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Maintaining religious identity in hiring in faith-based schools: A comparative analysis of Australia and the United States

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MAINTAINING RELIGIOUS IDENTITY IN HIRING IN FAITH-BASED SCHOOLS: A COMPARATIVE ANALYSIS OF AUSTRALIA AND THE UNITED STATES

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Even as Australia and the United States (US) are becoming increasingly secularised, they retain a significant number of faith-based primary and secondary schools. Aware of the tension between changing societal norms and the freedoms associated with religious institutions, the main part of this paper is divided into two sections. The first part surveys the relevant constitutional and anti-discrimination laws in Australia and the US along with exemplary litigation on how these statutes are applied. The second section offers six suggestions for school administrators who are wrestling with the challenge of preserving the faith-based ethos in their schools in the face of pressures to change, particularly in light of changing attitudes with regard to matters of sexuality such as sexual preference and same-sex relationships as they may conflict with religious teachings. The article ends with a brief conclusion.

I INTRODUCTION

Australia and the United States (US) are rapidly becoming increasingly secularised. Even so, these countries retain significant portfolios of faith-based primary and secondary schools. While census data and other surveys confirm that religious faith is declining, particularly in Australia,² other statistics ambiguously confirm that enrolments in faith-based primary and secondary schools continue unabated.³ Some sociological analysis reconciles the apparently conflicting data with the suggestion that institutional religion is slowly losing its convincing power, but that spirituality or respect for some form of transcendence remains important for most people in these two countries, especially for those raising children.⁴

This paper acknowledges the on-going nature of these sociological changes, but they are not its focus. Rather, the objective of this paper is to discuss how administrators in faith-based schools can best address the ambiguities resulting from these developments. It is important for educational leaders to face these social shifts in hiring because their actions are likely to play out in classrooms and staffrooms, especially in light of changing mores with regard to lifestyle choices reflected in sexuality, the family, and the meaning of marriage.

It certainly appears that Australians and Americans increasingly manifest a wish to accommodate different lifestyles, particularly those involving non-traditional sexual preferences.

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Yet, it remains to be seen how officials in faith-based schools can preserve the ethos, or religious values, which made them successful and attractive to parents especially when their teachings are premised on traditional religious values and observance.

Does the ethos have to change if it is part of the continuing attraction of that school's brand of private education? Or is it possible within the constraints imposed by enlarged anti-discrimination laws, to insist that teaching staff and students continue to observe the rules of conduct which are an integral part of the attraction of that faith-based school? Put another way, do religious freedom exemptions or constitutional freedom of conscience and religion preserve space within which school administrators can go about their faith-based school business as usual?

This paper seeks to provide practical answers to these questions in Australia and the US. After this introduction, this two-part paper begins with a survey of the relevant constitutional and anti-discrimination laws along with key cases in both Australia and the US demonstrating how the laws in the respective countries are being applied. In light of the comparative analyses in the first parts of the paper, the second section offers concrete recommendations for leaders in faith-based schools, and their lawyers, as they walk a tightrope in seeking to protect their religious autonomy while trying to avoid running afoul of anti-discrimination statutes. The article ends with a brief conclusion.

II COMPARATIVE ANALYSIS

A *Australia*

Australia, unlike the US, has no Bill or Charter of Rights.⁵ Moreover, the provision in the *Australian Constitution* which is assumed to protect 'free exercise of religion' and to prevent government endorsement or support of religious purposes and projects, arguably does not do so.⁶ To the extent that religious freedom is safe-guarded in practice in Australia, this protection is the product of custom protected by common law presumptions together with a patchwork of state and federal anti-discrimination laws and exemptions. Our explanation of that background will necessarily be brief so we can address the issue of how administrators in continuing faith-based schools best respond to these religious liberty issues as they play out in classrooms and staffrooms.

According to Section 116 of the *Australian Constitution*, which is modelled on the US *First Amendment*:⁷

[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Establishment Clause language in Australia is close to a carbon copy of the American provision. Yet, the Australian High Court has held it is much narrower and does not prevent anything except the establishment of a national religion.⁸ It is narrower than the American provision because of the substitution of the seventh word – 'for' – in place of the American word 'respecting.' The Australia courts have built a limited and uniquely Australian Establishment Clause jurisprudence on this difference.

Perhaps most significantly, the Australian High Court's interpretation allows the Australian federal government to provide extensive funding to private schools with a religious ethos. This interpretation, which has resisted multiple attempts to dislodge it, seems fixed for the medium

term despite liberal grumbling.⁹ The reliability of that interpretation is a product of both the High Court's respectful view of precedent and the federal government's pragmatism – nearly 35 per cent of all primary and secondary students are educated in private schools, most of which are faith-based, and they spend roughly 35 per cent of the national education budget on funding those schools.¹⁰ To change this status quo would require a massive and unpopular change which would likely unseat whichever government made the attempt.

So, what is left for secularly minded governments is to tinker around the edges. The Victorian State government has closed down all religious education in public schools¹¹ and enthusiastically voiced its intention to legislatively mandate the implementation of the controversial 'Safe Schools' program in all Victorian schools, public and private.¹² Other states and the federal government have gently withdrawn their support for the more controversial aspects of this so-called anti-bullying initiative¹³ when it was revealed that it intended a wholesale review of all curricula with gender-neutral stereotypes being required in all texts including mathematics.

Litigation designed to kill off bi-partisan federal government funding of a chaplaincy program in public schools in Queensland on constitutional grounds, succeeded on paper.¹⁴ However, this effort failed in practice because the federal government always had a fall-back way to legitimately fund the program. Yet, there have been cases involving schools and organised religion that have caused nervousness among school administrators.

In 1997, the Church of Jesus Christ of Latter-day Saints was unsuccessful in its attempt to defend its 'temple worthiness' requirement for its lead receptionist in Federal Court,¹⁵ and two evangelical pastors were subjected to an extended and hugely expensive legal saga beginning in the Victorian Civil and Administrative Tribunal when Muslims found their preaching offensive under Victorian anti-religious discrimination legislation.¹⁶ Similarly, and again in Victoria, the Brethren were unsuccessful when defending their alleged right to deny the request of a group trying to prevent teenage gay suicide (COBAW), to use their convention centre for a conference.¹⁷

This decision, upheld by a 2-1 majority in the Victorian Court of Appeal, raised church institutional anxiety levels on various fronts. First, because the State of Victoria has a *Charter of Rights*¹⁸ which was theoretically modelled on the *International Covenant on Civil and Political Rights* ('ICCPR') and was supposed to protect conscientious religious objections like this. Second, that State's *Charter of Rights* was theoretically buttressed by a specific State anti-religious-vilification Act¹⁹ designed supposedly to protect good faith religious instruction. Third, in keeping with the 'necessity language' of Article 18(3) of the ICCPR, it ought to have been difficult for a court to find this law as necessary to protect the rights and freedoms of others because other conference venues were available to COBAW.

More disconcerting still was the decision of the Tasmanian Anti-Discrimination Commission to investigate a complaint by Martine Delaney, a transgender Greens state election candidate who alleged that she was offended by a booklet about marriage published jointly by the Archdiocese of Tasmania and the Catholic Bishops Conference of Australia and circulated only to Catholic school parents and parishioners.²⁰ Though Delaney eventually dropped the complaint,²¹ religious believers and institutions all over the country who observed the booklet's respectful treatment of marriage and of people living alternative lifestyles, were dismayed that the State Anti-Discrimination Commissioner would consider it for penalty. After reading that brochure, religious believers have reasoned that anyone could take offence at any expression of religious belief regardless of whether it is in writing.

The Tasmanian government subsequently reviewed its anti-discrimination legislation and announced that while there will be an amendment, it will not extend to the offending provision – s 17.²² While some commentators have suggested that Tasmania’s anti-discrimination law was the most generous in the country,²³ the serious consideration the Delaney complaint was given by the Commissioner was surprising considering Tasmania is the only state in Australia which has provided constitutional protection for religious practice since 1934.²⁴

Absent a comprehensive federal Religious Freedom or Anti-Religious-Discrimination Act which would override any inconsistent state or territory law where religious liberty is concerned, religious institutions including schools, are thus obliged to understand the legislation containing anti-discrimination provisions or religious exemptions that applies federally and in their state. There are various relevant instruments in this regard.²⁵

Rather than review all the relevant provisions in Australia in this paper, we have chosen a representative sample. The New South Wales’ *Anti-Discrimination Act 1977* was one of Australia’s first anti-discrimination laws. Many of Australia’s other jurisdictions used it as a template when crafting their own similar laws. It now outlaws discrimination on grounds of race,²⁶ gender,²⁷ marital status,²⁸ disability,²⁹ responsibility as a carer,³⁰ homosexuality,³¹ HIV/AIDs and age.³² These provisions forbid discrimination in relation to accommodation, employment and education among other things. Vilification on grounds of race, transgender, homosexuality and HIV/AIDs is likewise forbidden. Section 56 provides the following exceptions for religious bodies:

56 Religious bodies

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.

It is important to note that these exceptions are small. They only apply if the education or employment relates to the employment, education, or appointment of persons who will serve as clergy in churches.

While what we will call the ‘susceptibilities’ exception could be interpreted broadly so that it protected religious practices within a school, the administrators of that school will not receive the benefit of the ‘susceptibilities’ exception unless they satisfy a court following a complaint, that their school was established to propagate religion. Murphy J was of the opinion that human rights guarantees are to be interpreted liberally so as not to mute or nullify the protection intended to be given by the legislature.³³ Yet, this same generosity does not apply when the legislative language is restrictive,³⁴ and a broad interpretation would not be afforded in favour of the exception in this case since the core rights at issue are the anti-discrimination norms which are the subject of the instrument.

It would be different if religious freedom protection in a constitutional Bill of Rights or a standalone federal legislative act protecting religious liberty passed to implement an international religious freedom norm, instructed a court interpreting an anti-discrimination law to be generous towards religious freedom exemptions so as not to nullify any guarantee under the Bill of Rights or other statute. But to date Australia has not taken steps to comply with its international obligations towards freedom of conscience and religion.

Note, in addition to s 56 of the *Anti-Discrimination Act 1977* (NSW), there are a list of specific exceptions that allow religious schools to be exempt from the operation of the Act in respect to employment decisions. Sections 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c) respectively allow ‘private educational authorities’ to discriminate in the employment context on the basis of sex, transgender status, marital or domestic status, disability and homosexuality. However, there has not been a single case where a religious school has invoked these exceptions, to date.³⁵ Accordingly, it remains to be seen whether or not such provisions will adequately protect religious educational bodies from civil claims.

It is opined, though, that a court would be likely to narrowly interpret and apply the above exceptions, as this has been the historical tendency with s 56 and other analogous legislative provisions that similarly embrace the language of the ‘susceptibilities’ exception. For example, in *OV v QZ [No 2]* [2008] NSWADT 115, the Wesley Mission – a Christian adoption agency – was unsuccessful in defending a claim of discrimination brought against it by a homosexual couple, whose application to serve as foster carers was rejected by the Wesley Mission. Despite citing ss 56(c) and (d) the tribunal found in favour of the same-sex couple and found that the Wesley Mission had unlawfully discriminated against the men.³⁶

Similarly, in *Griffin v The Catholic Education Office* (1998) EOC ¶92-928, a lesbian woman was found to have been unlawfully discriminated against by the Catholic Education Office (CEO) when her application for classification as a teacher was refused. The CEO sought to rely on the s 3(1) defence in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). CEO officials maintained that Ms Griffin’s employment would injure the religious susceptibilities of adherents of the Catholic faith because the complainant was a ‘high profile co-convenor of the Gay and Lesbian Teachers and Students Association’ and had publicly made ‘statements on lesbian lifestyles’. Even so, the Commission found that denying Ms Griffin’s application did not conform with the doctrines, tenets, beliefs and teachings of Catholicism, as the Catholic Church accepts *celibate* homosexual men and women among its employees, and there was no evidence that Ms Griffin was a sexually active homosexual. The Commission held that officials of the CEO simply assumed that ‘a person who acknowledges his or her homosexual orientation is sexually active’ and as such, any offence that would have been occasioned to its adherents was ‘not an injury to their religious susceptibilities but an injury to their prejudices.’³⁷

The exceptions contained in ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c) of the *Anti-Discrimination Act 1977* (NSW) may provide the leaders in faith-based schools trying to preserve the ethos in their schools with some confidence that their quests will be sustained by the law. But the litigation discussing the religious exceptions in Australian law suggest that the protection provided by the exceptions is illusory rather than real.

Another relevant statutory framework to consider is the *Equal Opportunity Act 2010* (Vic). According to Section 82 of the updated *Equal Opportunity Act 2010* (Vic):³⁸

- (1) Nothing in Part 4 applies to—

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

S. 82(2) amended by No. 26/2011 s. 18(1).

- (2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—
 - (a) conforms with the doctrines, beliefs or principles of the religion; or
 - (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

The Victorian exemption is also limited and only extends to the employment, education or appointment of persons who will serve as clergy in churches. It does not provide any assistance to primary or secondary schools or their administrators who are trying to preserve an ethos.

Sections 153, 195 and 351 of the *Fair Work Act 2009* (Cth) make almost identical provisions to recognise and protect religious practice in relation to 'Modern Awards',³⁹ 'Enterprise Agreements'⁴⁰ and in general.⁴¹ Yet again, the protection is limited and only extends to the employment, education or appointment of persons who will serve as clergy in churches. It does not provide assistance to primary or secondary schools or their administrators who are trying to preserve an ethos.

Before discussing the influence or potential influence that international declarations, treaties and law may have on domestic Australian employer behaviour, there is one further cross section of Australian anti-discrimination legislation that must be considered. That is the three Acts that purport to provide protection from anti-religious vilification. They are, ss 16(o) and 19(d) of the *Tasmanian Anti-Discrimination Act 1998*, ss 7(i) and 124A of the Queensland's *Anti-Discrimination Act 1991* (s 7(i)), and the *Victorian Racial and Religious Tolerance Act 2001*.

Section 16(o) of the *Tasmanian Anti-Discrimination Act 1998* prohibits 'discriminat[ion] against another person on the ground of...religious belief or affiliation'. Further, its s 19(d) makes it illegal to 'incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of...the religious belief or affiliation or religious activity of the person or any member of the group.'

Section 7(i) of the Queensland Act 'prohibits discrimination on the basis of...religious belief or religious activity' at work (Division 2), in education (Division 3), and in other areas (Divisions 4-9). Section 124A makes the public incitement of hatred, serious contempt or ridicule of anyone on grounds of religion unlawful unless done 'reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest.'

The anti-religious discrimination regime in the Victorian *Racial and Religious Tolerance Act 2001* is spread over a few more sections. Section 8 provides that 'a person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other

person or class of persons.’ However, ss 9 and 10 make the incitor’s motives and assumptions irrelevant, though s 11 provides a defence if the otherwise discriminatory conduct was ‘engaged in reasonably and in good faith’ for artistic, academic, religious, scientific or public interest purposes. There is also an exception if the incitor intended the conduct not to be seen or heard by others.

The interpretation of the Victorian provision prolonged the *Catch the Fires Ministry case*.⁴² At first instance, the adjudicating member of the Victorian Civil and Administrative Tribunal (VCAT) held that the disparaging comments made about Islam at an Evangelical Church conference were not protected because they were not made in good faith. On appeal, Nettle J (now a Judge of the High Court of Australia) in the Victorian Court of Appeal held that the finding of bad faith below was incorrect and directed that a new member of VCAT revisit the decision, but the parties were reconciled in the meantime. Yet, in the Queensland Anti-Discrimination Tribunal, Sofronoff QC as President, found more promptly that even though the religious vilification of Muslims in that case was proven, it was made in good faith during an election campaign and so was protected by the exemption in s 124A(2)(c) of the Act.⁴³

The contrast between the ease with which Nettle J and Sofronoff QC found that the ‘good faith’ exemption protected the religious expression, and the first instance Member of VCAT could not, is striking. And even though it cost the church organisations involved, a great deal of money in wasted legal costs, it would not raise concern if it presented as a one-off interpretive mistake by an inexperienced member of a minor tribunal. Even so, none of those grounds for reassurance exist. Because of VCAT’s success in managing tribunal complaints in Victoria, almost all of that State’s tribunal decision making has been consolidated under its umbrella.

It thus appears that VCAT’s template success is being copied in other states, most recently where most administrative tribunal decision making in New South Wales was consolidated under the stewardship of the New South Wales Civil and Administrative Tribunal (NCAT). And NCAT’s record in protecting even the right of campaigning politicians to freely communicate with their constituents during a federal election is concerning in the face of protecting the anti-discrimination norms in local state legislation that it considers itself bound to uphold against less proximate intruding interests.⁴⁴

Carolyn Evans and Patrick Parkinson have suggested that this trend of disfavour towards the genuine protection of religious freedom has created general church sourced antipathy towards ‘the human rights project’ as a whole.⁴⁵ They have commented that Church concerns effectively derailed the Rudd Government’s *Human Rights Bill* project under the Chairmanship of Jesuit priest, Father Frank Brennan in 2010.⁴⁶ Carolyn Evans outlined the primary concern of religious organisations about human rights legislation when she wrote about non-discrimination laws in 2012.⁴⁷ She said:

Most non-discrimination regimes, including Australia’s, began with quite substantial exemptions for religious bodies from the provisions of at least some of the discrimination laws.... Over time, however, many countries, particularly in Europe, have seen the scope of exemptions for religious groups narrow. There has been increasing public debate in Australia over whether the exemptions in Australian discrimination Acts should likewise be narrowed.⁴⁸

The concern of religious organisations is that religious freedom and the autonomy of religious institutions gets diluted as newer demands for equality claim that religious exemptions are privileges inconsistent with open-ended equality.

Patrick Parkinson added that even though church leaders want human rights recognised, they do not believe that Charters assist.⁴⁹ The concerns of the religious leaders Parkinson references stem from the perception that current standard form Charters ‘may be used to support agendas hostile to religious freedom’, do not always ‘enact the grounds of limitation contained in Article 18’ of the *ICCPR*, and that ‘governmental human rights organisations [can be]...rather selective about the human rights they choose to support.’⁵⁰

The ideology of anti-discrimination law attracts ‘widespread support’ from Christian organisations.⁵¹ Still, the narrow interpretive approach taken by officials of the institutions implementing any new version of equality to ‘genuine occupations requirements’ for jobs in a church institution, see the Christian ‘moral code’⁵² sidelined. If the government or its supervising human rights institutions consider society’s interest in promoting the new equality is sufficiently compelling, then they ‘curtail religious freedom’⁵³ to the extent required to achieve the government’s goal despite lofty pronouncements about the foundationality and even the non-derogability of freedom of conscience and religion. Quoting McConnell, Parkinson says that even though governments assert that they do not take sides when religious and philosophical differences arise in society, the more recent idea that all citizens and their institutions also need to be neutral, prevents religious believers standing for anything they consider important.⁵⁴

As Parkinson notes, in the context of an evangelical school ‘established to provide an explicitly Christian environment for children and young people’,⁵⁵ it is as reasonable for the sponsors to seek employees who adhere to ‘the fundamentals of the Christian faith’ as it is for the proprietors of a Thai restaurant to prefer Thai employees or the owners of a gay bar to want ‘to appoint only gay staff’.⁵⁶ ‘A right of positive selection is rather different from discrimination’.⁵⁷ The law should not proscribe reliance on characteristics which are relevant to employment.⁵⁸ Such affirmative selection is essential to the maintenance of multiculturalism because it promotes diversity⁵⁹ and because it imbues our society with a hybrid vigour that is lost when the law imposes homogeneity requirements.

Parkinson writes that religious institutions are sceptical about the implementation of human rights Charters in Australia because Victoria did such a poor job of implementing the religious limitation in the *ICCPR*. Instead of copying it and confirming that religious freedom should only be limited if limitation is necessary ‘to protect public safety, order, health or morals or the fundamental rights and freedoms of others’,⁶⁰ the Victorian drafters created a general balancing provision with so much discretion that the necessity provision in Article 18(3) was eviscerated.⁶¹

At the same time, Parkinson concedes that even the ‘[p]roper enactment of the protections for religious freedom in the *ICCPR*’ would not sweep away all the church concerns⁶² because when Victoria passed the *Abortion Law Reform Act 2008* (Vic), it chose not to protect doctor conscience at all.⁶³ Parkinson maintains that Frank Brennan was correct in his scathing criticism: ‘This was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable *ICCPR* human right.’⁶⁴

Australia could resolve all of this concern by passing a federal Religious Freedom or Anti-Religious Discrimination Act to trump all inconsistent state and territory legislation. Such a law could make it clear that institutional religious autonomy was preserved and could only be abrogated if abrogation was necessary to ‘to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’⁶⁵ However, the Australian government has not done so and does not look like doing so any time soon. Religious institutions, their human resources personnel, and their lawyers in Australia are thus obliged to chart a careful course around the various anti-discrimination laws when hiring personnel.

The provisions of the *Fair Work Act 2009* (Cth) are the most accommodating because they acknowledge and allow affirmative discrimination in employment in ‘an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’.⁶⁶ Still, these provisions in federal employment law do not prevent the commencement of cases outside the employment arena alleging discrimination under state anti-discrimination law, even though the prospect of engaging the inconsistency provisions of the *Commonwealth Constitution* may discourage employment cases under state and territory anti-discrimination legislation. Before discussing the approach that religious institutions, their human resources personnel and their lawyers should take to accord with the most accommodating legislation available, though, we will discuss the legal background in the US.

B *The United States*

Title VII was enacted as part of the *Civil Rights Act of 1964* (‘Act’) in response to the Civil Rights Movement following the Supreme Court’s monumental judgment in *Brown v Board of Education of Topeka* invalidating racial segregation in public schools.⁶⁷ The Act codified many of the equal opportunities advances emerging in response to the Civil Rights Movement. Moreover, while various state laws offer similar protection, insofar as none is as strong in protecting Title VII, this discussion focuses on federal law.

At the heart of the Act is Title VII, the most significant federal anti-discrimination statute dealing with employment. In its most relevant part, Title VII reads:

It shall be an unlawful employment practice for an employer:⁶⁸

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color [sic], religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color [sic], *religion*, sex, or national origin. (emphasis added)

Title VII recognises the potential tension between the authority of ecclesiastical employers to retain control in their schools and the rights of employees to be free from workplace discrimination. Still, Title VII provides far-reaching protection to religious employers by permitting them to create bona fide occupational qualifications (‘BFOQs’) for use in policies designed to focus on hiring, and retaining, members of their faiths.

As far-reaching as Title VII has been, challenges loom on the horizon due to a trilogy of cases from the US Supreme Court on same-sex unions. In *United States v Windsor*,⁶⁹ the Court struck down the Federal *Defense [sic] of Marriage Act*⁷⁰ thereby requiring it to now recognise unions that are legal in the States where they were entered. On the same day, in *Hollingsworth v Perry*,⁷¹ the Supreme Court overruled California’s Proposition 8, wherein a majority of Californians voted ‘no’ to legalising same-sex marriage, on standing grounds. Some would now say this prefigured a brave new world favouring same-sex marriage. Subsequently, in *Obergefell v Hodges* (*Obergefell*),⁷² the Court discovered a heretofore unknown right to substantive due process in the *Fourteenth Amendment*, thereby imposing same-sex unions throughout the US.

Judicial interpretations of Title VII recognise that a distinction can be made between the duties of ecclesiastical educational leaders who make hiring decisions based on religion and judgments where secular duties come into play. Courts are thus generally unwilling to intervene in disputes over whether teachers witness to the faith in their public-professional lives such as when they are pregnant out of wedlock or adopt lifestyles antithetical to the teachings of their church employers.⁷³ Courts are more willing to assert their jurisdiction over secular matters, including whether teachers in religious schools can engage in bargaining over the terms and conditions of their employment under state,⁷⁴ but not federal,⁷⁵ laws as well as whether they can file age discrimination claims.⁷⁶

The four exemptions under Title VII have a major impact on personnel issues in faith-based schools by protecting officials from charges of religious discrimination. These exemptions apply to institutions with fifteen or more employees; BFOQs; individuals who serve in ministerial capacities; and institutions that are in whole or in substantial part, owned, supported, controlled, or managed by religious bodies.

First, as just noted, the threshold exemption under Title VII applies to institutions with fifteen or more employees.⁷⁷ Accordingly, Title VII has a limited impact in small schools insofar as these institutions are typically treated as part of the larger religious organisations such as the parishes with which they are affiliated.

The second, and likely most important exemption, covers disputes where ‘religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the operations of that particular business or enterprise.’⁷⁸ For example, the Sixth Circuit addressed the nonrenewal of the contract of a teacher in a Roman Catholic elementary school in Ohio who gave birth six months after getting married. While pointing to language in the teacher’s contract that ‘by word and example you will reflect the values of the Catholic Church,’⁷⁹ the court refused to uphold a grant of summary judgment in favour of the diocese. The Sixth Circuit returned the dispute to trial court for further consideration because it was uncertain whether the teacher’s contract was not renewed solely due to her pregnancy.⁸⁰

Earlier, the same court upheld the dismissal of a suit filed by a former preschool teacher in Tennessee who claimed she was fired because she was pregnant.⁸¹ The court affirmed that officials in the Christian school did not violate Title VII because the plaintiff was unable to show they applied the policy against premarital sex in a discriminatory manner.

A closely related third exemption applies to:

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 by such corporation, association, educational institution, or society of its activities.⁸²

This is sometimes referred to as the ministerial exception, with the burden of proof of the necessity of BFOQs resting on employers, even if individuals are not ordained. In order to apply this exception, leaders in religious institutions must be able to prove that staff members’ teaching or other activities are so integrally related to furthering their spiritual and pastoral missions that their duties may be treated as ministerial.

In *Corporation of Presiding Bishop v Amos* (‘*Amos*’)⁸³ the Supreme Court upheld the constitutionality of the ministerial exception. *Amos* involved a building engineer who filed a class action on behalf of himself and others who were similarly situated when he was dismissed after sixteen years of employment at a gymnasium operated by the Church of Jesus Christ of Latter-

day Saints. Officials dismissed the plaintiff because he was unable to qualify for a certificate of eligibility to attend one of the Church's Temples. The Justices ruled that although the plaintiff was fired despite the fact that he did not perform religious duties, Title VII did not violate the Establishment Clause because earlier language, referring to an institution's 'religious activities', was no longer in the law. In so doing, the Court extended the reach of the exemption to non-religious employment-related activities.

The Supreme Court unanimously upheld the constitutionality of the ministerial exception, albeit as it has been extended under the *Americans with Disabilities Act* ('ADA') rather than Title VII.⁸⁴ At issue was whether officials at a Lutheran elementary school in Michigan could dismiss a contract teacher who was also a commissioned minister in the church. Reversing the Sixth Circuit's order to the contrary, in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunities Commission (Hosanna-Tabor)*,⁸⁵ the Supreme Court found that despite the teacher's allegation that her primary duties were secular, the ministerial exception, which is rooted in the *First Amendment*, precluded her ADA claim. The Court rejected the teacher's allegation that she was dismissed in retaliation for threatening to take legal action when she refused to resign in a dispute over whether she could return to work due to her health problems.

Emphasizing that the *First Amendment* forbids the government from contradicting the determination of church officials as to who can act as ministers, the *Hosanna-Tabor* Court reasoned that the exception applied to bar the teacher's claim. Even though the teacher spent more than six hours of her seven-hour day teaching secular subjects, using secular textbooks, but not incorporating religion into these materials, the Court decided that's he was a minister within the meaning of the law. The court added that teachers at the school were not required to be 'called' or members of the Lutheran faith in order to conduct job-related religious activities and the duties of contract teachers, such as the plaintiff, were identical to those lacking the title of minister.

In a post *Hosanna-Tabor* case, the Eleventh Circuit ruled in favour of a former fourth-grade teacher in a religious school in Florida who was dismissed for conceiving a child a month before getting married.⁸⁶ Reversing an earlier order in favour of officials, the court, noting that the school's administration failed to raise the affirmative defence of the ministerial exception under *Hosanna-Tabor*, remanded for further consideration of whether the teacher was dismissed for being pregnant out of wedlock or for engaging in premarital sexual relations.

A federal trial court in Illinois, in a case not involving pregnancy, rejected the age, sex, and marital status claims filed by a teacher in a Lutheran school who was dismissed due to budgetary constraints.⁸⁷ In light of the teacher's status as 'called', the court applied the ministerial exception in rejecting her claim.

More recently, in a case of first impression from New York, the Second Circuit ruled that a Roman Catholic elementary school was a 'religious organization' for the purposes of the ministerial exception. The court thus affirmed the archdiocese's motion for summary judgment, thereby precluding a principal's gender discrimination and retaliation claims because she was a 'minister' for the purposes of Title VII when her contract was not renewed.⁸⁸ The fourth exemption applies to institutions

in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university, or other educational institution ... is directed toward the propagation of a particular religion.⁸⁹

This exemption permits policies allowing institutions to enact hiring preferences for members of their own faiths. In such a case, albeit in higher education, the Eleventh Circuit permitted officials at a Baptist university to limit a faculty member's assignments to undergraduate classes and prevent him from teaching in its divinity school due to his religious differences with his dean.⁹⁰ The court added that even though the university was no longer under the direct control of a religious governing body, it was entitled to the exemption because it still received substantial support from the same church.

III RECOMMENDATIONS FOR EDUCATIONAL LEADERS IN FAITH-BASED INSTITUTIONS SEEKING TO PRESERVE THEIR RELIGIOUS ETHOS

While the secularity of the environments facing religious organisations sponsoring schools in Australia and the US vary considerably, the common theme is that the State is imposing more restrictions and progressively narrowing exemptions despite the commitments that each of these countries has to preserve religious freedom in their Constitutions and statutes at the federal and state levels. The question thus becomes what can sponsoring religious institutions and the leaders in their schools do to preserve their ethos when it appears that affirmative discrimination to protect a religious standard might offend an anti-discrimination norm? Against this background, the next part of the paper offers recommendations for leaders in faith-based schools and their lawyers.

In practice, religious sponsored institutions in Australia and the US should take a combination of the following six recommendations to try to avoid legal action in consequence of unlawful discrimination in employment or elsewhere at school.

First, as an initial matter, when leaders in faith-based schools, working with their lawyers, prepare job descriptions and hiring policies for new employees, they should follow judicial guidance in distinguishing between ministerial and secular duties, respectively, such as teaching religion and issues that are purely secular as opposed to salary and benefits that can be subject to collective bargaining. In delineating between religious and lay aspects of work, policies should enunciate BFOQs that clearly and unequivocally differentiate hiring criteria and job qualifications plus rationales as to why they are being put in place.

A second approach religious employers may wish to adopt is to advertise positions among those who subscribe to their faiths. Religious employers should also integrate ethos-related duties into all job descriptions emphasising the essentiality of the ethos qualifications to the success of all job applicants in a manner that would make it difficult for any would be complainant to argue that the ethos requirements were not a genuine occupational requirement for a person appointed to that role.

Third, religious employers should provide professional development opportunities for administrators and teachers. Doing so can help to familiarise educators with the dimensions of the relationship between their faith traditions and civil law. Offering professional development on the interplay between religious teachings and secular laws can provide a solid background to enhance policy development that meets the requirements of both their faiths and the legal systems.

Fourth, the need for employees to comply with the religious beliefs of their institutional employers at all times both at work and in private as a matter of employer loyalty and to preserve the confidence and trust of all of the institution's stakeholders, should be clearly set out in employment contracts. The value of making this language explicit is to enable the possible dismissal of a person who strayed from the institution's ethos after appointment. More specifically, religious employers should remember that if they wish to include church teachings

on matters such as pre-marital sexual relations and pregnancy, marriage to individuals who are divorced, or sexual orientation in personnel policies and job postings, they should do so carefully and explicitly, making it clear exactly what behaviour is proscribed.

One way in which leaders in faith-based institutions can help to limit confusion is to use incorporation by reference, citing the appropriate Church documents and giving prospective teachers and staff members copies of these materials with their contracts. Illustrative policy language, at least for a Catholic school, might read that ‘all employees are expected to familiarise themselves with the Church’s teachings on sexuality as contained in *The Catechism of the Catholic Church*, a copy of which they acknowledged being given when they signed their employment contracts’ rather than using such broad language as ‘employees must abide by the institutional ethos of the school’.

In such a case in the US, the Third Circuit upheld the authority of educational officials in Delaware to supervise faculty behaviour at a Catholic school. The court affirmed that officials did not violate the rights of a faculty member who taught English and religion to seventh and eighth grade students when they terminated her employment because she signed an advertisement in a local newspaper in support of the Supreme Court’s having legalised abortion even though she knew that this position contradicted Church teachings.⁹¹ Deferring to the authority of school officials to ensure doctrinal compliance, the court pointed out that insofar as the teacher was not engaged in protected free speech activity when she signed the newspaper advertisement, she failed to present a viable claim for retribution.

The fifth suggestion is grounded in the unstated assumption that in the development of hiring policies or dismissing individuals who refuse to comply with institutional norms is that educational leaders need to act on the advice of lawyers. However, in doing so, educators cannot select just any lawyer. Rather, school officials should work with lawyers who are knowledgeable not just about civil law but also the teachings of the ethos of faith traditions of their clients. Retaining the services of specialised lawyers who have expertise in both religious and civil law may well be more expensive than hiring generalists, but the extra costs will pay dividends in the form of costs saved and headaches avoided in attempting to resolve matters before they can head to even costlier litigation.

The sixth, and final, recommendation is that educational leaders regularly update personnel policies, typically on an annual basis. These reviews should take place during breaks, separate and apart from the regular school year so that time will have passed between controversies that may have led to calls for changes and actually reworking the language and content of personnel policies. Adopting a proactive approach should help in making changes in a thoughtful, reflective manner, rather than when in crisis mode, which can lead to hasty and often less than well thought out changes.

Almost needless to say, ethos preservation beyond the employment sphere is less predictable. The most likely challenges would come from students or parents challenging the ethos after admission. That likelihood again suggests that institutional promotion would focus on the faithful with emphasis on practices unlikely to appeal to persons outside the institution. Again, this is an issue that has arisen in the US in faith-based schools when same sex couples seek to enrol their children in these institutions.⁹² When these incidents occur, one cannot help but wonder why same-sex marriage activists seem to single out Christian schools, particularly if the parents are openly living in violation of Church teachings when other schools are available without controversy.

Of course, none of these recommendations can guarantee protection for institutions from determined rights crusaders with undetectable covers. However, if such activists do infiltrate institutions, or if they were less than honest on applications and in pre-employment interviews, it could be expected that the judiciary would be sympathetic to the argument that the institution had been transparent at all times. If such clean hands arguments were coupled with arguments sourced in international law premised in institutional religious autonomy protected by international law despite opposed local legislation, there is every possibility a court might find a way to allow employers in faith-based institutions to retain the ethos that reflects the sincerely held religious beliefs undergirding their existence.

IV CONCLUSION

As long as leaders in faith-based schools understand the different, yet complementary, role between the teachings of their churches and anti-discrimination laws in their respective countries, then they should be able to retain the freedom to hire individuals they deem appropriate insofar as these employees comply with the ethos of their employing institutions. To this end, it is crucial for educational leaders in faith-based schools to distinguish between religious and secular aspects of job duties for employees. By making these differences clear, leaders in faith-based institutions can ensure workplace peace and compliance with church teachings while satisfying the dictates of both the civil and religious juridical systems under which they operate by avoiding discriminatory employment practices.

Keywords: government aid; faith-based schools; freedom of religion.

ENDNOTES

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- 2 For example, see Robert D Putnam and David E Campbell, *American Grace: How Religion Divides and Unites Us* (Simon and Schuster, 2010) 120-135. In Australia, since the results of the 2016 census have been released, there has been considerable commentary on the declining number of people reporting religious affiliation, though a majority of Australians still report affiliation with one of the many branches of Christianity. Though there are some suggestions that the declining numbers are a result of the design of the census' religion questions, few argue with the decline argument. See, eg, Australian Bureau of Statistics, '2016 Census data reveals "no religion" is rising fast' (Media Release, 074/2017, 27 June 2017) www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument; Malcolm Forbes, 'Census 2016: Why Australians are losing their religion', *ABC Religions and Ethics*, (Online) 9 August 2016 <http://www.abc.net.au/religion/articles/2016/08/09/4515206.htm>; Gary D Bouma, 'Census 2016 shows Australia's changing religious profile with more 'nones' than Catholics', *The Conversation*, (Online) 27 June 2017 <https://theconversation.com/census-2016-shows-australias-changing-religious-profile-with-more-nones-than-catholics-79837>; Bernard Salt, 'Faith no more as nation goes godless', *The Australian*, (Online) 1 July 2017 <http://www.theaustralian.com.au/news/inquirer/faith-no-more-churches-in-trouble-as-the-nation-goes-godless/news-story/4e5c0d079888964c1ad871c6a7c61623>.

- 3 According to the Australian Bureau of Statistics, 34.9 per cent of all Australian primary and secondary students attend non-government schools: Australian Bureau of Statistics, *4221.0 - Schools, Australia, 2016* (2 February 2017) www.abs.gov.au/ausstats/abs@.nsf/mf/4221.0. Combined Commonwealth and State funding for those schools is set to exceed \$15 billion by 2018 and combined funding for public schools will reach \$40 billion by the same time: National Commission of Audit, *Towards Responsible Government: 9.7 Schools Funding* (February-March 2014) www.ncoa.gov.au/report/appendix-vol-1/9-7-schools-funding.html
- 4 See, eg, Putnam and Campbell, above n 1, 497-498.
- 5 The governments of the Australian Capital Territory and the State of Victoria have passed Charters of Rights as ordinary legislation, respectively the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, unlike the Bill of Rights, enacted in 1791 as the first ten amendments to the *United States Constitution*, these Acts can be amended by simple majority of their parliaments.
- 6 Unlike the *International Covenant on Civil and Political Rights* ('ICCPR'), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) which affirmatively protects both freedom of belief and the limited right to manifest that belief, s 116 of the *Australian Constitution* merely forbids the federal government from passing laws 'for establishing any religion, imposing any religious observance, or...prohibiting the free exercise of any religion' and does not prevent the states from passing such laws. There has been little litigation about the meaning of any of these three clauses, but unlike the similar US Establishment Clause, the Australian example only prevents the establishment of a national religion (*Attorney-General (Vic): Ex rel Black v Commonwealth (DOGS Case)* (1981) (146 CLR 559), and the free exercise protection does not exempt anyone from obedience to generally applicable laws (*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (Jehovah's Witnesses Case)* (1943) 67 CLR 116, 126 (Latham CJ).
- 7 The US *First Amendment*, adopted in 1791 as part of the *Bill of Rights*, reads: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...'
- 8 *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559.
- 9 *Ibid.* See also, *Williams v Commonwealth of Australia* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 252 CLR 416.
- 10 Australian Bureau of Statistics, above n 2.
- 11 Henrietta Cook and Timna Jacks, 'Religious instruction scrapped from curriculum', *The Age*, (Online) 21 August 2015 www.theage.com.au/victoria/religious-instruction-scrapped-from-curriculum-20150820-gj425e.html.
- 12 'Safe Schools: Victoria to defy Federal Government on anti-bullying plan', *ABC News*, (Online) 19 March 2016 <http://mobile.abc.net.au/news/2016-03-1/safe-schools-anti-bullying-victorian-government-to-continue/7260268>.
- 13 Editorial, 'Government reveal changes to controversial Safe Schools program', *Sydney Morning Herald*, (Online) 18 March 2016 <http://www.smh.com.au/federal-politics/political-news/government-reveals-changes-to-controversial-safe-schools-program-20160318-gnlyhj.html>.
- 14 *Williams v Commonwealth of Australia* (2012) 248 CLR 156; *Williams v Commonwealth* (2014) 252 CLR 416.
- 15 *Hozack v Church of Jesus Christ of Latter-day Saints* (1997) 79 FCR 441.
- 16 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2014); appeal allowed (2006) 15 VR 207.
- 17 *Christian Youth Camps Ltd v COBAW Community Health Services Ltd et ors* [2014] VSCA 75.
- 18 *Charter of Human Rights and Responsibilities 2006* (Vic).
- 19 *Racial and Religious Tolerance Act 2001* (Vic).
- 20 Editorial, 'Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says', *ABC News*, (Online) 28 September 2015 <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

- 21 Andrew Drummond, ‘Martine Delaney drops complaint over Catholic Church’s marriage booklet’, *The Mercury*, (Online) 5 May 2016 <http://www.themercury.com.au/new/tasmania/transgender-rights-activist-martine-delaney-drops-complaint-over-catholic-churchs-marriage-booklet/new-story/d8d9079bf932526b27e5ff094e57dbe84>.
- 22 Monica Doumit, ‘Tasmania to review anti-discrimination laws’, *Catholic Talk*, (Online) 23 August 2016 <http://www.catholictalk.com.au/walking-the-talk/blog/item/784-tasmania-anti-discrimination>.
- 23 Ibid.
- 24 *Constitution Act 1934* (Tas), s 46. It reads:
- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
 - (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.
- 25 *Racial Discrimination Act 1975* (Cth); *Sexual Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Fair Work Act 2009* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT); the *Racial and Religious Tolerance Act 2001* (Vic).
- 26 *Anti-Discrimination Act 1977 (NSW)* Part 2.
- 27 Ibid Parts 3 and 3A.
- 28 Ibid Part 4.
- 29 Ibid Part 4A.
- 30 Ibid Part 4B.
- 31 Ibid Part 4C.
- 32 Ibid Parts 4E and 4G.
- 33 *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGs Case)* (1981) 146 CLR 559, 622 and 631-634 (Murphy J); see also 577 (Barwick CJ), who agreed in part with Murphy J’s interpretation.
- 34 Ibid 652 (Wilson J) citing Dixon CJ in *Wragg v NSW* (1953) 88 CLR 353, 386. See also, 614 (Mason J).
- 35 Greg Walsh, ‘The right to equality and the employment decisions of religious schools’ (2014) 16 *University of Notre Dame Australia Law Review* 117. <http://search.informit.com.au.ipacez.nd.edu.au/documentSummary;dn=991544748674059;res=IELAPA>.
- 36 Ultimately, after an extensive legal battle (which commenced in 2003 and finalised in 2010) the Wesley Mission was able to successfully defend the claim of discrimination. In *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, the tribunal held that the religious organisation was covered by the protection in s 56(d). However, this finding came after several appeals and significant legal costs were incurred by the Wesley Mission. More importantly, the protracted legal saga signaled to religious organisations that exceptions such as s 56 would not guarantee ‘the integrity and ethos’ of their organisations could be preserved without legal disturbances. See, Australian Christian Lobby, Submission to the Australian Law Reform Commission, *Freedoms Inquiry*, 02 October 2015, 6. This anxiety was no doubt exacerbated in 2013 when a bill sought to remove the various exceptions granted to private educational authorities in the area of education that made it lawful to discriminate against a student or prospective student. See, *Anti-Discrimination Amendment (Private Educational Authorities) Bill 2013*.
- 37 *Griffin v The Catholic Education Office* (1998) EOC ¶92-928, 22. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) contained an analogous provision to s 56 of the *Anti-Discrimination Act 1977* (NSW). Section 3(1) of the Act provided that it was lawful for a distinction, exclusion or preference to be made:
- (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in

good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

38 There were earlier versions of the Act in 1977, 1984 and 1995.

39 Section 153 discusses the provisions of 'Modern Awards'. It exempts discrimination which is necessary in accordance with religious practice:

Certain terms are not discriminatory

- (2) A term of a modern award does not discriminate against an employee:
 - (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or
 - (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted *in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*:
 - (i) in good faith; and
 - (ii) *to avoid injury to the religious susceptibilities of adherents of that religion or creed* [similar words italicised].

40 Section 195 discusses the terms of 'Enterprise Agreements'. It exempts discrimination which is necessary in accordance with religious practice:

Discriminatory term

- (1) A term of an enterprise agreement is a ***discriminatory term*** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Certain terms are not discriminatory terms
- (2) A term of an enterprise agreement does not discriminate against an employee:
 - (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
 - (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

41 Section 351, which forbids discrimination generally, confirms that the prohibition does not extend to religious discrimination when it is required by the relevant religious faith:

- (2) However, subsection (1) does not apply to action that is:
 - (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
 - (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.
- (3) Each of the following is an ***anti-discrimination law*** :
 - (aa) the *Age Discrimination Act 2004*;
 - (ab) the *Disability Discrimination Act 1992*;
 - (ac) the *Racial Discrimination Act 1975*;

- (ad) the *Sex Discrimination Act 1984*;
 - (a) the *Anti-Discrimination Act 1977* of New South Wales;
 - (b) the *Equal Opportunity Act 2010* of Victoria;
 - (c) the *Anti-Discrimination Act 1991* of Queensland;
 - (d) the *Equal Opportunity Act 1984* of Western Australia;
 - (e) the *Equal Opportunity Act 1984* of South Australia;
 - (f) the *Anti-Discrimination Act 1998* of Tasmania;
 - (g) the *Discrimination Act 1991* of the Australian Capital Territory;
 - (h) the *Anti-Discrimination Act* of the Northern Territory.
- 42 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2014). Brief details of this case are provided above in the text supporting n 15.
- 43 *Deen v Lamb* [2001] QADT 20 (8 December 2011).
- 44 The saga of litigation surrounding Tess Corbett’s candidacy for the Katter Party for the Victoria seat of Wannon in Australia’s 2013 federal election is a case in point. After three unsuccessful hearings before NCAT and its predecessor, the Administrative Decisions Tribunal of New South Wales, the New South Wales Court of Appeal decided as Ms Corbett had believed all along, that NCAT did not have jurisdiction to hear Mr Garry Burns’ claim that Ms Corbett had vilified him by a public statement she had made about homosexual people in Victoria but which the *Sydney Morning Herald* and *Australian* newspapers had republished in New South Wales (*Burns v Corbett*; *Gaynor v Burns* [2017] NSWCA 3). The High Court has recently given leave for a further appeal to be heard in this case (Case S183/2017, *Burns v Corbett & Ors*).
- 45 Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia*, (The Federation Press, 2012) 97 citing Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15(2) *Australian Journal of Human Rights* 83.
- 46 Parkinson above n 44, but see particularly 83 and 97-98.
- 47 Evans, above n 44, 139.
- 48 *Ibid* 139, citing Fyfe, Costello, Brennan, de Kretser and Croome.
- 49 Parkinson, above n 44, 87.
- 50 *Ibid*.
- 51 *Ibid*.
- 52 *Ibid* 89.
- 53 *Ibid* 90.
- 54 *Ibid* 91.
- 55 *Ibid* 94.
- 56 *Ibid*.
- 57 *Ibid*.
- 58 *Ibid*.
- 59 *Ibid* 96.
- 60 *ICCPR*, art 18(3).
- 61 Parkinson, above n 44, 98-101.
- 62 *Ibid* 101.
- 63 *Ibid* 104.
- 64 *Ibid* 105, quoting Frank Brennan, ‘The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience’ (Paper presented at the Values and Public Policy: Fairness, Diversity and Social Change Conference, University of Melbourne, 19 February 2009).
- 65 *ICCPR*, art 18(3).
- 66 *Fair Work Act 2009* (Cth) ss 153, 195 and 351.
- 67 347 US 483 (1954).
- 68 42 U.S.C.A. § 2000e–2(a) (1991).
- 69 133 S. Ct. 2675 (2013).

70 28 U.S.C.A. § 1738C (1996).
71 133 S. Ct. 2652 (2013), *on remand*, 725 F.3d1140 (9th Cir. 2013).
72 135 S. Ct. 2584 (2015).
73 For a case upholding the dismissal of a teacher in a faith-based school for violating the precepts of her religious employer by openly living with her boyfriend and raising their child without being married because she was a ‘spiritual leader’ pursuant to the ministerial exception, see *Henry v Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal.Rptr.3d 15, 25 (Cal. Ct. App. 2011).
74 For cases mandating bargaining under state law, see, eg, *Catholic High Sch. Ass’n v Culvert*, 753 F.2d 1161 (2d Cir. 1985); *Hill-Murray Fed’n of Teachers v Hill-Murray High Sch.*, 487 N.W.2d 857 (1992).
75 For cases in K-12 settings where the judiciary refused to permit federal law to compel bargaining in Catholic schools, see, eg, *National Labor Relations Bd. v Catholic Bishop of Chicago*, 440 U.S. 490 (1979).
76 For cases on this point, see *DeMarco v Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993); *Guinan v Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp.2d 849 (S.D. Ind. 1998); *Tomic v Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied*, 549 U.S. 881 (2006). But see *Coulee Catholic Schs. v Labor and Indus. Rev. Comm’n, Dep’t of Workforce Dev.*, 768 N.W.2d 868 (Wis. 2009) affirming that where a teacher had a ministerial position, officials were precluded from denying her the opportunity to adjudicate her age discrimination claim.
77 42 U.S.C.A. § 2000e(b).
78 *Ibid* 42 U.S.C.A. § 2000e–2(e)(1).
79 *Cline v Catholic Diocese of Toledo*, 206 F.3d 651, 656 (6th Cir. 2000), *reh’g and reh’g en banc denied* (2000).
80 For other cases denying motions for summary judgment by officials in religious schools over whether the contracts of unmarried teachers were terminated due to their pregnancies, see *Redhead v Conference of Seventh-Day Adventists*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *Ganzy v Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1997).
81 *Boyd v Harding Acad. of Memphis*, 88 F.3d 410 (6th Cir. 1996).
82 42 U.S.C.A. § 2000e–1.
83 483 U.S. 327 (1987).
84 *Americans with Disabilities Act*, 42 U.S.C. §§ 12101 *et seq.* (2008).
85 563 U.S. 903 (2011), *reh’g*, (6th Cir. 2010), *reh’g and reh’g en banc denied* (2010).
86 *Hamilton v Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012).
87 *Herzog v St. Peter Lutheran Church*, 884 F. Supp. 2d 668 (N.D. Ill. 2012).
88 *Fratello v. Roman Catholic Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017).
89 42 U.S.C.A. § 2000–(e)(2)(e).
90 *Killinger v Samford Univ.*, 113 F.3d 196 (11th Cir. 1997). See also *Hall v Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) permitting the dismissal of an employee who was ordained by a church with a large gay congregation.
91 *Curay-Cramer v Ursuline Acad. of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006).
92 See, eg, Evan Prieskop, Christian Preschool Boots Child of Gay Couple, COURTHOUSE NEWS SERVICE, Dec. 14, 2012, <http://www.courthousenews.com/2012/12/14/53132.htm> β This source no longer exists; Dave Bohon, ‘Homosexual Couple Sues Christian Preschool for Rejecting Son as Student’ The New American (Online) 24 December 2012 <<http://www.thenewamerican.com/culture/faith-and-morals/item/14013-homosexual-couple-sues-christian-preschool-for-rejecting-son-as-student>>; Erica Meltzer, ‘Denver Archbishop Defends Sacred Heart of Jesus’ Decision on Lesbians’ Children at Boulder Preschool’ Daily Camera, (Online) 13 March 2010, <http://www.dailycamera.com/ci_14640646>; Lisa Wangsness, ‘O’Malley Post Cites ‘Good of the Child’: Cardinal Backs Hingham Catholic School Decision, Offers to Help Gay Couple’ Boston Globe (Online) 20 May 2010 <http://archive.boston.com/news/local/massachusetts/articles/2010/05/20/omalley_post_cites_good_of_the_child/>, See also Charlie Danaher, ‘Tolerance Goes Both Ways’ Daily Camera (Online) 13 March 2010 <http://www.dailycamera.com/ci_14665405>