

DISCRIMINATION BY RELIGIOUS SCHOOLS: VIEWS FROM THE COAL FACE

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[There is much debate surrounding the application of exemptions from anti-discrimination legislation for religious schools. This article seeks to discover the views of a wide cross-section of religious schools, and organisations which play a role in administering or guiding those schools, with regard to the current state of anti-discrimination laws in Australia. It presents a number of different views on anti-discrimination laws and examines how these attitudes affect policy and decision-making processes in religious schools. The article contributes to the current debate by demonstrating that there is no single cohesive viewpoint held by the religious schools sector. Rather, the sector is shown to be a highly heterogeneous one.]

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I INTRODUCTION

Religious schools make up a significant portion of the education sector in Australia and receive large amounts of government funding. Figures produced by the Australian Bureau of Statistics in 2009 show that in 2008 there were 1 169 737 full-time students enrolled in 2729 non-government schools in Australia, comprising 34.1 per cent of the total number of students and 28.5 per cent of the total number of schools.¹ Of these, 696 577 students were enrolled in 1705 Catholic schools, and 483 324 students were enrolled in 1024 independent schools (most of which had religious affiliations).² In the 2005–08 period these non-government schools received \$489 million in federal capital grants including \$126.7 million in grants for capital works in 2008 alone.³ In addition, the states spent hundreds of millions of dollars on non-government schools.⁴ Total government funding for non-government schools in 2007–08 was \$7666.7 million.⁵ The fact that non-government schools comprise such a significant proportion of the education sector and receive such significant amounts of money has long made them socially contentious.⁶

Recently, there has been renewed scrutiny of religious schools, and one issue that has been the cause of particular contention is the extent to which religious schools are required to comply with anti-discrimination laws.⁷ Religious schools in Australia are exempted from a number of elements of anti-discrimination law that apply to government schools. While the precise legislative regimes differ from state to state, religious schools are generally permitted to give preference in

¹ Australian Bureau of Statistics, *Schools*, ABS Catalogue No 4221.0 (2009) 3.

² *Ibid* 7, 8. The figures for independent schools also included non-government schools that were not affiliated with the Catholic school system but may have been affiliated with other religious organisations: at 38.

³ Department of Education, Employment and Workplace Relations (Cth), *Capital Grants Program* (2008) <<http://www.deewr.gov.au/Schooling/Funding/CapitalGrantsProgram/Documents/CGPFACTSHEET20082.pdf>>.

⁴ For example, in 2007–08, the Victorian Department of Education and Early Childhood Development ‘provided over \$380 million in financial assistance to non-government schools ... through the Financial Assistance Model for Non-Government Schools’: Department of Education and Early Childhood Development (Vic), *Annual Report 2007–08* (2008) 51. The New South Wales Department of Education and Training allocated \$833.5 million to independent schools in the 2009–10 financial year: NSW Department of Education and Training, *Annual Report 2009* (2010) 9.

⁵ Marilyn Harrington, Department of Parliamentary Services (Cth), *Australian Government Funding for Schools Explained* (Background Note, Parliamentary Library, Parliament of Australia, 2010) 21.

⁶ For an example of an attempt to contest the legal validity of funding for religious schools, see *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559.

⁷ See, eg, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009) 64–5 (‘*Exceptions and Exemptions Report*’); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) 99–101 [7.32]–[7.39]; South Australian Attorney-General’s Department, *Proposal for a New Law against Religious Discrimination and Vilification*, Discussion Paper (2002) 10–11; *Equal Opportunity (Miscellaneous) Amendment Act 2008* (SA).

admitting students on the basis of religion, and in some states are permitted to discriminate on the basis of religion, sexual orientation and marital status with respect to staff and students, as outlined below.

The question of whether religious schools should be given exceptions from the anti-discrimination laws has been debated in the media⁸ and in scholarly work.⁹ The public debate has been reignited by three recent inquiries: the first by the Victorian Parliament into the current exceptions and exemptions under the *Equal Opportunity Act 1995* (Vic),¹⁰ the second by the Australian Human Rights Commission into religious freedom in Australia,¹¹ and the third by the National Human Rights Consultation Committee, which recommended that 'Australia adopt a federal Human Rights Act.'¹² Each of these inquiries has raised concerns amongst some religious groups that the current exception arrangements for religious groups are threatened. As discussed below, there is also a body of literature on the very detailed and complex legislative regime that regulates religious exceptions from anti-discrimination laws.

What has been missing to date, however, is empirical work on how these exceptions operate in practice in religious schools and how those who work within religious schools view the current legal framework. This article sets out the results of a series of interviews with principals, senior school leaders and representatives of organisations that represent religious schools. The research on which it is based aimed to explore attitudes and actual practices in religious schools, to investigate how issues are understood and handled by schools, and how important a role the law plays in those attitudes and actions. The research was not designed as a representative social survey containing sufficient numbers of responses to provide a basis for statistically significant conclusions about the whole population of religious schools. Instead, we sought to provide an initial evidence-base about internal understandings and experiences that can provide a basis for further research. It was not possible to include examples of every type of school and every central organisation. Those selected were chosen to include a number of schools from the same religious background in order to assess the degree of diversity that existed within them, and schools across a number of

⁸ See generally Melissa Fyfe, 'Churches in Clash with State: Religious Groups Fight for Right to Discriminate', *The Sunday Age* (Melbourne), 19 July 2009, 1-2; Peter Costello, 'Pursuing the Churches over Human Rights Is Contradictory', *The Age* (Melbourne), 29 July 2009, 15; Frank Brennan, 'Charter Not the Cause of Problems', *The Age* (Melbourne), 31 July 2009, 12; Hugh de Kretser, 'Equality Loses Out to Freedom', *The Age* (Melbourne), 3 August 2009, 11; Rodney Croome, 'Catholics Limiting Choice', *Online Opinion* (online), 6 June 2007 <<http://www.onlineopinion.com.au/view.asp?article=5937>>.

⁹ See Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law & Justice Journal* 320.

¹⁰ *Exceptions and Exemptions Report*, above n 7. Legislation drafted following this review has now been enacted as the *Equal Opportunity Act 2010* (Vic). This legislation will come into effect on 1 August 2011: s 2(4).

¹¹ Human Rights and Equal Opportunity Commission, *Freedom of Religion and Belief in the 21st Century*, Discussion Paper (2008).

¹² National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009) xxxiv.

different religions, to see the effects of religious diversity on attitudes and experiences.

The actual number of participants was relatively small, and our results should be seen as indicative rather than definitive of the range of views within this sector. For this reason, while the number of respondents who took particular viewpoints is set out in the article, such numbers should not be seen as necessarily reflecting the proportion of religious school leaders who would take this view if a larger or more representative sample could have been obtained. Nevertheless, even within a relatively small sample, clearly divergent responses emerged and demonstrated the diverse range of approaches that religious schools take to issues of discrimination. The views of those interviewed and the policies and procedures that they have adopted within their schools demonstrate that very different approaches may be used within the same legal framework. There is no single 'religious schools' response to anti-discrimination law; differences arise both between and within religious communities about whether religious schools should have exceptions and whether they should use the exceptions that they currently have.

The debate over whether the current exceptions should be maintained is generally carried out at the level of principle¹³ and often portrayed as either a tension between two rights (religious freedom and equality) or two world views (religious/faith-based and secular). To date, however, there has been very little empirical work on how such exceptions operate in Australian religious schools and the attitude of those in leadership positions in those schools to the exceptions. This article aims to contribute to the debate by examining the rather more complicated picture of competing interests which emerges when the views of those who are most directly involved in leading religious schools are examined.

II AN OUTLINE OF THE EXCEPTIONS FOR RELIGIOUS SCHOOLS

The current exceptions for religious schools from the various applicable prohibitions on discrimination in anti-discrimination laws differ in detail, but they follow some common patterns. Because of their complexity and because there is already high quality secondary literature dealing with this issue,¹⁴ this article does not give a detailed analysis of the various legal regimes. Instead, it provides an overview of some of the common patterns, in order to provide a context for the interview results that follow.

Australia's 12 anti-discrimination laws at federal and state/territory levels, as well as the federal workplace relations legislation, prohibit discrimination in relation to education and employment (among other activities) with respect to a wide range of attributes. Discrimination is generally prohibited in admission to and exclusion from educational institutions, and in selection for or termination of

¹³ For a contribution at this level by one of the authors of this article, see Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31.

¹⁴ See generally *ibid* 44–52; Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 376–8.

employment, as well as in conditions and treatment during the period of education or employment. The four federal anti-discrimination laws cover the attributes of race¹⁵ (including national origin, descent and ethnicity), sex¹⁶ (including marital status, pregnancy, potential pregnancy and, in relation to termination of employment, family responsibilities), disability¹⁷ and age.¹⁸ The *Fair Work Act 2009* (Cth) also prohibits discrimination in employment on a wide range of attributes including ‘race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, [and] religion’.¹⁹ Thus, at the federal level, there are prohibitions on discrimination based on religion and sexual preference in employment, but not in education. The eight laws at state and territory level²⁰ each cover a wide range of attributes, including those attributes covered at federal level, as well as religion (in all jurisdictions except New South Wales and South Australia), religious dress or appearance in employment or education (in South Australia)²¹ or ethno-religion (in New South Wales);²² and sexuality or sexual orientation (in all jurisdictions). In any situation, both federal and state laws can apply and a person who wants to make a complaint is required to choose the jurisdiction in which to proceed.

Because the broad prohibitions on discrimination in education and employment would apply to most of the activities undertaken by religious schools, accommodating claims to religious freedom generally requires exceptions from the anti-discrimination laws. The exceptions vary in detail between jurisdictions but there are some general similarities. First, all jurisdictions allow schools to be operated for people of a single sex, and most permit them to be operated for students of a particular religion.²³ Secondly, all legislative schemes except the *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth) contain exceptions, generally for any ‘act or practice of a body established for religious purposes’²⁴ that either ‘conforms with the doctrines of the relig-

¹⁵ *Racial Discrimination Act 1975* (Cth).

¹⁶ *Sex Discrimination Act 1984* (Cth).

¹⁷ *Disability Discrimination Act 1992* (Cth).

¹⁸ *Age Discrimination Act 2004* (Cth).

¹⁹ *Fair Work Act 2009* (Cth) s 351(1).

²⁰ *Discrimination Act 1991* (ACT) (‘DA (ACT)’); *Anti-Discrimination Act 1977* (NSW) (‘ADA (NSW)’); *Anti-Discrimination Act 1992* (NT) (‘ADA (NT)’); *Anti-Discrimination Act 1991* (Qld) (‘ADA (Qld)’); *Equal Opportunity Act 1984* (SA) (‘EOA (SA)’); *Anti-Discrimination Act 1998* (Tas) (‘ADA (Tas)’); *Equal Opportunity Act 2010* (Vic) (‘EOA 2010 (Vic)’), repealing *Equal Opportunity Act 1995* (Vic) (‘EOA 1995 (Vic)’ from August 2011; *Equal Opportunity Act 1984* (WA) (‘EOA (WA)’).

²¹ *EOA* (SA) s 85ZN.

²² *ADA* (NSW) s 4(1) (definition of ‘race’).

²³ See, eg, *Sex Discrimination Act 1984* (Cth) s 21(3) (sex); *DA* (ACT) ss 36, 46 (sex and religion); *ADA* (NSW) s 31A(3)(b) (sex); *ADA* (NT) ss 30(a)–(b) (sex and religion); *ADA* (Qld) s 41(a) (sex and religion); *EOA* (SA) s 37(3) (sex); *ADA* (Tas) s 27(1)(b) (gender); *EOA 1995* (Vic) s 38; *EOA 2010* (Vic) s 39 (sex and religion); *EOA* (WA) s 18(3) (sex). Since religious discrimination is not prohibited in New South Wales and South Australia or by the Commonwealth anti-discrimination laws, there is no need for an exception relating to selection or exclusion on the basis of religion in these jurisdictions. There is no exception relating to schools for particular religions in Tasmania or Western Australia.

²⁴ *Age Discrimination Act 2004* (Cth) s 35; *DA* (ACT) s 32(d). The wording of the exception differs across jurisdictions: see, eg, *Sex Discrimination Act 1984* (Cth) s 37; *DA* (ACT) s 32; *ADA*

ion'²⁵ or 'is necessary to avoid injury to the religious sensitivities of people of the religion'.²⁶ This exception would apply to schools run by churches or religions, since the religion is clearly a 'body established for religious purposes'. However, many religious schools are now run by organisations that, while associated with churches, may be separately incorporated, and this exception may not apply to them if the school organisation's purpose in running a school is not a 'religious purpose' or the 'propagation of the religion'.

There are four different legislative approaches to dealing with those religious schools that are not operated by a 'body established for a religious purpose'. The broadest is the approach taken in New South Wales, which exempts actions relating to education in or employment by a 'private educational authority' based on the attributes of 'sex',²⁷ 'pregnancy',²⁸ 'marital or domestic status',²⁹ 'transgender',³⁰ 'homosexuality',³¹ disability³² and age.³³ This would cover all religious schools, but is not strictly necessary in relation to religious discrimination, as New South Wales does not prohibit discrimination based on religion. It is a very broad exception in relation to the other attributes covered, since it is not conditioned on any requirement that the school's action be in accordance with religious beliefs or principles. Its effect is to deprive students and staff of these institutions of any non-discrimination rights on the listed attributes.

The most common approach is a middle path which involves an exception that specifically relates to religious schools. The exceptions vary in wording, but in general they apply to educational institutions 'conducted in accordance with religious doctrines, beliefs or principles'³⁴ and exempt anything done 'in the course of establishing, directing, controlling or administering the educational institution (including the employment of people by the institution) that is in accordance with the relevant religious beliefs or principles.'³⁵ Most exceptions in this form apply to all attributes in the legislation, although some cover only a

(NSW) s 56(d), which covers 'bod[ies] established to propagate religion'; *ADA* (NT) s 51; *ADA* (Qld) s 109; *ADA* (Tas) s 52; *EOA 2010* (Vic) s 81; *EOA 1995* (Vic) s 75(2); *EOA* (SA) s 50; *EOA* (WA) s 72.

²⁵ *EOA 1995* (Vic) s 75(2). Cf the reference to 'precepts' of the religion in *EOA* (SA) s 50(1)(c).

²⁶ *EOA 1995* (Vic) s 75(2). The term 'susceptibilities' is also commonly used: see, eg, *ADA* (NSW) s 56(d); *EOA* (SA) s 50(1)(c); *EOA* (WA) s 72(d).

²⁷ *ADA* (NSW) s 31A(3)(b).

²⁸ *Ibid* s 35.

²⁹ *Ibid* ss 40(3)(c), 46A(3).

³⁰ *Ibid* ss 38C(3)(c), 38K(3).

³¹ *Ibid* ss 49ZH(3)(c), 49ZO(3).

³² *Ibid* ss 49D(3)(c), 49L(3)(a).

³³ *Ibid* s 49ZYL(3)(b).

³⁴ *EOA 1995* (Vic) s 83(1). Terminology used in other jurisdictions includes 'educational institution[s] administered in accordance with the precepts of a particular religion': *EOA* (SA) s 34(3)(a); educational institutions conducted 'in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed': *EOA* (WA) s 73(1) and *DA* (ACT) s 33; and 'educational institution[s] [operated] in accordance with the doctrine of a particular religion': *ADA* (NT) s 30(2).

³⁵ *EOA 1995* (Vic) s 76(2).

more limited selection of attributes.³⁶ The effect of these exceptions is to permit discrimination on the basis of sex and marital status, religion, or sexual orientation or gender identity where it is consistent with religious doctrine.

There have been attempts to refine the scope of this type of exception in order to narrow it as much as possible by adopting a test of 'genuine occupational requirement' or 'inherent requirement' in relation to employment discrimination by religious bodies. In the *EOA 2010* (Vic), Victoria restricted the exception in relation to employment, while making only minor wording changes in relation to educational discrimination against students. Discrimination in employment by religious schools will, after the Act commences in August 2011, be excepted only where 'conformity with the doctrines beliefs or principles of the religion is an inherent requirement of the particular position, that the person cannot meet'.³⁷ In Queensland, the 'religious bodies' general exception does not apply to employment or education.³⁸ However, in relation to employment, an employer can impose a genuine occupational requirement, which would include 'employing persons of a particular religion to teach in a school established for students of the particular religion'³⁹ and a body established for religious purposes can discriminate reasonably where the work 'genuinely and necessarily involves adhering to and communicating the body's religious beliefs'⁴⁰ and a person 'openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs'.⁴¹

The last and narrowest legislative approach is to have very limited or no exceptions. Tasmania, for example, allows discrimination on the basis of gender in a religious institution only if it is 'required by [rather than merely in compliance with] the doctrines of the religion',⁴² or on the basis of religious beliefs only where it is 'in order to enable, or better enable, the educational institution to be conducted in accordance with those ... beliefs'.⁴³ The *Anti-Discrimination Act 1991* (Qld) provides no general exception in relation to education in a religious school other than the power in the context of admission to exclude students who are 'not of the particular ... religion'.⁴⁴

There are no specific exceptions for religious schools in the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) or *Age Discrimination Act 2004* (Cth). Since these federal laws apply in all the states and territories, the scope for religious schools to discriminate on the attributes of

³⁶ The exception relating to education in Western Australia does not apply to race, impairment or age: *EOA* (WA) ss 44, 66I, 66ZD. The exceptions in *EOA 2010* (Vic) s 83(3)(b) now apply only to the attributes of 'religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity', thus narrowing the width of the general exception previously granted by s 76(2) of the *EOA 1995* (Vic).

³⁷ *EOA 2010* ss 82(3), 83(3).

³⁸ *ADA* (Qld) s 109(2).

³⁹ *Ibid* s 25(1).

⁴⁰ *Ibid* s 25(2)(b).

⁴¹ *Ibid* s 25(3)(a).

⁴² *ADA* (Tas) s 27(1)(a) (emphasis added).

⁴³ *Ibid* s 51(2).

⁴⁴ *ADA* (Qld) s 41.

race, disability or age depends on whether a complainant chooses to start proceedings under federal law. The exceptions permitted under the *Fair Work Act 2009* (Cth) generally set the standard at the same level as it would be under any local anti-discrimination law in force, so it adds little to the prohibitions in state laws.⁴⁵

In summary, the legislative provisions on non-discrimination and freedom of religion are complex and vary between jurisdictions and between attributes regulated. Even within the confines of one state or territory, the legislation can be complex, and, since both federal and state laws can apply, it may be quite difficult for individual school principals or administrators to be sure exactly what the law requires of them. At present, in most Australian jurisdictions the laws resolve the potential conflict between the right to freedom of religion and the right to non-discrimination in a generalised way by giving priority to freedom of religion through broad exceptions that allow no scope for considering the actual issues and circumstances of the particular case. The research presented in this article focused on participants' attitudes and experiences to two broad categories of exceptions: the first related to religious beliefs, and the second related to sexuality issues including marital status and sexual orientation.⁴⁶

There is not space in this article to undertake a comprehensive discussion of the state of the law concerning the prohibitions on and exceptions to discrimination by religious schools, and our present focus is on the socio-legal aspects of this area rather than on the fine details of the case law. For this purpose, an understanding of the basic legislative framework is sufficient background to understand how those in charge of religious schools operate within the limits that the law imposes on them. Some discussion of the provisions and how they have been interpreted can be found in the secondary literature on Australian anti-discrimination law.⁴⁷

⁴⁵ *Fair Work Act 2009* (Cth) s 351(2)(a).

⁴⁶ The importance that religious groups place on these exceptions is evident in a Pastoral Letter authored by the Catholic Archbishop of Melbourne and six Victorian Catholic bishops:

The Church does not see a need for the exemptions to apply to all attributes or to any of the contraventions. The Church seeks exemption only in relation to seven attributes — religious belief or activity, sex, sexual orientation, gender identity, lawful sexual activity, marital status and parental status or status as a carer.

Denis J Hart et al, *Threat to Religious Freedoms: A Pastoral Letter of the Catholic Bishops of Victoria on the Threat to Religious Freedoms* (15 July 2009) Catholic Archdiocese of Melbourne <<http://www.cam.org.au/equal-opportunity/a-pastoral-letter-of-the-catholic-bishops-of-victoria-on-the-threat-to-religious-freedoms.html>>.

⁴⁷ See, eg, Rees, Lindsay and Rice, above n 14, 374–8; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) ch 7; Nick O'Neill, Simon Rice and Roger Douglas, *Retreat From Injustice: Human Rights Law in Australia* (Federation Press, 2nd ed, 2004) 511–12, 544–8; Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167; Mortensen, 'A Reconstruction of Religious Freedom', above n 9; Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1994) 18 *University of Queensland Law Journal* 208; The Australia Institute, *Public Attitudes to Discrimination in Private Schools* (17 May 2004) <<https://www.tai.org.au/index.php?q=node%2F19&pubid=331&act=display>>; Anna Chapman, 'Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope' (1996) 3(3) *eLaw: Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v3n3/chapman.html>>.

III METHODOLOGY

This article aims to provide some insight into the way in which those who have responsibility for leadership in religious schools or organisations associated with religious schools use and understand the current regime for exceptions to anti-discrimination law, and also whether they think that the current regime needs to be changed. Two primary types of material have been analysed for the purposes of this article. The first is a set of detailed interviews with principals or other senior school leaders from religious schools based in New South Wales, Victoria and Tasmania. Most participants were from schools in the capital cities of those states or their suburbs (including some outer suburbs); we did, however, interview two principals from regional schools. The second is a set of interviews with representatives of organisations that play a representative or coordinating function for groups of religious schools in those three jurisdictions.

A wide variety of religious schools were approached to take part in the research. Unfortunately, there was a low participation rate and ultimately we interviewed 18 principals. This means that there are insufficient interviews for them to be representative; however, the sample includes schools from a good cross-section of religious traditions and in a range of areas. The religious schools in the sample included four Catholic schools, nine Anglican schools, two Jewish schools (one Orthodox and one liberal), two Muslim schools and one Uniting Church school. The sample was sufficiently broad to allow us to explore the diversity of approaches to issues of discrimination in religious schools — and the schools in combination enrolled over 17 000 students. However, the limited number of participants means that statistical generalisations cannot be drawn from this sample about the experiences or views of the total pool of religious schools in Australia. As many school principals asked not to be named, generic descriptors are given to all the participants in this article. Additionally, to protect anonymity, all interviewees are described as ‘principals’ as this was the most common position of the interviewees, even though this group included three whose proper title was headmaster and also three deputy principals or other senior school leaders.

In addition, we interviewed nine representatives from organisations that had a relationship with religious schools. The nature of the relationship varied between organisations, with some having a role in setting policies and standards for schools and others being more of a source of information and guidance. Most of the organisations had a role in lobbying government on behalf of the schools that they represented. The religious organisations that were interviewed included the Association of Independent Schools, the Catholic Education Office in two states, Christian Schools Australia and Christian Schools Tasmania, the Australian Association of Christian Schools, the Australian Federation of Islamic Congress and Adventist Schools Victoria. Although four of these organisations represent independent Christian schools systems, we were unable to interview the principals of any such schools.

Each set of interviewees was asked similar questions. First, they were asked about the relationship of their school or organisation to the religious group with

which it was affiliated (we also asked the organisations about their relationship with the schools). We then asked about their policies regarding admissions and employment with particular reference to issues such as whether they give preference to potential employees or students on the basis of their religion and whether they have any policies or practices with respect to people whose sexual life may not be in compliance with the teaching of the religion (for example, those in same-sex relationships or unmarried relationships with someone of the opposite sex). They were then asked to discuss what would happen in the hypothetical situations that an unmarried teacher or student became pregnant, and that a student or teacher came out as gay. Finally, they were asked about their understanding of the current laws and whether they felt that any reform was necessary or desirable. The research therefore explores the role and influence of anti-discrimination law on the ways that religious schools deal with the conflict between anti-discrimination law and freedom of religion.

IV DISCRIMINATION/PREFERENCING ON RELIGIOUS GROUNDS

A Student Admissions

One of the key areas of concern for the organisation representatives and school principals who were interviewed for this research was the capacity of the schools to control their own admission policies, including selecting students on the basis of religion. There was some sympathy from principals of religious schools which did not themselves discriminate on the basis of religion towards those schools that did wish to do so,⁴⁸ although at least one principal was critical of public funding going to such schools.⁴⁹

The anti-discrimination laws of all states other than Tasmania at present clearly allow for schools to select on the basis of religion,⁵⁰ and 19 of 27 school principals and organisation representatives were aware that they were allowed to discriminate on the basis of religion. Those interviewed in Tasmania understood that the law gave them less flexibility with respect to admissions.⁵¹ One principal was critical of it for that reason, while admitting it did not make much difference in practice in his school.⁵² Outside Tasmania, there seemed to be a reasonably good understanding of the laws as they applied to admissions and a fairly high degree of acceptance of the status quo. Where changes to the law were proposed

⁴⁸ Interview with Organisation 7, Catholic organisation; Interview with Principal F, Catholic school; Interview with Principal K, Anglican school.

⁴⁹ Interview with Principal P, Anglican school.

⁵⁰ See the religious exceptions cited in above n 23. Note that no prohibition on religious discrimination exists in New South Wales or South Australia (only ethno-religion in New South Wales as part of the definition of race): *ADA* (NSW) s 4(1) (definition of 'race').

⁵¹ Interview with Principal F, Catholic school; Interview with Principal G, Catholic school; Interview with Principal H, Catholic school.

⁵² Interview with Principal H, Catholic school.

for admissions it tended to be with respect to greater clarity in the capacity to discriminate on the basis of religion.⁵³

1 *Religious Criteria for Student Selection*

Schools were asked about their requirements for admission into the school and, in particular, what religious tests there were for entry. The schools ranged in their approaches from admitting only students who shared the school's religion to being completely open in their enrolment policies. A relatively small number of schools would only accept students from the same religious background. The two types of schools that had this enrolment policy in the sample surveyed were one Orthodox Jewish school and certain closed enrolment Christian schools represented by one of the organisations (we did not speak to the principals of such schools directly). Those who discussed the Protestant schools that were religiously exclusive noted that they did in fact accept students from a variety of Christian denominations as long as they shared the same basic commitments to Christian principles. They had methods for ensuring that only students of that religious background were admitted in practice, and these are discussed below.

A second group of four schools, whilst giving preferential treatment to students who were co-religionists and sometimes even having a quota of students who should belong to that religion, were open to students enrolling from a variety of backgrounds, including from quite different religious traditions. The Catholic schools generally took this approach. In practice, it became clear that the various aspirational quotas created by archbishops in various dioceses were not very effective. In Tasmania, for example, the Archbishop had set an aspirational quota of 75 per cent Catholic students in Catholic schools not long before the interviews took place.⁵⁴ However, those principals from Catholic schools who discussed quotas acknowledged that they were only one factor in determining the religious background of the student population in a given school. The religious make-up of the school tended to depend more on the demographics of the local area, with schools in more monocultural areas more likely to achieve the quotas than those in more culturally diverse areas.⁵⁵ The three Catholic school principals interviewed in Tasmania, for example, said that they were not going to be able to reach the target and two of the three were critical of the target.⁵⁶

The final group of schools had an open admission policy. Sometimes this would include the privileging of a very small group of students (typically the children of the clergy of the associated religion) but there was otherwise no religious test or exclusion of students on the basis of religion. Schools in this

⁵³ Of the 12 interviewees who proposed a change to the law, seven advocated greater clarity with regard to the capacity to discriminate. In addition, three others expressed great concern about the limited resources provided to them to carry out their obligation under disability discrimination legislation. As this was not the focus of the research, we did not explore this issue further, but it demonstrates the difficulties faced by some schools that are committed to certain anti-discrimination requirements but struggle to find resources to fulfil their obligation.

⁵⁴ Croome, above n 8.

⁵⁵ Interview with Organisation 6, Catholic organisation.

⁵⁶ Interviews with Principals F, G and J, Catholic schools.

category included the Muslim schools, the liberal Jewish school and some Protestant schools.

While further analysis of the schools' admission policies is set out below, two points are worth highlighting here. First, even schools that had an open enrolment policy tended to attract a majority of students from their own religion or a closely related religion (eg other Christian denominations in a Christian school associated with a particular denomination). For example, the principal of one of the Muslim schools that we interviewed indicated that the school had an open enrolment policy and noted that it would like to attract some non-Muslim students. The school hoped in time to develop an academic record that would facilitate that process. For now, however, they had only Muslim students.⁵⁷

Second, 14 of the 18 school principals said that their schools, regardless of their admissions policy, required all students to participate in the religious life of the school. Precisely what that meant differed from school to school, but it almost always included religious education lessons, often included prayer or religious ceremonies and celebrations, and always included at the very least demonstrating some level of respect for the religious beliefs of the school. The principal of one school with an open admission policy put it this way:

our role as a Christian school is to make sure that we enable young people to be aware of and not necessarily to be inducted into the Christian faith. We are unapologetic in the way that we preach the Christian gospel and when parents enrol their children at the school they understand that we are an Anglican school, and they also understand that their child will attend Christian worship and Christian studies classes whether or not they are Christians.⁵⁸

The active integration of religious practices and teaching into the life of the school would presumably make the school more attractive to those who share the religious beliefs of the school community, and also make it less attractive to those who are hostile to or sceptical of that religious viewpoint.⁵⁹

2 *Evidence of Religion*

When schools did give preference on the basis of religion to a certain group, we asked them what evidence was required to determine whether the students fell into this group or not. There were a variety of practices. One school was prepared to simply accept the word of the parents that they belonged to the particular religion; one school belonged to a relatively small religious community in which the members were known to each other; five sought documentary evidence (Catholic schools sometimes required baptismal certificates and others required letters from religious leaders giving evidence of regular worship); and one organisation indicated its members often required more personal statements of faith. Some of those interviewed implicitly recognised that adolescents may

⁵⁷ Interview with Principal A, Muslim school.

⁵⁸ Interview with Principal C, Anglican school.

⁵⁹ Even those who were critical of the current exceptions noted that there is 'a tendency for applicants to self-select out of the interview process or the recruitment process if they feel it's not the right school for them': Interview with Organisation 3.

struggle with their faith and may engage in questioning or even rejection of religion at various points in time.⁶⁰ Therefore, the school was usually looking for evidence of the *parents'* commitment to the relevant religion and their preparedness to ensure that the child engaged with the religious life of the school. One exception to this is where the child had actively decided to join the religion of the school, even though his or her parents did not belong to that religion, and the parents were prepared to support that decision.⁶¹

Four Protestant schools acknowledged that religious affiliation may be more a matter of stated identity than profound religious conviction. One Anglican principal, for example, noted with respect to religions that 'they all state it on their application form ... but most of them don't actually attend. It's more just a sort of family thing that they might have been baptised into that denomination but that is pretty much it.'⁶² One Catholic school principal referred to what he described as 'tribal Catholics': people who identify as Catholics but do not necessarily practise.⁶³ Another noted that although the school had 60 per cent nominal Catholic enrolments the number 'actually practising their faith would be far smaller than that.'⁶⁴ Another estimated that only five per cent of the students at his school were practising Catholics even though about 50 per cent of them had nominated as such in the application process.⁶⁵ Another Anglican principal when questioned about whether enrolment was limited to Anglicans said that there was 'no way you'd find [enough students] who are Anglican even nominally.'⁶⁶ Thus there is some need for caution with respect to analysing figures on the religious breakdown of the schools; some schools that appear to have high levels of enrolment of students from one religion or denomination may in fact only have a relatively small number of committed and practising members.

B Staff

1 *Requiring All Staff to Be of the School's Religion*

A similar spread of attitudes held by the schools can be seen in the appointment of staff as could be seen with students. At one end of the spectrum there was a group of schools that required that all staff, both teaching and non-teaching, be of the same religion as the school. Only one school that we interviewed had this policy, as did four organisations,⁶⁷ all of which were associated

⁶⁰ See, eg, Interview with Organisation 4, Christian organisation:

It would be somewhat presumptuous and judgmental of a person to say that there was something wrong with a child who was really just struggling with doubts and questions. ... Why should we be surprised and concerned when a child or adolescent is going through that same process even if they are for the time being abandoning or leaving their faith?

⁶¹ Interview with Organisation 9, Christian organisation.

⁶² Interview with Principal D, Anglican school.

⁶³ Interview with Principal F, Catholic school.

⁶⁴ Interview with Principal H, Catholic school.

⁶⁵ Interview with Principal G, Catholic school.

⁶⁶ Interview with Principal Q, Anglican school.

⁶⁷ Interview with Organisation 1, Adventist organisation; Interview with Organisation 4, Christian organisation; Interview with Organisation 8, Christian organisation; Interview with Organisa-

with the Christian independent school movement.⁶⁸ One participant distinguished between a church school and a Christian school, or between religious and faith-based schools, where the former may have a subject on religious and values education and chapel services, but the rest of the curriculum is delivered as a secular curriculum, whereas in the latter, the whole of the curriculum is taught from a biblical worldview. The school organisations that indicated that they required that teachers or employees be religiously committed usually accepted teachers from a variety of Protestant denominations and thus argued that they were demonstrating inclusiveness to the degree that was possible while being consistent with their beliefs.⁶⁹ Three of the organisations required teachers to be members of the relevant religion and those interviewed noted that some schools required teachers to teach the curriculum from a Christian perspective.⁷⁰

Only one religious organisation said that a teacher leaving the religion would be a sufficiently serious issue that it might raise questions about their ongoing employment.⁷¹ Another would have been more concerned if the teacher had converted to another religion, particularly Islam.⁷² When a member of staff had left the religion, before taking any action there was usually an attempt to give the person a chance to come back to their religious practices and to ensure that this was not just a temporary period of doubt or questioning. However, once it became clear that the person was no longer a practising Christian, there was an informal discussion during which the person in question was either asked to leave or concluded that it would be in their best interests to leave.⁷³ These cases were dealt with informally by agreement between the principal and staff member and did not lead to litigation or contention.⁷⁴ For most schools, however, as there was not a strict employment test regarding religion, there were no consequences if a teacher left the religion.

tion 9, Christian organisation; Interview with Principal B, Anglican school. In the interview with Principal K, Anglican school, the principal indicated that, at his previous school, a person who was not an active Christian 'wouldn't have even got an interview.'

⁶⁸ On the Christian independent school movement, see Australian Association of Christian Schools, *Formation and History* <http://www.aacs.net.au/about_Formation.asp>; Christian Schools Australia, *About CSA* <<http://csa.edu.au/csa/about>>. The Australian Association of Christian Schools covers 100 schools with a total enrolment of about 33 000 students. Christian Schools Australia covers 150 schools with about 60 000 students. These organisations have an Affirmation or Statement of Faith relating to the Bible as the fundamental source of guidance.

⁶⁹ Regarding the requirement for Christian faith, rather than following a specific denomination, see the sources cited in above n 68.

⁷⁰ Interview with Organisation 1, Adventist organisation; Interview with Organisation 8, Christian organisation; Interview with Organisation 9, Christian organisation.

⁷¹ Interview with Organisation 9, Christian organisation.

⁷² Interview with Principal K, Anglican school.

⁷³ Interview with Principal B, Anglican school; Interview with Principal K, Anglican school.

⁷⁴ These cases did not appear to be common and those interviewed tended to describe the discussion between the principal and staff member as amicable or leading to an agreed outcome. We did not interview teachers so cannot comment on their experience from our data, but some contrasting perspectives from teachers affected (primarily in the Catholic education system) are included in Victorian Independent Education Union, Submission No 763 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, April 2008, 14–19. These perspectives outline the substantial personal and economic costs for individual teachers who have no choice, within the legal context, but to resign from their jobs.

2 *Requiring Staff of the Religion in Specified Positions Only*

A second approach was to permit only co-religionists in certain, limited roles, but to employ people from a variety of religious backgrounds in other positions. In Catholic schools, the principal and deputy principal had to be Catholic. In many schools, religious education could only be taught by co-religionists and in Muslim and Jewish schools this sometimes also included Arabic and Hebrew respectively. In schools that had a school chaplain, the chaplain usually had to be of the same religion, although some schools were comfortable having chaplains from denominations other than that of the school.⁷⁵

3 *Preference for Staff of the Religion*

Another approach, which was used in conjunction with restricting certain positions to co-religionists, was to have a preference for co-religionists where all other factors were equal.⁷⁶ For example, one Catholic school principal said that if there were two applicants of equal quality, they would give preference to the Catholic applicant but that they ‘wouldn’t sacrifice competence for religious affiliation if they were confronted with that choice.’⁷⁷ Similarly, another commented that while the school gave preference to Catholic teachers, ‘there’s no hard and fast rule because if you had a rule it would be pretty easy to break when you need[ed] the best candidate for the role.’⁷⁸ In large school systems like the Catholic system, and in school systems operated by small religious groups in the community (such as Jewish or Muslim schools), staffing needs of a school may exceed the number of qualified teachers of the religion, or there may be a preference for diversity among the staff group.

One rationale offered for preferring co-religionists was that it gave the principal greater flexibility in being able to deploy staff members to teach religious education as well as other subjects and to prepare them for school leadership roles.⁷⁹ Another was that this approach enhanced the religious life of the school. Catholic schools invariably took this approach, which tended to lead to a greater percentage of Catholics on staff than in the general population, but which also left considerable space for people of a variety of religious backgrounds in practice, as long as they were prepared to support the Catholic nature of the school. A typical example of the way that this was expressed was by a Catholic school principal, who said: ‘It is not mandated for [teachers] to become Catholic. But they’ve got to be respectful of the Catholic teaching and Catholic practices that are operating within the College.’⁸⁰

⁷⁵ 12 of 18 schools required their chaplain or religious education teachers to be of the same religion, of which three were comfortable with people from other denominations of the same religion.

⁷⁶ ‘We advertise that our preference is for people who are practicing Anglicans or members of a related Christian denomination but I can employ someone who is not if I need to, other than as chaplain’: Interview with Principal D, Anglican school.

⁷⁷ Interview with Principal F, Catholic school.

⁷⁸ Interview with Principal J, Catholic school.

⁷⁹ Interview with Principal M, Anglican school.

⁸⁰ Interview with Principal J, Catholic school.

Of the 17 schools that recruited from outside the religion, 15 required teachers to be supportive of the ethos or beliefs of the school. One principal put it this way:

every time that I interview a member of staff, I make it clear that I don't expect them as staff to be a practising Christian but I do say to them that you're moving into a school that is an Anglican school, its philosophy is Christian based and therefore you must support that philosophy.⁸¹

Similar comments were made by most other principals.⁸²

A less common approach, but one that was expressed by two principals of Christian schools, was that they would not be comfortable hiring someone of another religious belief or of a particular religious belief (Muslims were singled out). While they were prepared to hire people from a variety of Christian denominations, and even those without any religious belief, they thought that those who were committed to other religious beliefs would not fit in with the school. One principal said that 'I think I would be extremely unlikely to employ a person who was a practising member of another religion, like Islam or Buddhism or something like that. I think that would not happen.'⁸³ Another concluded that '[a] Muslim, no matter how, what's the word, non-fundamental, they basically wouldn't be comfortable delivering the sort of curriculum that we're delivering.'⁸⁴

4 *Open Employment Policy*

Finally, a group of schools had an entirely open employment policy (sometimes with the relatively minor exception of the school chaplain). Such schools claimed to simply employ the best person regardless of their religious background and did not ask questions about a person's religious beliefs in employment interviews or forms. Such schools invariably did, however, require that staff members be supportive of the values or ethos of the school and did not want to employ people who would be actively hostile to those values.⁸⁵

As with students, however, there were factors that tended to lead to greater numbers of co-religionists being employed in religious schools. First, such teachers were often attracted by the ethos and religious values of the school, while those who were hostile to those values were likely to feel uncomfortable teaching in such an environment.⁸⁶ Second, teachers were often required to take

⁸¹ Interview with Principal Q, Anglican school.

⁸² 15 of 18 principals affirmed that teachers must support the ethos of the school; the other three were silent on the matter.

⁸³ Interview with Principal D, Anglican school.

⁸⁴ Interview with Principal K, Anglican school.

⁸⁵ One organisation said that a teacher criticising the religion of the school in which they worked would be 'stupid' and that this was really a work ethics issue rather than one based on religious grounds; however, this had not occurred in the organisation's experience: Interview with Organisation 2. We understand this comment to mean that a teacher who has agreed to work in a school on the basis of supporting its ethos would be acting unethically by failing to keep to their undertaking.

⁸⁶ Interview with Principal H, Catholic school:

part in the religious life of the school, for example through attending religious services and prayers, regardless of their own religious beliefs. Finally, there were additional hurdles in some schools that made it more likely that co-religionists would be attracted to teach at the school. One Muslim school principal, for example, noted that the school employs ‘experienced staff regardless of what their background is’ but requires adherence to a dress code which requires women to cover their hair and wear loose fitting clothes and for men to wear a corporate standard of clothing (suit and tie).⁸⁷

C Overall Approach

There was some correlation between the approaches to hiring staff and to student admissions. Schools that required their staff to be of a certain religion, for example, tended to require the same of their students,⁸⁸ and schools with an open student admission policy also tended to have a purely merit-based employment policy.⁸⁹ For example, two of the organisations interviewed said that their members required both students and staff to have an appropriate religious affiliation. However, this was not always the case. The Orthodox Jewish school in the sample, for example, had quite strict admission requirements and only accepted Orthodox Jewish students, but had open employment policies for general studies (although not Jewish studies).⁹⁰ Conversely, other schools were strict with respect to the beliefs of their staff but open in their admission policy — the Seventh Day Adventist schools, for example, were inclusive with respect to students but for teaching positions gave preference to Adventists first and then other Christians.⁹¹ Greater detail about how these policies worked in practice is provided in the discussion below.

All of those interviewed saw the school as a community and not simply a workplace or education factory ‘churning out’ young people with certain skills and knowledge. The membership of that community was clearly important in defining the community and its values. This was so irrespective of the employment or admissions policies of the school; five schools with more open policies still described themselves as ‘unashamedly’ religious.

the matter of their religious affiliation is not relevant unless they are [religious education] teachers. The other caveat would be to support the Catholic ethos of the school. If someone had a religious position or affiliation that was strongly opposed to the Catholic religion I guess that might tend to self disqualify if they could not support the Catholic ethos, nature and values of the school.

⁸⁷ Interview with Principal L, Muslim school.

⁸⁸ Interview with Organisation 8, Christian organisation; Interview with Organisation 9, Christian organisation.

⁸⁹ Of the 13 of 18 schools which had an open enrolment policy, none said staff must adhere to the religion of the school.

⁹⁰ Interview with Principal I, Jewish School. The liberal Jewish school in the sample had no restrictions on the basis of religion for students but still had an overwhelmingly Jewish student body; Interview with Principal N, Jewish School.

⁹¹ Interview with Organisation 1, Adventist organisation. See also interview with Principal B, Anglican school; Interview with Principal K, Anglican school. Those Anglican schools have a relatively open policy for student admissions but try to employ a largely active Christian staff.

Religious identity was maintained in a variety of ways in addition to hiring and admissions policies. We received a variety of answers in response to our question about the role that religion played in the life of the school, but all schools had a place for religion in both the curriculum and activities outside the core curriculum. Thirteen of the 18 schools interviewed had compulsory religious education classes; 11 had prayer and religious services. The precise nature and frequency of these depended on the particular religion and school, but included things such as celebrating the Sabbath together at a Jewish school, observing the Ramadan fast at a Muslim school, and attending school masses at Catholic schools. None of these activities would be easy in a state or secular school. The distinctive choices or needs of a religious school could also extend to uniforms, for example, head-covering for female teachers, and other areas of religious practice outside worship. Integrating these religious elements into the daily life of the school enabled the schools to create a distinctive school community sometimes in conjunction with the operation of anti-discrimination law and exceptions.

V MARITAL STATUS/PREGNANCY AND SEXUALITY

A *Students*

At the time of admission, those principals for whom religion was a relevant criterion were most interested in the religion and values of the family. However, as the students grew older it was possible for the students themselves to engage in behaviour which might be seen as problematic from the point of view of the religion with which the school was affiliated. Principals were asked about two hypothetical scenarios — one involving an unmarried female student who became pregnant and the other involving a student who came out as gay or lesbian.

Thirteen of the 27 schools and organisations interviewed said that they would try to take a supportive approach to a pregnant student, although most had not had occasion to follow through on this intention. Only four mentioned that this situation had occurred in schools with which they had been associated. One organisation said, ‘we had a situation last year on that very issue of a pregnant student and we talked to them about it and established that we were happy to continue [that student’s enrolment].’⁹² Three interviewees drew a distinction between a student or teacher who admitted that she had made a mistake (in all cases it was assumed that the sexual intercourse was consensual) and one who was defiant or triumphant about having become pregnant outside of marriage; if the pregnant student or teacher was perceived as continuing to deliberately undermine the values of the school, it was considered best that she left.⁹³ Where the student was prepared to continue to abide by the values of the school, however, 9 of 18 schools said that they would try to keep the student in school or

⁹² Interview with Organisation 1, Adventist organisation.

⁹³ Interview with Organisation 4, Christian organisation; Interview with Organisation 6, Catholic organisation; Interview with Principal I, Jewish school.

support her outside of the school to complete her education.⁹⁴ One Christian school and one Christian organisation noted that a punitive approach to student pregnancy might sit uncomfortably with their opposition to abortion, in that it might create an incentive for a student to terminate a pregnancy before it became noticeable.⁹⁵

Three interviewees, however, while reiterating that they would be supportive of the student and her ongoing education, suggested that there would be problems with her continuing at the school:

we would possibly arrange for her to complete her education but without actually attending school. But we would continue to provide educational experience for her, such as providing course work for her to complete at home, maybe with individual tuition in some contexts, but I think that it would be unlikely that we would encourage or be able to have her attend the school, because, I think, that it would probably be difficult for her to be at school rather than difficult for us.⁹⁶

A Muslim principal noted that ‘I don’t see how the student could attend the school being pregnant with[in] an unlawful relationship as considered by Muslims. That would be quite difficult, I think.’⁹⁷

There was a reasonable degree of variation in approach in answers to the question relating to gay and lesbian students. A number of interviewees avoided the question, saying that secondary school students were ‘too young to know’ if they were gay or lesbian.⁹⁸ Five of 18 schools acknowledged that they had had gay and lesbian students at the school.⁹⁹ One principal said that this did not ‘make any difference to me’ and said that protecting such children from bullying was the key issue;¹⁰⁰ another talked about the importance of bringing together parties if a gay student believed that he was being discriminated against in order to resolve the issue.¹⁰¹ A third said that they had ‘no issues’ with the fact that

⁹⁴ Interview with Principal B, Anglican school:

Well, I would keep the student here. I would manage it by talking to the year group of students first then make it bigger and explain that we all make mistakes and we have got to stick together. I have this thing about Christians shooting their own wounded ... She gets pregnant and then you kick her out of the school — that is so wrong.

Another school had a student on maternity leave at the time of the interview and commented that the ‘school’s attitude is generally quite liberal’: Interview with Principal M, Anglican school.

⁹⁵ Interview with Organisation 6, Catholic organisation; Interview with Principal B, Anglican school.

⁹⁶ Interview with Principal C, Anglican school.

⁹⁷ Interview with Principal L, Muslim school.

⁹⁸ See, eg, Interview with Principal F, Catholic school, where the principal said that there were children in the school who had decided that they were gay although he doubted that they were old enough to make this decision.

⁹⁹ No principal actually denied that there were gay or lesbian students at their school. One principal had parents withdraw their children to place them at a school that guaranteed that they had no homosexual staff members. In response the principal ‘just looked at them and said, “I’m astounded that anyone can actually make that claim”’: Interview with Principal Q, Anglican school.

¹⁰⁰ Interview with Principal D, Anglican school.

¹⁰¹ Interview with Principal G, Catholic school.

some of the school's students were gay.¹⁰² However, most of those interviewed were not enthusiastic about acknowledging sexual diversity in the school in any public way. The emphasis tended to be on ensuring that students did not publicly contradict the values of the school and, so long as students were low-key about their sexual orientation, there was no problem about them continuing at the school.¹⁰³

B *Staff*

The interviewees were also asked hypothetical questions about a teacher who either became pregnant outside marriage or was known to be gay or lesbian.¹⁰⁴ The question applied to whether such a person would be hired and whether it would cause any problems with ongoing employment if the facts became known after the teacher was employed. Most respondents did not distinguish between the two elements of the question and their responses to each were therefore often the same.

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.¹⁰⁵ 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.¹⁰⁶ 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. Another school, which tried to keep a slightly lower profile on these issues, was prepared to defend the values of the school if need be. The principal commented that

I just have to try to be sensitive that there might be a variety of views within the community and be aware of those. But if it came to the point where I felt we were being asked to compromise the values of the Uniting Church, which is a fairly liberal Church with strong views about social justice, I would ... seek the support of the Synod of the Uniting Church.¹⁰⁷

One school principal reported having recently put a note of congratulations in the newsletter for a member of staff who had had a child with her female

¹⁰² Interview with Principal E, Uniting Church school.

¹⁰³ However, one principal said that merely identifying as gay was seen as unproblematic, but if they tried to 'influence other students or it became some sort of behavioural issue' then the school would 'need to do something about it.' As this principal had never experienced this, it was not clear what would need to be done: Interview with Principal F, Catholic school.

¹⁰⁴ Some questions were also asked about hiring on the basis of sex, however this was rarely an issue for schools; however, one Jewish school principal complained that their main problem related to their policy that only men teach boys and women teach girls. '[W]e can't advertise for male or female teachers without an exception every time we advertise ... It takes a long time and it is very inconvenient': Interview with Principal I, Jewish school. They were, however, granted an exception every time that they applied for one.

¹⁰⁵ Two of nine organisations and 13 of 18 principals interviewed commented that they sought the best person for the job.

¹⁰⁶ Interview with Principal Q, Anglican school.

¹⁰⁷ Interview with Principal E, Uniting Church school.

partner — this caused no concern within the school community.¹⁰⁸ Another commented that they had ‘a couple of staff that have had same-sex commitment ceremonies and it has just not even remotely been an issue for me.’¹⁰⁹ Where schools had this attitude to same-sex couples, they were also happy to employ heterosexual couples living together outside marriage, including women who became pregnant.

Other schools took a much stricter approach. One principal, of a Muslim school, said that if it became clear that a staff member was in a sexual relationship outside marriage (regardless of whether this had resulted in pregnancy or not and regardless of whether it was a heterosexual or homosexual relationship) this would be grounds for asking the person to leave the school.¹¹⁰ Another principal said that sexual orientation would influence hiring practices in the school, even if this was not expressed in the school’s official policies. That principal explained the practice in this way:

[The school] doesn’t have written policies on it. I have my own personal policies on it. For example, let me explain. If someone applied for the job here and I knew nothing about their sexuality I wouldn’t ask them but if they exhibited things that made me think that they were of a gay nature I wouldn’t want them in the school.¹¹¹

Twelve schools in the sample took a middle path between requiring staff members to leave employment and openly acknowledging a range of differences. This was a form of ‘don’t ask, don’t tell’ approach to a range of issues to do with sexuality.¹¹² These principals emphasised that they would not ask an applicant about their marital status or sexuality at interview or at any other time. To ask was considered inappropriate and two believed that it would be a breach of their legal obligations if they did so.

The outcome of such a policy, in theory, was that if a teacher became pregnant it would not be known by the parents or students whether she was in a married relationship or not. Similarly, as long as gay or lesbian teachers or those who were in a sexual relationship with someone who was not their partner were discrete, the school principals believed that their private lives should remain private and were not grounds for termination of employment.¹¹³ Comments

¹⁰⁸ Interview with Principal M, Anglican school.

¹⁰⁹ Interview with Principal Q, Anglican school.

¹¹⁰ Interview with Principal A, Muslim school. One organisation representative also discussed the fact that, in the several cases that he had dealt with, either the staff member decided that it was inappropriate or unfair to stay in the religious school system, or had been asked to leave: Interview with Organisation 4, Christian organisation.

¹¹¹ Interview with Principal B, Anglican school. However, Principal B did go on to say that if the person’s sexual orientation was not evident from the way that they behaved then the school would have no problem with hiring them.

¹¹² Reid Mortensen refers to this approach, which has been given some legal backing in Queensland (see above n 41 and accompanying text) as ‘moral schizophrenia’ and argues that it gives appropriate protection to neither religious schools nor gay and lesbians: Mortensen, ‘A Reconstruction of Religious Freedom and Equality’, above n 9, 332.

¹¹³ This view was held in schools across the spectrum of religions: Interview with Principal A, Muslim school; Interview with Principal C, Anglican school; Interview with Principal E, Uniting

about privacy were made by a wide range of the principals who were interviewed and this was clearly the way that many principals felt most comfortable dealing with the issue. Typical comments included:

The private life is the private life, the school life is the school life.¹¹⁴

These days you can't ask so you don't know.¹¹⁵

Sexuality, we certainly don't request any information or collect any information, or seek any information or want to know any information about someone's sexuality, so that's not really relevant information in terms of recruitment.¹¹⁶

If it is private and people keep it to themselves it is not an issue at all. If it starts getting around we would not be happy about it.¹¹⁷

More work than it's worth, really, dealing with anyone's private life!¹¹⁸

Eleven principals did, however, expect teachers not to discuss issues of personal sexuality with students. This applied to all teachers regardless of marital status or sexual orientation — it was more a matter of what it was considered appropriate for a teacher to discuss with students than a particularly religious issue:

This is not an issue for us — it has nothing to do with us. I would expect people to be reasonably private about their sex life but that is in relation to people who are heterosexual, homosexual or whatever. I mean I don't want people talking about those things with students. It is inappropriate.¹¹⁹

One principal also said that an inclusive approach is what their parent group would expect and that the parent group was not uniformly living in married relationships.¹²⁰ However, six principals gave examples of having to stand up to groups of parents who believed that the school should take a stronger line, particularly against gay and lesbian teachers. Three interviewees were also fearful of potential repercussions for teachers, particularly teachers whom the principals knew to be gay or lesbian, if the facts about their sexuality became known in the school or broader community. They feared that the parent group may become antagonistic if it became known that the school was employing gay or lesbian teachers, and also feared the response of the religious hierarchy, overseeing body or religious authority (such as the bishop), or the media.

In the schools in the middle group that expected teachers to maintain their personal privacy and not to discuss issues of sexuality with the students, there was still an emphasis on respect for the values of the school (which usually included a morality that promoted sexual intercourse only within a married relationship). Thus, while most principals were opposed to the idea that they

Church school; Interview with Principal H, Catholic school; Interview with Principal L, Muslim school; Interview with Principal N, Jewish school.

¹¹⁴ Interview with Principal A, Muslim school.

¹¹⁵ Interview with Principal C, Anglican school.

¹¹⁶ Interview with Principal H, Catholic school.

¹¹⁷ Interview with Principal I, Jewish school.

¹¹⁸ Interview with Principal L, Muslim school.

¹¹⁹ Interview with Principal N, Jewish school.

¹²⁰ Interview with Principal J, Catholic school.

would police their staff members' sexual life or the (lawful) activities that they engaged in outside school, they did think that a line had to be drawn with respect to influencing the students to act in a manner that was inconsistent with the religious teachings on sexuality or actively working to undermine the values of the religion on sexual matters:

as long as the student or teacher manages to keep that aspect of their life private then it just isn't an issue for the school. It only becomes an issue for the school when there is an intersection between that person's lifestyle and values and the school's preferred position and values and that can only [occur] when the oppositional values become public.¹²¹

If such problems arose, they were dealt with through a discussion about the appropriate boundaries of professional behaviour between the principal and the staff member, rather than through termination of employment. A typical response from a principal included:

[I might] suggest to them that they behave a bit more in a moderate way or be aware that people observe what they do ... but I would not want to be censorious about their private lives as long as they kept them private.¹²²

It is worth noting that, while 11 interviewees talked about the impressionability and vulnerability of young people as a reason for either not wanting gay or lesbian members of staff at all or for wanting them to keep their sexual orientation low-key, there was very little discussion about the impact of the schools' approach on students who were gay or lesbian (or wondering if they were gay or lesbian), or their impact on other students. It was assumed that the best way of protecting young people was to keep discussions of sexuality to a minimum, and perhaps this is a reasonable compromise between the official teachings of the religion and the practices of the school in many cases. However, it was clear that many of the interviewees had not considered the impact on gay and lesbian students of not having positive role models and not having any place for the acknowledgement of sexual differences in the school. A report released recently by Jesuit Social Services on same-sex attracted students in Catholic schools heard stories from young people who had experienced isolation, depression and bullying because of their sexuality and who felt entirely unsupported and unacknowledged by their schools or judged because of their sexuality.¹²³ Such young people had much higher rates of self-harm and suicide than their heterosexual peers.¹²⁴ There was little recognition in most interviews that this issue was of serious concern or that schools were facing the potentially negative impacts of this policy on students (although four of those interviewed did discuss these issues, at least to some degree).

¹²¹ Interview with Principal C, Anglican school.

¹²² Interview with Principal E, Uniting Church school.

¹²³ Father Peter Norden, Jesuit Social Services, *Not So Straight: A National Study Examining How Catholic Schools Can Best Respond to the Needs of Same Sex Attracted Students* (2006) 27–8, 41, 45–55.

¹²⁴ *Ibid* 12, 28–9.

VI RELIGIOUS SCHOOLS' REASONS FOR THEIR POSITIONS

A Staff

Participants from the religious organisations and the one school that only employed co-religionists defended this practice as integral to their religious identity and mission. Their aim was to create a community in which students were given a consistent message about the Christian religion and were provided with Christian examples and practices from all members of that community. Thus, every subject was approached as relevant to religion — it was not simply religious education but also science, maths and English classes in which some religious message could be experienced. Speaking of previous experiences in Christian schools that only enrolled Christian students, one principal reflected on the role of religion across the curriculum:

Where's the God in one plus one? God is a God of order is the way teachers would answer. Where's God in algebra? God is a systemic God. Where's God in languages? Well then there's all the different nations of the world and they all speak in different tongues, God meant for us to be different in that way. So I can prove to you in a sense that any part of the whole of the subjects and the curriculum that we teach from prep to year 12 would be described from a Christian worldview.¹²⁵

Further, one of the Christian organisations noted that, for some schools, it was considered important for every single member of the school community to be Christian and to engage with their work and the students in a way that was consistent with the Christian message. This interviewee gave the example of a cleaner who 'has a great pastoral heart, has a great gift of pastoring and builds important and very valuable relationships with students, which the teacher, as an authority figure, can't do.'¹²⁶

In none of these interviews did the interviewee speak with hostility or contempt for people from other religions. Instead, the desire to have solely co-religionists as staff members was at least expressed in positive terms as the desire to create a community of shared values, rather than negative terms as the desire to exclude others who are undesirable, wrong-minded or less worthy.

However, among other schools, three principals who were very concerned about the influence of teachers from other religions or whose sexual life was not consistent with the teachings of the school's religion reiterated that students were vulnerable and at an age where the principals had to be concerned about improper influence on students by teachers. This line of reasoning tended to carry with it a more negative view of those that they wished to exclude from the school. One principal of an Anglican school had asked a teacher who had converted to Islam and taken up wearing a prayer cap to resign. 'I told him that

¹²⁵ Interview with Principal K, Anglican school.

¹²⁶ Interview with Organisation 8, Christian organisation. A similar point and examples of a school bus driver or receptionist were given by Organisation 9, Christian organisation. The importance of this point was a reason for that organisation taking a 'pretty strong stance against all this anti-discrimination stuff.'

he shouldn't be working at the school because he had changed sides and it was a bad influence on the kids'.¹²⁷ Another noted that:

I would be particularly uncomfortable with the prospect of there being a homosexual male working in my school. Or for that matter a gay woman. Because I think that opens up a discussion with kids as to who they might be at this age ... It's not an issue where they should be saying, 'well, I wonder if I'm gay or not, and he's gay and he's a good bloke'. I might be ... a bit old fashioned about this — [but I think that's a discussion that] should be held with mum and dad.¹²⁸

The middle group of schools — those that limited certain positions to co-religionists but had a wider variety of people teaching in other positions and non-teaching positions — justified this approach through a combination of principled and pragmatic rationales. A common and pragmatic response was that it would either be impossible to obtain sufficient staff of the same religion or at the very least that it would be impossible to do this while maintaining high levels of competency and experience. This applied to both the Catholic and Anglican school sectors which were simply too large to be able to have a strict co-religionist employment policy, and also to the Jewish and Muslim schools where the communities were too small to produce sufficient numbers of qualified teachers and other staff.¹²⁹

However, even if it had been possible to staff such schools with co-religionists, three principals firmly believed that a religiously homogenous staff was undesirable. They said that it was beneficial to both staff and students to get to know people from a variety of religious backgrounds: 'it's good for us ... to learn of other faiths and experience'.¹³⁰ It helped students to understand and respect religious differences and prepared them better for life after school. As one Anglican principal put it:

One thing that is certain is that the 18 year olds that leave here are going to mix and move within a fairly diverse community as soon as they leave school and where they have had the opportunity perhaps to confront a variety of world-views, if not specifically of lifestyles, their education is going to be more rounded than had they say been educated in a school where all the staff was Anglican.¹³¹

However, these principals were also generally quite committed to the idea that certain positions — usually leadership and religious teaching — should be able to be restricted to co-religionists. This allowed the school to ensure that religious education was being taught seriously and appropriately and that the values of the school were being formed by its leaders in a way that was consistent with the

¹²⁷ Interview with Principal B, Anglican school.

¹²⁸ Interview with Principal K, Anglican school.

¹²⁹ Principal A estimated that 50–60 per cent of the teachers were not Muslim. The principal himself was Christian and there were no restrictions placed on him in his role because of this: Interview with Principal A, Muslim school.

¹³⁰ Interview with Principal J, Catholic school.

¹³¹ Interview with Principal C, Anglican school.

values of the religion. There was, however, some dissent about this with one participant being critical of restrictions by other schools on leadership positions.¹³²

Finally, the schools that did not discriminate at all on the basis of religion in the selection of staff tended to defend this decision as a matter of principle,¹³³ arguing that it was generally consistent with their understanding of their religion that all people were embraced regardless of their religion and that diversity was a matter for celebration. They saw inclusiveness as an important religious value. For example, the principal of a Uniting Church-affiliated school said that children were not given priority on the basis of religion (except children of Uniting Church ministers) and noted that there were children of a variety of faiths present in the school. That principal concluded, '[it] is very much in the tradition of the Uniting Church to be accepting of a multi-faith community and that would be the philosophy that I would adopt.'¹³⁴ Similarly, another principal said that they would never breach the anti-discrimination laws or avoid equal opportunity laws by using the exceptions: 'I am extremely scrupulous about that sort of legislation. I believe that it is right.'¹³⁵ Another principal described the ethos of the school as follows: 'we really acknowledge and recognise difference and diversity ... and within that context we respect it — it is more than just tolerated — we actually celebrate difference.'¹³⁶ This position may not be as readily open to schools catering for minority religions or communities, where maintaining a separate identity may be a more important function of the school.

The schools that did not discriminate at all also valued what individuals from a variety of sexual orientations could bring to the schools. They looked at the contribution of the individuals and celebrated those contributions: 'we've got teachers of different persuasions in that regard [sexual orientation] and they are wonderful, wonderful people.'¹³⁷ While they acknowledged that this could cause some disquiet, they were also careful to draw attention to those in the school community who were supportive of gay and lesbian staff members. One principal pointed out that only a small number of families had been critical of the school because of a gay staff member, whereas the majority of children and parents were very supportive of his role because 'they just love this guy, so that was the other side of that coin.'¹³⁸

¹³² Interview with Principal P, Anglican school.

¹³³ However, they often defended the right of other schools to take a different course. For example, one school principal, whose school did not take advantage of the exceptions in the legislation, said, 'I respect their wish to maintain their particular community through a set of values': Interview with Principal E, Uniting Church school.

¹³⁴ *Ibid.*

¹³⁵ Interview with Principal N, Jewish school.

¹³⁶ Interview with Principal P, Anglican school.

¹³⁷ Interview with Principal R, Anglican school.

¹³⁸ Interview with Principal Q, Anglican school.

B *Students*

The schools that had closed enrolment policies, which only accepted enrolments from students from a particular religious background, emphasised the importance of community (particularly in the case of Christian schools) and identity (particularly in the case of Jewish schools).¹³⁹ As the principal of a Jewish school noted:

One of the reasons that parents send their children to a Jewish school is that they want to do their best to ensure the continuity of their child's religious identity. ... The school sees the best likelihood of Jewish continuity being through education.¹⁴⁰

It was thought to be in a school environment where the students were from the same religious background that students would be best able to develop their religious identity and to live out their religious obligations authentically and without the compromise that a mixed student body would entail.¹⁴¹

Schools that had a quota for students of a particular religion or a preference for students from that religion or closely related religions gave a variety of rationales for this policy. In Tasmania, for example, the Archbishop had recently called for an aspirational quota of 75 per cent Catholics in the Catholic schools. A Catholic principal from Tasmania who was interviewed was at pains to point out that this was not intended to be hostile to the non-Catholics currently within the schools (who felt quite threatened by the announcement) but rather a positive attempt to attract more Catholics back to the Catholic school system, which was important because it allowed the Church to give better pastoral care to Catholic children and their families.¹⁴² Another Catholic principal from Tasmania was much more critical about the message that such quotas sent to the non-Catholic students currently enrolled in the school.¹⁴³

While there was some support in principle for the admissions quotas among Catholic-affiliated interviewees, some were resentful of the interference with the schools that the quotas implied. A level of pragmatism was also involved here. For example, one school principal noted that quotas for Catholic students set by the Catholic Education Office were not a problem for their school. However,

¹³⁹ Interestingly, only one school principal singled out the importance of creating within the students a sense of identity as members of the Australian community, as well as protecting the religious community, and that was the principal of a Muslim school. See Interview with Principal L, Muslim school:

Well my goal is basically to be able ... to cater for the Muslim community's needs and the students and to be here as an advocate for the students to be able to really instil them within the Australian society and to make them comfortable about where they live and where they're growing up.

¹⁴⁰ Interview with Principal N, Jewish school.

¹⁴¹ Identity can have different meanings in different contexts. One principal noted that some parents want to see a relatively restrictive enrolment policy in order to help ensure that their child marries someone from the right religious community although this was not a view supported by the school: Interview with Principal N, Jewish school.

¹⁴² Interview with Principal F, Catholic school.

¹⁴³ Interview with Principal G, Catholic school.

the bottom line is the viability of your school, really, and principals aren't going to say 'look really we've got vacancies here but can't take in this group of Muslim children' and you know there's a richness for more young people to have a multi-faith environment. So I would think that principals would decide in favour of the additional enrolment.¹⁴⁴

The groups of schools that had an open enrolment policy also tended to defend this on principled grounds. Even when the enrolment policy was open, the schools often tended to attract predominantly students of the same or similar religion to that taught in the school, but the principals from those schools spoke about the many benefits of having a multi-faith student body. A principal whose school included students from a wide variety of religious backgrounds said that this policy was part of its 'clear statement of values. In other words, a real authentic understanding of who we are and at the core of that is this approach to diversity.' The same principal said of the student body that 'it's a really rich, eclectic mix and that is what we'd wish.'¹⁴⁵ Along similar lines, a principal noted that 'those kids, [from a non-Anglican background] as they share their genuine faith with others in the school, provide a real richness within the place'.¹⁴⁶ Still others described the idea of discriminating on the basis of religion as abhorrent: 'I don't believe in discrimination. I have a strong belief in inclusiveness'.¹⁴⁷

VII THE ROLE OF LAW

Anti-discrimination law played a complicated role in the way in which schools acted with respect to hiring and admissions. Nineteen of 27 interviewees said that they knew and understood their legal obligations (although their understanding was not always accurate) and seven others acknowledged a degree of confusion or uncertainty about them. Particularly with respect to the employment or termination of those in teaching roles, there was some caution about how overtly factors such as religion, sexuality and marital status could be taken into account.¹⁴⁸ The principals face a complex regulatory environment which includes state and federal anti-discrimination law and employment law; this could make it difficult for them to be certain of their obligations.

¹⁴⁴ Interview with Principal J, Catholic school.

¹⁴⁵ Interview with Principal P, Anglican school.

¹⁴⁶ Interview with Principal R, Anglican school.

¹⁴⁷ Ibid.

¹⁴⁸ Organisations 2 and 3, for example, warn their member schools not to rely on exceptions and not to use advertisements for positions where being of a particular religion is specified. They believe that there is too much danger in taking any other approach, since tribunals or courts may not consider the use of the exception fair or reasonable. In Interview with Organisation 2, the interviewee commented that:

Advertisements for job vacancies should only specify religious beliefs if they are an inherent requirement of the position. Advertisements can specify that the job requires the employee to support the religious values and beliefs of the school community. Employers are encouraged to specify religious beliefs only if they are essential and inherent, as it is difficult to know exactly how an exception might be applied to a particular situation, given that there have been few decisions by the relevant tribunals or courts ...

For 12 of 27 interviewees, the key issue was clarity of communication, and greater importance was therefore placed on contract rather than anti-discrimination law. Many of the schools said that they had never had a problem with legal claims concerning discrimination because they were very clear in all their materials and information distributed to parents that the school had certain policies or practices (for example, giving preference to Catholic students or requiring everyone at the school to attend religious services or wear a certain uniform). Parents were required to agree expressly to these policies and practices before admission, and these principals seemed confident that this was all that was required in order to ensure that disputes did not arise in the first place.

Sometimes difficulties would occur later when older students asserted their rights. There was a certain level of indignation by some principals in these situations that students should attempt to rewrite a bargain that had already been agreed by their parents.¹⁴⁹ For example, it was considered by several principals to be improper for an older Muslim student at a Christian school to decide to begin wearing a head-covering or to refuse to attend religious services for religious reasons. This breached the agreement that had been reached with their parents. None of the principals who discussed this issue thought that there was any question around the child's own right to religious freedom or any question about the extent to which the parents were entitled to bind the conscience of the student for the period of schooling.¹⁵⁰

While 12 interviewees believed that clear communication was the key to preventing legal problems, another believed that the current anti-discrimination laws prevented them from honestly setting out their policies. One complaint by some schools that wished to largely hire or admit people of the same faith was that they believed that the law did not permit them to express this preference in as clear and plain language as they would wish to. Instead they were required to disguise their preferences by referring to 'supporting the Christian ethos' of the school or similar words.¹⁵¹ Two principals said that they found ways of hiring co-religionists, even though they believed that the law did not allow them to advertise for people of a certain religion or to make this an explicit criterion for employment; for example they would discuss with applicants how comfortable they would be working in conformity with the school's ethos and objectives.

When disputes or conflicts that touched on issues of discrimination did arise, 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

¹⁴⁹ See Interview with Principal B, Anglican school: 'They will come to you and say that I don't want to go to chapel because I am Muslim. And I will say "hang on a minute. We had the interview with your parents. To come to school, you sign on to go [to chapel]."'

¹⁵⁰ Although some principals did say that they would try to allow some accommodation of this kind: see, eg, Interview with Principal E, Uniting Church school.

¹⁵¹ In Interview with Organisation 3, an employee of Organisation 3 commented:

I think that it would be valuable [if] a school of a particular faith could advertise to employ staff members of a particular faith if they wish to do so. I think that would make the recruitment process highly transparent and ensure that everyone understood what issues would be part of the recruitment process.

discrimination claims, these were generally settled outside the formal system and thus have not given rise to any significant case law. Generally, the principals felt that these issues had been handled well and to the satisfaction of all parties; however, without interviewing the other parties (which was not possible as we did not seek their details for reasons of confidentiality) it is impossible to assess whether that view was shared by the student or staff member.

Thus, while anti-discrimination law certainly acted as some constraint on the behaviour of school principals, at least two of 18 schools found ways to ensure that they were able to continue to hire and admit the staff and students that they believed were best suited to the school regardless of whether this might have constituted discrimination. In those cases, anti-discrimination law operated to regulate behaviour such as advertising but not actual decision-making.

A The Diversity of Responses

While the sample of schools was too small to be representative, those interviewed included people associated with most of the key types of religious schools in Australia. Even with the limited number of interviews, it was clear that the religious school sector is a heterogeneous one when it comes to issues of discrimination. The heterogeneity was not driven by law; for example, there was no indication that schools took different approaches according to the anti-discrimination law of their state. Nor was it simply that religious people took one view and secular people another; rather there is dissent and debate within the sector and among religious school leaders as well. Some refuse to use the current exceptions to the anti-discrimination laws at all as a matter of principle, and believe that religion should not be used to counter claims of fundamental human rights. Others believe that the current exceptions do not go far enough and do their best to avoid the application of the current laws without breaching them. For them, applying anti-discrimination law to a religious school is a serious breach of religious freedom and of the capacity of the school community to create a distinctive religious identity and community.

Different 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.

One concerning finding was that some of those 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. For example, one principal who believed that the Church should not have any exceptions from the anti-discrimination law said, '[i]t wouldn't be easy at the moment for me to speak out against the anti-discrimination exception because that's not the party line — the party line is that the Church needs it. I don't think it does.' This type

of pressure gives the outside world the impression of a far more internally consistent and homogenous position than was really the case.

Similarly, in schools where there were gay and lesbian teachers on staff but the religion with which the school was associated was not tolerant of sexual differences, three principals were very concerned about imperilling their staff members' employment (and, indeed, sometimes their own employment) if their protection of such staff members became known. In arguing that the anti-discrimination laws should not allow the Church to discriminate on the basis of sexuality, one principal said that:

I fear for a staff member who has an alternative life — or a gay orientation that they may disclose that to a class or it becomes common knowledge from the pub because we've got 16–18 year olds and it may become known, and it's a small town ... and then someone for their own nefarious reasons might try to undermine the teacher for their own agenda, so it's a horrible set of circumstances I think.¹⁵²

The exceptions from anti-discrimination laws for religious groups left these principals feeling vulnerable, unable to protect themselves or their staff by reference to law if an issue came to light in the media or in the religious community.

VIII CONCLUSION

The religious school sector is a diverse and complicated one — and the results of our research illustrate the diversity in responses to anti-discrimination law and the use of exceptions. There is a wide range of religions operating schools, and even within each religious group there exists a great diversity between schools in both their approaches and their practices. Some religious schools are highly independent while others are more under the authority of their parent religion. Some serve to protect religious minority identity, while others are open to a wide range of students. Some schools are long-established while others are more recently established under different funding structures and with different religious contexts and objectives. Analysis focusing simply on a distinction between religious and secular schools fails to capture the complexity of the sector.

Some schools rarely or never use the exceptions for religions in the current anti-discrimination legislation. Others use the full range of exceptions and find ways to push beyond the current bounds of the legislation. Some see the mere application of anti-discrimination law to their schools as a denial of a fundamental right to religious freedom and autonomy. Others see any denial of equal opportunity as a blatant misuse of religion and a denial of the fundamental right to equality. Many school principals tried to negotiate what they saw as a range of legitimate demands — demands from religious authorities, from equal opportunity bodies, from concerned parents, from teachers and their unions — and balance these against the needs of students. They also had a pragmatic desire in

¹⁵² Interview with Principal G, Catholic school.

many cases to see their schools remain financially viable and to employ highly competent and capable staff, which meant sometimes bending rules set down by those from outside the school who did not always understand the difficult balancing act that principals have to achieve. Legislators deciding on whether discrimination exceptions need to be tightened should be wary of claims that suggest that the religious school sector is homogenous or even that all the schools from a particular religious tradition are united in their position towards the exceptions or unconditionally support the position of their religious hierarchy. The diversity within the religious school sector makes the role and use of law, such as the religious exceptions, more complex than a simple conflict between freedom of religion and equality.

Diversity within the religious school sector means that schools have different needs and priorities in dealing with issues that might raise discrimination concerns, and that, subject to the overall preference for informal handling of disputes and avoidance of explicit reference to law, issues are resolved differently under the different value systems of the various types of schools.¹⁵³ However, the current legal approach does not allow for the diversity of religious schools, for example by considering the nature of a particular school or the doctrine which it regards as important to observe, nor specific aims and practices of schools other than those dictated by doctrine. Nor do the exceptions to the anti-discrimination laws, as currently drafted, provide any mechanism to consider the non-discrimination right that is overridden, whether it be a right of a student, a staff member or another person. There is no opportunity to consider the importance and impact of both the religious freedom interest and any non-discrimination claim and to see whether it is possible to reach a reconciliation of the two rather than resolving the conflict by giving one right absolute priority over the other. It may be necessary in the future to consider whether a more nuanced and contextual approach to balancing these competing claims is necessary or helpful.

Any changes to the exceptions in the anti-discrimination laws that narrowed or restructured the exceptions would be likely to have a greater impact on some

¹⁵³ The differences between religious denominations were evident in the submissions made to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria (see the final report in above n 7), in relation to whether there was a need for any amendments to the exceptions relating to religious schools. The Uniting Church, for example, supported some narrowing of the religious exceptions: Uniting Church in Australia Synod of Victoria and Tasmania, Submission No 5 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, April 2008. Many other denominations were opposed to any narrowing of the existing exceptions: see the various views expressed in Catholic Church of Victoria, Submission No 663 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, 8 July 2009, 2; Australian Christian Lobby, Submission No 136 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009, 1. See also the submissions of the Australian Association of Christian Schools, Christian Schools Australia and Seventh-Day Adventist Schools (Victoria) Ltd, which are available on request from the Department of Justice: Department of Justice, *List of Submissions to the Exceptions Review* (2009) <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/your+rights/equal+opportunity/justice+-+equal+opportunity+-+list+of+submissions+to+the+exceptions+review>>.

schools than others. Schools with more flexible employment and admissions policies may find that they would not have to change those policies significantly. As long as they can continue to require students to engage in religious education and religious practices, then many schools that currently give a preference to co-religionist students and staff may find that any changes would make little difference in practice in the make-up of their students and staff, particularly if they are able to reserve a limited number of positions as requiring a co-religionist (for example, the chaplain and religious education teachers) as a genuine occupational requirement. While the legal environment in which they work may be altered, the reality on the ground may be little changed.

However, the relatively small number of schools that take a very restrictive view of who should be employed and/or which children can be educated at the school are likely to face more significant challenges if the exceptions in anti-discrimination laws were changed to restrict their capacity to preference coreligionists and those who adhere to the religion's teaching on matters of sexuality. They would perceive laws that limit their capacity to make such choices as radically undermining their capacity to create a community of religious belief in the school and to transmit their values to their children. Some churches have suggested that this would be a sufficiently serious attack on their religious freedom that they would refuse to comply with the laws.¹⁵⁴ It is also clear that some schools effectively find ways around current anti-discrimination laws by employing informal policies and practices, for example, not expressing a preference for Christians in an employment advertisement but only hiring those who are Christians, or persuading teachers who have left the religion to voluntarily leave employment. Reliance on such informal strategies for avoiding the reach of anti-discrimination law might well increase if the laws were to become more restrictive.

The question of the extent to which religious schools should be permitted exceptions from the general anti-discrimination law is a complex one. It requires consideration of whether, and for what reasons, religious schools are valuable in Australia and the extent to which the principle of non-discrimination should be valued. While the views outlined in this article tell only part of the story about why religious schools might value the right to make choices that do not conform to anti-discrimination laws, they provide a window into the world of actual practices, and a useful illustration of the complexity of the debate and the importance of understanding a variety of viewpoints.

¹⁵⁴ See, eg, Presbyterian Church of Victoria, Submission No 748 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, 17 July 2009, 4, which noted that changes to reduce the religious exceptions 'are strongly opposed as a matter of faith, human rights and the common law. If the changes are made, the Church will consider using all means at its disposal to challenge them, including legal challenge and engaging in civil disobedience based on religious conscience.'