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Meeting the challenges facing religious schools

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Balancing expectations

- clergy/ lay leadership – priorities?
- parents – priorities?
- educational authorities
- discrimination laws
- duty of care to students
- what are the religious and educational goals of the school?

Freedom of religion in Australia

- no common law right to freedom of religion
- international treaties prohibiting discrimination and protecting freedom of religion – ICCPR
- international law influential but not part of Australian law:
 - obligations enforceable by international tribunals and assistance from UNHRC
 - international interpretation of legislation
 - enable Commonwealth to make laws
- s116 Commonwealth Constitution – Parliament cannot make laws establishing or prohibiting free exercise of religion
- no national bill of rights – though Acts in ACT/Vic

Legal framework – discrimination on ground of religion

- SA - prohibits discrimination on ground of religious dress or appearance in employment or education
- NSW - prohibits discrimination on ground of ethno-religious origin (as part of racial discrimination)
- Cth - Human Rights Commission may inquire into discrimination on basis of religion in employment/occupation
- all other jurisdictions expressly prohibit discrimination on basis of religion
- racial/religious vilification laws

Legal framework – other grounds of discrimination

- other grounds that may be relevant to religious schools:
 - sex and gender identity/ status
 - sexuality or sexual orientation
 - marital status
- *Fair Work Act 2009* – mirrors discrimination laws:
 - ‘adverse action’

Legal framework – exemptions to discrimination law

- exemption for religious bodies in all jurisdictions – may or may not apply to school
- specific exemptions for schools of varying scope
 - NSW – broad exemption for private education authorities
 - other jurisdictions have varying narrower exemptions for religious education authorities

Other relevant laws

- work health and safety
- duty of care
- education legislation
 - curriculum
 - minimum (modifications possible)
 - greater requirements for external recognised achievement eg HSC

Religion and the enrolment process – who makes the cut?

- specific exemptions for school admissions in some jurisdictions
- for example, *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 if that institution is conducted solely for students having a religious conviction other than that of the applicant (section 46)
 - single sex schools

Religion and the enrolment process (cont)

R (on the application of E) v JFS [2009] (UK)

- British Supreme Court ruled that a Jewish school directly discriminated on the ground of race against a boy by denying him admission because his mother is Jewish by conversion, not by birth (ie he was not 'ethnically' Jewish)
- significant minority decision to the contrary: policy was indirect discrimination, but reasonable

Religion and the enrolment process (cont)

Goldberg v Korsunski Carmel School (2000) (WA) (NB – 9 years earlier than JFS case)

- similar policy – here, non-Jewish student admitted but not entitled to all the same terms of admission
- no unlawful discrimination
- 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

Treatment of students based on sex

*X School v Her Majesty's Chief Inspector of Education,
Children's Services and Skills* [2016] (UK) (cited JFS case)

- policy of Islamic school segregating boys and girls
- although segregation may amount to denial of a benefit, it was not discriminatory because applied equally to both sexes
- could not be concluded that segregation was in reference to status of women in the community

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

Relevant considerations:

- teachers as role models – modelling religious values and beliefs
- insufficient numbers to recruit staff only of specific faith
- varying expectations of schools in terms of recruitment and behaviour of teachers

Staff and their faith (cont)

- specific exemptions for school recruitment in some jurisdictions
- for example, *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)

Staff and their faith (cont)

- *Jones v Lee and Guilding* [1980] (UK)
 - principal summarily dismissed from Catholic school for getting a divorce and remarrying an assistant teacher
 - court held that summary dismissal was invalid
- *Thompsons v Catholic College, Wodonga* (1988)
 - teacher dismissed for being an unmarried mother living in a de facto relationship
 - held: was never made clear at time of employment, nor would a reasonable person have been aware, that 'detailed conditions of lifestyle' would be demanded of the teacher
 - no exception available
 - unlawful sex discrimination under the SDA

Staff and their faith (cont)

Griffin v The Catholic Education Office (1998)

- Griffin denied role as teacher at Catholic school because co-convenor of Gay and Lesbian Teachers and Students Association
- held: unlawful discrimination on the ground of sexuality
- no evidence that advocated/engaged in homosexual activity
- GALTSA did not promote homosexual activity; only advocated against discrimination/violence against homosexuals – consistent with Catholic teachings
- religious institutions cannot seek exemption beyond that necessary to uphold the values/teachings of particular religion

Religious requirement and custom at school: dress cases (staff and students)

- *Achbita v G4S Secure Solutions* [2016] EUECJ
 - policy prohibiting employee from wearing signs of political, philosophical or religious beliefs for the purpose of ensuring neutrality is (if properly applied) not discriminatory
- *Bougnaoui v Micropole Univers*, EUECJ C-188/15
 - willingness of an employer to take account of wishes of a customer not to have services provided by a worker wearing an Islamic headscarf not a 'genuine and determining occupational requirement' that (alone) would provide an exemption to relevant discrimination laws

Religious dress cases (cont)

- *Azmi v Kirklees Metropolitan Borough Council* [2007] (UK)
 - direction not to wear veil in class when teaching was appropriate to achieve legitimate aim of raising educational achievements of children in the school
- *Denbigh High Case* (2007) (UK)
 - House of Lords upheld uniform policy of a public school which had consulted widely with local Muslim community, and had developed a version of school uniform incorporating elements of Muslim clothing which satisfied most Muslims in the community – even though one student complained

Sexuality/sexual orientation and transgender issues

- all jurisdictions prohibit discrimination on the grounds of sexuality and gender identity
- NSW – exemption for private education authorities in employment and education
- Cth – exemption in employment and education for religious educational institution where discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed
- ACT, WA and Vic – similar exemptions to Cth
- SA, NT, Qld – exemption only in relation to employment

Sexuality/sexual orientation and transgender issues (cont)

- no relevant cases in Australia
- accommodating students transitioning – easier for some schools to navigate than others
- consider USA cases involving toilet use of transgender students

Religion in the classroom

- education legislation and relevant exemptions
- otherwise little regulation, despite potential for conflict between religious school and secular educational authorities
- teaching of general subjects from a religious perspective within guidelines
 - creationism v evolution
 - sexuality and gender issues
 - safe sex/outside marriage
 - homosexuality
 - transsexuality

Religion in the classroom (cont)

A obo V and A v NSW Department of Education [2000] (NSW)

- claim that school prayers, Christmas and Easter activities were ethno-religious discrimination
- Tribunal: 'ethno-religious' right to claim 'religious' discrimination BUT anyway not "less favourable"
- not sufficient that children were exposed to Christianity 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
- held: excusing children from activities was not discrimination. School segregated children out of respect for parents

Religion in the classroom (cont)

- *Trinity Western University v BC College of Teachers* [2001] (Can)
 - evangelical college teaching that homosexuality is sexual sin
- teachings clearly contravening societal norms or encouraging infringements of rights will likely be prohibited
 - UK corporal punishment case (safety)
 - UK schools teaching domestic violence is acceptable (safety)
- prohibitions of racial and religious vilification
 - *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] (Vic) (not a school, but): defence hinges on whether conduct 'reasonably' for genuine religious purpose; this objective standard would reflect views of reasonable members of a tolerant, multicultural society

Conclusion

- religious schools play a complex role in Australia's multi-faith, multicultural society
- legal landscape that schools face is obscured by mist (and includes treacherous ground)
- answers to choices/dilemmas that religious schools face are often unclear
- always consider circumstances of each case

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