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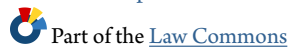
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THE RIGHT TO EQUALITY AND THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS

GREG WALSH*

Abstract

Under the *Anti-Discrimination Act 1977* (NSW) religious schools are provided with an exception from the operation of the Act in relation to their employment decisions. This article evaluates the merits of the legal protections provided to religious schools by specifically focusing on the extent to which the provisions are consistent with the right to equality. Although there are a range of other considerations relevant in determining the merits of the provisions a specific focus on the right to equality is appropriate considering the significance of the right in anti-discrimination legislation. The article explores the extent to which the provisions may violate the right to equality in relation to the number of persons adversely affected and also the gravity of harm that these individuals are likely to suffer, and then addresses whether there are any grounds for considering that the protections can be justified on the grounds of equality.

I INTRODUCTION

Under the *Anti-Discrimination Act 1977* (NSW) ('the Act') it is unlawful for a person when making an employment decision to discriminate on any of the following grounds: race, sex, transgender status, marital or domestic status, disability, a person's responsibilities as a carer, homosexuality, or age.¹ Religious schools are not regulated by most of these provisions due to an exception provided to private educational authorities. A 'private educational authority' is defined as

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1 *Anti-Discrimination Act 1977* (NSW) ss 8-16, 25-31, 38C-38J, 40-46, 49D-49K, 49V-49ZC, 49ZH-49ZN, 49ZYB-49ZYK.

a person or body administering a school, college, university or other institution at which education or training is provided, not being: (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or (b) an agricultural college administered by the Minister for Agriculture.²

Under the exception 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.³ No exceptions are provided to religious schools on the grounds of race, age or a person's responsibilities as a carer.⁴ As religion is not an attribute protected in the Act an adverse employment decision made by a religious school on the grounds of religion does not breach the Act.⁵

In addition to the specific exception granted to private educational authorities it is also possible for a person or organisation to apply to the Anti-Discrimination Board of NSW ('the ADB') for an exemption from the operation of the Act.⁶ In determining whether to grant an exemption the President of the ADB must consider six factors: 1) whether the proposed exemption is appropriate or reasonable; 2) whether the proposed exemption is necessary; 3) whether there are any non-discriminatory ways of achieving the objects for which the proposed exemption is sought; 4) whether the applicant has taken reasonable steps to reduce any adverse consequences before seeking the exemption; 5) the public, business, social or other community impact of the exemption; and 6) any conditions or limitations to be included in the exemption.⁷ If after consideration of these factors the President considers an exemption

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

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

4 *Ibid* ss 8, 49ZYB, 49V.

5 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 s 351(1) *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 private educational authorities as the prohibition does not apply in any jurisdiction where the conduct is not unlawful under that jurisdiction's anti-discrimination legislation: s 351(2)–(3). A complaint concerning an employment decision of a religious school in NSW 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).

6 *Anti-Discrimination Act 1977* (NSW) s 126(1).

7 *Anti-Discrimination Regulation 2009* (NSW) reg 5(1).

should be granted then they may grant a renewable exemption from any part of the Act for a period of up to 10 years.⁸

The approach adopted in New South Wales ('NSW') has not been followed in other jurisdictions in Australia. 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.⁹ Additional protection 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',¹⁰ 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'.¹¹

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'.¹² 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

8 *Anti-Discrimination Act 1977* (NSW) ss 126(3)-(4).

9 *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) ss 33(1)-(2); *Equal Opportunity Act 1984* (WA) s 73(1)-(2). Section 56(d) of the *Anti-Discrimination Act 1977* (NSW) adopts a similar protection for a 'body established to propagate religion' in relation to any act or practice that 'conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'. A religious school may be able to also rely on this protection to justify employment decisions if it can satisfy a court that it is a 'body established to propagate religion'; however, considering the broad scope of the protections provided to private educational authorities the section would likely only be of relevance if there was an allegation against the religious school of discrimination on the grounds of race, age or a person's responsibilities as a carer.

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

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

12 *Equal Opportunity Act 2010* (Vic) ss 83(1)-(2).

principles of their religion'.¹³ The Northern Territory also protects the employment decisions of religious educational institutions if they are made '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.¹⁴

Queensland permits employers to declare that a genuine occupational requirement applies to employment positions, which the Act specifically indicates includes 'employing persons of a particular religion to teach in a school established for students of the particular religion'.¹⁵ The provisions allow a religious school to make an adverse employment

13 Ibid s 84.

14 *Anti-Discrimination Act 1996* (NT) s 37A. A similar approach to a religious sensitivities test has been adopted in the United Kingdom ('UK') 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.

15 *Anti-Discrimination Act 1991* (Qld) s 25(1). A genuine occupational requirement has also been adopted by the European Union ('EU') 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). 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 ('US') 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': (1(a)), a specific exception to religious educational institutions to employ persons of a particular religion: (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* (2012) 132 S Ct 694). For more detailed information on the scope of the constitutional and legislative protection of religious groups in the US 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.

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.¹⁶ 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'.¹⁷ 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.¹⁸

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'.¹⁹ 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.²⁰ Additional protection is provided to religious institutions if they are required by their religion to 'discriminate against another person on the ground of gender'.²¹

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.²² Religious schools are also permitted to make adverse employment decisions in relation to persons in a same-sex domestic partnership.²³ 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'.²⁴

16 *Anti-Discrimination Act 1991* (Qld) ss 25(2)-(3).

17 *Ibid* s 25(5).

18 *Ibid* ss 25(6)-(7).

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

20 *Ibid* s 51(1).

21 *Ibid* s 27(1)(a).

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

23 *Ibid* s 85Z(2).

24 *Ibid* ss 50(ba)-(c).

This article evaluates the merits of the current approach adopted in NSW ('the general exception approach') by specifically focusing on the extent to which the approach is consistent with the right to equality. There are a range of other considerations that would need to be addressed in order to determine the merits of the general exception approach including the right to religious liberty, the welfare of children, the rights of parents and minorities, human rights education, the right to privacy and freedom of association.²⁵ However, a specific focus on the right to equality is appropriate considering the central role of the right in anti-discrimination legislation. If the protections are determined to be inconsistent with the right to equality then this would provide a powerful argument in favour of their repeal.²⁶ The major concern about the appropriateness of the general exception approach with respect to the right to equality is that it unjustifiably allows religious schools to make employment decisions that can cause individuals to suffer harm including financial loss, emotional trauma and a violation of their dignity as human beings. The aim of this article is to examine the validity of this claim by considering the number of individuals who may be adversely affected by the protections, the nature of the harm that may be suffered by those who are adversely affected, and whether the general exception approach can be justified considering the scope and nature of the harm that it may be causing.

25 For articles that address the relevance of these criteria in the context of religious schools and anti-discrimination legislation, see, eg, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 201–297, 338–426, Deb Wilkinson, Andrew Macintosh and Richard Denniss, 'Public Attitudes to Discrimination in Private Schools' (The Australia Institute, 2004) <https://www.tai.org.au/index.php?q=node%2F19&pubid=331&act=display>; Carolyn Evans and Beth Gaze, 'Religious Freedom and Non-discrimination Laws' (2007) 16 *Human Rights Defender* 5; Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31; John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16.

26 Although terms such as 'exceptions' and 'exemptions' are commonly used to refer to limitations provided to the operation of anti-discrimination legislation these terms are not used extensively in the article 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.

II THE EXTENT OF THE ADVERSE IMPACT OF THE GENERAL EXCEPTION APPROACH

The general exception approach has the potential to violate the right to equality of many individuals considering the substantial number of religious schools that exist in NSW. There are approximately 1000 religious schools in NSW employing the full time equivalent of more than 40,000 teaching and non-teaching employees including administrative staff, gardeners and cleaners.²⁷ The actual number of individuals employed by religious schools would be much higher than this as the figure refers to full time equivalent positions and is not broken down into full time, part-time and casual positions.²⁸ Importantly the extent of the possible adverse impact from the operation of religious schools is expanding considering that in Australia non-government schools—the majority being religious schools—are becoming increasingly popular with the percentage of students attending non-government schools rising from 31% in 2001 to 34.6% in 2011.²⁹

A *The Lack of Empirical Evidence Regarding School Reliance on the Protections*

Considering the number of employees at religious schools, there is clearly a significant potential for the protections provided to religious schools to harm many individuals. However, a determination of the extent of the actual adverse impact on individuals is problematic due to the great difficulty involved in conducting empirical studies into the extent to which the protections provided under the general exception approach are relied upon.

An initial challenge in undertaking an empirical study in the area is that any conflict between a religious school and an employee³⁰ may be resolved through confidential discussions in a way that is acceptable to both parties. A principal of a religious school, for example, who concludes that an employee is undermining the school's religious environment through openly rejecting a moral principle of the religion may privately request that the employee refrain from doing so. If such

27 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>>.

28 Ibid.

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

30 To avoid repetition any reference to 'employee' includes a person applying for employment. Similarly the title of 'principal' refers to any person who has the power to employ, manage or dismiss a person on behalf of the school.

a request is not heeded the principal and the employee may agree that it is best for the employee to look for employment elsewhere, with the principal agreeing to continue employing the person until they have secured alternative employment.

Further difficulties in undertaking empirical studies are created through an unwillingness on the part of employers and employees to openly discuss adverse employment decisions; confidentiality clauses that can be attached to any settlement that is reached with a religious school; and pervasive institutional and cultural pressure that can discourage individuals from reporting adverse employment decisions.

Evidence of the existence of both informal settlements and the inclusions of confidentiality clauses between religious schools and employees is provided in a detailed study carried out by the ADB entitled 'Discrimination and Religious Conviction'.³¹ The ADB identified a number of incident in which informal settlements were reached including one situation in which a teacher at a Catholic school was dismissed for holding views on abortion that were inconsistent with official Catholic teaching.³² The matter did not reach the courts as the teacher agreed to a settlement offer that contained a confidentiality clause.³³ The ADB only became aware of the matter as the teacher had published an account of her experience before agreeing to the settlement offer.³⁴

The level of reporting of adverse employment decisions may also be significantly reduced due to institutional pressure against complaints and a reluctance among employees to jeopardise future employment. Thornton, for example, argues that '[c]onciliation of complaints alleging sex discrimination by a well-qualified female teacher is unlikely as she would be faced with the entire weight of the church against her'.³⁵ Similarly the ADB noted that

[i]n our view, the cases that reach us may be only a fraction of those that occur, such is the pressure in the Catholic school system to stifle knowledge of such dismissals. We suspect that this pressure has successfully deterred teachers from trying to gain redress for dismissal through taking industrial action. The silence and stigma that surround these cases isolate the teachers concerned and promote

31 Juliet Sheen, *Discrimination and Religious Conviction: A Report of the Anti-Discrimination Board in Accordance with Section 119(a) of the Anti-Discrimination Act 1977* (NSW Anti-Discrimination Board, 1984).

32 Ibid 426-7.

33 Ibid.

34 Ibid.

35 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 109.

a sense of guilt that effectively ensures that secrecy will be observed. Under these circumstances it has been difficult for us to quote directly from individual case histories, because even those teachers who contacted the Board are unwilling to be identified by an organisation that they hope will employ them again some day. Others have been restrained from contacting us by the terms of a legal settlement.³⁶

Further support for the existence of informal and confidential settlements is provided by Debra James, General Secretary of the Victorian Independent Education Union, an organisation with 15,000 members in non-government educational institutions representing principals, teachers, school officers, school service officers and education support staff in Victoria.³⁷ During public hearings held in Victoria by the Scrutiny of Acts and Regulations Committee into the merits of exceptions contained in the *Equal Opportunity Act 1995* (Vic) James informed the Committee that

[o]n average every year the union will deal with cases dealing with alleged discrimination ... We have represented members in discussions and negotiations with individual employers to varying degrees of success. Often employers do not want the detail of the case to become public and they agree to settle.³⁸

In addition to an informal approach to resolving conflicts, the protections themselves are a key reason why empirical studies in the area are so rarely undertaken. There is often little incentive for a person who considers they have been denied employment due to a particular attribute to complain about the school's conduct when they realise that the religious school will likely be legally protected from a discrimination action. On the lack of complaints in relation to the protections provided in Victoria, John Tobin observed that 'the lack of litigation and complaints against Catholic schools was due to the fact that the law in Victoria provided no avenue for redress - the *1995 EO Act* allowed religious schools to discriminate against persons on the basis of what would have otherwise been protected attributes'.³⁹ Similarly Michael Gorton, the

36 Sheen, above n 31, 425-6. Although in this section the ADB specifically addressed the situation in Catholic schools, it was clear in other sections of the report that the ADB also had such concerns in relation to other religious schools: at 407.

37 Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009 <http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/submissions/763%20-%20VIEU%20-%2031.07.09.pdf> 3.

38 Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 3-4 (Debra James).

39 Tobin, above n 25, 44.

then Chairperson of the Victorian Equal Opportunity and Human Rights Commission, stated that

[w]e have had complaints in relation to religious schools, but we also cannot tell how many complaints we do not get because the exemptions apply at the moment. We clearly have a lot of inquiries about those issues which do not lead to complaints, because once they are advised of the extent of the exception that may apply in their case, they do not proceed to a formal complaint. We certainly have anecdotal evidence of a number of complaints that have not proceeded to formal complaints because the exceptions apply.⁴⁰

A further challenge in obtaining reliable empirical evidence on the extent of reliance on the protections is that principals at religious schools are reluctant to openly discuss adverse employment decisions that have been made at their schools. There would be a range of reasons for such reluctance including a desire to protect the school's public reputation, a concern that staff members and students might openly challenge the principal on the appropriateness of the employment decision, and a fear that publicly discussing employment decisions may jeopardise the principal's own employment. The existence of a reluctance among principals to openly discuss their reliance on the protections was confirmed in an empirical study of religious schools in Australia undertaken by Carolyn Evans and Beth Gaze.⁴¹ The authors reported that although a 'wide variety of religious schools were approached to take part in the research ... there was a low participation rate' and only 18 principals agreed to participate in the study.⁴² Further evidence was provided by the principals who did agree to be interviewed for the study with authors observing that some of the principals 'who were critical of their own religious leaders did not want to be identified because they feared for their careers if it was known that they dissented from the official view'.⁴³

B Evidence that Individuals are being Adversely Affected

Despite the difficulties in obtaining empirical evidence due to the different factors discussed, there is evidence that indicates that religious schools are relying on the legal protections provided to them to make adverse employment decisions against a substantial number of individuals.

40 Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/4_August_-_Victorian_Equal_Opportunity_and_Human_Rights_Co.pdf>, 4 August 2009 (M Gorton, H Szoke and E Turner, Victorian Equal Opportunity and Human Rights Commission), 7 (Michael Gorton, Chairperson, Victorian Equal Opportunity and Human Rights Commission).

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

42 *Ibid* 400.

43 *Ibid* 421.

1 *Court Decisions on the Employment Decisions of Religious Groups*

No cases were located that addressed the legality of a religious school relying on the protections contained in the *Anti-Discrimination Act 1977* (NSW). However, there have been a few cases involving religious schools relying on similar protections contained in other Acts, which demonstrate that religious schools are relying on the legal protections provided to them in an attempt to legally justify their decisions to exclude individuals from their schools.

In *Thompson v Catholic College, Wodonga* a Catholic school argued that its decision to dismiss a school teacher for being in a non-marital sexual relationship did not violate the *Industrial Relations Act 1979* (Vic) as it was an implied term of the employment contract that employees would adopt a lifestyle that was consistent with Catholic morality.⁴⁴ The Conciliation and Arbitration Board found that the dismissal was unlawful, but may have been justified if it had been made clear to her before she started her employment that adherence to the ethical beliefs of the school was an essential element of her employment.⁴⁵

In *Griffin v Catholic Education Office* a woman's application for classification as a teacher in Catholic schools was refused by the NSW Catholic Education Office of the Archdiocese of Sydney on the basis that her high profile activism for gay rights was contrary to the teachings of the Catholic Church.⁴⁶ The Catholic Education Office, relying on defences in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), argued that she was both unable to meet an inherent requirement of the position, and her employment would injure the religious susceptibilities of adherents.⁴⁷ The Human Rights and Equal Opportunity Commission rejected the attempt by the Catholic Education Office to rely on the protections and found that the employment decision was discriminatory.⁴⁸ In *Goldberg v G Korsunski Carmel School* the WA Equal Opportunity Tribunal found that an Orthodox Jewish school was able to rely on a defence provided to religious schools under section 73(3) of the *Equal Opportunity Act*

44 (1988) EOC ¶192-217, 77 054.

45 Ibid 77 055.

46 [1998] AusHRC 6; Chris Sidoti, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation* (March 1998) Human Rights and Equal Opportunity Commission <http://www.humanrights.gov.au/pdf/human_rights/discrimination_sexual_pref.pdf> 5-9. As the Commission had no powers to enforce its finding of discrimination the case was part of a formal report prepared by the Human Rights Commissioner for the Commonwealth Attorney-General.

47 Ibid 11-13, 19-20.

48 Ibid 23.

1984 (WA) to justify a decision to impose restrictive conditions on the enrolment of a non-Orthodox Jewish boy within the school.⁴⁹

Further evidence that religious individuals and organisations will attempt to rely on protections available under anti-discrimination legislation can be provided by other cases involving religious individuals and organisations that have excluded individuals from becoming members of their organisation, receiving services from the organisation, or participating in some way in the life of the organisation. For example, in *Walsb v St Vincent de Paul Society Queensland [No 2]*, the Society tried unsuccessfully to rely on various protections provided to religious organisations to claim that a person had to be Catholic to hold a leadership position in the organisation.⁵⁰ In *OW & OV v Members of the Board of the Wesley Mission Council*, a Christian adoption agency's refusal to provide adoption services to a same-sex couple on the grounds that it would be contrary to their religious beliefs was found to be covered by the protections.⁵¹ In *Cobaw Community Health Services v Christian Youth Camps Ltd*, an attempt by Christian Youth Camps to rely on protections provided to religious organisations to justify a decision to not provide weekend accommodation to a welfare organization aimed at helping same-sex attracted youth was rejected by the court.⁵² Similarly in *Burke v Tralaggan*, a religious couple who considered that they were unable ethically to rent out their premises to an unmarried couple were held to be unable to rely on a general protection provided to religious organisations.⁵³

These cases provide important evidence that individuals are being adversely affected by religious individuals and organisations (such as religious schools) attempting to rely upon protections provided under anti-discrimination legislation. Considering the vast majority of cases are settled before a hearing the few cases that have been considered by

49 (2000) EOC ¶93-074, 74 236-8.

50 [2008] QADT 32 [70]-[78]; [79]-[126].

51 [2010] NSWADT 293 [34].

52 [2010] VCAT 1613 [211]-[356]. The decision was affirmed by the Victorian Supreme Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75. The case has been appealed to the High Court of Australia.

53 (1986) EOC ¶92-161, 76 586. For additional Australian cases involving religious organisations and protections provided under anti-discrimination legislation see: *Hazan v Victorian Jewish Board Of Deputies* (1990) EOC 92,298; *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441; *Rocca v St Columba's College Ltd & Rogers* [2003] VCAT 774; *Dixon v Anti-Discrimination Commissioner of Queensland* (2004) QSC 58; *Mornington Baptist Church Community Caring Inc (Exemption Anti Discrimination)* [2005] VCAT 2438.

the courts suggest that many other individuals are likely to have been adversely affected by the protections.⁵⁴

2 Reports of Religious Schools Relying on Protections

Reports by government bodies, the media and members of the public can also play a useful role in assessing the extent of reliance by religious schools on protections provided under anti-discrimination legislation. In 2006, for example, media outlets reported that a principal of a Catholic school had been suspended for remarrying when his first marriage was still recognised as valid by the Catholic Church.⁵⁵ In 2009 it was reported that a primary school teacher at a Catholic school had been advised that her contract would not be renewed when she became pregnant from a non-marital relationship.⁵⁶ The school did renew her contract after she complained to the Victorian Equal Opportunity and Human Rights Commission; however, the school insisted as a condition of her ongoing employment that she sign an agreement not to promote her lifestyle.⁵⁷ In the same year the principal of a Christian school refused to provide a Muslim woman training to be a teacher with a placement on the grounds that her religious beliefs were incompatible with the Christian commitments of the school—a result that was particularly disappointing to the applicant as the school was the closest to her home and taught subjects in which she had a particular interest.⁵⁸ In 2012 a primary school teacher at a Christian school was dismissed when she became pregnant from a non-marital relationship in violation of the school's lifestyle agreement.⁵⁹

Government and non-government reports on religious schools provide further evidence on the extent of the reliance by religious schools on the protections. The study undertaken by Evans and Gaze provides clear evidence that religious schools are making employment decisions that

54 Marc Galanter and Mia Cahill "Most Cases Settle": Judicial Promotion and Regulation of Settlements' 46(6) *Stanford Law Review* 1339, 1339.

55 Matthew Benns, Eamonn Duff and Hannah Edwards, 'Catholic School Principal Sacked for Getting Married', *The Sydney Morning Herald* (Sydney), 16 April 2006 <<http://www.smh.com.au/news/national/sacked-for-getting-married/2006/04/15/1144521541555.html>>.

56 Melissa Fyfe, 'Teacher Scorned for Chosen Lifestyle', *The Age* (Melbourne), 4 October 2009 <<http://www.theage.com.au/national/teacher-scorned-for-chosen-lifestyle-20091003-ghbl.html>>.

57 Ibid.

58 Farrah Tomazin, 'Christian School Rejects Teacher', *The Age* (Melbourne), 25 March 2009 <<http://www.theage.com.au/national/christian-school-rejects-teacher-20090324-98y0.html>>.

59 Bridie Jabour, 'Teacher Sacked over Pregnancy', *Brisbane Times* (Brisbane), 1 May 2012 <<http://www.brisbanetimes.com.au/queensland/teacher-sacked-over-pregnancy-20120501-1xw79.html>>.

would be unlawful if the protections were not available.⁶⁰ Similarly the Discrimination and Religious Conviction report undertaken by the ADB referred to a number of incidents of adverse employment decisions made by religious schools.⁶¹ In relation to the conduct of Catholic schools the ADB provided the following examples:

One Catholic teacher complained to us that a position she had already been appointed to was withdrawn in 1978 when her parish priest informed the Catholic Education Office that she had been living with her husband before their marriage. A divorced teacher said that when she announced in 1980 that she was marrying again she was told by the parish priest that she had to resign, because he didn't want the children influenced into accepting divorce. A third teacher was dismissed from her position in 1978 after another staff member, who had initially been friendly to her, told the principal, students, and their parents that she was a lesbian. When a parent complained, the principal dismissed the teacher allegedly 'because of the suspicious nature of your relationship with the girl you live with'. A fourth teacher told the Board in 1978 that after he renounced the priesthood and married, he was unable to find another teaching position in Catholic schools.⁶²

3 *The Conduct of Religious Groups and Employee Advocate Groups*

Further evidence that a significant number of individuals are adversely affected by the protections can be provided by the religious groups that lobby in favour of their retention and employee advocacy groups that lobby in favour of the protections being limited or abolished. A recurrent focus of law reform in jurisdictions throughout Australia is on the appropriate operation of anti-discrimination legislation, especially on the merits of any exceptions granted to the operation of anti-discrimination legislation. In situations where government bodies invite submissions from interested members of the community on the merits of reforming anti-discrimination legislation it is common for a large percentage of the submissions to be from religious groups and employee advocacy groups. An excellent illustration of this is the statement by members of the Parliament of Victoria's Scrutiny of Acts and Regulations Committee that of the approximately 1800 submissions received from community members regarding reforms to the *Equal Opportunity Act 1995* (Vic) the majority focused on the exceptions provided to religious organisations and were in favour of their retention.⁶³ Furthermore 20 out of the 27 organisations that gave oral evidence to the Committee directly addressed the merits of providing anti-discrimination legislation

60 Evans and Gaze, above n 41, 404-422.

61 Sheen, above n 31.

62 Ibid 425. For additional examples of adverse employment decisions being made and a general discussion of the context in which the decisions were made see ibid 407-442.

63 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995 - Final Report* (2009) 116.

protections for religious schools and other religious organisations—9 organisations lobbied in favour of the limitation or abolition of the protections, while 11 lobbied in favour of their retention.⁶⁴

It is highly unlikely that religious groups and employee advocacy groups would be spending so much effort lobbying on whether religious schools should have protections for their employment decisions if they did not consider that it was likely that religious schools would be relying upon the protections in the future. The high number of submissions on these grounds is persuasive evidence that a wide variety of religious schools are relying on the protections and that consequently a significant number of persons have likely been adversely affected by the protections.

Taking into account the cases that have been heard by courts, the extensive lobbying efforts of a diverse range of parties and the reports of individuals excluded from religious schools it is clear that a significant number of individuals are being adversely affected by religious schools making employment decisions relying on protections such as those provided by the general exception approach.

C Limited Reliance by Religious Schools on the Protections

Considering the above factors and that there are approximately 950 non-government schools in NSW—many of them religious schools that consider attributes such as gender, sexuality, marital status and religion to be significant in making employment decisions—it could be concluded that a very high number of individuals are being adversely affected by the protections provided to religious schools.⁶⁵ However, there are a range of factors that make it likely that the number of individuals who actually are adversely affected by the protections would be substantially less than might be expected.

64 Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions in the Equal Opportunity Act 1995—Public Hearings* (1 June 2010). Those organisations lobbying against the protections were the Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Resource Centre, Public Interest Law Clearing House, Law Institute of Victoria, JobWatch, Victorian Gay and Lesbian Rights Lobby, ALSO Foundation, the Victorian Independent Education Union and the Sikh Interfaith Council of Victoria. Those organisations lobbying for the protections were the Catholic Bishops of Victoria, Catholic Social Services, Anglican Church of Australia, Presbyterian Church of Victoria, Islamic Council of Victoria, Christian Schools Australia, B'nai B'rith Anti-Defamation Commission, Mt Evelyn Christian School, Australian Christian Lobby, the Catholic Education Office, and the Association of Independent Schools of Victoria.

65 Non-government Schools Guide, *The NSW Schooling System* <<http://www.privateschoolsguide.com/schooling-in-nsw>>.

1 *Many Individuals Do Not Want to Work for Religious Organisations*

An important issue to consider in any attempt to determine the extent of the adverse impact of the general exception approach is that many individuals do not want to work for religious schools. Often a person will be uncomfortable working in schools where the religion of the school is integrated into the work environment in a variety of different ways (eg, religious symbols on the walls of the buildings, meetings beginning with prayers, religious ceremonies, discussions about faith, different gender expectations regarding appropriate clothing, etc). The identity of a school as a religious school will likely attract applicants compatible with the school's religious teachings—against whom adverse decisions by the religious schools are less likely to be made—and deter individuals from even applying for employment who are critical of the existence of particular religious schools or religious schools in general. The reluctance of some individuals to work for religious schools would substantially reduce the likely extent of any disadvantage caused by the general exception approach.

2 *Religious Schools that do not need Protection for Employment Decisions*

It is also important to note that a substantial number of religious schools will rarely, if ever, rely on the protections provided under the general exception approach as according to the religion on which these schools are based it would be unacceptable to exclude a person from employment due to their gender, sexuality or marital status. The existence of a variety of different theological and ethical commitments among religious schools was supported in the empirical study undertaken by Evans and Gaze who found that for many religious schools the grounds covered by the general exception approach were not relevant for employment decisions.⁶⁶ The authors reported:

Several of the schools in the sample said that they celebrated diversity, including with respect to sexuality, and thus a staff member was welcome if they were the best qualified person for the job. There was no attempt by the school to hide the fact of that diversity. In one case this extended to a school chaplain who was gay, a fact which was known to the school community. While a couple of families left the school in protest at this development, the overwhelming majority of families were supportive — in part because they had chosen this school because of its liberal approach to religious issues.⁶⁷

⁶⁶ For a detailed discussion of the actual views of the principals and others in positions of authority in religious schools in Australia see Evans and Gaze, above n 41, 401-422.

⁶⁷ Ibid 411 (citations omitted). A number of additional examples of this kind of approach by religious schools are provided by the authors, see, eg, ibid 411-4.

3 *Disagreement within Religious Schools Regarding the Doctrines of the Religion*

Even at those schools based on religions that could be expected to rely on the protections provided by the general exception approach, there will be authority figures who will make employment decisions that are inconsistent with the ethical teachings of the religion. A principal of a Christian school, for example, may disagree with the denomination's position on sexual ethics and willingly employ a person in a same-sex or non-marital sexual relationship on the basis that the person will be competent to fulfill the technical aspects of the job. In regards to the potential influence the employee may have on students and other employees the principal may conclude there will be little significant impact, or even be of the view that employing the person will play a positive role in demonstrating to those attending the school the loving and committed nature of relationships that do not conform to that Christian denomination's views on sexual ethics.

The existence of such an approach was supported in the study by Evans and Gaze who reported widespread disagreement among authority figures of various religious schools with the teachings of the religion on which the school was based. Some of these authority figures indicated they disagreed with the teachings of the religion, often would not rely on any protections provided under anti-discrimination legislation, and were even critical of the protections being provided to the schools.⁶⁸ Evans and Gaze noted that the

[d]ifferent views on the appropriate reach of the anti-discrimination laws occurred not only between different religions or denominations but also within them. The Anglican schools that we interviewed, for example, represented both some of the most diverse and the most religiously homogeneous in the sample. Even among Catholic schools, whose religious hierarchy has fairly clear and express views on the appropriate role for anti-discrimination law, there were two interviewees who were opposed to the Church's viewpoint.⁶⁹

4 *A Lack of Applicants with Good Mission Fit for Employment Positions*

Religious schools may encounter situations where the compatibility of an applicant with the school's religion (their 'mission fit') may be poor, but they are the only applicant who is suitably qualified and experienced for the employment position. In these situations the principal would need to weigh the importance of filling the role versus the possibility

68 Ibid 401, 411-3, 417.

69 Ibid 421.

that employing a competent person with poor mission fit may have a significant adverse impact on the religious identity and commitments of the school. Many principals in this position would decide to employ a person in the role if the importance of filling the employment position is sufficiently high and they are confident the applicant will not undermine the school's religious commitments. The reality that religious schools hire employees from a range of faith backgrounds was emphasised by the Victorian Independent Education Union, which stated that

[c]lose to 29 000 teachers work in Victorian non-government schools, and some 13 000 are employed in various support roles. We are looking at a workforce of about 42 000. Due to the sheer volume of staff needed, it is simply not possible to employ those staff along denominational lines only ... It is an undisputed fact that there is a diverse range of employees working in schools — staff in de facto relationships, non-Jewish staff working for Jewish schools, non-Catholics working in Catholic schools, and non-Christians working in Christian schools.⁷⁰

5 *Political and Social Pressure to Not Rely on the Protections*

Religious schools will often not rely on the protections due to the possibility that it may cause adverse publicity resulting in employees and students leaving or not applying to join the school and members of the community deciding not to donate their time and money to the religious school. Such a situation occurred in NSW where the principal of a Catholic primary school refused to admit a child as the child's mother was in a lesbian relationship.⁷¹ The bishop of the diocese disagreed with the decision and intervened to force the primary school to offer a place to the child.⁷² It is likely that a key reason why the bishop knew about the primary school's decision and intervened in the way that he did was due to the adverse publicity generated by the school's decision.

It should also be acknowledged that social pressure can also operate to make it more likely that a person with a particular attribute will be excluded from a religious school. Pressure from the religious members of staff or from adherents of the wider religious community may be placed on a principal to rely upon the protections provided by the general exception approach to make an adverse employment decision

70 Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union) 3.

71 Amos Aikman, 'Lesbian Parents Reject Catholic Primary School', *The Australian* (Online), 15 December 2011 <<http://www.theaustralian.com.au/national-affairs/state-politics/lesbian-parents-reject-school/story-e6frgczx-1226222311363>>.

72 *Ibid.*

when the preferred approach of the principal would have been to hire or retain the employee.

6 Religious Schools Unaware of Relevant Attribute or Consider it a Private Matter

In many situations the relevant attribute of the employee – such as their marital status or sexuality – will not be known by anyone within the religious school (or at least not known by the principal of the school). Consequently there will be no possibility of the person being refused employment or dismissed due to the attribute. Further many principals of religious schools who are aware that an employee has an attribute covered by the general exception approach will not make an adverse employment decision so long as the employee does not actively publicise their status in the school. The existence of such an approach was supported in the Discrimination and Religious Conviction report, which found that many principals would not consider issues such as those relating to sexuality and marital status to be a significant factor in making an employment decision so long as the teacher did not openly contradict the school’s values. One principal interviewed for the report stated:

Of course I am concerned about moral issues, but then I don’t go around finding out which members of my staff are living with other people. Mind you, I wouldn’t have much choice if there was a scandal, not that I’ve had any parent complain to me in all the years I’ve been teaching here. Some principal[s] carry on about it, but what right have we to cast the first stone?⁷³

It is accepted that this approach adopted by some principals can be criticised on the grounds that it may be contrary to a person’s dignity to require them to hide an important part of their identity. Nevertheless, in regards to a determination of the likely impact of the general exception approach the relevant point is that when such an approach is adopted a person will not be denied an employment position or other employment benefit on the basis of a particular attribute.

7 Many Religious Schools Adopt a Compassionate Approach to their Employees

Another important factor is that many religious schools are based on religions that require adherents to treat all individuals with love and

⁷³ Sheen, above n 31, 422.

respect regardless of their individual characteristics, to recognise that all individuals are fallible, and to be particularly caring for the vulnerable in society.⁷⁴ Also a common element of many of these religions is that all individuals are fallible and have their own particular challenges in remaining fully committed to the theological and ethical commitments of the religion. Consequently many religious schools would be willing to employ and continue employing someone whose conduct is not in line with the religion so long as they do not actively promote their conduct or publicly claim that the doctrines of the school's religion are wrong.⁷⁵

Support for the compassionate nature of those working for religious schools can be provided by the studies and projects that these schools undertake to improve their ability to more effectively care for the diverse range of staff and students under their care. For example, a report by Fr Peter Norden, a Catholic priest, entitled 'Not So Straight: A National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students' was published in 2006 with the evident aim of improving the quality of the care Catholic schools are providing to gay students under their care.⁷⁶ At the end of Fr Norden's report there are 21 recommendations for improving the ability of Catholic schools to meet the needs of same-sex attracted persons, including that 'each Catholic secondary school should seek to create an inclusive and supportive environment in which staff and students feel confident to explore issues of identity, difference and similarity ... [and that] Catholic secondary schools [should] implement a pastoral care program that reflects the Church's positive teaching on the pastoral care of homosexual persons'.⁷⁷

8 *Commitment to a Broad Education and Building a Just Society*

Many religious schools are fundamentally committed to working with all members of the community to promote social justice. Considering this some religious schools would be willing to employ a variety of different individuals to form their workforce on the understanding that this could assist staff members and students in developing their ability to understand the diversity in the community. For example, many religious

74 See, eg, the Bhagavad Gita 17: 20-22 for Hinduism, Deuteronomy 15:7-11 for Judaism, Matthew 25:31-40 for Christianity, and the Quran 2:177 for Islam.

75 Evans and Gaze found evidence of such a compassionate approach taken by religious schools in their empirical study: above n 41, 411-414.

76 Peter Norden, 'Not So Straight—a National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students' (Ignatius Centre for Social Policy and Research, 2006) <<http://www.nordendirections.com.au/presentations/NSS.pdf>>.

77 Ibid 57.

schools have a strong commitment to inter-faith dialogue and would consider having some staff members of different religions a useful way of furthering this dialogue. Bishop Christopher Prowse made this point on behalf of the Catholic Bishops of Victoria in his evidence to the Scrutiny of Acts and Regulations Committee:

We allow and gratefully accept people from different religious backgrounds, as long as they do not upset the threshold, as it is a Catholic community and there has to be a threshold level where the majority of people are Catholic, otherwise it would undermine our vision. In every community I think we will find people from not only different cultures but also different faiths. They are very welcome; indeed they help with the inter-religious dialogue imperative that is now becoming not just something on the periphery but towards the centre of a healthy society. They make good healthy Catholic communities healthier, and that will continue.⁷⁸

Considering all the factors discussed above there are persuasive reasons for concluding that many religious schools do not rely upon the protections available to them when making employment decisions. Consequently it is likely that the number of individuals who actually suffer from an adverse employment decision would be much less than might be expected based only on the number of individuals employed in non-government schools. Nevertheless as there is convincing evidence from case law, lobbying activities of parties and reports on the operation of religious schools that a significant number of adverse employment decisions are being made, it is important to assess the nature of the harm that these decisions may be causing individuals to experience.

III THE NATURE OF THE HARM SUFFERED

Discrimination can gravely harm an individual causing them to experience major physical, emotional, psychological and social harm. Discrimination in an employment context can be particularly harmful as the employment position may be of fundamental importance to a person's financial and emotional well-being. Bell J in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* ('*Lifestyle Communities*') expands on the harms of discrimination warning that discrimination can cause an individual to

experience emotional pain, distress and a grievous loss of personal dignity and self-worth. It makes the individual feel less than the valuable human being they are. It undermines their sense of personal autonomy and their capacity for self-realisation. Depending on its nature, unequal treatment can also have serious, and

78 Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 6 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

even traumatic, physical, social or economic consequences for the individual and their families. Most of all, it corrodes the dignity which is the essence of their humanity.⁷⁹

The major harm that can be caused to an individual from an employer relying on protections such as those provided in the general exception approach is demonstrated in the South African case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* ('Strydom').⁸⁰ The case involved a Christian arts academy that terminated the employment of a music teacher when it was discovered that he was living in a same-sex relationship. In his judgment, Basson J considered it significant that the teacher was not required to teach religious material or be involved in any formal religious activities, that he was a member of a different Christian denomination, and that the respondents were unable to prove that he was employed to be a Christian role model. Consequently his Honour held that it 'would not have been devastating to the church to keep the complainant on in his teaching position ... [and] if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the *Constitution* that they not discriminate'.⁸¹ Basson J ordered the church leaders to pay compensation for the harm suffered by Strydom from the adverse employment decision and to make an unconditional apology. On the importance of the right to religious liberty in comparison to the harm that the man suffered from the employment decision Basson J stated:

[T]he impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining on in his position as a lecturer of music. On the other hand, the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination ... his dignity was impaired when his contract was terminated on the basis of his sexual orientation ... he suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house.⁸²

The grave nature of the harm that can be caused to individuals denied employment by religious schools is a major criticism of the protections provided under the general exception approach. The significance of this criticism can usefully be discussed according to the harm that can be caused to a person's dignity, and the other types of harm that a person can suffer from an adverse employment decision.

79 [2009] VCAT 1869 [109].

80 [2009] 4 SA 510.

81 *Ibid* [23]-[24].

82 *Ibid* [25], [33].

A *The Adverse Impact on a Person's Dignity*

As stressed by Bell J in *Lifestyle Communities* one of the main ways in which a person can be harmed from discrimination is through the adverse impact that the conduct can have on their dignity. On the importance of the protection of dignity in the context of anti-discrimination legislation, Iacobucci J in *Law v Canada (Minister of Employment and Immigration)* explains that

human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups.⁸³

Critics of provisions that allow religious schools to make employment decisions on the basis of attributes such as gender, sexuality and marital status claim that the provisions permit discriminatory practices that constitute a profound violation of the dignity of those who are excluded. The harm to dignity may not just be suffered by those directly affected by the employment decision, but by all members of the community – especially those with the particular attribute—when they learn that the State has provided religious schools with legal protections to allow them to exclude individuals with that attribute from employment positions at their schools. Thus Lee Rhiannon argues that when

someone misses out on a job, or is abused or not served in a shop because of their sexuality, or disability or gender, our society suffers. The dignity and humanity of those who are discriminated against suffers. The dignity and humanity of those who perpetrate the discrimination suffers. In fact, the dignity and humanity of all of us suffers.⁸⁴

Bilchitz expands on the dignity argument in the context of discrimination arguing that when a person is dismissed the loss of employment

is not the only harm involved. Discrimination on the basis of the prohibited grounds harms the dignity of the individual concerned ... Employment is of course connected to a person's sense of dignity and thus losing one's job on discriminatory grounds may indeed cause a crisis of self-worth. Yet, the dignity claim goes beyond this: it is about the exclusion of individuals from the community in question on the basis of a central element of their identity, and the

83 [1999] 1 SCR 497 [53].

84 Lee Rhiannon, 'Anti-Discrimination Amendment (Equality in Education and Employment) Bill' (Speech delivered at the launch of the Greens private members bill at the Parliament of New South Wales) Sydney, 22 March 2004.

stigma that this causes. It involves fundamentally a failure to treat individuals as ends in themselves. It involves reducing individuals to a particular characteristic and taking decisions that have a detrimental impact upon them simply because of this characteristic.⁸⁵

Despite the importance appropriately placed on the need to protect human dignity, there are some significant counters to any criticism of the general exception approach that it violates human dignity.

One response is to argue that the protection of the dignity of persons is not of overriding importance and so long as religious schools are clearly adhering to a religious commitment then the State should not intervene. Considering the importance of religious schools to many religious communities and the central role that employment decisions play in maintaining a school's religious identity, the operation of religious schools should not be impaired in an attempt to protect persons from the harm they may suffer to their dignity when they are adversely affected by the employment decisions of religious schools. This kind of approach is taken by Woolman, an atheist academic, who despite stating that decisions by religious groups to exclude individuals from their organisations on grounds such as sexuality are 'morally repugnant', argues that

[s]o long as church rules clearly preclude openly gay and lesbian members of the church from participating in public practices in the church, neither our courts nor our state has any business using such blunt cudgels as the right to dignity to reinstate an openly lesbian organist so that she might teach in a faith-based school and be remunerated for her efforts.⁸⁶

A stronger argument is that adequate protections for the employment decisions of religious schools are necessary to protect the dignity of other individuals who may be adversely affected by the inability of religious communities to establish schools that faithfully adhere to the commitments of their religion. Religious schools can play an essential role in the life of religious communities through delivering religious education, providing an opportunity for adherents to engage in charitable work, and operating as a centre for the religious community to socialise and cooperate in resolving common challenges. All the points that Iacobucci J makes about the harm that can occur when human dignity is not adequately protected can be claimed to occur when the State fails to adequately protect the rights of religious individuals, including harm to self-respect and self-worth, and an undermining of the religious person's

85 David Bilchitz, 'Should Religious Associations Be Entitled to Discriminate?' (2011) 2 *South African Journal of Human Rights* 219, 239.

86 Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal of Human Rights* 280, 282, 304-5.

physical and psychological wellbeing. Further the gravity of this violation of human dignity is arguably much greater than for those who may be excluded by employment decisions of religious schools. Persons excluded from employment at religious schools may be able to secure employment elsewhere, while laws that remove the ability to select and effectively manage employees can undermine the ability to create authentically religious schools and thereby deprive religious adherents of the benefits provided by religious schools – benefits that cannot be obtained by the religious adherents from an alternative source. On the possible failure to adequately protect the human dignity of religious persons, Moon states:

When the state treats an individual's religious practices/beliefs as less important or less true than the practices of others, or when her/his religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of her/his views and values but as a denial of her/his equal worth or desert – as unequal treatment that affects her/his dignity.⁸⁷

Perhaps the strongest argument against the attempt to criticise the general exception approach on the basis of human dignity is that the ambiguous concept of dignity can be used to support a variety of different, often conflicting, claims, which demonstrates that it is of limited value in assessing the merits of any approach to regulating the employment decisions of religious schools. The limitation of the concept of dignity in determining when distinctions made by individuals and groups should be considered to be inappropriate has been widely recognised. For example, in *Christian Education South Africa* the Constitutional Court of South Africa discussed its usefulness in regards to the conflict between the different rights relied upon by the parties in a case concerning the constitutionality of corporal punishment of students in Christian schools. Sachs J held that

[t]he overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated. On the one hand, the dignity of the parents may be negatively affected when the state tells them how to bring up and discipline their children and limits the manner in which they may express their religious beliefs. The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting.⁸⁸

⁸⁷ Richard Moon, 'The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools' in David Rayside and Clyde Wilcox (eds), *Faith, Politics, and Sexual Diversity in Canada and the United States* (UBC Press, 2012) 324.

⁸⁸ *Christian Education South Africa v Minister of Education* [2000] 4 SA 757 (Constitutional Court) 14–5.

Similarly the Canadian Supreme Court in *R v Kapp*, a case addressing the validity of fishing licences granted exclusively to indigenous groups, claimed that although dignity was the guiding principle for all rights, not just the right to equality, the concept of dignity was so ambiguous that it should not be considered to be of practical value in determining when differential treatment was inappropriate.⁸⁹ The Court held that

[t]here can be no doubt that human dignity is an essential value underlying the s 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity ... But as critics have pointed out, human dignity is an abstract and subjective notion that ... cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be'.⁹⁰

For these reasons it is difficult to conclude that appeals to the concept of dignity can provide any significant support to those who are critical of the protections provided to religious schools.⁹¹

B *The Extent of the Physical and Mental Harm Suffered*

An adverse employment decision can cause an individual and their dependants to suffer substantial emotional, psychological, social, financial and even physical harm. This harm suffered by vulnerable persons can be magnified when they realise that the State instead of establishing legal protections to help them avoid harm has instead enacted laws allowing religious schools to make adverse employment decisions.

It is important to note that many individuals who experience an adverse employment decision will not suffer significant harm due to a range of factors, including having a high level of resilience and the particular

89 [2008] 2 SCR 483 [21]-[22].

90 Ibid [21]-[22]. See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *The European Journal of International Law* 655 for a comprehensive account of the history of the concept of dignity and a critical analysis of its utility.

91 These criticisms of the usefulness of arguments based on dignity should not lead to a conclusion that the concept is of no value in equality jurisprudence. Sandra Fredman, for example, argues that the concept of dignity can play a valuable role in creating a 'substantive underpinning to the equality principle [that] makes it impossible to argue that the principle of equality is satisfied by 'equally bad' treatment or by removing a benefit from the advantaged group and thereby 'levelling down'. Equality based on dignity must enhance rather than diminish the status of individuals': Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 21. Fredman further argues that dignity can be useful in both helping law makers determine when the scope of the protection provided by the right to equality should be expanded to include additional attributes, and in determining whether the right to equality has been violated in areas such as sexual harassment where there may be no obvious comparator to use in determining if a violation has occurred: *ibid* 21-3.

employment position being of limited importance to their financial and psychological wellbeing. However, as can be seen in *Strydom*, some individuals who are denied employment will go on to suffer serious financial, psychiatric and physical harm from the event. Further even those who do not lose their employment can still suffer emotional and psychological harm through being forced to hide an important part of their identity to secure and retain employment with a religious school. As Mortensen states:

As a cost of employment in the religious school gays, lesbians and people in de facto relationships are legally encouraged to suppress knowledge within the school of their private lives ... it is hard to see that gays, lesbians and people in de facto relationships will remain happy with an arrangement that preserves their most intimate relationships as a love that dares not speak its name.⁹²

If adverse employment decisions by religious schools were causing many individuals to suffer major harm then this would be a significant criticism of the general exception approach; however, there are various factors that indicate that the kind of harm suffered in *Strydom* may be uncommon.

Many of the religious schools that want legal protections for their employment decisions are based on religions where love and respect for all persons without exception is considered to be a spiritual requirement. The study conducted by Fr Peter Norden on how Catholic schools can more effectively care for same-sex attracted students is a good example of this approach.⁹³ The caring environment of these schools would play a significant role in reducing the risk that employees with particular attributes might be harmed by an adverse employment decision. For example, a principal who concludes that a particular teacher is acting in a way that is incompatible with the school's religion might have an informal discussion with the employee to request that they modify their behaviour. If the discussions do not lead to a satisfactory change in conduct the principal and employee could negotiate a mutually agreeable solution for the employee to obtain employment at another organisation. Evans and Gaze provide evidence for the existence of such an approach in their empirical study in which they reported that 'it was clear that 15 of the 27 interviewees usually tried to resolve the dispute informally through discussion and negotiation. Thus, although there were many examples given during the interviews that could have given rise to formal discrimination claims, these were generally settled outside the formal

92 Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3(2) *Queensland University of Technology Law and Justice Journal* 320, 332.

93 See Norden, above n 76.

system'.⁹⁴ The caring nature of religious schools was also emphasised by Bishop Christopher Prowse in his evidence to the Victorian Scrutiny of Acts and Regulations Committee when responding to a question regarding the issue of gay employees working for Catholic schools. Bishop Prowse stated:

The Catholic Church's attitude to these important areas is well known. We would not want to have working under our employ people who are undermining our ethos and the general direction in which we move, which we say comes from our religious theological basis in the scripture and tradition and the way it is articulated in our times through the bishops and particularly the Pope. So the undermining of that would be seen in a very negative light. However, we are not ethical or moral policemen and we do not go around pointing the finger at people. We are a very compassionate community. I think we do that very well despite the stereotypes the place is under sometimes.⁹⁵

Further the theological views of the religions on which various religious schools are based are normally well known. Even in situations where a school's theological views are not well known employees are often advised of the school's commitments before and during employment through discussions with school authorities and from policy documents that detail the school's religious commitments and the relevant expectations that the school has of their staff members. The Catholic Archdiocese of Brisbane, for example, in a public document entitled 'Statement of Principles for Employment in Catholic Schools' explains that 'each staff member has an indispensable role to play in contributing to Catholic education. It is required of all staff members employed in Catholic education that they recognise and accept that the Catholic school is more than an educative institution as it is a key part of the Church, an integral element of the Church's mission'.⁹⁶ This kind of approach is also adopted in the employment policy of the Calvary Chapel Christian School based in NSW, which states that '[a]ll staff of Calvary Chapel Christian School must support and demonstrate through their daily lives, the school's Statement of Faith. As a Christian school, we employ staff who profess the school ethos and demonstrate the same beliefs, thus are practicing Christians'.⁹⁷ Similarly the employment policy documents of Bethany

⁹⁴ Evans and Gaze, above n 41, 420-1.

⁹⁵ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 4 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

⁹⁶ Catholic Education Archdiocese of Brisbane, *Statement of Principles for Employment In Catholic Schools* <http://www.holyfamilyps.qld.edu.au/parents/Child%20Protection%20Documents/Statement_of_Principles.pdf>.

⁹⁷ Calvary Chapel Christian School, *Employment Guidelines* (2013) <<http://www.cccs.nsw.edu.au/employment.html>>.

Christian School in South Australia state that these ‘documents reflect the School’s understanding of the lifestyle and values which staff members of the School, regardless of their role, are required to respect and maintain at all times’.⁹⁸

Knowledge about the school’s requirement that employees act in a way that is compatible with the school’s religion likely plays a significant role in reducing the harm that can be caused by the general exception approach. Individuals who disagree with the views of the school’s religion will often not even apply for the position, and would rather apply for work at government schools (constituting two-thirds of all schools) or at non-government schools that are either secular or have theological views that the individuals support;⁹⁹ while a person who does decide to work for the school will be aware that a failure to conform to the school’s religious views could jeopardise their school employment. If the person does not disclose relevant information to the school or decides to act in a way that the school regards as unacceptable then the employee’s decision to accept the risk of any harm that they might experience from an adverse employment decision is relevant to determining the acceptability of the school’s conduct. Further an employee in this position at least has the benefit of knowing in advance that they are endangering their employment, which may play a role in reducing any harm they suffer from an adverse employment decision, especially as it will likely result in some employees ensuring that they have back-up employment in the event that the school does decide to terminate their employment.

It should also be noted that adverse employment decisions made by religious schools may increase the harm suffered by individuals. For example, if a religious adherent is employed in a school based on their religion and is dismissed because they are in a same-sex relationship then they may experience this not only as a rejection of their sexuality and the worth of their relationship, but also as a rejection by their religious community. Such harm is likely to be exacerbated when the person concerned belongs to a small religious community and the reason for the dismissal becomes widely known throughout the community. In such a circumstance it is much more likely that a person will suffer serious harm from the school’s decision—including the possibility of substantial, long term mental harm similar to that suffered by the complainant in *Strydom*.

98 Bethany Christian School, *Equal Opportunity Policy* (2014) <<http://www.bethany.sa.edu.au/assets/files/BCS%20Equal%20Opportunity%20Policy.pdf>>.

99 Australian Bureau of Statistics, above n 29.

The various factors discussed above indicate that many individuals are unlikely to be significantly affected by an adverse employment decision by a religious school and will often be able to obtain alternative, fulfilling employment. However, cases like *Strydom* indicate that some individuals will suffer substantial financial, mental and physical harm on grounds typically protected by equality legislation (such as gender, sexuality and marital status). Considering that the general exception approach is allowing religious schools to make employment decisions that are likely to be causing at least some individuals to suffer substantial harm, and many more individuals to experience minor, but still significant, emotional and financial distress, the view that the protections provided to religious schools violate the right to equality appears to have merit. However, before concluding that the provisions do violate the right to equality it is necessary to consider whether there are any aspects to the right to equality that can justify the protections provided in light of the harm being caused.

IV THE MERITS OF THE GENERAL EXCEPTION APPROACH

Any law that allows a group to manage its membership according to a particular attribute can cause persons lacking that attribute to suffer harm through being excluded from the group. The harm caused to others should not be considered to be an adequate justification to repeal the law so long as the merits of retaining the law are sufficiently strong.

Although there are a range of considerations identified in the introduction that might justify any harm caused by the general exception approach, the specific focus of this article is on the right to equality. The protections currently provided to the employment decisions of religious schools may be justifiable on the grounds that all religious individuals can claim protection from the State on the basis that religion is an attribute protected by the right to equality. Alternatively the general exception approach could be justified on the more specific basis that it is a special measure.

A *The Religious Dimension of the Right to Equality*

Religion is an attribute that is protected in the same way that other attributes such as gender and marital status 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'.¹⁰⁰ 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'.¹⁰¹

Demonstrating appropriate respect for the right to equality does not just involve removing laws and eliminating practices that overtly impose a detriment on someone because of a protected attribute. A State genuinely committed to the right to equality will provide comprehensive protection for individuals belonging to a protected group, and support them individually and collectively in understanding and affirming their attribute. A key way that the State can achieve this is through allowing these individuals to establish supportive organisations, and permitting them to manage group membership so that the organisations remain committed to supporting the individuals.

This commitment to allowing individuals with a range of protected attributes to create and manage supportive organisations has already been adopted by the State. Under the Act, 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.¹⁰² This protection is provided to clubs irrespective of whether the racial group on which the club is established has historically suffered from discrimination.¹⁰³ A similar protection is also provided under the Act to registered clubs where membership of the club is only available to a particular gender.¹⁰⁴ The *Equal Opportunity Act 2010* (Vic) also provides protection for the employment decisions of political parties stating that '[a]n employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser,

100 *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).

101 *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*, G.A. res 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. 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.

102 *Anti-Discrimination Act 1977* (NSW) s 20A(3).

103 *Ibid* s 20A(3).

104 *Ibid* s 34A(3).

member of staff of a political party, member of the electorate staff of any person or any similar employment'.¹⁰⁵

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 ADB, for example, granted an exemption from the Act 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.¹⁰⁶ 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.¹⁰⁷

A State committed to equality should be similarly committed to protecting religious individuals and the organisations that they create in a manner that is sensitive to the diversity that exists within the different religious worldviews. On the need for States to adopt such an approach Arcot Krishnaswami, the then UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, noted that 'since each religion or belief makes different demands on its followers, a mechanical approach to the principle of equality which does not take into account the various demands will often lead to injustice and in some cases discrimination'.¹⁰⁸ Similarly Sachs J in *Christian Schools South Africa* argued that '[t]o grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views ... the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect'.¹⁰⁹ Considering the importance of this point the comments of Heiner Bielefeldt, the United Nations Special Rapporteur on Freedom of Religion or Belief, are also noteworthy:

105 *Equal Opportunity Act 2010* (Vic) s 27.

106 Anti-Discrimination Board, *Exemptions Granted under Section 126 of the Anti-Discrimination Act 1977* (28 March 2013) <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_exemption_126>.

107 *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 916; *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2010] VCAT 2005.

108 Australian Christian Lobby, Submission No 92 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012, 6.

109 *Christian Education South Africa v Minister of Education* [2000] 4 SA 757 (Constitutional Court) [42].

[M]embers of minorities should have the possibility to demand, to a certain degree, personal adjustments when general legal provisions collide with their conscientious convictions. Such measures of 'reasonable accommodation', which often have been criticized as allegedly privileging minorities, in fact should be seen as an attempt to rectify situations of indirect discrimination from which members of minorities typically suffer even in liberal democracies that are devoted to the principle of neutrality in questions of religion and belief.¹¹⁰

An example that demonstrates the need to adopt this approach to protecting the equality rights of religious citizens is a law that penalises all citizens who fail to wear helmets while riding a motorcycle. Some religious adherents would have no difficulty in complying with this law, while other religious adherents would be unable to comply with the law on religious grounds - for example, Sikh males who consider themselves to be under a religious obligation to wear a turban.¹¹¹ A State committed to equality should respect religious adherents who could not ethically comply with this law, and amend the law to protect this aspect of their worldview unless there were exceptional grounds that justified not doing so.

A key way in which many religious persons fulfil their religious commitments is through creating religious organisations, such as religious schools, to learn more about their faith, fulfil religious obligations, and discuss various challenges that the religious community might be facing. If the State is willing to structure anti-discrimination legislation so that individuals with a common attribute, such as gender, race or sexuality, can legally form supportive organisations and exclude from membership or employment within the group those who do not share the attribute or who are not committed to the purposes of the group then it should be willing to do the same to protect the commitment of individuals and groups who share the same worldview. A failure to enact laws to provide the same level of protection to religious organisations can appropriately be understood as a violation of the right to equality. As Iain Benson notes:

[R]eligion is an equality right itself and religious people are entitled to non-discriminatory treatment in terms of their religion as well, so placing equality and non-discrimination over against religion or placing some forms of non-discrimination (say, sexual orientation) as things more important than the religious person's freedom against non-discrimination is an error - though an all too common one.¹¹²

110 Heiner Bielefeldt, 'Freedom of Religion or Belief—A Human Right under Pressure' (2012) 1(1) *Oxford Journal of Law and Religion* 15, 24–5.

111 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 88.

112 Iain Benson, 'Taking Pluralism and Liberalism Seriously: the Need to Re-understand Faith, Beliefs, Religion and Diversity in the Public Sphere' (2010) 23 *Journal of the Study of Religion* 17, 31.

The provision of legal protections for an indigenous school so that it could employ indigenous staff members in order to help the school more effectively protect and promote indigenous culture, history and religion would likely be widely supported by members of the community. If in future decades there is no longer any significant difference between indigenous and non-indigenous persons in terms of health, education, employment and other social markers there would likely still be strong support for the indigenous school and its ability to preferentially hire indigenous employees in order to protect the unique cultural and religious aspects of the indigenous community. The level of support would likely remain high even if it were shown that the protections provided were causing non-indigenous persons to suffer physical and mental harm from adverse employment decisions. A State genuinely committed to respecting the right to equality should show the same level of support to religious groups that want to establish and effectively manage a religious school to meet the particular needs of their community.

B *Recognising the Protections Provided to Religious Schools as Special Measures*

A special measure can be understood as action taken by a State or non-State actor that has the effect of providing a benefit to individuals belonging to a group that has historically suffered from discrimination.¹¹³ It is widely accepted that the provision of this additional assistance—not available to those who do not belong to the group – does not constitute discrimination. For example, s 8 of the *Charter of Human Rights and Responsibilities 2006* (Vic) focuses on equality before the law and states that '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.¹¹⁴ Similarly an act is not unlawful under the *Disability Discrimination Act 1992* (Cth) if it is reasonably intended to 'ensure that persons who have a disability have equal opportunities with other persons'.¹¹⁵ The non-discriminatory nature of special measure was emphasised by Crennan J in *Jacomb v Australian Municipal Administrative Clerical and Services Union* who declared that 'a person taking a special measure is not discriminating against others because such measures are designed to ensure genuine equality'.¹¹⁶

113 *Gerhardy v Brown* (1985) 159 CLR 70, 131 (Brennan J). For a detailed discussion of special measures in an Australian context see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (The Federation Press, 2nd ed, 2014) 534–561.

114 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

115 *Disability Discrimination Act 1992* (Cth) s 45(1)(a).

116 [2004] FCA 1250 [47]. For a detailed discussion of the non-discriminatory nature of special measures in the context of the *Racial Discrimination Act 1975* (Cth) see *Gerhardy v Brown* (1985) 159 CLR 70.

Religious groups that have a long history of suffering disadvantage from harm inflicted on them from outside the religious community can legitimately call upon the State to adopt special measures to assist them in overcoming any ongoing difficulties they are experiencing due to the historic injustices they have suffered. This additional protection—which could include providing the religious group with sufficient freedom to select and manage employees for any schools they manage—would be appropriate even if it resulted in others suffering harm through being denied a benefit due to the special measure (such as by being excluded from a school managed by the religious group).

Jewish religious groups, for example, could legitimately ask the State for special assistance to allow them to maintain their religious identity considering the disadvantage Jewish religious groups have suffered, and continue to suffer, in countries throughout the world. Although Jewish persecution has been far less serious in Australia than elsewhere, Jews have experienced various forms of hardship in Australia, including being denied employment, prohibited from becoming members of various institutions, and being exposed to criticism and ridicule by various Australian newspapers, journals and members of the community.¹¹⁷

As most religious groups in Australia would not legitimately be able to claim a history of persecution, any support available on this ground is limited to those members of religious groups who have genuinely suffered significant past and ongoing disadvantage. For those religious groups that have suffered it is appropriate for the State to provide additional assistance to them, which could legitimately include legal protections for the groups to establish and manage religious schools so that an authentic religious environment is created within them to assist the group in meeting the particular needs of adherents of the religious group.

C *The Level of Support Provided by the Right to Equality*

The provision of some level of protection for the employment decisions of religious schools can clearly be supported by the right to equality on the understanding that religion is an attribute protected by the right to equality. However, the protections provided by the general exception

117 Anti-Defamation Commission, *History of Antisemitism in Australia—Antisemitism in Colonial Australia* (2008) <<http://www.antidef.org.au/about-us/w1/i1001208/>>; Jeremy Jones, *Report on Antisemitism in Australia, November 2011* (2011) Australia/Israel & Jewish Affairs Council <<http://www.aijac.org.au/news/article/report-on-antisemitism-in-australia-november-2011>>.

approach cannot be supported on this ground as a substantial part of the protection provided is non-religious in nature.¹¹⁸

The protection available under the general exception approach is provided to all 'private educational authorities' rather than specifically to religious schools. Such broad protection may be justifiable on other grounds, but the provision of protection to schools not based on a religious or non-religious worldview cannot be supported by the religious dimension of the right to equality as the schools are not religious.

Additionally, the general exception approach provides protection to all religious schools even though some religious schools are based on religions that consider it unethical to exclude employees on the basis of attributes such as gender, sexuality or marital status. Employment decisions by these religious schools to exclude persons on these grounds could not be religious decisions as they would not be justified according to their religion. Consequently the protection provided to these religious schools under the general exception approach similarly cannot be supported by the religious dimension of the right to equality.

A further problem is that the protection provided to religious schools automatically applies to all employment positions regardless of the importance or religious content of the position within the school, and covers all attributes of employees except for race, age and a person's responsibilities as a carer. However, many religious schools that want protections for their employment decisions may only need protection for a few central employment positions and only on a few grounds rather than the near complete protection currently provided. A religious group managing a particular school, for example, may consider that the school's religion only requires protection to be provided for employment positions that they consider to be of central importance to the religious commitments of their school such as the principal, religious education teachers, and religious ministers.¹¹⁹ Further they may only want to be able to make employment decisions on the basis of religion and marital

118 The claim that the general exception approach provides excessive protection that cannot be justified according to the right to religious liberty is also discussed in another article submitted for publication that addresses in detail the consistency of the general exception approach with the right to religious liberty.

119 The term 'religious minister' is used in a broad sense to refer to any person within a religious community who plays a central role in providing religious education and performing religious ceremonies (eg, priests, imams, rabbis, etc). It is accepted that for some religious groups a broad range of religious adherents can legitimately be regarded as religious ministers, while for other non-hierarchical religions the concept of a religious minister may have little, if any, meaning.

status on the understanding that according to their religion there is no relevant significance in the differences that exist for attributes such as gender or sexuality. Under the current approach such a school would be provided with protection for a wide range of employment decisions that would be non-religious in nature and which could not be supported by the religious dimension of the right to equality.

The flawed nature of the general exception approach can be demonstrated by the example of a school based on a religion that does not require any protection for its employment decisions. The principal of this school could openly refuse to hire a woman for an employment position involving religious leadership within the school despite the school being based on a religion that is committed to gender equality in religious leadership positions. Such a decision might result in action being taken against the principal by others in the school or within the religious community; however, the decision would not constitute discrimination under the general exception approach even though it is entirely contrary to the religion on which the school is based.

Similarly employment decisions by religious school authorities based on a prejudiced understanding of the likely conduct that particular individuals might engage in would similarly be legal under the current approach. The Gay and Lesbian Rights Lobby emphasised this undesirable aspect of the general exception approach in relation to the ground of sexuality, arguing that

people frequently act, or claim to act, in the honest belief that their discrimination against gay men and lesbians is justified, even necessary or good. Discrimination is usually based on ignorance and/or prejudice and frequently manifests in stereotyping. Prejudices may be honestly held ... An obvious example of a stereotype that may result in discrimination is the genuinely held belief that gay men are all paedophiles. This myth persists in the face of all evidence that child sexual abuse is overwhelmingly perpetrated by heterosexual male family members. Yet if true it would make gay men (and lesbians when they are tarred with the same brush) unsuitable for a wide range of occupations. This would include not only those directly working with children but any occupation in which they were likely to come into contact with children.¹²⁰

Considering that a substantial part of the general exception approach protects non-religious schools and employment decisions of religious schools that are non-religious in nature it cannot be considered to be supported by the right to equality in its religious dimension. Consequently the claim that the harm caused by the general exception

120 Gay and Lesbian Rights Lobby Inc, Submission to the Attorney General's Department, *Law Reform Commission Report 92 (1999) Review of the Anti-Discrimination Act 1977 (NSW)* (2000), 14.

approach can be justified on the grounds of equality as an appropriate measure to promote equality cannot be accepted. However, an equality argument could support a more limited approach that restricts the protection provided to religious schools to the particular needs of religious groups.

V CONCLUSION

There are persuasive reasons to consider that the harm caused by the general exception approach – in terms of both its scope and gravity – may be substantially less than could be expected given the number of persons employed at non-government schools. However, there are reliable sources of evidence, including court decisions, media reports and the lobbying efforts of activists, that indicate that some significant harm is being caused by religious schools relying on the protections provided for their employment decisions.

The harm that is being caused by the protections provided to religious schools could be justified on the grounds of equality as an appropriate measure to promote equality for religious groups. However, the general exception approach cannot be supported on this ground as much of the protection that it provides is non-religious in nature. Nevertheless a more limited approach that restricts the protection provided to religious schools and employment decisions that are justified by the school's religion could be supported by the right to equality.

It is important to recall that there are a range of other considerations that are relevant to determining the merits of the general exception approach, including the welfare of children, the rights of parents and minorities, human rights education, the right to privacy and freedom of association. It may be the case that some or all of these other considerations provide strong support for the general exception approach. Considering the importance of appropriately regulating the employment decisions of religious schools, there is a need for future work to be undertaken in comprehensively evaluating the general exception approach in relation to these additional criteria. In the event that these criteria do not provide sufficient support for the general exception approach, a range of alternative approaches, including those adopted in other jurisdictions in Australia, should be evaluated to determine if they would more appropriately regulate the employment decisions of religious schools.