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AN OPT-IN APPROACH TO REGULATING THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

GREG WALSH*

This article evaluates the merits of an opt-in approach to regulating the employment decisions of religious schools in Australia under anti-discrimination legislation. The essence of the model involves religious schools registering with the government for the specific protection they need to make employment decisions that they consider necessary due to the school's religious identity. The legislature, executive and judiciary are provided with significant supervisory roles under the proposed model to address the potential for religious schools to abuse the protections provided. The article argues that the opt-in model has the potential to more appropriately regulate the employment decisions of religious schools compared to the other approaches currently relied upon in Australia.

I INTRODUCTION

It is important for the State to adopt the model that most appropriately regulates the employment decisions of religious schools under anti-discrimination legislation considering the substantial number of religious schools that exist in Australia. In 2011, for example, there were 9435 schools in Australia, comprising 6705 government schools, 1710 Catholic schools and 1020 Independent schools — the majority being religious schools¹ — with the Catholic and Independent schools together employing 104 779 teachers.² The actual number of employees who could be adversely affected by the employment decisions of religious schools would be much higher than this as this figure does not include management, support or maintenance staff of these schools or the employees of educational institutions other than schools. The importance of appropriately regulating religious schools is likely to be an issue of increasing importance considering that in Australia non-government schools — the majority being religious schools — are becoming more popular with the percentage of students attending non-government schools rising from 31% in 2001 to 34.6% in 2011.³

It is also necessary to appropriately regulate the area considering the importance of the different rights that are involved in any consideration of how religious schools should be regulated under anti-discrimination legislation. Of particular importance in regulating the employment decisions

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¹ Australian Bureau of Statistics, *Schools* (3 May 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features202011>>; Jennifer Buckingham, *The Rise of Religious Schools* (The Centre for Independent Studies, 2010) 4.

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

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

of religious schools are the rights to equality and religious liberty. A failure to adopt an approach that fairly addresses the legitimate concerns of a range of individuals including employees, students, parents and adherents of the religious community on which the school is based can constitute a major violation of these two important rights. There are a range of other important considerations that would need to be considered in order to comprehensively evaluate the merits of any approach to regulating religious schools including the welfare of children, the rights of parents and minorities, human rights education, the right to privacy and freedom of association. However, a consideration of these additional factors is outside the scope of the article.

The article is structured in three main sections. Part II outlines the current approaches to regulating religious schools in jurisdictions throughout Australia. Part III provides an account of the opt-in model and an overview of its merits. Part IV addresses in detail some of the major advantages of the opt-in model.

II CURRENT APPROACHES TO REGULATING THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS⁴

One of the most common legislative approaches in Australia allows religious schools to make adverse employment decisions in order to avoid injury to the religious susceptibilities of religious adherents. This approach has been adopted in the anti-discrimination legislation of the Commonwealth, the Australian Capital Territory and Western Australia in almost identical language.⁵ Additional protection⁶ is provided to religious schools by the Australian Capital Territory to allow adverse employment decisions to be made for employment positions that involve ‘the teaching, observance or practice of the relevant religion’,⁷ while Western Australia provides this protection to private educational authorities for employment positions that involve ‘the participation of the employee in any religious observance or practice’.⁸

⁴ The author has submitted another article for publication addressing the compatibility of provisions regulating the employment decisions of religious schools with the right to equality, which has a particular focus on whether the interests of religious schools can justify these kinds of provisions considering the substantial adverse impact they can have on employees and applicants. Although the two articles are substantially different there are some issues that have been addressed in a similar manner in both articles.

⁵ *Sex Discrimination Act 1984* (Cth) ss 38(1)–(2); *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of ‘discrimination’); *Age Discrimination Act 2004* (Cth) s 35; *Fair Work Act 2009* (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b); *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73(1)–(2).

⁶ Although terms such as ‘exceptions’ and ‘exemptions’ are commonly used to refer to limitations provided to the operation of anti-discrimination legislation the terms are not used extensively in the thesis as they can suggest that the limitations are merely permissions to engage in discrimination that the government was forced to provide due to political pressure. The term ‘protections’ is preferred as it more accurately recognises that the limitations to the operation of anti-discrimination legislation are typically aimed at ensuring that a range of important rights are appropriately respected. For similar reasons the article avoids referring to employment decisions made by religious schools under the protections granted as acts of ‘discrimination’. Such terminology is more appropriate after the relevant factors have been considered and it has been concluded that the employment decisions cannot be justified.

⁷ *Discrimination Act 1991* (ACT) s 44.

⁸ *Equal Opportunity Act 1984* (WA) s 66(1).

A similar approach has been adopted in Victoria which provides protection to religious educational institutions for employment decisions on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity that conform to 'the doctrines, beliefs or principles of the religion' or are 'reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion'.⁹ Further protection is provided in Victoria under a general section that provides that a person does not engage in discrimination if their conduct is 'reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion'.¹⁰ The Northern Territory also protects the employment decisions of religious educational institutions if they are 'in good faith to avoid offending the religious sensitivities of people of the particular religion', but only on the grounds of sexuality and religious belief or activity.¹¹

Queensland permits employers to declare that a genuine occupational requirement applies to employment positions, which the *Anti-Discrimination Act 1991* (Qld) specifically indicates includes 'employing persons of a particular religion to teach in a school established for students of the particular religion'.¹² The provisions allow a religious school to make an adverse

⁹ *Equal Opportunity Act 2010* (Vic) ss 83(1)–(2).

¹⁰ *Ibid* s 84.

¹¹ *Anti-Discrimination Act 1996* (NT) s 37A. A similar approach to a religious sensitivities test has been adopted in the United Kingdom under the *Equality Act 2010* (UK) where employment decisions for the purposes of organised religion can be made on a range of grounds if the decision is to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (sch 9 pt 1 ss 2(1)–(6)). For a detailed discussion of the approach adopted by the UK Parliament see Russell Sandberg, 'The Right to Discriminate' (2011) 13(2) *Ecclesiastical Law Journal* 157, 173–180; James Dingemans et al, *The Protections for Religious Rights* (Oxford University Press, 2013) 408–418.

¹² *Anti-Discrimination Act 1991* (Qld) s 25(1). A genuine occupational requirement has also been adopted by the European Union in relation to the ground of religion where a difference of treatment is held not to constitute discrimination if 'a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos': *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16, art 4(2) ('*Council Directive*'). Guided by the *Council Directive* the British Parliament enacted legal provisions to allow a person with a religious ethos to make employment decisions on the basis of religion if they can show that religious identity is an occupational requirement, the requirement is a proportionate means of achieving a legitimate goal, and that the person who suffered from the adverse employment decision was unable to meet the requirement: *Equality Act 2010* (UK) sch 9 pt 1 s 3. A similar approach has also been adopted in the United States where it is lawful for an employer to hire employees on 'the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise': *Civil Rights Act of 1964*, 42 USC § 2000e–2(e)(1). Further protection is provided through a general exception for a 'religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities' (*ibid* 1(a)), a specific exception to religious educational institutions to employ persons of a particular religion: (*ibid* 2(e)(2)) and a Constitutional prohibition on the US government regulating the decisions of religious bodies in respect of their ministers (*Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 132 S Ct 694 (2012)). For more detailed information on the scope of the constitutional and legislative protection of religious groups in the United States see Michael McConnell, 'Reflections on Hosanna-Tabor' (2012) 35 *Harvard Journal of Law and Public Policy* 821; Carolyn Evans and Anna Hood, 'Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1(1) *Oxford Journal of Law and Religion* 81, 83–94.

employment decision that is not unreasonable against a person who openly acts in a work situation in a way that they knew or should have known was contrary to the school's religion, and it is a genuine occupational requirement that the person acts consistently with the school's religion when in the work environment.¹³ A determination of the reasonableness of the employment decision depends on all the circumstances of the case including whether the school's conduct was 'harsh or unjust or disproportionate to the person's actions' and 'the consequences for both the person and the employer should the discrimination happen or not happen'.¹⁴ A religious school is not able to make an adverse employment decision on the grounds of age, race or impairment, and the school can by agreement remove its ability to make adverse employment decisions on any ground.¹⁵

Tasmania allows a religious school to make adverse employment decisions on the grounds of religion if it is in 'order to enable, or better enable, the educational institution to be conducted in accordance with [the religion's] tenets, beliefs, teachings, principles or practices'.¹⁶ A general protection is also provided for employment decisions made by persons on the grounds of religion if religious observance or practice is a 'genuine occupational qualification' for the position.¹⁷ Additional protection is provided to religious institutions if they are required by their religion to 'discriminate against another person on the ground of gender'.¹⁸

South Australia protects employment decisions of religious schools made on the grounds of chosen gender or sexuality if the decision is based on the school's religion, and the school provides a written policy on its position to persons to be interviewed or offered employment and any other person who requests a copy.¹⁹ Religious schools are also permitted to make adverse employment decisions in relation to persons in a same-sex domestic partnership.²⁰ Further protection is provided to bodies established for religious purposes for conduct 'that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.²¹

New South Wales provides a broad protection to any school that is a 'private educational authority', which would include the vast majority of religious educational institutions in NSW.²² Under the provisions, religious schools are permitted to make employment decisions on the grounds of sex, transgender status, marital or domestic status, disability, and homosexuality that would otherwise be unlawful.²³ No exceptions are provided to religious schools on the grounds of race, age or a person's responsibilities as a carer.²⁴ As religion is not an attribute protected in

¹³ *Anti Discrimination Act 1991* (Qld) ss 25(2)–(3).

¹⁴ *Ibid* s 25(5).

¹⁵ *Ibid* ss 25(6)–(7).

¹⁶ *Anti-Discrimination Act 1998* (Tas) s 51(2).

¹⁷ *Ibid* s 51(1).

¹⁸ *Ibid* s 27(1)(a).

¹⁹ *Equal Opportunity Act 1984* (SA) s 34(3).

²⁰ *Ibid* s 85Z(2).

²¹ *Ibid* ss 50(ba)–(c).

²² *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'private educational authority').

²³ *Ibid* ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).

²⁴ *Ibid* ss 8, 49ZYB, 49V.

the *Anti-Discrimination Act 1977* (NSW), an adverse employment decision made by a religious school on the grounds of religion does not breach the NSW Act.²⁵

III THE OPT-IN MODEL

Under the opt-in model religious schools can register with the government to obtain the protections for employment decisions that the school authorities consider are necessary to safeguard the religious identity and commitments of the school. The registration process would require the religious school to indicate their religion, the particular attributes on which the employment decision may need to be made in order to protect the religious commitments of the school (for example, race, gender, sexuality, marital status, etc), and whether the school wants all or only some of the employment positions to be covered by the protections provided under anti-discrimination legislation. The appropriate government body to manage the registrations of religious schools may vary between jurisdictions, although the bodies established under anti-discrimination legislation in each jurisdiction may be particularly suited to the role as they may already have a statutory function in resolving complaints concerning discrimination, undertaking investigations into the operation of the legislation, and educating the community about anti-discrimination laws.²⁶

A key feature of the opt-in model is that the registration system is optional. The religious schools that want protections under anti-discrimination legislation are required to register, while other religious schools that do not want any protections are not required to take any action. A religious school that has registered for protections can opt-out of the protections or reduce or expand the extent of the protections at any time. Any religious school that registers for protections is required to provide the government with a document indicating the grounds on which they have sought protections and explaining their understanding of why their religious commitments require them to make employment decisions taking these grounds into account. The religious schools must ensure that this document is available for members of the public to access from their websites and from the premises of the schools.

Registration provides protection to religious schools for employment decisions made on the basis of the specified attributes if the authorities of the religious school believed in good faith that it was important to make the decision due to the religious commitments of the school. The protections cover any decision relating to employment including the decision to employ, manage,

²⁵ Although the Act defines ‘race’ to include ‘ethno-religious’ origin—a term that includes groups such as Jews—this has been held to not allow discrimination complaints on the grounds of religion: *A on behalf of V and A v NSW Department of School Education* [2000] NSWADTAP 14, [16]. It should also be noted that section 351(1) of the *Fair Work Act 2009* (Cth) prohibits an employer from taking adverse action against an employee or prospective employee on a variety of grounds including religion. However, this prohibition is limited in its application to religious schools as the prohibitions do not apply in any jurisdiction where the conduct is not unlawful under that jurisdiction’s anti-discrimination legislation: *ibid* 351(2)–(3). A complaint concerning an employment decision of a religious school can also be made to the Australian Human Rights Commission. Such a complaint is limited in its effectiveness as the Commission has no coercive powers and can only attempt to conciliate the matter between the parties and provide a report on the matter to the Commonwealth Attorney-General: *Australian Human Rights Commission Act 1986* (Cth) ss 31(b), 32(1)(b).

²⁶ See, eg, *Anti-Discrimination Act 1977* (NSW) ss 90, 119.

and dismiss an employee on the basis of an attribute specified in the registration document. If an employment decision is covered by the protections obtained through the registration process then a person adversely affected by the decision cannot use the employment decision to support a discrimination complaint against the religious school. Under the opt-in model the executive is provided with the power to modify or remove any registration granted to address the possibility that religious schools will abuse the protection provided.

The next part provides a detailed discussion of the key elements of the opt-in model and includes at various parts an explanation regarding why the opt-in approach is likely to be superior to alternative approaches.

IV THE MERITS OF THE OPT-IN MODEL

A *An Inclusive Approach to the Nature of Religious Schools*

Under the opt-in model any school based on a religious or a non-religious worldview can legally make employment decisions on the basis of an employee's compatibility with the school's religious identity (their 'mission fit'). The opt-in model does not just provide the protections to schools founded on established religions, but also respects minority religions, new religions and non-religious worldviews — that is, systems of beliefs about reality and ethics that are of such fundamental importance to adherents that the worldviews are of a quasi-religious nature. On the appropriateness of recognising non-religious worldviews as religions Shah, Franck and Farr state:

Even where people are not religious in a conventional sense, they frequently have deeply held convictions about ultimate reality. Perhaps they believe that all of life is somehow sacred. Perhaps they are deeply convinced that every person has a god-like freedom and dignity. Perhaps they believe that a benevolent, pervasive force or spirit suffuses the universe. In any case, such convictions are deeply held. And they are religious.²⁷

An example of non-religious worldviews that could be considered to have obtained this status could be the worldview of humanists who have formed a group that is committed to explicit philosophical principles including the non-existence of God, the dignity of the human person, and the importance of showing profound respect for non-human life. If such a group wanted to establish a school based on their worldview then it is to be expected that they would want the ability to select employees for mission fit and hire employees who adhere to, or at least respect, their core principles. Such a group would likely register their school for protections as an inability to take into account an applicant's religious and ethical beliefs could substantially undermine the ability of the school to hire employees who are able to effectively educate and inspire students and other individuals within the school according to the school's worldview.

The importance of respecting both religious and non-religious worldviews has been recognised in Australian law. Of particular relevance is the adoption of this approach in a range of anti-discrimination Acts, which use the inclusive phrase 'religion or creed' in regulating the

²⁷ Timothy Shah, Matthew Franck and Thomas Farr, *Religious Freedom: Why Now? Defending an Embattled Human Right* (The Witherspoon Institute, 2012) 76.

employment decisions of religious schools.²⁸ On the scope of the term ‘creed’, Madgwick J in *Hozack v Church of Jesus Christ of Latter Day Saints* held that ‘if there be an institution conducted in accordance with the tenets of what, as a matter of “arid characterisation”, could be called a “creed” and which opposed established religions, its adherents too would be entitled to the same broad protection [as that provided to religious institutions]’.²⁹

This kind of approach has also been adopted by the United States Supreme Court. In *United States v Seeger* the Court was required to determine if three persons with a conscientious objection to military service were able to rely upon an exception granted to persons on the grounds of ‘religious training and belief’, which Congress had defined as belief in ‘relation to a Supreme Being involving duties superior to those arising from any human relation’.³⁰ The Court held that it was important to adopt a broad approach to the worldviews included in the exemption and that the applicants qualified for the exemption as their beliefs occupied the same place in their life ‘as an orthodox belief in God holds in the life of one clearly qualified for exemption’.³¹ Importantly, one of the applicants, Seeger, was included within this protection even though he was uncertain about the existence of a Supreme Being.³² This broad approach was reaffirmed by the United States Supreme Court in *Welsh v United States*, which involved an applicant who also had a conscientious objection to military service.³³ The Court held that the applicant qualified for the exemption even though he considered, at least during the early stage of proceedings, that his worldview was not religious.³⁴ On the limited relevance of the applicant stating that his beliefs were non-religious the Court declared that

very few registrants are fully aware of the broad scope of the word “religious” ... and accordingly a registrant’s statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption. Welsh himself presents a case in point. Although he originally characterized his beliefs as nonreligious, he later upon reflection wrote a long and thoughtful letter to his Appeal Board in which he declared that his beliefs were “certainly religious in the ethical sense of the word”.³⁵

The merits of an inclusive approach are also affirmed under international law, which places States under an obligation to demonstrate respect for both religious and non-religious

²⁸ *Sex Discrimination Act 1984* (Cth) s 38(1); *Equal Opportunity Act 1984* (WA) s 73(1); *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of ‘discrimination’); *Discrimination Act 1991* (ACT) s 33(1)(b); *Fair Work Act 2009* (Cth) s 351(2)(c).

²⁹ (1997) 79 FCR 441, 445. A similar approach has been adopted in legislation enacted in other jurisdictions. In the United Kingdom, for example, ‘religion’ is defined in section 2(3)(a) of the *Charities Act 2006* (UK) as including ‘(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god’.

³⁰ 380 US 163, 164, 173 (1965).

³¹ *Ibid* 184, 187–8.

³² *Ibid* 185–7.

³³ 398 US 333, 335 (1970).

³⁴ *Ibid* 341–2.

³⁵ *Ibid* 341. It should be noted that this inclusive approach to the scope of religious liberty did not receive majority support in the subsequently decided case of *Wisconsin v Yoder*, 406 US 205 (1972) where the majority held that a conviction that is ‘philosophical and personal rather than religious ... does not rise to the demands of the Religion Clauses’: 216. However, the decision on this aspect of this case was not unanimous with Douglas J specifically affirming the broad definition of ‘religion’ adopted in *Seeger* and *Welsh* stating that ‘I adhere to these exalted views of “religion” and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race’: 249.

worldviews. For example, the Human Rights Committee held that the right to religious liberty includes both religious and non-religious worldviews and that States are obliged under Article 18 of the *International Covenant on Civil and Political Rights* to protect religious liberty according to this broad interpretation of the right.³⁶ In their General Comment 22 the Committee stated:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.³⁷

It is accepted that there are significant difficulties in proposing criteria that can clearly distinguish between non-religious worldviews and specific commitments that are not aspects of a worldview, and that difficult cases will inevitably arise where the appropriate classification of a conviction will be uncertain. In such circumstances the appropriate approach will normally be for the registration of the school to be accepted considering that the registration can always be subsequently reviewed by the State if it becomes apparent that the school cannot legitimately be considered to be based on a religious or non-religious worldview.

B *The Supervisory Role of the Government*

Under the opt-in model the executive plays the key role in ensuring that the protections provided to religious schools are not abused.³⁸ If a particular religious school registers for broader protections than what can be justified by the school’s religion then the executive would be able to modify or remove the registration of the religious school. It is expected that the power to prohibit religious schools from obtaining the protections would rarely be used. However, it would be useful in a range of situations including when it appeared that a school was promoting hatred or violence or was attempting to fraudulently abuse the protections. The de-registration power would also be useful for the protection of students and employees at religious schools in situations where it became clear that the conduct of a particular religious school was harming their psychological or physical wellbeing. Deregistration from the protections would also be another option available to the State in attempting to reform a school, and would be a less drastic measure compared to other options available to the State such as denying the school funding or closing down the school. As there would be no specific criteria that the executive would have to satisfy to modify the protection provided to religious schools it would simply be at the executive’s discretion regarding when it was appropriate to modify a religious school’s registration.

³⁶ Human Rights Committee, *General Comment No 22: The right to freedom of thought, conscience and religion* (Art. 18), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993).

³⁷ *Ibid* [2].

³⁸ As the opt-in model provides protection to both religious and non-religious worldviews any subsequent reference to religion or religious schools should be understood as also referring to non-religious worldviews and schools based on these worldviews.

The executive would only be able to modify or remove the registration of a religious school through enacting a statutory rule, which would provide Parliament with an important role in deciding whether a school would be denied particular protections for its employment decisions. In NSW, for example, statutory rules can be disallowed by either House of Parliament so any decision by the executive to deny a particular school protection would be subject to Parliamentary oversight.³⁹

Under the opt-in model the role of courts would be restricted to determining whether a school is based on a religious or non-religious worldview, whether the grounds on which the employment decision was made were protected under the school's registration, and whether the school authorities believed, in good faith, that it was important to make the employment decision due to the religious commitments of the school. If the person adversely affected by the employment decision is successful in convincing the court that the school is not based on a worldview, that the employment decision was based on a ground not protected by the registration, or that the authorities did not consider that the decision was required due to the school's religious commitments then the protections would not apply to that decision and the complainant would be able to access the standard remedies available under anti-discrimination legislation. In the majority of cases it is to be expected that the school authorities would easily be able to provide sufficient evidence to prove their genuine belief that it was important to make the employment decision in question, yet the possibility of court review of the decision on this ground would be important to reduce the likelihood of the protections being abused.

An example where the protections could be abused would be in a situation where a religious school obtains registration on particular grounds and then subsequently loses its religious identity over a number of years. The absence of any review mechanism for employment decisions would allow persons to still be excluded on particular grounds even though the decisions were no longer being made on the grounds that the decision was important due to the religious commitments of the school. The example demonstrates the importance of court involvement because in such a situation the justification for the protections has been undermined as it is no longer supported by a range of rights, especially the right of religious freedom.

Under the opt-in model courts do not have a role to play in determining whether a particular theological or ethical view should be considered to be part of a religion, nor do they play a role in deciding whether the school authorities had an adequate basis for considering that it was important that the employment decision was made to protect the religious commitments of the religious school. Providing these roles to courts often requires them to address a range of challenging legal and theological issues including the identity of the controlling entity of the school, the school's religion, the beliefs that should be attributed to the religion, the importance and religious nature of various teaching and non-teaching positions within religious schools, and the impact of employing a person who is not committed to the religion on the religious school's ability to remain faithful to its religious commitments and develop a supportive religious environment.

³⁹ *Interpretation Act 1987* (NSW) s 41.

As registration with the government would provide a religious school with protections for its employment decisions, there would normally be no need to determine the individuals or bodies that control the religious school.⁴⁰ There would also be no need to engage in a detailed analysis of the school's religion as the registration document would indicate the school's religion and clearly state the protections that the school authorities consider necessary.

The situation under the opt-in model approach is substantially different to that which would exist under alternative approaches involving greater court involvement such as a 'genuine occupational requirement' approach or a 'religious susceptibilities/sensitivities' approach. Courts in applying these tests will often be required to address a range of theological issues including issues such as the doctrines to be attributed to a religion, the religious content of an employment position, the theological significance of individual attributes, and whether those attributes prevent a person from being able to fulfil the inherent requirements of an employment position.

Some of the practical difficulties that courts can encounter when required to determine these theological issues were illustrated in *OW & OV v Members of the Board of the Wesley Mission Council*.⁴¹ The case concerned a Christian foster care agency's refusal to provide foster care services to a same-sex couple on the grounds that it would be contrary to their religious beliefs. The Christian organisation attempted to rely on a provision in the *Anti-Discrimination Act 1977* (NSW) that provides a defence to an act of a religious organisation 'that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.⁴² The respondent provided a number of different descriptions of their religion, but the Tribunal held that the respondent was claiming that their religion was 'the religion of the Uniting Church as practised by Wesley Mission'.⁴³ The Tribunal rejected the respondent's claim and held that the Act did not recognise Christian denominations and that the relevant religion for the purposes of the Act was Christianity, but that even if the Act did recognise denominations the relevant religion was the 'religion of the Uniting Church' and that the further specificity claimed by the respondent could not be accepted.⁴⁴ On appeal the Tribunal's approach was rejected and the Appeal Panel held that the relevant religion for the purposes of the provision was Wesleyanism, a term the Appeal Panel used to refer to the more precise religious beliefs of the respondent.⁴⁵ On a further appeal to the NSW Court of Appeal the use of the label 'Wesleyanism', or any religious label, was considered inappropriate with their Honours holding that the preferable approach was to simply focus on the religious commitments of the respondent at the time of the decision to not provide foster care services.⁴⁶ When the matter was reheard by the Tribunal detailed evidence was given about the respondent's religious beliefs at the time of the decision, the influence of the teachings of John Wesley, and the position

⁴⁰ A situation could arise where the control of a religious school was claimed by multiple parties and there was a dispute regarding the appropriateness of the school registering for the protections or registering for protection on particular grounds. Although such a situation is likely to be rare it could be resolved by the courts in the same way that they would resolve any dispute regarding who has ownership and control over any legal entity.

⁴¹ [2010] NSWADT 293.

⁴² *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁴³ *OV v QZ (No.2)* [2008] NSWADT 115 [88].

⁴⁴ *Ibid* [89]–[121].

⁴⁵ *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57, [18], [40].

⁴⁶ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, [53]–[55].

of the respondent's religious commitments within the broader Uniting Church.⁴⁷ The case is a useful example of how the apparently simple task of determining an organisation's religion can in reality be a complex and time consuming endeavour for the court and parties.⁴⁸

A further criticism of courts addressing theological issues is that it is fundamentally inappropriate for a secular court to be placed in a position where it is required to provide a legal resolution of issues that are essentially theological. The requirement for a secular court to address these issues can be seen as an unjustifiable interference by the State with the right to religious liberty of the adherents of the school's religion. The inappropriateness of courts attempting to resolve theological issues was emphasised by the United States Supreme Court in *Serbian Eastern Orthodox Diocese v Milivojevic* when it refused to intervene in a decision made by church authorities to dismiss a bishop and reorganise a diocese.⁴⁹ The Court held that attempting to determine whether the decision was theologically justifiable would

entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But ... religious controversies are not the proper subject of civil court inquiry, and ... a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.⁵⁰

A similar position was adopted in *EEOC v Catholic University of America* where the United States Supreme Court held that State involvement in the decision of the Catholic University of America to not grant tenure to a theology lecturer was not only in violation of the freedom of religion clause but also the non-establishment clause.⁵¹ The Court found that being required to evaluate the merits of the evidence provided by different theological experts required the Court to play an inappropriately intrusive role in the operation of the religious group and was in violation of the right to religious liberty.⁵²

The Canadian Supreme Court addressed this issue in *Syndicat Northcrest v Amselem* ('*Syndicat Northcrest*'), which concerned an attempt by the managers of an apartment complex to prevent a Jewish person from annually building a hut (a succah) on their balcony for a nine day period in order to fulfil a religious obligation.⁵³ On the appropriate approach that courts should adopt when confronted with theological issues Iacobucci J held that

claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same

⁴⁷ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [18]–[20].

⁴⁸ For additional cases that demonstrate the difficulties that courts encounter when attempting to address theological issues see *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (22 December 2004), *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) and *Walsh v St Vincent de Paul Society Queensland [No 2]* [2008] QADT 32 (12 December 2008).

⁴⁹ 426 US 696, 724–5 (1976).

⁵⁰ *Ibid* 713. Importantly in the case the Supreme Court did not reject the possibility that court review of the validity of the conduct of a religious body would be appropriate in situations involving fraud or collusion: 713. Such a position is consistent with the role provided to the judiciary under the opt-in model that allows courts to assess whether the employment decision was made in good faith due to the school's religious commitments.

⁵¹ 83 F3d 455, 467 (1996).

⁵² *Ibid* 466–7.

⁵³ [2004] 2 SCR 551.

religion, nor is such an inquiry appropriate for courts to make ... the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.⁵⁴

The merits of such an approach was affirmed in *R v Secretary of State for Education and Employment (Respondents) ex parte Williamson (Appellant)*, which involved the House of Lords rejecting a claim by parents and teachers of Christian schools that a legal prohibition on corporal punishment violated their religious liberty.⁵⁵ On the importance of courts not playing a substantive role in determining the religious beliefs of adherents Lord Nicholls stated that

[w]hen the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith ... But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion.⁵⁶

Providing courts with a role in determining whether a theological or ethical view is part of a particular religion involves a profound violation of the right to religious liberty. The adherents within a religious group should be recognised as the only individuals who can determine the content of their religion. The State has a legitimate role to play in regulating the expression of religious beliefs to the extent that is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.⁵⁷ However, providing courts with a role in determining the beliefs of religious groups is inconsistent with a State's obligation to respect the right to religious liberty.

There are further reasons why this allocation of roles between the three arms of government is superior to alternative possibilities. A court focused approach encounters the problems that courts have to wait until the matter is raised with them, they will typically have less time and financial resources to devote to investigating the issues, and they will be limited in their ability to receive submissions from experts and other members of the public on the legitimacy of the claims made by the religious school. It is preferable that the executive, under the supervision of the legislature, is given the central role in determining whether a school should lose its protections under anti-discrimination legislation due to the greater resources available to the executive, its ability to play a more active, ongoing role in ensuring that the protections are not abused by schools, and the likelihood that any decision made will more closely reflect the range

⁵⁴ Ibid [43], [50].

⁵⁵ [2005] UKHL 15 (24 February 2005) [52], [86].

⁵⁶ Ibid [22]. For a general discussion of the historical and contemporary aspects of the understanding that the State should be limited in addressing theological issues see generally W Cole Durham Jr and Brett G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Aspen Publishers, 2010) 1–76; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 23–84.

⁵⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

of community views on the issue considering the greater number and diversity of individuals involved in decisions made by the executive.

It is arguable that another advantage to assigning the executive to play the key role in the issue is that they are more democratically accountable to the community. If they make a decision that is considered inappropriate by the community then they can be held responsible for it at the next election. However, the merits of this argument would likely be strongly contested considering that many would consider that the lack of direct accountability to the people is one of the key reasons why significant human rights conflicts should be resolved by the courts as they can focus solely on the merits of the issue and not have their judgment inappropriately influenced by considerations relating to re-election.

An alternative way in which the opt-in model could be structured would be to allow religious schools to register for any protections they consider necessary without any government review of the registration decision, while retaining court oversight of religious schools to ensure that their employment decisions are made in good faith. Such an approach has not been adopted as it fails to impose sufficient safeguards to ensure that religious schools do not abuse the protections. The supervisory function given to the executive under the proposed model would allow it to play an essential role in minimising the extent to which protections obtained through registration are abused. If a religious school makes a claim for protection on grounds that a majority of adherents of that religion consider to be unjustified then this would likely result in significant criticism of the school's decision from both within and outside of the religious, which may lead to the school modifying its registration or the executive intervening to deny the school protection on that ground.

A key aspect of the opt-in model is that the State should normally defer to religious adherents regarding the philosophical and ethical commitments of their religion, and should avoid becoming involved in a theological assessment of whether a particular claim made by a religious adherent is actually justified by the sources of authority for the religion. The State should also show substantial respect for claims made by religious adherents that their particular religion requires a specific cultural environment in which their religious obligations can be adequately met.

Although there should be considerable deference shown by the State to religious adherents regarding their commitments, there is a need for the State to be involved in a limited way to ensure that the right to religious liberty is not abused through fraudulent claims. The ability of the executive to modify or remove the protections provided to religious schools is the central measure to ensure schools do not abuse the protections provided. A further safeguard is that religious school authorities can be required to prove to the courts that they believed in good faith that it was important to make the employment decision considering the religious commitments of the school. In the vast majority of cases this should not be a difficult burden for the school authorities to discharge as they will normally be able to rely on documentary evidence and support from other adherents to sufficiently demonstrate the sincerity of their religious convictions and their belief that it was important to make the relevant employment decision considering these convictions.

In determining the sincerity of a person's belief the courts should avoid taking excessive measures to ensure that the school authorities are sincere in their claim. Instead the courts should simply focus on determining whether the person has an honest belief that it was important to make the employment decision due to the religious commitments of the school. On the appropriate approach that should be adopted by courts Iacobucci J in *Syndicat Northcrest* held that

the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings. Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony ... as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.⁵⁸

The role given to the courts under the opt-in model should significantly reduce the likelihood that individuals will abuse the protections provided through fraudulent claims. Such an outcome is particularly likely due to the ability of courts to require school authorities to provide evidence of the sincerity of their religious beliefs and to demonstrate that the school authorities believed in good faith that it was important to make the particular employment decision due to the religious commitments of the school.

C *The Broad Protection Provided to Religious Schools*

Under the opt-in model a school can register for protections for employment decisions on any ground and for any employment position at the religious school. Critics would likely consider it to be controversial that registration could provide religious schools with such broad protections. In particular, some could be expected to argue that even if most of the grounds commonly protected by anti-discrimination legislation should be included there should no exception on the ground of a person's race. Such an argument was made by the Anglican Diocese of Sydney in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

There is almost universal acceptance within the community that all forms of discrimination on the grounds of race which cause detriment are wrong. It is therefore appropriate that a broad approach be taken to the matters that may constitute racial discrimination rather than limiting it to particular areas and activities. There are sincerely held differences of opinion in the community on matters of sexual practice. There is nowhere near universal acceptance that it is wrong to discriminate on the grounds of sexual orientation, gender identity or marital status in all contexts.⁵⁹

However, it is important to recall that what supporters of religious schools are seeking is not the ability to impose a detriment on a person on the basis of a particular attribute, but rather they are seeking the ability to create an authentically religious educational environment to assist the school in its ability to provide an effective religious education and formation.

⁵⁸ [2004] 2 SCR 551, [52]–[53].

⁵⁹ Anglican Diocese of Sydney, Submission No 178 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 2 February 2012, 10.

This issue was confronted by the Supreme Court of the United Kingdom in *R (on the application of E) v Governing Body of JFS* ('*JFS*'), which concerned a refusal by an Orthodox Jewish school to enrol a student whose mother's conversion to Judaism was not recognised as valid according to the Orthodox Jewish faith as understood by the Office of the Chief Rabbi, but was recognised as valid by other branches of the Jewish faith.⁶⁰ The school's decision could not be unlawful on the basis that it involved religious discrimination as religious schools were permitted under the *Equality Act 2006* (UK) to make decisions regarding the admission of students on the grounds of religion.⁶¹ However, a majority of the Supreme Court held that the school's decision to exclude the student was made on the grounds of 'ethnic origin' and that this violated the legal prohibition on discrimination on the grounds of race, which was defined in the *Racial Relations Act 1976* (UK) as including 'colour, race, nationality or ethnic or national origins'.⁶²

The majority of the judges in the case who found against the religious school made this clear in their judgments, emphasising that they were not holding that those involved with the decision to exclude the student from enrolling in the school were acting inappropriately. Lord Phillips, for example, stated that '[n]othing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of [the school] in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are "racist" as that word is generally understood'.⁶³ This point was also made by the Australian Christian Lobby in its submission to the inquiry into the consolidation of Commonwealth anti-discrimination legislation:

[t]hose exercising their freedom of religion do not seek to discriminate on the basis of sexual orientation or gender identity but rather seek to employ staff most suited to the religious environment of the employer. What is sought is freedom to positively select individuals for employment on the basis of the particular religion of the employer, as appropriate to support the religious aims of the religious body.⁶⁴

Furthermore, under the opt-in model regulations can always be introduced to temporarily or permanently deny a religious school the benefit of protections for their employment decisions. Consequently if a religious school's views on race or any other attribute are inappropriate then the government is able to intervene to deny them the protection to make employment decisions on the basis of specific attributes. Such intervention would be appropriate if a group that considered particular races to be inferior attempted to establish a religious school and registered for protections. A further safeguard is provided by the courts whose role it is to determine whether the worldview is a religion and whether the school authorities believed, in good faith, that it was important to make the relevant employment decision due to the school's religious commitments. A racist group attempting to abuse the protections could always be challenged in court and may be unlikely to satisfy the court that these elements have been satisfied.

⁶⁰ [2009] UKSC 15 (16 December 2009) [5]–[7].

⁶¹ *Equality Act 2006* (UK) ss 59(1)–(2).

⁶² *Race Relations Act 1976* (UK) s 3(1); *JFS* [2009] UKSC 15 (16 December 2009), [46], [71], [92], [124], [149].

⁶³ *JFS* [2009] UKSC 15 (16 December 2009) [9].

⁶⁴ Australian Christian Lobby, Submission No 92 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012, 15.

D *Registration Details of Religious Schools are Publicly Accessible*

Another important aspect of the opt-in model is that the details concerning which schools have registered for protections, the grounds on which the protections have been provided, and an explanation regarding why they consider these protections to be necessary would be in the public domain and accessible online or in hardcopy by members of the public from the religious schools. Such an approach has already been adopted in South Australia,⁶⁵ and was supported by the Senate Legal and Constitutional Affairs Legislation Committee in its review of the draft consolidation bill of Commonwealth anti-discrimination legislation and the Law Institute of Victoria in a policy document prepared for the Victorian election in 2014.⁶⁶

The requirement to produce a public document would have a number of advantages. Persons considering applying for employment at a particular religious school would be able to access the document to determine the grounds, if any, on which the religious school has sought protections. This would be of value in assisting potential applicants make informed decisions regarding whether they want to apply to work for the religious school, and help avoid the situation encountered in *Thompson v Catholic College, Wodonga* where the applicant was not aware before she started her employment that adherence to the ethical beliefs of the school was considered to be an essential element of her employment by the school authorities.⁶⁷ If the registration of the school includes a ground that may be relevant to the potential applicant then they are able to make an informed decision as to whether they want to continue with the application knowing that the school will have the ability to make an adverse employment decision on that ground.

The requirement to register for specific protections and produce a public document explaining why the school is registering for anti-discrimination legislation protections on particular grounds could also assist applicants in understanding how a religious school is likely to rely on the protections. For example, an Orthodox Christian school would likely register for anti-discrimination legislation protection on the grounds of gender as they consider particular religious leadership roles can only be performed by men and so would want protection for employment positions at the school that involve conducting religious ceremonies. However, such a school may not want these protections to apply to other employment roles, and so a public document detailing their religious commitments would be helpful to women considering applying to the school as it would provide them with a detailed understanding of how a school intends to rely on the protections.

A public document addressing the protections provided to a religious school and the need to have these protections would also be useful for the courts as a religious school would find it difficult to justify the good faith requirement of the protections if their decision contradicted their commitments expressed in the public document. For example, if the Orthodox school indicates in the public document that it considers gender to be significant for employment positions

⁶⁵ *Equal Opportunity Act 1984* (SA) s 34(3).

⁶⁶ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 96; Law Institute of Victoria, *Call To Parties State Election 2014 Key Issues* (2014) <<http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/CallToTheParties2014>>.

⁶⁷ (1988) EOC ¶92-217, 77 054.

involving religious worship but not for teaching and non-teaching roles then it would be likely that a court would reject an attempt by the school to rely on the protections to justify an employment decision that excluded a woman from a teaching and non-teaching role on the basis of her gender. Similarly the requirement to produce a public document justifying a school's need for the protections would assist the executive in determining whether to remove particular protections from a religious school.

The requirement for a religious school to produce a public document may also improve community cohesion as protections granted to individuals and groups under anti-discrimination legislation can be viewed with hostility by other members of the community not covered by the protections. Under the models currently used in Australian jurisdictions religious schools are not required to explain to the community their need for protections for their employment decisions. The requirement under the opt-in model for religious groups to produce a document explaining their need for these protections could serve the valuable role of defusing community tension through educating community members about the particular challenges and commitments of the religious group and the reasons why their schools need protections for their employment decisions. The message contained in the documents produced by religious schools is likely to be in the form of desiring to create an authentic religious community, rather than an expression of hostility or contempt towards certain individuals or groups. The likelihood of schools adopting this approach is supported by an empirical study conducted by Evans and Gaze into the reliance by religious schools on protections provided under anti-discrimination legislation. The authors stated that in none of their interviews

did the interviewee speak with hostility or contempt for people from other religions. Instead, the desire to have solely coreligionists as staff members was at least expressed in positive terms as the desire to create a community of shared values, rather than negative terms as the desire to exclude others who are undesirable, wrong-minded or less worthy.⁶⁸

Further the public nature of the registration system and the ability of religious schools to modify or withdraw from any protections granted might stimulate debate within religious communities about whether particular protections are actually required by the religion. Such debate could lead to some religious communities reflecting more deeply on whether their commitments are authentic expressions of their religion, and if so, how best to explain those commitments to those who adopt different views. The flexibility of the registration system would also be useful for religious communities that have revised their theological understanding of the significance of particular attributes. Christian denominations, for example, that conclude that there is no significant theological difference between different genders or sexualities would be able to modify their registration to ensure the protections more closely comply with their new theological understanding.

A further advantage of the opt-in model compared to alternative models is that it would produce valuable evidence indicating the number of religious schools that want protections and the particular type of protections sought. This evidence would be useful to government bodies, non-government organisations, and a wide range of individuals. The information would be particularly useful to persons considering whether they want to send their children to the school,

⁶⁸ Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views From The Coal Face' (2010) 34 *Melbourne University Law Review* 392, 415.

attend the school themselves, donate money to the school or volunteer their time to help the school. The information would also be relevant in relation to the human rights education of students and others attending religious schools. If particular religious schools have sought protections on various grounds it could highlight to government and non-government organisations that it would be useful to focus human rights education campaigns specifically on these schools to ensure that those attending the schools appreciate the importance of respecting the diversity of persons that exist in the community.

E *An Appropriate Respect for Religious Liberty and the Right to Equality*

A major problem with approaches such as the model used in NSW is that protections are provided to non-government schools, whether they are religious or non-religious, on most grounds covered by anti-discrimination legislation and for all employment positions regardless of whether such protections are desired by schools. The opt-in model better respects both the right to religious liberty and equality through restricting the protections so that they are only provided to religious schools and through adapting the protections to the actual needs of religious schools. However, the opt-in model also avoids two of the major flaws of court-based approaches: inadequate protection of a school's ability to select for mission fit, and the involvement of courts in complex legal and theological issues.

The opt-in model demonstrates appropriate respect for the importance of allowing religious schools to select teaching and non-teaching employees according to their mission fit through allowing religious schools to determine for themselves the grounds and the employment positions where mission fit is relevant and to register for protections accordingly. Providing this role to religious schools rather than to courts avoids the problem involved in a court-based approach where many teaching and non-teaching employment positions may be held to not have a sufficiently significant religious component to justify excluding individuals with poor mission fit from employment.

The capacity to periodically amend the nature of the registration is an important feature of the opt-in model that ensures that a school's ability to select employees for mission fit is appropriately protected. The ability to alter the scope of the registration is useful considering that views regarding the significance of attributes can change within religious groups, and anti-discrimination legislation can be amended to cover additional grounds that may be significant to some religious schools. The possibility of an expansion in coverage is particularly likely in jurisdictions such as NSW as the *Anti-Discrimination Act 1977* (NSW) currently does not prohibit a range of grounds that are prohibited by anti-discrimination legislation in other Australian jurisdictions. The *Equal Opportunity Act 2010* (Vic), for example, prohibits a variety of additional grounds including employment activity, lawful sexual activity, physical features, political belief or activity, and religious belief or activity.⁶⁹ The ability to amend the nature of the registration would allow religious schools to adapt the protections provided through the registration process to ensure that their ability to select employees for mission fit is adequately protected.

⁶⁹ *Equal Opportunity Act 2010* (Vic) s 6.

A legitimate concern about the opt-in model is the likelihood that some religious schools may attempt to claim additional protections that cannot be justified according to the school's religion. However, the public nature of the registration process would significantly reduce the likelihood of this occurring as the details of the school's registration would likely be closely examined by community members — both within and outside of the religious group — and by the executive, which would place pressure on religious schools to avoid making claims for protections that could not be justified.

As the ability to select employees for mission fit is already provided to a variety of different groups constituted on grounds such as race, gender and sexuality,⁷⁰ a significant argument in favour of the opt-in model is that it better respects the right to equality compared to alternative approaches that do not provide similar protection to groups constituted on the grounds of religion. Under the opt-in model once a religious school has been registered they can make employment decisions on the basis of mission fit in the same way as many other groups.

The opt-in model could be criticised for failing to adequately respect the right to equality as it does impose additional regulations on religious schools not imposed on other groups. However, this differential treatment can be justified on account of the scope of the protections provided to religious schools considering that there are more than 1000 non-government schools in NSW employing more than 40 000 individuals.⁷¹ The capacity for such a large number of people to be adversely affected justifies the State playing a greater role in regulating religious schools to ensure that they do not abuse the protections provided to them. It could also be argued that the additional features of the opt-in model are important safeguards to implement in regulating all groups, and that the preferable approach to adopt in ensuring equal treatment of groups is to amend the legislation to use the opt-in model for regulating all groups.

⁷⁰ Under section 20A(3) of the *Anti-Discrimination Act 1977* (NSW), for example, a registered club established with the principal object of providing benefits to a particular race is able to exclude persons not of that race from becoming members of the club. This protection is provided to clubs irrespective of whether the racial group on which the club is established has historically suffered from discrimination. A similar protection is also provided under section 34A(3) of the Act to registered clubs where membership of the club is only available to a particular gender. While section 27 of the *Equal Opportunity Act 2010* (Vic) permits political parties to 'discriminate on the basis of political belief or activity in the offering of employment'. In addition to the exceptions specified in anti-discrimination legislation specific exemptions from the operation of anti-discrimination provisions can be granted to organisations. The Anti-Discrimination Board of NSW, for example, granted an exemption from the *Anti-Discrimination Act 1977* (NSW) to an arts organisation to allow them to consider the race of the applicants in making employment decisions so that they could employ Indigenous staff members to provide services to the Indigenous community: Anti-Discrimination Board of New South Wales, *Current section 126 exemptions* (18 November 2014) <http://www.antidiscrimination.justice.nsw.gov.au/adb/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.html>. A similar commitment was also demonstrated by the Victorian Civil and Administrative Tribunal, which granted an exemption from the *Equal Opportunity Act 1995* (Vic) to allow a gay club to refuse entry to persons who did not identify as homosexual males so that the club could preserve its distinct identity and create an environment where it could meet the needs of its patrons: *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 916; *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2010] VCAT 2005.

⁷¹ National Catholic Education Commission, *2011 Annual Report* (Canberra, 2011) 29–31; Non-government Schools Guide, *The NSW Schooling System* <<http://www.privateschoolsguide.com/schooling-in-nsw>>.

A further benefit of the opt-in model is that it avoids the undesirable situation existing under alternative approaches where neither the religious school nor its employees are certain about their legal position. Once a religious school has registered for protections it will be able to make employment decisions on the grounds of mission fit without fear of litigation. Providing this confidence to religious schools is desirable to ensure that they are not inappropriately discouraged from attempting to build authentic religious communities — a particular problem for smaller religious schools that have limited resources to defend discrimination actions.

The opt-in model would also benefit employees as they will know in advance the position of the religious school. If the school has not registered for protections then a person will know that the school cannot make an adverse employment decision on various grounds. Further if a school has registered for protections then an employee will know that the school considers these grounds significant and so can decide to seek employment elsewhere, or work for the school knowing that an adverse decision may be made on those grounds and with the benefit of this knowledge take financial and non-financial steps to reduce the adverse impact of such a decision if it is ever made.

There will inevitably be some individuals who suffer from an adverse employment decision made by religious schools that would be permitted under the opt-in model. However, this is the same result that occurs for the similar protection provided to groups constituted on grounds such as race, gender and sexuality. The protection provided to these groups is often justified on the grounds of the right to equality. However, it is important to note that religious groups can justifiably claim similar protection as religion is an attribute that is protected in the same way that many other attributes are protected under international human rights instruments. For example, Article 26 of the *International Covenant on Civil and Political Rights* states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion ... or other status'.⁷² Similarly, under Article 2 of the *International Covenant on Economic, Social and Cultural Rights* an obligation is imposed on States to protect rights contained in the Covenant 'without discrimination of any kind as to race, colour, sex, language, religion ... or other status'.⁷³ Further the possibility of the executive intervening to remove or modify the protections would place ongoing pressure on religious schools to not abuse the protections, and to ensure that when they do rely on the protections they do so in a way that is respectful of any persons who may be adversely affected.

⁷² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26 (emphasis added).

⁷³ *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 2(2) (emphasis added). See also *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 1, 24; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) arts 3, 19; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36 UN GAOR, 36th sess, Supp No 51, UN Doc A/36/684 (25 November 1981) art 2; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 2–4.

Considering all of these factors the extent and nature of any harm caused by the opt-in model might be significantly less than could be expected. Furthermore, the nature of the harm would be similar to that caused by protections provided to other groups, and can be supported on the basis that the harm suffered by those excluded from different groups can be justified on the basis of rights such as the right to equality and religious liberty.

V CONCLUSION

The opt-in model avoids a major problem of approaches such as those adopted in NSW of providing excessive protections to religious schools. Under the opt-in model the protections provided are limited to schools based on religious or non-religious worldviews and are adapted to the particular needs of each religious school substantially reducing the number of individuals who could be harmed from an adverse employment decision. The opt-in model also has important safeguards to prevent religious schools abusing the protections provided to them especially the public nature of the registration process and the significant supervisory role of both the executive and the judiciary.

The opt-in model is also superior to court-based approaches as it demonstrates a more appropriate respect for the right to religious liberty. The flexible nature of the registration process permits religious schools to register for the protections they need to employ persons on the basis of mission fit, while also allowing the registration to be easily amended to account for any theological changes that may occur within particular religious groups. The model also appropriately avoids violating the right to religious liberty by not providing courts with the role of determining the doctrines of religious groups. Furthermore, as a range of other groups constituted on various grounds are provided with strong protections under anti-discrimination legislation, the opt-in model also demonstrates a more appropriate respect for the right to equality through avoiding approaches to regulating religious schools that have the potential to substantially undermine the ability of religious schools to fulfil their religious objectives.
