (Cth) s 3. There are no equivalent provisions in the other jurisdictions.

[36] *Fair Work Act 2009* (Cth) section 351.

[37] [1980] ICR 310 (UK).

[38] Human Rights and Equal Opportunity Commission Inquiry, HRC Report No 6, 1998.

(b) that the discrimination was warranted due to the inherent requirements of the position: teachers were required not only to teach but to minister the Catholic faith, and even if Ms Griffin supported Catholic principles in words, her conduct/lifestyle was inconsistent with it.

6.12 The Commission found that:

(a) Ms Griffin suffered discrimination on the ground of sexuality;

(b) there was no evidence that the CEO knew of Ms Griffin's personal lifestyle or that Ms Griffin acknowledged that she was a lesbian or advocated/engaged in homosexual activity. GALTSA did not promote homosexual activity – it only provided support for gay and lesbian teachers and students; Ms Griffin did not advocate homosexual practices contrary to Catholic teachings, and Ms Griffin only advocated against discrimination and violence against homosexuals, which is consistent with Catholic teachings;

(c) religious institutions are not entitled to and cannot legitimately seek exemption from the requirements of human rights law beyond that necessary to uphold the values and teachings of the particular religion; and

(d) where exemptions apply to religious institutions the discrimination must be in good faith to avoid injury to the religious susceptibilities of members of that religion. While the private conduct of a teacher might attract disapproval, this is not necessarily injurious to religious susceptibilities.

6.13 Media reports have also referred to a number of cases that have not reached hearing:

(a) a primary school teacher at a Catholic school in Victoria was advised that her contract would not be renewed when she became pregnant from a non-marital relationship. The school did renew her contract after she complained under Victorian discrimination legislation, on condition that she sign an agreement not to promote her lifestyle[39];

(b) 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[40]; and

(c) 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[41].

7 Navigating religious requirement and custom within the school gates

7.1 Religion is inherently about action and custom as well as faith. Two areas in which this results in an interesting balancing process, navigating between religious freedom and other rights, are the type of dress and symbols that are worn, and the treatment of homosexual and transgender students.

Religious dress or symbols

7.2 Two recent cases from the European Court of Justice, although they do not involve schools, give insight on how the issue of religious dress at work is currently being approached in Europe:

[39] Fyfe, M, 'Teacher Scorned for Chosen Lifestyle'', *The Age*, 4 October 2009 http://www.theage.com.au/national/teacher-scorned-for-chosen-lifestyle-20091003-ghbl.html-> .
[40] Jabour, B, 'Teacher Sacked over Pregnancy', *Brisbane Times*, 1 May 2012 http://www.brisbanetimes.com.au/queensland/teacher-sacked-over-pregnancy-20120501-1xw79.html .
[41] Tomazin, F, 'Christian School Rejects Teacher', *The Age*, 25 March 2009 http://www.theage.com.au/national/christian-school-rejects-teacher-20090324-98y0.html.

(a) in *Achbita & Anor v G4S Secure Solutions NV*[42], Samira Achbita worked as a receptionist for the Belgian branch of G4S. She decided to start wearing a headscarf at work after three years. G4S advised her that she had broken unwritten policies prohibiting religious symbols. G4S then instated a written policy stating 'employees are prohibited in the workplace from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs.' When Ms Achbita continued to insist on her wish to wear a headscarf her employment was terminated. The Court was only referred the question of whether G4S's policy directly discriminated against Ms Achbita. On this question, the Court held G4S's policy was applied equally to all staff and therefore, did not directly discriminate against Ms Achbita. The Court also offered the following observations on the issue of indirect discrimination:

(i) it was open to find that the policy was capable of placing persons adhering to a particular religion or belief at a particular advantage, by comparison to other employees;

(ii) however, this will not amount to unlawful indirect discrimination if the policy is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary;

(iii) the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate, particularly if only applied to those workers who are required to come into contact with the employer's customers;

(iv) the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner; and

(v) provided the policy covered only G4S workers who interacted with customers, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued;

(b) similarly, but with a potentially different result, in *Bougnaoui v Micropole Univers SA*[43], Asma Bougnaoui worked as a design engineer at IT consultancy firm, Micropole. Her employment was terminated after a customer complained that his staff had been 'embarrassed' by her headscarf while she was on their premises to give advice. She had been told before taking the job that wearing a headscarf might pose problems for the company's customers. The Court was asked to determine whether the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constituted 'a genuine and determining occupational requirement' which would provide an exemption to the relevant discrimination laws. The Court found that:

(i) it was necessary to ascertain whether Ms Bougnaoui's dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs. If so, the findings and reasoning in the Achbita case should be applied;

(ii) if the dismissal of Ms Bougnaoui was not based on such an internal rule it was then necessary to consider whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who, like Ms Bougnaoui, has been assigned to that customer by the employer and who wears an Islamic headscarf constituted a genuine and determining occupational (and therefore fell within the relevant exemption);

[42] [2016] EUECJ C-157/15.
[43] C-188/15, lodged on 24 April 2015.

(iii) a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer; and

(iv) the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

The case was referred back to the French court for reconsideration based on these principles.

7.3 The rulings by the ECJ have been predicted to fundamentally change how some courts will assess similar cases, because since 2002 the assumption has been that religious symbols could only be barred from the workplace on safety grounds; and some experts have opined that the ruling seems to conflict with European Court of Human Rights rulings that allowed crosses to be worn at work, on the basis that sometimes wearing religious symbols is a manifestation of the right to freedom of religion. Note that the ECJ is the court of the European Union, while the ECHR is the high court of the 47-member Council of Europe. Not surprisingly, the rulings have been welcomed by the nationalist right across Europe, and lamented by religious bodies.[44]

7.4 The reportage on the new European rulings does not seem to consider two important arguments:

(a) that there is a fundamental difference between religious symbols that are worn as a matter of choice (such as crosses) and religious dress that religious adherents believe they are mandated to wear (such as some items of Islamic and Jewish Orthodox dress). It may be reasonable to have policies that prohibit dress practices that are a matter of choice, but not those that are compulsory for the employee as a matter of religious faith or law; and

(b) other than the type of non-political/secular image that the employer in these cases wished to project, the cases do not seem to consider the nature of the work being done by the employees, or the impact of the dress in question on that work.

7.5 By way of comparison, consider the approach taken in the earlier UK case of *Azmi v Kirklees Metropolitan Borough Council*.[45] Ms Azmi was employed as a teaching assistant for children from minority ethnic backgrounds in a Church of England school 'controlled' by the Council. The school's population was 92% Muslim, most from minority ethnic backgrounds, and 25 out of 70 staff were Muslim, minority or both, and many wore hijab (traditional head coverings). Ms Azmi, a devout Muslim aged 22, wanted to wear a veil – showing only her eyes – when in the presence of men, including male teachers whom she assisted. She was suspended for refusing an instruction not to wear her veil when in class. This direction was only given after much consultation, including observation of Ms Azmi's teaching both with and without her veil.

7.6 The UK Employment Tribunal held that this was not direct discrimination on the grounds of religion or belief, but was indirect discrimination on that ground – because anyone who wished to cover their face while teaching would have been treated the same way, regardless of religion. However, the direction was held to be lawful as it was proportionate in support of a legitimate aim (as required by the relevant UK law). The UK Employment Appeal Tribunal upheld this finding. The legitimate aim was to raise the educational achievements of children in the school, in particular the support given to targeted pupils from minority ethnic backgrounds for whom English was a second or additional language. The instruction was regarded as proportionate because:

[44] Rankin,J and Oltermann, P, 'Europe's right hails EU court's workplace headscarf ban ruling', *The Guardian*, 14/3/17, accessed at https://www.theguardian.com/law/2017/mar/14/employers-can-ban-staff-from-wearing-headscarves-european-court-rules.
[45] [2007] UKEAT/0009/07.

(a) Ms Azmi was only required to be unveiled whilst she was teaching the children – she was free to wear the veil at all other times, and

(b) the head teacher and other teachers had observed her teaching with the veil and concluded that it impaired her communication with the children. The school, supported by the local education authority, gave the direction because it said she was far less effective teaching language while veiled, as (amongst other things) students needed to see her facial expression.

7.7 The decision did not criticise the school for also directing that, while Ms Azmi could continue to wear hijab and a jabbah (long dress), but that she needed to ensure that the length of the jabbah did not compromise her safety – particularly when she was wearing heels under it.

7.8 The case is also interesting because of reference made to Ms Azmi's particular belief that she must be veiled – which clearly was not a belief necessarily shared by all the Muslim women around her. This points to possible ethnic differentiation between Muslims, which creates interesting further legal questions.

7.9 Similar ideas emerged in a different UK case, also in 2007: the Denbigh High Case[46], in which the House of Lords upheld the uniform policy of a public school which had consulted widely with the local Muslim community, and had developed a version of the school uniform incorporating elements of Muslim clothing which satisfied most Muslims in the community: a shalwar kameeze, which is a combination of a long loose top and pants underneath. The complainant was a student who had accepted the policy for two years, but then refused to wear the uniform and began wearing a different type of clothing that she believed was religiously required of her: a jilbab – a long dress and coat combination. While the Court of Appeal found against the school, the House of Lords overturned the decision and found that the policy did not breach the *Human Rights Act 1998* (UK). Their Lordships noted that this was not a judgment about every restriction on religious clothing in schools but rather a case concerning 'a particular pupil and a particular school in a particular place at a particular time.' Relevant factors included that the student knew about the uniform when she joined the school; that she had other schools available to her where she could wear a jilbab; the trouble that the school had taken to consult about and develop a uniform that was respectful of Muslim requirements; the evidence that the uniform helped to promote cohesion and contributed to academic performance at the school, and the concerns that some students had expressed that they would be pressured into wearing a jilbab if the school permitted it to be worn as uniform.

7.10 The reasoning in the Denbigh High Case was subsequently applied to disallow a school from prohibiting a Sikh student from wearing a kara (a small bangle that is religiously significant).[47] By comparison, a 'no jewellery rule' was permitted to be applied to a girl who wanted to wear a 'Silver Ring Thing purity ring' as a symbol of her decision to remain a virgin until marriage due to her Christian beliefs.[48] These cases seem to acknowledge the significance of the religious obligation in each instance.

7.11 Using similar principles in a different context, the Canadian Supreme Court found[49] against a school that prohibited a Sikh schoolboy from attending school wearing a kirpan (a ceremonial dagger) – which breached the policy against weapons and dangerous objects in schools. While the school and the student's parents agreed on an accommodation that would allow the boy to carry the kirpan if it was sealed and sewn up inside his clothes, this agreement was rejected by the school's governing board and, on appeal, by the relevant commission, which required him to wear a kirpan made of a substance other than metal. The boy refused to do so and eventually left the school. The Court found the policy to be an interference with religious liberty; and one that was not justified by the legitimate object of maintaining a reasonable standard of safety in schools, given that there was no evidence of a kirpan being used as a weapon in the 100 years that Sikh children had been attending schools in Canada, the likelihood of it being used as a weapon under the

[46] *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100
[47] *R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865
[48] *R (on the application of Playfoot) v Governing Body of Millais School* [2007] HRLR 34
[49] *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256

conditions agreed to were low, and there were all sorts of dangerous objects in schools (such as scissors, baseball bats and cafeteria knives) that were permitted while creating a higher risk to students.

Sexuality/sexual orientation and transgender issues

7.12 New South Wales provides a broad exemption from discrimination in education[50] on the ground of homosexuality and transgender grounds for private educational authorities.

7.13 This quite broad reaching exemption is overridden by a more narrow exemption at Federal level under the *Sex Discrimination Act,* which prohibits discrimination in education on the ground of another person's gender identity or sexual orientation but provides an exemption in relation to education or training for 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed,' where the discrimination occurs 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'. [51]

7.14 Other State and Territory jurisdictions except Tasmania provide a similarly qualified exemption as at Federal level.[52] However, the Northern Territory, South Australia and Queensland provide an exemption only in relation to work[53] and not the provision of education to students.

7.15 We have not been able to identify cases decided in this area in Australia. We are aware of religious schools navigating carefully to accommodate students who 'come out' as homosexual or who have transitioned while at school – something that it is easier for some schools to do than others. The public debate about the 'Safe Schools' program indicates the level of controversy that these issues – and how to handle them at schools while keeping students safe from bullying and other risks – still generate.[54]

7.16 In the USA, there have been some celebrated public legal discussions of some of these issues – in particular the issue of the use of toilet facilities by transgender students, which has caused enormous controversy. In a landmark 2013 case, the Colorado Civil Rights Division ruled in favour of a 6-year-old transgender girl, allowing her to use the girls' bathroom at her elementary school[55]. In March 2016, the United States Department of Justice and the United States Department of Education released a joint guidance on the application of Title IX protections to transgender students, stating that, for the purpose of Title IX, the Department of Justice and the Department of Education treat a student's gender identity as their sex. In October 2016, the Supreme Court agreed to take up the case of Gavin Grimm, a transgender male student who was barred from using the boys' bathrooms at his high school in Gloucester County, Virginia. However, on 6 March 2017, as a result of the Trump Administration's rescission of the guidance of March 2016, the Supreme Court refused to hear the case and sent it back to the Fourth Circuit Court of Appeal.[56]

7.17 Public opinion regarding transgender bathroom rights in the U.S. is mixed. A Pew Research poll from October 2016 found that about 51% of U.S. adults stated transgender individuals should be 'allowed to use public restrooms that correspond with the gender they currently identify with', with nearly as many (46%) taking the opposite position. Younger people aged 18-29 were more likely to

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[50] *Anti-Discrimination Act 1977* (NSW) s 49ZO(3) for homosexuality and s s38K(3 for transgender.
[51] *Sex Discrimination Act 1984* (Cth) s 38(3).
[52] *Discrimination Act 1991* (ACT) s 33(1) and (2); *Equal Opportunity Act 2010* (VIC) ss 83(2); *Equal Opportunity Act 1984* (WA) s73(1) and (3).
[53] *Anti-Discrimination Act 1992* (NT) s 37A; *Anti-Discrimination Act 1991*(QLD) s 25(2), 25(3); *Equal Opportunity Act 1984* (SA) s34.
[54] Just one recent example of the significant press that the issue has received can be found in Haydar, N, 'Safe Schools program ditched in NSW, to be replaced by wider anti-bullying plan', ABC News, 16/4/17, http://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680, and the many links at the bottom of that article.
[55] https://en.wikipedia.org/wiki/Bathroom_bill.
[56] *G.G. [Gavin Grimm] v. Gloucester County School Board*; see Shapiro, I, T Burrus and D McDonald. 'Gloucester County School Board v G.G', *Cato Institute*, 10 January 2017 accessed at https://www.cato.org/publications/legal-briefs/gloucester-county-school-board-v-gg-0 and http://www.hrc.org/blog/breaking-united-states-supreme-court-remands-and-vacates-gavin-grimm-case.

support transgender people's right to use the bathroom of the gender they identify with (67%).[57] Research from YouGov this year suggests that opinions on this issue have polarized along party lines. When asked whether they would favour or oppose a law that would require transgender people to use the bathroom corresponding to the gender of their birth, Americans were split 40% in favour and 40% opposing. Compared to 2016, an additional 12% of Democrats would now oppose such a law. The number of Republicans who said they would support it have increased 14%.[58] The issue is an important one because of the apparent link between bathroom use issues and mental health for transgender people, for whom feelings of isolation and belonging are critical.[59]

8 Religion in the classroom – what can and cannot be part of the curriculum and the teachings and expressed values of the school?

8.1 This section of the paper admittedly overlaps with much of what has come before in principle – because it is at the heart of the activities of most religious schools that they be able to teach what they believe and act in accordance with those beliefs. When it comes to curriculum and values teaching, however, there is significant potential for conflict between the school and the public secular educational authorities with which it must coexist. Given this, the absence of specific guidelines and restrictions is stark.

8.2 As noted above, governments impose minimum curriculum requirements on schools, including non-government schools. For example, the *Education Act 1990* (NSW) provides for 'key learning areas'.[60] However, non-government schools can apply to modify the NSW Education Standards Authority (NESA) syllabus to meet their religious requirements. As the Board of Studies Teaching and Educational Standards NSW (BOSTES) website states:

> *Where a school considers that one or more of the outcomes of a NESA syllabus are incompatible with the school's educational philosophy or religious outlook for part of the school's curriculum, the school may apply to NESA to use modified outcomes for that part of the syllabus.*
>
> *A school may be granted approval for the use of modified outcomes for part of a syllabus if NESA is satisfied that:*
>
> - *the identified NESA outcome(s) are incompatible with the educational philosophy and/or religious outlook of the school*
> - *the proposed modified outcome(s) are compatible with the educational philosophy and/or religious outlook of the school*
> - *the proposed modified outcome(s) comply with the curriculum guidelines developed by NESA.*
>
> *Modifications approved under this provision of the Act are not permitted to the curriculum for the Record of School Achievement or Higher School Certificate.*

[57] Lipka, Michael (3 October 2016), 'Americans are divided over which public bathrooms transgender people should use', Pew Research Center, http://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/.
[58] McCarriston, Gregory (16 March 2017), 'Partisan gap widens on transgender bathroom rights', https://today.yougov.com/news/2017/03/16/partisan-lines-drawn-which-bathrooms-transgender-p/.
[59] Schuster, M, S Reisner and S Onorato, 'Beyond bathrooms – Meeting the health needs of transgender people', (14 July 2016) *The New England Journal of Medicine* 375, accessed at http://www.nejm.org/doi/full/10.1056/NEJMp1605912#t=article; Human Rights Watch 'Shut out: Restrictions of bathroom and locker room access for transgender youth in US schools' *Human Rights Watch* 13 September 2016, https://www.hrw.org/report/2016/09/13/shut-out/restrictions-bathroom-and-locker-room-access-transgender-youth-us-schools
[60] See sections 8 and 10.

8.3 The NESA (formerly BOSTES) website also provides some further information on how to do this, and the additional documentation required to show compliance.[61] This is reiterated in the Registered and Accredited Individual Non-government Schools (NSW) Manual[62] and also in the Registration Systems and Member Non-government Schools (NSW) Manual[63].

8.4 Within these types of guidelines, religious schools often teach general subjects from a religious perspective. This might be, for example, 'what do our faith's values say about the environment', or it might be teaching creationism rather than, or alongside, evolution. As Michael Bachelard reported in *The Age* in 2008:

> *Take the Accelerated Christian Education (or ACE) syllabus used by five Victorian schools and 41 Australia-wide. A sample page of the ACE curriculum shows that in primary school science class, students are confronted with this statement: 'God made many kinds of fish. He made them on day five.'*
>
> *The page accompanying the sheet gives a comprehension test, asking children on which day God made them.*
>
> *The Victorian curriculum asks schools to teach the theory of evolution, explaining the link between natural selection and evolution. But it is not compulsory for independent schools to teach the state curriculum.*
>
> *Victorian Registration and Qualifications Authority director Lynne Glover told The Age: 'Within the general provision of science, schools may choose to teach students about a range of theories related to science, including creationism and evolution.'*
>
> *The mix, she said, was 'up to schools to determine in consultation with their community'.*
>
> *The details vary but, in Christian schools, creationism is almost universal, and is taught not in religious education classes but in science….*
>
> *In a number of Christian schools, such as Chairo Christian College in Drouin, the science teacher talks about evolution and then moves on to suggest that the hand of God was the real creative force. The grade four class at Heatherton Christian College last year studied 'dinosaurs from a biblical perspective'.*[64]

8.5 Similarly, religious schools might teach sex education, gender issues and health from a faith-based perspective. Sometimes, this might bring the school into potential conflict with public policy – thus Bachelard notes that '*the Victorian curriculum expects students to deal with the issues of "sexual harassment, homophobia and/or discrimination", and issues such as "safe sex practices, sexual negotiation, same-sex attraction"…At religious schools, though, this is very tricky ground.*'[65]

8.6 It seems that there is a lack of strict regulation governing the details of teaching of religion and religious views in non-government schools. Again, we need to consider the requirements of discrimination and safety laws. There is an interesting potential for arguments that homosexual/transgender students are being harassed at school by the teachings to which they are subjected; that harassment and/or bullying results; and that the school is being negligent in not considering their needs. The converse argument is that school should be able to teach in accordance with their faith systems, and that if those systems do not suit particular students then they should choose other schools.

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[61] See http://rego.bostes.nsw.edu.au/registered-individual-non-government-schools/registration-requirements/curriculum/modifications-to-a-nesa-syllabus.
[62] http://educationstandards.nsw.edu.au/wps/wcm/connect/e9aad3a8-808b-468f-a8e1-92de94b10e31/reg-accred-individ-non-gov-manual.pdf?MOD=AJPERES&CVID, at 3.3.2 and 4.1.3.2.
[63] http://educationstandards.nsw.edu.au/wps/wcm/connect/01c6d391-6906-4f6c-9618-6c6596ecea7b/reg-sys-member-non-gov-manual.pdf?MOD=AJPERES&CVID=, at 5.3.2 and 6.1.3.2.
[64] Bachelard, M, 'At the crossroads?' *The Age*, 25/2/08; http://www.theage.com.au/news/in-depth/at-the-crossroads/2008/02/24/1203788145887.html?page=3.
[65] Op cit, p 4.

8.7 There are no Australian cases in which unlawful discrimination has been alleged based on what was being taught in a religious school. However, *A obo V and A v NSW Department of Education EOD*[66], a case in the NSW public system, sheds some light on how religious schools might deal with students of a different faith or no faith in their community when it comes to religious teaching. In this case, the father of two Jewish pupils brought a claim under the *Anti-Discrimination Act 1977* (NSW) that the following conduct at the public school his children attended amounted to discrimination on the ground of ethno-religious origin:

(a) the practice of conducting school prayers at assembly;

(b) the school's activities focused on Christmas, and in particular, the children's participation in the Christmas nativity scene at the school Christmas concerts and Christmas party, and the attendance of Santa Claus at one or both of those functions; and

(c) the exchange of Easter eggs, and other events associated with the Easter story of the Christian faith.

8.8 Once the father objected to his children participating in these activities, they were excused from further involvement and provided with alternative activities. The father also complained that this 'segregation' amounted to discrimination against his children.

8.9 The Tribunal found that:

(a) the amendments to the definition of race to include the term 'ethno-religious' were not designed to allow members of such groups to lodge complaints in respect of discrimination on the basis of their religion;

(b) there was no less favourable treatment of the father's children than the treatment accorded to every other child at the school in respect of the relevant activities;

(c) it is not sufficient to establish that the children were exposed to Christian teachings in the course of the Christmas and Easter activities at the school by virtue of their presence in the student body. Mere attendance at school cannot amount to the imposition of a requirement to participate in certain activities. What would have to be established is that the children's adherence to the Jewish faith was a factor in the respondent's decision to include them in the Christmas and Easter activities. In this case, the conduct in involving them in the Christian activities occurred in spite of their religion, not because of it; and

(d) as for the 'segregation', that was an action taken by the school out of respect for the parents, not as a form of discrimination, and was required by section 33 of the *Education Act 1991*.

8.10 Some relevant examples about what might and might not be taught and done can be found in overseas case law. In Canada, a devout Greek Orthodox father whose children were in a public school was unsuccessful in his claim that the school Board should provide him with advance notice of specific curriculum areas being taught to his children. He also failed to obtain an order that he be permitted to withdraw the children from certain classes, lessons or activities that conflicted with his religious beliefs[67]. The context was that the Ministry of Education had directed school boards to implement equity and inclusive education policies to help reduce racism, religious intolerance, homophobia and gender-based violence – while at the same time allowing for religious accommodation in accordance with the *Canadian Charter of Human Rights and Freedoms* (which provides for fundamental freedom of conscience and religion) and the *Ontario Human Rights Code*. Perhaps not surprisingly, the father's religious views clashed with many aspects of the inclusive education approach, including in particular classroom practices that were 'anti-homophobic and anti-heterosexist' and gave staff access to 'a wide variety of bias-free teaching and learning materials'. His faith compelled him to ensure that his children were taught about marriage and sexuality in accordance with a biblical perspective and the teachings of this church.

[66] [2000] NSWADTAP 14.

[67] *E.T. v Hamilton-Wentworth District School Board*, 2016 ONSC 7313

He also objected to the Ministry's approach to a raft of issues including 'moral relativism', 'environmental worship', abortion and euthanasia. The court found that he was sincere. It also found that the school Board acted reasonably when it refused to accommodate him – even though this infringed on his freedom of religion – because there was a limit to the accommodation that was possible. From the perspective of the Charter, the Board acted proportionately, balancing the relevant interests sensibly and practically. Important in this context was the Board's religious accommodation guideline, which provided that it could not 'accommodate religious values and beliefs that clearly conflict with mandated Ministry… policies'.

8.11 In terms of what may be taught in religious schools, an evangelical teachers' college in Canada successfully challenged the College of Teachers when it refused to approve the evangelical college for full teacher training on the basis that it listed homosexuality as a 'sexual sin' that was 'biblically condemned', and which its students were prohibited from committing. There was no evidence that teachers trained in the institution would not treat homosexual students equally and in accordance with the law, and the approval was therefore granted[68].

8.12 It seems likely that teachings that clearly contravene general societal norms and encourage the infringement of the rights of others, even if those teachings appear to have a religious base, would be prohibited in Australia on the basis of either human rights or discrimination laws. Again, looking overseas for examples:

(a) the heads of a number of Christian private schools in the UK wished to use corporal punishment as a disciplinary device in their schools, and claimed that the prohibition of corporal punishment in the *Education Act 1996* s.548 was a breach of their freedom of religion under Article 9 ECHR. The claim failed at first instance in the Administrative Court, in the Court of Appeal and also in the House of Lords – which held unanimously that there was a difference between freedom of religious belief and freedom to manifest that belief. The interference with the latter freedom was deemed justified in this case, 'necessary in a democratic society... for the protection of rights and freedoms for others'.[69] While this reasoning might only apply directly in an Australian jurisdiction with a bill of rights, the balancing act is similar to that required under discrimination law, looking here at balancing gender-based rights and the need to ensure safety against freedom of religion; and

(b) very recently, schools in the UK that were teaching students that it is acceptable for a man to beat his wife, among other extreme views, have been forced to shut down.[70]

8.13 Beyond ordinary discrimination law, the prohibitions of racial and religious vilification impose some limits on religious schools.

8.14 One religious vilification case which did not involve a school but includes reasoning very relevant to schools is the Catch the Fire Ministries Case[71], in which the Islamic Council of Victoria lodged a representative complaint against Catch the Fire Ministries, an evangelical Christian church. The church had conducted a seminar and published a newsletter and online material, that the Council claimed attacked the Islamic faith in breach of the Victorian provisions[72]. Catch the Fire defended the claim on the basis that its statements were accurate, and its actions were reasonable and undertaken in good faith, for a genuine religious purpose and in the public interest. The Victorian Civil and Administrative Tribunal upheld the complaint, finding that the cumulative effect of the statements and publications was hostile, demeaning and derogatory to Muslims and their faith, and that they were likely to incite others to religious hatred, contempt and ridicule. The Tribunal further found that no legitimate defence could be sustained[73] of engaging in such conduct reasonably and in good faith for any genuine religious purpose. However, the Victorian Court of Appeal set aside

[68] *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772.
[69] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.
[70] http://www.independent.co.uk/news/education/education-news/islamist-girls-school-jamia-al-hudaa-taught-pupils-gay-people-should-be-killed-forced-closure-aliyah-a7361596.html; and https://www.thesun.co.uk/news/2130831/four-extremist-schools-which-teach-men-can-beat-their-wives-fighting-government-orders-to-shut-down/.
[71] *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510
[72] *Racial and Religious Tolerance Act*, s 8.
[73] Under section 11 of the Act.

the Tribunal's orders, remitting the matter to be heard by a different Tribunal member, and the matter was settled confidentially – essentially leaving no clear public result. The principles outlined by the Court of Appeal[74] included that:

(a) while for there to a breach of the legislation, there needed to be a definite link between religious beliefs and the hatred or other emotion incited, this was not necessarily of a causal nature as suggested in the Tribunal hearing. The matter for determination was rather whether Catch the Fire Ministries' audience was incited to hatred of Muslims because of their Islamic faith; and

(b) ultimately the legitimacy of the defence hinged on whether the conduct was engaged in 'reasonably' for a genuine religious purpose; and that this objective standard would naturally reflect the views of reasonable members of a tolerant, multicultural society.

9 Conclusion

9.1 The role that religious schools play in Australia's multi-faith, multicultural society is complex.

9.2 As we have seen, Australian law does not include clear or well-defined rights to religious freedom, and our discrimination laws are inconsistent and not always helpful. Further, safety and negligence obligations do not always happily coexist with discrimination laws. This is combined with the relative lack of strict content requirements imposed by educational authorities. In summary, the landscape that schools face is obscured by mist and includes some treacherous ground.

9.3 It follows that the answers to the choices – sometimes dilemmas – that schools face in navigating their way through questions of faith and practice, and how these play out at school, are often unclear. It is always important to consider the circumstances of each case, and to check on the details of the particular laws that are applicable to that case. Luckily for our community, most religious schools take their obligations seriously and seek to address these issues in good faith and with compassion.

[74] *Catch the Fire Ministries Case* (2006) 15 VR 207.