The Position of Religious Schools under International Human Rights Law

Adjunct Associate Professor at the University of Notre Dame, School of Law, Sydney

Adjunct Associate Professor in the Law School, the University of New England

Contents

Introduction

1. This note considers the international human rights law concerning the employment of persons by religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of an 'inherent requirements' to employees within religious schools appropriately gives effect to the requirements of international law. The first Part of this note observes that that law is found in two primary protections: the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians, and the protection against discrimination. The second Part of this note illustrates the domestic implications of these regimes by considering the human rights rationales offered by the Governmental proponents of two separate laws, the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021* and the proposed *Commonwealth Religious Discrimination Bill 2021*. While the Victorian Bill is found to be an inadequate implementation of the relevant human rights law, the analysis concludes by proposing a model that more ably acquits the requirements of international law.

Context

2. Australian discrimination law is a complex interaction of prohibition and exemption, operating within differing, but interacting, overlays of Commonwealth and State law. All Australian jurisdictions provide exemptions in variant forms to religious educational institutions in both the areas of employment[1] and in respect of the supply of services to students (although only the former is the focus of this note).[2] The recently convened Commonwealth Expert Panel on Religious Freedom, having had the benefit of a wide consultation with academics, peak bodies and community groups and having received 15,620 submissions, provides a suitable framing of the issues considered in this note. In their report the Expert Panel emphasized 'the pivotal role of exceptions to discrimination laws in the protection of freedom of religion', flowing from to the 'absence of any specific and comprehensive law dealing with freedom of religion'.[3] The 2018 comments of the Expert Panel remain relevant 'The lack of case law in the area, as well as the fact that jurisdictions balance the rights in different ways, makes it unclear how narrowly or extensively these exceptions may apply.'[4] As set out in the first Part of this note, these provisions give effect to the internationally recognised human rights of religious freedom and associational freedom. In the context of religious schooling, the framework of those rights has been primarily considered within matters that concern the ability of a private school to define its religious ethos through its employment policies.

3. The Panel described the contribution of faith-based schools to diversity within Australia in the following terms:

> The Panel noted the wide variety of faith-based schools in Australia and the communities in which they operate. The Panel considered there is value in this variety, as it supports parental rights to select the best education for their individual child. While many faith-based schools choose not to rely on the existing exceptions in legislation to discriminate against staff on the basis of protected attributes, others consider that the

[1] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Equal Opportunity Act 2010* (Vic) s 83A; *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1); *Anti-Discrimination Act 1991* (Qld) s 25.

[2] *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 1984* (SA) s 35(2b); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3); *Anti-Discrimination Act 1991* (Qld) s 41(a).

[3] Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018) [1.418].

[4] Ibid 61-2 [1.241].

> freedom to select, and to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs.[5]

The Panel linked the ongoing presence of this diversity to the ability of faith-based schools to exercise discretion in their hiring practices, [6] recording the views of:

> a number of religious schools that argued that spiritual education is not just about teaching content in classes, but also the formation of a community or environment that supports the teachings of their faith. A key theme in these discussions was the need for staff to model the religious and moral convictions of the community and to uphold, or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is 'caught not taught'.[7]

4. The Panel recognised that 'For some religious schools … the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.'[8] The Panel noted that

> For many religious groups, the key issue is that parents have the choice whether to raise their children in accordance with their own religious beliefs … Some religious schools attributed their success to the ability of the school to create a community that accords with the values and beliefs of their faith. They argued that the ability of the school to foster a community that accords with the values and beliefs of their faith was critical to the achievement of their religious purpose and was the reason for their existence in the first place.[9]

As we will see, whether religious schools can require that all employees share the stated beliefs of the school, relying on the notion that faith is 'caught not taught', lies at the very heart of recent contention over legislative reforms concerning religious schools. These assertions by religious schools introduce the context underpinning the key consideration of this note: are such practices by religious schools in accordance with the relevant international human rights law?

Part I – International Human Rights Law

United Nations Jurisprudence

5. The right to establish private schools is protected by international human rights law that Australia has ratified. The starting place for the consideration of the rights of religious schools is the protection to the right to manifest religion contained Article 18 of the *International Covenant on Civil and Political Rights 1966* (ICCPR).[10] The *United Nations Universal Declaration of Human Rights* (UNDHR),[11] the *International Covenant on Economic, Social*

[5] Ibid 62 [1.245].
[6] Ibid 62 [1.246].
[7] Ibid 56 [1.210].
[8] Ibid 56 [1.212].
[9] Ibid 57 [1.218]-[1.219].
[10] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('*ICCPR*').
[11] UN General Assembly, *Universal Declaration of Human Rights*, General Assembly resolution 217A(III), (10 December 1948) ('*Universal Declaration of Human Rights*').

and Cultural Rights (ICESCR)[12] and the *Convention on the Rights of the Child*[13] (CRC) also provide relevant protections to children and their parents.

6. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights states:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(4) provides a guarantee that individuals and bodies may establish private educational institutions:

> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *United Nations Universal Declaration of Human Rights* (UDHR) simply protects the prior right of parents to choose the kind of education that shall be given to their children.[14]

7. Article 18 of the ICCPR states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to found religious schools is protected under each of the above sub-articles. As the Expert Panel recognised: 'A key aspect of the right to manifest one's belief in article 18(1) of the ICCPR is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion.'[15] As Taylor further notes, Article 18(4) right protects the freedom to establish independent religious schools: 'Private religious schools may be seen as a means of supporting the religious and moral education of children in conformity with parental convictions.'[16] In his commentary on the ICCPR Nowak concludes that '[w]ith respect to the express rule in Art.13(3) of the *International Covenant on Economic, Social and Cultural*

[12] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
[13] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990) ('*CRC*').
[14] UN General Assembly, (n 11).
[15] Expert Panel on Religious Freedom (n 3) 59 [1.225].
[16] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.

Rights and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[17]

8. In *Delgado Páez v Colombia* the United Nations Human Rights Committee (UNHRC) considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment by his employer due to his advocacy of 'liberation theology'. The UNHRC stated:

> With respect to Article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.[18]

Similarly, the UNHRC found no breach of Article 19, concerning the right to freedom of expression by the employee. The Committee's view reflects the assertion that the ICCPR is to be interpreted according to the important principle that religious schools are free to exercise control over the staff that teach religion and the means by which that religion is taught.

9. Furthermore, the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* provides that the right to freedom of thought, conscience, religion or belief under Article 18 of the ICCPR includes the freedom, 'to establish and maintain appropriate charitable or humanitarian institutions'.[19] The Religious Declaration has been relied upon by the UNHRC when interpreting the substantive content of the rights protected by Article 18.[20] The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers. This instrument was declared 'an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986*' by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993, thus enabling the making of a complaint alleging a breach of these principles to the Australian Human Rights Commission.

10. The *Convention on the Rights of the Child*, also ratified by Australia, requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents …'.[21] The right of the child to 'freedom of thought, conscience and religion' is explicitly protected in Article 14 of the Convention.[22] Further, it requires States to respect the 'rights and duties of parents … to provide direction to the child in the exercise of his or her right.'[23] This also includes in the substantive content of education the development of respect for the child's parents, and the child's own cultural identity, language, and values.[24]

---

[17] Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR Commentary* (N.P. Engel, 2nd rev ed ed, 2005) 443.
[18] *William Eduardo Delgado Páez v Colombia* Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990), [5.7] ('*Delgado Páez*').
[19] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, (25 November 1981) art 6 ('*Religious Declaration*').
[20] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005).
[21] *CRC* (n 13).
[22] Ibid art 14(1).
[23] Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'
[24] Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 243.

United Nations Special Rapporteur on freedom of religion or belief

11. In 2010 former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt concluded that 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.[25] He offered the following comments in relation to the community aspect of religious freedom and the right to determine appointments:

> Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.[26]

12. The Special Rapporteur has also emphasised that these principles apply to religious schools, noting that limitations on the ability to incorporate private religious schools:

> may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions – a right explicitly enshrined in international human rights law as an integral part of freedom of religion or belief.[27]

13. The Special Rapporteur has emphasized the foundational importance of the ability of religious bodies to determine the appointment of their representatives, which

> For religious minorities … can even become a matter of their long-term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace, much depends on the details of each specific case.[28]

Accordingly, the UNHRC has taken the approach that where the manifestation of religion (including the expression of a religious opinion or belief) has an adverse effect on the rights or freedoms of others, those rights must be subject to a careful balancing against each other.[29] The

---

[25] Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010) [54] ('*Report of the Special Rapporteur on freedom of religion or belief*').
[26] Heiner Bielefeldt, *Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013) [57] ('*Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*').
[27] Heiner Bielefeldt, *UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/19/60 (22 December 2011) [47] ('*UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief*').
[28] Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014) [41] ('*Interim report of the Special Rapporteur on freedom of religion or belief*').
[29] See, for example, *Ross v Canada* United Nations Human Rights Committee Communication No. 736/1997 (2000), [11.5]–[11.8].

exercise of control by religious schools over the appointment of staff entails competing rights. Chief among these is the right to equality of the staff member in question under Article 26 (further considered below), and the right to maintain a religious school, as an effectuation of the rights granted to individuals under Article 18. Other rights that may be enlivened include the right to privacy, the right to family life and the rights to work and education, where the actions of a religious school would deprive persons of employment opportunities. As the current Special Rapporteur has noted, in such cases 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.[30] However, while regard to 'the details of each specific case'[31] is required in determinations of whether the conduct of religious institutions constitutes a permissible limitation on the rights of others, as we will see, much turns on the precise means adopted within domestic law by which those specific circumstances are incorporated.

14. The compliance of domestic legislation within the international law that Australia has ratified has more than symbolic importance. As Australia has ratified the ICCPR and is also bound by the First Optional Protocol individuals may make complaints to the UNHRC that Australian legislation does not align with the protections offered by the ICCPR. As Article 50 of the ICCPR clarifies that the provisions of the Covenant apply in all parts of a federation 'without any limitations or exceptions', the legislation against which a complaint may be made includes legislation enacted by Australian States and Territories.[32] As Debaljak notes (in respect of the Victorian *Charter of Human Rights and Responsibilities 2006*), 'where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia's international human rights obligations.'[33]

European Court of Human Rights

15. The European Court of Human Rights (ECtHR) provides the most developed body of applied human rights law at an international level. However, important distinctions between the jurisprudence of the ECtHR and that developed under the ICCPR should not be overlooked. The UNHRC has specifically eschewed the jurisprudence of the ECtHR in several respects, and in some cases has imposed more stringent protections for religious manifestation.[34] Chief among these distinctions is the UNHRC's eschewal of the margin of appreciation doctrine.[35]

---

[30] Ahmed Shaheed, *UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/37/49 (28 February 2018) [47] ('*UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief*'). See also Asma Jahangir, *UN Economic and Social Council, Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2006/5 (2006) [51]–[52] ('*UN Economic and Social Council, Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*').: 'contentious situations should be evaluated on a case-by-case basis' and 'the competing human rights and public interests put forward in national and international forums need to be borne in mind'.

[31] Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (n 28).

[32] *ICCPR* (n 10) art 50; *Human Rights Committee, Decision: Communication No. 488/1992, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('Toonen v Australia')* ('*Human Rights Committee, Decision: Communication No. 488/1992, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('Toonen v Australia')*').<ST>

[33] Julie Debeljak, 'Balancing Rights in a Democracy : the Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422.

[34] See for example *Bikramjit Singh v France*, CCPR/C/106/D/1852/2008, (1 November 2012) [8.6] ('*Bikramjit Singh v France*'). cf *Ranjit Singh v France (dec.)* no 27561/08, 30 June 2009.

[35] *Länsman v Finland*, CCPR/C/52/D/511/1992, (26 October 1994) [7.13] [9.4] ('*Länsman v Finland*'); *Bikramjit Singh v France*, (n 35).

As Taylor shows, the UNHRC has also been less willing to adopt the 'progressive' conception of its chief enabling treaty as a 'living instrument' than has the ECtHR.[36]

Religious Institutional Autonomy

16. At a broad philosophical level, the European Court of Human Rights summarised its view of the correlation between religious institutional autonomy and plural democratic society in *Hasan v Bulgaria*:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[37]

In respect of members' rights, in *Sindicatul "Păstorul Cel Bun" v Romania*[38] the Grand Chamber of the ECtHR stated that:

> In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones … in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community.[39]

In that matter the formation of a Romanian Orthodox priest's trade union without the consent of the Bishop was held to not breach Article 11 (right to freedom of association and to form unions), as it was not the role of the State to interfere in the internal governance of dissidents by religious institutions:

> it is the domestic courts' task to ensure that both freedom of association and the autonomy of religious communities can be observed within such communities in accordance with the applicable law, including the Convention. Where interferences with the right to freedom of association are concerned, it follows from Article 9 of the Convention that religious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and that this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' trade-union rights compatible with the requirements of Article 11 of the Convention. It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. The national courts must ensure that these conditions are satisfied, by conducting an in-depth

[36] Taylor (n 16) 19.

[37] *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000, ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* Second Section, no 38178/97 Eur Court HR ('*Serif v Greece*').

[38] *Sindicatul "Păstorul Cel Bun" v Romania* (2014) 58 EHRR 284, 319 [137] (citations omitted) ('*Sindicatul "Păstorul Cel Bun" v Romania*').

[39] Ibid 324 [165].

> examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.[40]

17. As illustrated by the following array of decisions, the Court has developed the application of these broad principles to a range of faith-based institutions. In *Rommelfanger v Germany*[41] a faith-based hospital was permitted to sanction staff that made public statements on abortion contrary to its beliefs. In *Siebenhaar v Germany*[42] a day-care centre run by the German Protestant church could act lawfully in dismissing a member of a differing religious body in order to maintain the credibility of the church in the eyes of the general public and parents and to avoid the risk that children would be influenced. In *Obst v Germany*[43] the dismissal of the European Director of Public Relations of the Church of Latter-Day Saints for entering into an extramarital relationship was upheld as a legitimate expression of religious institutional autonomy in light of the public position assumed by the role. In *Fernández Martínez v Spain*[44] the Court held that a Catholic scripture teacher in public schools can be required to live a life consistent with the teachings of the Church, demonstrating a sufficiently close proximity between the role and the requirements of the faith. In so doing the Court recognised the important link between authentic modelling of a religious conviction and employment within religious schools:

> > it is not unreasonable for a Church or religious community to expect particular loyalty of religious-education teachers in so far as they may be regarded as its representatives. The existence of a discrepancy between the ideas that have to be taught and the teacher's personal beliefs may raise an issue of credibility if the teacher actively and publicly campaigns against the ideas in question.[45]

18. In eschewing the distinction between secular and religious roles when determining whether an employee may be subject to a heightened degree of loyalty,[46] the Court has conducted a proportionality analysis that has regard to a range of factors. In some cases this has included the specific roles assigned to an employee. However in the overwhelming number of instances a wider range of factors than this limited consideration have proven to be determinative. Various of these factors have not proven to be a feature of the United Nations jurisprudence. A further developed account of the ECtHR jurisprudence is provided in Part II, where its application to reforms within Australian law is detailed.

Right to Establish Private Religious Institutions

19. The right corresponding to Article 18(4) of the ICCPR is contained within Article 2 of the First Protocol to the *European Convention on Human Rights* (ECHR):

> > No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The seminal ECtHR judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark (Kjeldsen)*[47] concerned the right of parents to remove children from sex education. Therein the

---

[40] Ibid.
[41] *Rommelfanger v Germany* (1989) ECHR 27 ('*Rommelfanger v Germany*').
[42] *Siebenhaar v Germany* European Court of Human Rights Application no 18136/02 ('*Siebenhaar v Germany*').
[43] *Obst v Germany* (2010) ECtHR, App. No. 425/03 ('*Obst v Germany*').
[44] *Fernández Martínez v Spain* (2014) European Court of Human Rights, Grand Chamber, no 56030/07 ('*Fernández Martínez v Spain*').
[45] Ibid [137].
[46] Ibid.
[47] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 ('*Kjeldsen*').

European Court of Human Rights held that Article 2 aims at securing pluralism across the education sector:

> The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the 'democratic society' as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[48]

As noted by Rivers '[t]he two sentences of the article are connected, in that parents have the prior duty to ensure that children receive an education, and the right to determine what that education shall be. State provision is only legitimate if it respects this prior parental responsibility.'[49] The Court held:

> The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education … It is in the discharge of a natural duty towards their children - parents being primarily responsible for the 'education and teaching' of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.[50]

20. The Court also noted the important role private schools play in offering an opportunity for parents to excuse their children from sex education that does not align with their religious or philosophical convictions:

> the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.[51]

Thus, Article 2 will be breached where a state's education system fails to make reasonable provision for parental convictions across the entire education system. The presence of alternative private religious schools was held to be a critical component of a state's ability to satisfy this requirement.

21. In *Ingrid Jordebo Foundation of Christian Schools v Sweden*[52] the European Commission on Human Rights applied the principles set out in *Kjeldsen* to the context of independent schools. Therein the Commission considered that Article 2 of the First Protocol guaranteed the right to start and run religious educational institutions as a 'corner-stone' protection to individual freedom.[53] The Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the European Convention on Human Rights] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that it should be possible at a private school to give certain topics a more, and others a less, prominent position than that given in

[48] Ibid [21]. Also affirmed in *Folgero and Others v Norway* European Court of Human Rights, Grand Chamber, Application No 15472/02, [84(b)] ('*Folgero*').
[49] Rivers (n 24) 245, commenting upon the decision of *Kjeldsen* (n 47).
[50] *Kjeldsen* (n 47) [22].
[51] Ibid [24].
[52] *Ingrid Jordebo Foundation of Christian Schools v Sweden European Commission of Human Rights, Application No 11533/85 ('Ingrid Jordebo').*
[53] Klaus Beiter, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).

> public schools and that the activity in a private school should be allowed 'within very wide ranges to bear the stamp of different views and values'.[54]

In light of these principles the Commission criticised the Swedish Government, which:

> seem[ed] to regard the right to keep a school as something entirely within 'le fait du Prince' [permissible acts of government]. But this is clearly different from the mainstream in the countries of the High Contracting Parties, necessitating an autonomous way of judgment… The Government seem to look at schooling the same way as at military service, where of course no competing 'private regiments' could be tolerated.[55]

Such foundational democratic principles necessitate close scrutiny of any legislative proposals that may impact upon the ability of private education associations to maintain their distinct religious ethos.

22. In a lengthy analysis worth setting out in full the Commission was critical of the unitary nature of the Swedish schooling system, linking diversity in private schooling to a flourishing democratic State:

> The applicants' school was founded with the aim of preserving the tradition of the Christian school in Sweden before the secularisation of the municipal schools. There is thus nothing odd or strange in these general ideas, although this kind of school no longer fits in the general system of a secularised school and State. Thus, in the applicants' school, the teaching of religion, although ecumenical and not pertaining to any particular Christian sect or movement, is confessional and founded on Christian belief. There are morning prayers and prayers before and after meals, such as was common in all schools 30 years ago…
>
> The State has the right to have the applicants' school inspected, but the judgment over the school and its quality should be made in an independent way, avoiding all harassment, by inspectors free of bias. The school has not been treated in such a way, and Mrs Jordebo's right, as a parent, has thereby been violated, as also by decisions of the instances which are bound to be biased by their coupling to the State and the municipal school system…
>
> Finally, as general information the following is mentioned. Sweden is nearly unique among countries belonging to the Council of Europe as far as the school policy is concerned. In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country. For this reason private schools, although formally allowed, are in practice stopped with all means. The children should be kept within the State-municipal public schools in order to prevent any other influence on the education than such as has been accepted by the political majority. A formal decision has been made that not more than 0.3 % of the children of compulsory school age may be allowed to visit private schools, three out of 1000 children. The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament. When this majority has decided that the public education should be non-confessional, it means that this majority can allow only three children out of 1000 to have a confessional education. To maintain a democratic outlook, private schools cannot be totally forbidden but instead economic rules have been adopted to stop

[54] *Ingrid Jordebo* (n 52).
[55] Ibid.

> private schools in Sweden in reality. These measures are very efficient. The Anna school has, in spite of all these difficulties of a financial kind, been successful and created an alternative in Jönköping. Then other ways have been used in order to stop its development. In this respect it is easy to say that the education offered at the Anna school is not good enough. In the applicants' opinion the education offered to the children was good enough for reasons which it is not necessary to explain here.[56]

Legislative reforms that fail to afford religious education associations the ability to maintain their ethos through restrictions on their ability to employ persons who share their beliefs require strict scrutiny to ensure they do not evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament'.[57]

23. Having emphasised the need for a non-biased approach to religious schooling and the importance of private schooling in ensuring civil society freedoms, the Commission concluded:

> The question which arises is whether Article 2 of Protocol No. 1 (P1-2) could be interpreted as granting a right to start and run a private school, and whether, when a private school is as such approved, the school should have a right to run classes at all stages of the compulsory school … The Commission considers that it follows from the judgment of the European Court of Human Rights in the Case of Kjeldsen, Busk Madsen and Pedersen that Article 2 of Protocol No. 1 (P1-2) guarantees the right to start and run a private school.[58]

The 'free-standing right, regardless of State provision, to establish and run private schools, including faith-based schools, subject to State oversight and conformity to minimum standards' was subsequently affirmed by the Commission in *Verein Gemeinsam Lernen v Austria*.[59] It is also worth noting that in that decision the Commission also confirmed that private schools have a right based on article 14 in the context of article 2 First Protocol to non-discriminatory conditions of existence, including equal access to State funding for schools of their type.[60] Similarly, in *Waldman v Canada*,[61] the United Nations Human Rights Committee held that the differential treatment granted by Ontario to Roman Catholic religious schools, which were publicly funded, as opposed to schools of other religions, which were not, amounted to discrimination. The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26.

24. In summary, the above rulings, fashioned as extensions of foundational philosophical conceptions as to the nature of democratic society, would support the offering of strong protections for faith-based schools in respect of their employment decisions. As the application of these principles to domestic legislation in Part II considers, failure to do so may jeopardise the ability of religious schools to control their leadership, staff and volunteers, and thus the ability of religious schools to offer students a holistic religious education in accordance with the applicable religious convictions. It is therefore important that both State and Commonwealth law within Australia preserve the right to establish independent schools, a right protected in human rights law as a fundamental to the preservation of pluralistic democracy. Such protections preserve the legitimate expression of the rights of children. They also enshrine the rights of their parents to ensure the religious and moral education of their children,

---

[56] Ibid.
[57] Ibid.
[58] Ibid (citations omitted). Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[59] *Verein Gemeinsam Lernen v Austria* (1995) 20 EHRR CD 78.
[60] Rivers (n 24) 248.
[61] *Waldman v Canada*, Communication No 694/1996, UN Doc CCPR/C/67/D/694/1996 (1999) (5 November 1999) [10.5] – [10.6] ('*Waldman v Canada*').

preserving the ability of parents to choose a school consistent with their ethical and religious values.

25. In light of the above analysis, a failure to allow proper recognition to the discretion of religious schools over leadership and staff could jeopardise their unique religious identity and ethos. Such would be a proposal to breach what the European Commission on Human Rights has termed the 'guaranteed … right to think freely'; the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society. Under both the ICCPR and the ECHR, regard must be had to the specific circumstances of each case in balancing the rights of individuals to freedom from discrimination, and the rights of religious individuals to form collective institutions, and the associated parental right. However, as will be seen in Part II, the precise means adopted to incorporate the specific circumstances can have a significant impact on the ability of schools to maintain their unique ethos.

What is Enfolded within the Right to Equality?

26. Where a faith-based school receives a complaint of discrimination by a staff member, that complaint gives effect to the rights enshrined at Article 26, the protection to the equality of individuals. However, if Article 18 is to be upheld, Australian anti-discrimination laws that give effect to Article 26, like all other domestic laws, must not pose an unjustified restriction on the freedom afforded by Article 18, measured by all the principles which attach to State reliance on limitation provisions.[62] Any restrictions imposed on religious schools by anti-discrimination laws require full justification according to the principles for limitations enshrined within Article 18. The primary focus for religious schools is thus the freedom of religion or belief, to which the limitation criteria of Article 18 apply. The appropriate limitations upon this right within the context of domestic anti-discrimination legislation are considered further below at Part II.

27. In respect of Article 26, close consideration of the bounds of that protection is also required. The breadth of the right to equality under international law is often misunderstood. Principles of non-discrimination are relevant to the question of the protections to religious schools as they determine whether Australian anti-discrimination laws go too far in preventing acts as discrimination that are not discrimination according to international law, for example by adopting blanket prohibitions without adequate exceptions.[63]

28. While most of the attention given to religious freedom is directed to the permissible grounds for limitation of that freedom under Article 18, the central focus for the right to equality under Article 2 is a threshold one, requiring attention to the conditions in which the right will be enlivened. This is because international law recognises that the protection to equality will not apply to all acts of 'differentiation'. Equality is thus not a right that can be assumed to immediately apply to all distinctions. Indeed, there may be legitimate forms of distinction that will not give rise to a breach of the right to equality. It is, for example, not contentious that the equality right will not be relevant where a comparison is being made between matters that are not alike in substance. It is the nature of the criteria that are being compared that will determine whether questions of equality can arise. This principle applies to the right to equality on the basis of religious belief and activity, as it does to other protected attributes.

29. These notions are reflected in the applicable human rights law. The United Nations Human Rights Committee's General Comment 18 on Article 26 provides:

> The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[64]

[62] Taylor (n 16).
[63] Expert Panel on Religious Freedom (n 3).
[64] *Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, (10 November 1989)*.

This statement is not qualified by 'necessity' (as is the right to religious freedom under Article 18(3)), nor does it require that the purported differentiation is the most appropriate means of achieving the purpose. Rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria. This test accords with common experience – individuals and organisations discriminate between differing substances through a multitude of means each day – the preference to purchase Thai over Vietnamese for dinner, the awarding of dux to the person who has earned it by merit, the awarding of first place to the person who completes the race before other competitors. These distinctions are reasonable and objective, and are not regarded as unlawful discrimination. The principle was also reflected in the UNHRC View *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka, Communication* in the following terms:

> the notion of equality before the law requires similarly situated individuals to be afforded the same process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation.[65]

The same approach has been adopted by the ECtHR, for example in *Thlimmenos v Greece, where* the Grand Chamber held:

> the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[66]

30. The determination as to what comprises comparable substances will therefore be highly consequential in determining what is reasonably and objectively protected within the fold of the human right of equality. What it protects is defined by matters that are alike in the relevant criterion. Thus a degree of likeness must be established in order to assert that equality is required, or conversely to assert that inequality has arisen. These are not novel notions. In *The Politics* Aristotle writes:

> they admit that justice is a thing and has a relation to persons, and that equals ought to have equality. But there remains a question: equality or inequality of what?[67] …
> those who are equal in one thing ought not be to have an equal share in all, nor those who are unequal in one thing to have an unequal share in all.[68]

As noted by Finnis, Aristotle goes on to claim that 'it is a characteristic perversion of democracy to hold that because all persons are equal in some respects, all persons should be considered equal in all respects'.[69] He cites 'a key sentence in the page of Plato's Laws which anticipates much in Aristotle's and Hart's discussions of justice and equality: 'indiscriminate equality for all amounts to inequality [inequity], and both fill a state with quarrels between its citizens'.[70]

---

[65] *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005). See also *Althammer v Austria UN Human Rights Committee Communication No 998/01 (2003), [10.2] ('Althammer v Austria').*

[66] *Thlimmenos v Greece* European Court of Human Rights, Grand Chamber, Application no 34369/97 6 April 2000, [44] (citations omitted).; see also *Schalk and Kopf v Austria* (2010) First Section, no 30141/04 Eur Court HR. <.>

[67] Aristotle, 'The Politics' in Robert Maynard Hutchins (ed), *Great Books of the Western World*, tr Benjamin Jowett (Encyclopaedia Brittanica, 1952) vol II, 1282b20-23, 480.

[68] Ibid.

[69] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 461; John Finnis, 'Equality and Differences' (2012) 2(1) *Solidarity*.

[70] Finnis (n 69) (*Natural Law and Natural Rights*).

31. Professor Herbert Hart concludes his analysis of Plato and Aristotle and the tradition of thought about justice with this statement:

> the general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality… Hence [the] leading precept [of justice] … is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'… though … [this] is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinative guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant. Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.[71]

32. How are these principles relevant to the religious freedom protections provided to 'religious bodies' within domestic anti-discrimination law? The right to be free from discrimination under Article 26, as determined according to its unique bespoke tests, operates alongside the freedom of religious institutions protected under Article 18, the bounds of which freedom is determined according to the principles of limitation enunciated at subarticle 18(3). The coherence between Article 18 and 26 is understood within the terms of General Comment 18: conduct by a religious institution is not 'discrimination' because it effects a purpose that is 'legitimate' under the ICCPR.[72] These principles are reflected within the United Nations Human Rights Committee View in *William Eduardo Delgado Páez v Colombia.*[73] In that matter the Committee found that the selection of teachers that conform with the teachings of the Catholic church by that church does not infringe on Article 18, and further, does not amount to discrimination, not disclosing a 'violation of article 26'. These principles disclose the internal coherence between Article 18 and Article 26 within the ICCPR.

33. In this respect it is notable that in what would be a first for Australian law, clause 7 of the *Religious Discrimination Bill 2021* declares that the legitimate exercise of religious freedom by religious institutions 'is not discrimination'. Existing law that characterises religious freedom as an 'exemption' from a more fundamental standard of equality does not reflect this international law principle. This principle underpins the recognition of the 'the indivisibility and universality of human rights, and their equal status in international law' that is proposed to be introduced into the objects of the various Commonwealth anti-discrimination statutes pursuant to the *Human Rights Legislation Amendment Bill 2021* (Cth). Such is consistent with the recommendation of the Expert Panel that 'Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.'[74]

34. This analysis belies the uncritiqued, but almost uniformly echoed, assertion that religious institutions are provided with a 'right to discriminate'. A recent example of such thinking is found in the Second Reading Speech for the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021*. Therein Minister Natalie Hutchins stated the view asserted within consultations by certain 'faith leaders, as with many ordinary people of faith, [that] the law should not give credence to any suggestion that their religion endorses discrimination. For

[71] Herbert Hart, *The Concept of Law* (Oxford University Press, 2012) 159.
[72] *Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, (10 November 1989)*.
[73] *Delgado Páez* (n 18).
[74] Expert Panel on Religious Freedom (n 3).

them, religious bodies should operate by the same rules as everyone else.'[75] The untested assumption behind this statement, the notion that a religious body is 'discriminating' when it selects its staff, is not logically limited to parachurch entities, or administrative staff. It extends also to the training and appointment of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order. This is why the recognition that the actions of religious institutions do not constitute discrimination, forming the legitimate exercise of a right under the Covenant, is so central to the protection of religious freedom within an open society.

35. As Aroney has argued the proposition that 'any individual can decide whether he or she qualifies for membership of an organisation' is a '*reductio ad absurdum*' simply because, if given effect 'no organisation will be able to maintain its distinctive identity.'[76] Associations as distinct entities giving expression to the diversity within our community will not exist if the appointment of their members and representatives is 'discrimination'. Hutchins' assertion that 'Equality is not negotiable in Victoria'[77] thus begs the question, 'by what definition of equality?' The language of 'exemptions' contains some beguiling and at times untested philosophical presumptions. We do not say, for instance, that the right of the press to free speech is an 'exemption' from majoritarian imposed control. Similarly, we do not say the citizen's freedom to associate around common interests is an 'exemption' granted by the state from compelled forms of association. Such laden terminology characterises religious freedom as a secondary right. As such, clause 7 of the *Religious Discrimination Bill* is correct when it states that a religious body 'does not discriminate' when it exercises rights as outlined therein.

Part II – Domestic Application

Victorian Equal Opportunity Amendment Religious Exceptions Bill 2021

36. Having outlined the general principles applying to both the right to freedom of religion or belief and also the right to freedom from discrimination, this note now considers the requirements for domestic legislation imposed by international law through two further case studies. The first is the enacted Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021*, (the Victorian Bill). The second is the proposed, but yet to be enacted, Commonwealth *Religious Discrimination Bill 2021* (the RDB).

37. The enactment of the Victorian Bill limited the 'exemptions' available to religious institutions and schools found within the Victorian *Equal Opportunity Act 2010* (the Victorian Act). As the Statement of Compatibility (SoC) provided with the Bill sets out:

> The Bill promotes the right to equality by amending the religious exceptions in the EO Act to remove the ability for religious bodies and educational institutions to discriminate on the basis of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment, education and the provision of goods and services.[78]

Under section 83A of the resultant amended EOA a religious school can only 'discriminate' if an employee has an inconsistent 'religious belief', or engages in an inconsistent religious 'activity'. To the extent that the Bill permits religious institutions and religious educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

---

[75] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.
[76] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 184.
[77] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4377.
[78] Ibid 4368.

> conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[79]

As the SoC argues 'This replaces the current blanket exception with an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary.'[80] The SoC further clarifies that

> The Bill narrows the test for discrimination on the basis of religious belief or activity, to ensure that this limitation does not extend further than is reasonably necessary to protect the right to freedom of religion. The test ensures that the interests of the individual and rights of the religious organisation or educational institution are both considered. This flexibility ensures that that test is the least restrictive means to achieve the purpose of protecting the right to privacy.[81]

38. These claims have significant impact for religious schools in Victoria. They rely on a particular interpretation of international human rights law in three key respects. First, that non-religious activity can be irrelevant to the suitability of an employee of a religious institution under that law. Second, that an 'inherent requirements test' is consistent with that law. And third, that the test of 'reasonableness' also meets the requirements of that law. The following discussion considers the accuracy of these claims. For all three contentions the Statement of Compatibility that accompanies the Bill fails to provide one citation expressing reliance on the judgements of international human rights bodies for its interpretation.

The Relevance of an Employee's Inconsistent, but Non-Religious Conduct

39. The Victorian Bill sparked significant concerns for religious institutions. One of the primary concerns was associated with the propensity of a person's non-religious conduct to be inconsistent with the teachings of a religious institution. While the SoC states that it preserves the ability of faith communities to 'exclude individuals who do not share their faith', it also states that it

> promotes the right to privacy by removing the ability of religious organisations and schools to discriminate on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment. Teachers and other employees at religious organisations and educational institutions should not need to hide their identity in order to avoid risking their livelihoods.[82]

Prima facie, these statements could appear to be in tension. What guiding principles are we provided with that could reconcile these competing demands? The SoC states the clear intention to allow some ongoing form of discretion to schools when it states that the Bill

> limits the right to equality by allowing religious organisations and educational institutions to continue to discriminate against individuals on the basis of a religious belief or activity (a protected attribute under the EO Act) in employment, education and the provision of government-funded goods and services. The purpose of this limitation is to protect the ability of religious organisations and educational institutions to demonstrate their religion or belief as part of a faith community, and exclude individuals who do not share their faith. The formation of religious schools and

[79] Ibid 4369, see also 4370.
[80] Ibid 4369.
[81] Ibid.
[82] Ibid.

> organisations is an important part of an individual's right to enjoy freedom of religion with other members of their community.[83]

40. The presenting questions are perhaps best illustrated by example. In her Second Reading Speech Hutchins stated:

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee only on the basis that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body.[84]

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.[85]

In calling into question the extent to which private conduct of a non-religious nature is relevant to the determination of an employee's suitability, the resulting interaction between non-religious 'activity' and religious 'belief' introduced into Victorian law has the potential to cause significant uncertainty. Schools and their employees will now need to consider the extent to which belief can be informed by action that is not 'inherently' religious, but which nonetheless is inconsistent with religious belief.

41. The judgement of the ECtHR in *Obst v Germany*[86] raises serious questions for the compliance of this aspect of the Bill with international human rights law. That matter concerned the Director for Europe at the public relations Department of the Mormon Church. It came to the Church's attention that he had engaged in an extramarital affair. No question was raised of any activity or views that would fall within the definition of 'religious belief or activity' under the *Equal Opportunity Act*. The private activity of the employee, which would (absent an exemption) fall within the protected attribute of 'lawful sexual activity' under the EOA, was not a 'religious activity'. The Court held that the Church was justified in dismissing him, on the ground that to do so was vital for its credibility.[87] The private nature of the conduct was not a decisive factor, as the special nature of the professional requirements imposed on the Applicant was due to the fact that they were established by an employer whose ethos is based on religion or belief.[88] To the extent that the Victorian Bill requires that a religious institution disregard the same activities of a similarly placed employee of a religious institution, it is inconsistent with the recognition provided to religious institutional autonomy by the ECtHR. Under the newly amended Victorian regime, even the prominent position occupied by a public relations director would not justify disciplinary action, if the conduct complained of was personal (as in *Obst v Germany*) and there was no corresponding religious belief, such as that extramarital affairs were permissible.

---

[83] Ibid 4368-9.
[84] Ibid 4375.
[85] Ibid.
[86] *Obst v Germany* (n 43).
[87] Ibid [51].
[88] Ibid.

42. *Travaš v Croatia* also raises significant concerns as to the compliance of the Victorian Bill with international human rights principles.[89] That matter concerned a religious teacher at a State School who divorced and remarried, in contravention of Catholic Canon Law. The Court noted that unlike *Fernández Martínez v Spain* (where the applicant had voluntarily disclosed the inconsistency in his private life to the media, further considered below) a question of the public incompatibility of the actions of the teacher did not arise:

> the question is rather whether a particular religious doctrine could be taught by a person whose conduct and way of life were seen by the Church at issue as being at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.[90]

In answering that question in the negative the Court concluded 'it does not appear that the decision to withdraw his canonical mandate, justified by the interest of the Church to preserve the credibility of its teachings, was in itself excessive'.[91] In reaching that conclusion the Court reasoned

> in order for a religion to remain credible, the requirement of a heightened duty of loyalty may relate also to questions of the way of life of religious teachers. Lifestyle may be a particularly important issue when the nature of an applicant's professional activity results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers, as was the case with the applicant's position of teacher of Catholic religious education and the precepts of the Catholic religion. In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity.[92]

The crucial point arising from both of the preceding cases is that the ECtHR has emphasized that the credibility of religious institutions whose moral code governs private conduct, requires that such institutions be entitled to discipline employees whose conduct does not conform to that moral code, regardless of whether that conduct is inherently religious. In this respect, the Victorian Bill is not compatible with international human rights law.

Inherent Requirements Test

43. The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test (substantively akin to 'genuine occupational requirements' tests) for certain roles. In her second reading speech Natalie Hutchins explicated the distinctions that this aspect of the Victorian Bill seeks to draw in stating:

> In most religious schools it would be an inherent requirement of a religious education position that employees must closely conform to the doctrines, beliefs or principles of the school's religion. On the other hand, a support position, such as a gardener or maintenance worker, is unlikely to have religious conformity as an inherent requirement of their role.[93]

---

[89] See further *Travaš v Croatia* European Court of Human Rights, Application no 75581/13, 04 October 2016, [97]-[98] ('*Travaš v Croatia*'). and *Fernández Martínez v Spain* (n 44) [137], in the context of teachers of religious doctrine.

[90] *Travaš v Croatia* (n 89) [97].

[91] Ibid [107].

[92] Ibid [98].

[93] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4374.

The test is intended to protect persons from being 'discriminated against for reasons that have nothing to do with their work duties'[94]

44. That the provision introduces significant uncertainty both for schools and employees is accentuated by the following selection of examples provided within the SoC:

- 'there may be a situation where conformity with religion is an inherent requirement in a teaching role at a religious school. The school's religion holds that marriage is solely between a man and a woman. During employment at the school, a teacher changes their religious beliefs and becomes accepting of marriage equality. They now hold an inconsistent religious belief. The teacher continues to promote the religious views of the school on marriage to students but also tells students that there are those in the broader community that hold different views. Depending on the circumstances, it *may not* be reasonable and proportionate to dismiss a teacher who is willing to convey the religious views of the school, even if they differ from their own.'[95]
- 'a support position, such as a gardener or maintenance worker, is *unlikely* to have religious conformity as an inherent requirement of their role.'[96]
- 'some schools may require a wide range of teaching staff to have religious pastoral roles, in which strict doctrinal conformity is required. Others may designate specific positions as largely responsible for conveying religious beliefs, such as chaplains. Many will require executive staff to conform to the religion more closely than other staff. Religious bodies and schools can meet the inherent requirements test by considering the importance and extent of religious conformity required by each role in the context of their overall operations.'[97]
- 'a religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the teaching roles. While the school may prefer that its teachers conform with the religion, the test is not about preference, but a genuine inherent requirement in practice'[98]
- 'The inherent requirements test must be assessed based on the role in practice, rather than how it is described on paper. For example, a religious school may state in a job description that conformity with certain religious doctrines is an inherent requirement of a role, for teachers who lead religious devotions. However, if a teacher is never required to lead devotions, it is unlikely that the religious beliefs could be shown to be a genuine inherent requirement of their role. This highlights that inherent requirements must be assessed based on how the job is actually performed, rather than requirements which are simply asserted to be necessary.'[99]

45. The latter example illustrates a key effect of the 'inherent requirements' test. If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions.[100] Thus, any

[94] Ibid.
[95] Ibid 4375 (emphasis added).
[96] Ibid 4374 (emphasis added).
[97] Ibid 4374.
[98] Ibid 4375.
[99] Ibid 4374.
[100] Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32 ('*Walsh*').

equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of the other teacher as evidence for their subsequent unlawful dismissal. If each equivalent teaching position can be performed without the relevant requirement, this element of the school's efforts to reflect its religious ethos in its interactions with its students will be lost. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. The maintenance of the school's ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). Such an outcome would risk frustrating the operations of those schools, as recorded by the Expert Panel, that seek to inculcate an institutional ethos by applying a preference for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is 'caught not taught'.[101]

46. Further, through their vague and imprecise application, inherent requirements tests can run afoul of the requirement that they be sufficiently clear to enable application. The Special Rapporteur overviewed the concern in the following summary of the requirements of necessity under the ICCPR:

> The Special Rapporteur has gained the impression that restrictions imposed on religious manifestations at the workplace frequently fail to satisfy the criteria set out in relevant international human rights instruments. This critical assessment covers both public employers and the private sector. Limitations are often overly broad; it remains unclear which precise purpose they are supposed to serve and whether the purpose is important enough to justify infringements on an employee's right to freedom of religion or belief. The requirement always to minimize interferences to what is clearly "necessary" in order to achieve a legitimate purpose, as implied in the proportionality test, is frequently ignored. Moreover, restrictions are sometimes applied in a discriminatory manner. Indeed, many employers appear to lack awareness that they may incur serious human rights problems as a result of restricting manifestations of freedom of religion or belief by their staff. Under international human rights law, States —in cooperation with other stakeholders —have a joint responsibility to rectify this state of affairs.[102]

47. Given these effects, serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law. Again, the Statement of Compatibility is notably scant on detail. The Special Rapporteur's comment that under the ICCPR 'much depends on the details of each specific case'[103] was noted above. Similarly, although not ratified by Australia, the ECHR jurisprudence recognizes that, amongst a range of factors, 'the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned'.[104] However, as the following analysis demonstrates, both of these recognitions do not equate to an assertion that the adoption of an 'inherent requirements' test will assure compliance with the applicable human rights law. Indeed, if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance. This is because, as Aroney and Taylor have summarised:

> In its determinations in a number of cases the ECtHR has found there to have been no violation of the rights of the employee, without applying narrow occupational

[101] Expert Panel on Religious Freedom (n 3) 56 [1.210]
[102] Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (n 28) [40].
[103] Ibid [41].
[104] *Fernández Martínez v Spain* (n 44) [130] (see also *Obst v Germany* (n 43) [48]-[51], and *Schüth v Germany* European Court of Human Rights, Grand Chamber, Application no 1620/03 ('*Schüth v Germany*').**Error! Bookmark not defined.**) [69])

requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[105]

48. As noted above, the ECtHR's consideration of this issue has unfolded against the backdrop of several core philosophical principles. These include that 'the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention' and that 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords.' A key recognition is that 'Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[106] Against that framework the Court has acknowledged that 'the autonomy of religious organisations is not absolute'[107] and that a religious institution must demonstrate that 'the risk [to autonomy] alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.'[108]

49. Rather than an 'inherent requirements' test, when applying these principles the Court has focused on a range of factors, including whether a 'heightened degree of loyalty' exists;[109] the impact of the impugned conduct or belief on the ethos of the religious institution;[110] 'the proximity between the applicant's activity and the Church's proclamatory mission';[111] whether procedural fairness according to the rules of the religious institution has been afforded;[112] whether the relevant documents sufficiently clarified the expectations of the employer;[113] whether the applicant had knowingly placed themselves in a position of conflict;[114] whether the domestic courts had conducted 'a detailed assessment of all the competing interests and provided sufficient reasoning when dismissing the applicant's complaints';[115] and the availability of alternative employment,[116] all to be exercised with the understanding that the Court is not to engage in an exercise of assessing the legitimacy of the asserted beliefs of the institution, or the means by which they are expressed.[117] In particular, as noted above, the ECtHR's jurisprudence recognizes that personal beliefs and conduct engaged in within the 'private life' of an employee can impact upon the ethos of a religious institution.[118]

50. *Siebenhaar v Germany*[119] provides a direct illustration of this latter principle. As noted above, that decision concerned dismissal of person employed as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'[120] run by the German Protestant church. The relevant contract of employment provided:

---

[105] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42, 58.
[106] *Hasan and Chaush v Bulgaria* (n 37) See also *Serif v Greece* (n 37).
[107] *Fernández Martínez v Spain* (n 44) [4].
[108] *Sindicatul "Păstorul Cel Bun" v Romania* (n 38).
[109] *Travaš v Croatia* (n 89); *Obst v Germany* (n 43) [51]; *Schüth v Germany* (n **Error! Bookmark not defined.**).
[110] *Siebenhaar v Germany* (n 42).
[111] *Schüth v Germany* (n **Error! Bookmark not defined.**) [69]; *Fernández Martínez v Spain* (n 44) [139].
[112] *Schüth v Germany* (n **Error! Bookmark not defined.**).
[113] *Travaš v Croatia* (n 89) [93]; *Siebenhaar v Germany* (n 42).
[114] *Fernández Martínez v Spain* (n 44) [144]-[145]; *Siebenhaar v Germany* (n 42).
[115] *Travaš v Croatia* (n 89) [69] summarising *Schüth v Germany* (n **Error! Bookmark not defined.**).
[116] *Schüth v Germany* (n **Error! Bookmark not defined.**); *Fernández Martínez v Spain* (n 44).
[117] *Hasan and Chaush v Bulgaria* (n 37).
[118] *Siebenhaar v Germany* (n 42).
[119]Ibid.
[120] Ibid.

> Service in the church and in the diakonia is determined by the mission to proclaim the gospel in word and deed. The employees and the employer put their professional skills at the service of this objective and form a community of service regardless of their position or of their professional functions. On this basis is concluded the following employment contract ...[121]

The dismissal related to behaviour outside of work hours, namely Ms Siebenhaar's membership of, and proselytisation for, the Universal Church/Brotherhood of Humanity. The Court reasoned:

> As regards the application of these criteria to the applicant's case, the Court notes that the labor courts noted that, by virtue of her employment contract and the regulations governing it, the applicant did not have the right to belong to or participate in an organization whose objectives were in conflict with the mission of the Protestant Church, which could require its employees to abstain from activities that put in doubt their loyalty to it and to adopt both professional and private conduct that conforms to these requirements. According to the labor courts, given the declarations signed by the applicant and the incompatibility of the teachings of the universal Church with those of the Protestant Church, the applicant no longer offered the guarantee that she respected the ideals of her employer. In this regard, the Federal Labor Court pointed out that the applicant, who had also shown a rigid attitude during the interviews prior to her dismissal, was not only a member of the universal Church but that she had offered introductory courses and that she was listed as a contact person on the registration form for basic educations courses for "higher spiritual learning". The Protestant Church could therefore reasonably fear that the applicant's appointment would have repercussions on her work, especially since a seminar of the universal Church on an educational subject was to take place in the kindergarten premises. The Federal Labor Court concluded that the applicant's interest in being retained in her post had to yield to that of the Protestant Church in staying credible in the eyes of the public and the parents of the children attending the kindergarten, and to avoid any risk of influence on children by an educator who is a member of a confession that is in contradiction with the precepts of the Protestant Church managing the kindergarten. The Court also observes that the labor courts have taken into account the relatively short duration of the applicant's employment and her young age.[122]

51. It is of particular note that the Court specifically referenced both the administrative and managerial duties engaged in by Ms Siebenhaar in acknowledging the Church's concern for the impact on the credibility of the Protestant Church 'in the eyes of the public and the parents of the children'. The credibility issue also arose because of the perceived 'risk of influence' Ms Siebenhaar might pose as an 'educator', notwithstanding the young age of the children.

52. Noting that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them',[123] the Court affirmed the Church's conception of the conduct or beliefs held by its employee that would detrimentally impact on its ability to 'form a community of service regardless of their position or professional functions'.[124] Such is consistent with the frequently adopted approach that Courts should have regard to the genuine nature of the religious beliefs in question.[125] The Court thus placed weight

[121] Ibid [9] [tr author].
[122] Ibid [44] [tr author].
[123] See also *Hasan and Chaush v Bulgaria* (n 37) [62], [78].
[124] *Siebenhaar v Germany* (n 42) [9] [tr author].
[125] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious*

upon the self-conception of the Protestant Church as to the impact of Ms Siebenhaar's private conduct and belief on the ethos of the relevant centres. The decision discloses particular regard to the ethos of the organisation, and its engagement with the wider public, as opposed to any imposition of an 'inherent requirements' style test that would have regard to the particular requirements of any given role. Accordingly, the Court found that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos [lit. 'ethic'] is founded on religion or beliefs'.[126]

53. In *Rommelfanger v Germany*,[127] the ECtHR found no violation in respect of a Catholic hospital's discipline of staff that had publicly criticized the Catholic Church's position on abortion. The judgement provides a further example of the Court giving credence to the self-conception of a religious institution concerning the fitness of a person to fulfill the responsibilities of their employment, and the impact of their extra-work activities on the religious ethos of an institution. Therein the ECtHR held:

> If, as in the present case, the employer is an organisation based on certain convictions and value judgments *which it considers as essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment *as well as the importance of the issue* for the employer.[128]

54. *Fernández Martínez v Spain*[129] concerned a Catholic priest and scripture teacher in public schools who in the context of a campaign against Catholic teaching on clergy celibacy disclosed to the media that he was married. It provides a further illustration of the Court's recognition that, in the case of religious institutions, private conduct may impact upon the ability of an employee to perform their professional activities:

> In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of Christian life, and teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.[130]

In the context of religious schools, it is of particular interest that the Court considered that the concerns of the Church in ensuring alignment between its representative's private lives and its teachings 'were all the more important as the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion.'[131]

55. The above authorities establish that the 'real and substantial' risk to religious autonomy test[132] does not preclude a religious community from considering that the private life and beliefs of

Freedom in Contemporary Australia (Shepherd Street Press, 2021); Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175.

[126] *Siebenhaar v Germany* (n 42) [46] [tr author].

[127] *Rommelfanger v Germany* (n 41).

[128] Ibid (emphasis added).

[129] *Fernández Martínez v Spain* (n 44).

[130] Ibid [110] (citations omitted).

[131] Ibid [141].

[132] *Sindicatul "Păstorul Cel Bun" v Romania* (n 38); *Fernández Martínez v Spain* (n 44) [131].

employees may give rise to a legitimate concern that its religious ethos would be undermined. Further, as *Travaš v Croatia* demonstrates, while the public nature of acts undertaken in the private life of an employee may be relevant, the importance of fidelity to teachings means that for some religious institutions, inconsistent acts need not be public. As *Travaš v Croatia* demonstrates, the private beliefs of an employee may be a sufficient consideration, having regard to the conception of the religious institution employer. As the Court stated in *Obst v Germany* 'the absence of media coverage … cannot be decisive … the special nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer whose ethos is based on religion or belief'.[133] Further, as *Siebenhaar v Germany* demonstrates, even where an employee is engaged in managerial tasks and the education provided is directed to small children the Court is willing to recognize that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos is founded on religion or beliefs' and that the detrimental impact of the employee's beliefs on the credibility of the institution 'in the eyes of the public and the parents' may be a sufficient factor.[134] Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake 'any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them'.[135] As Aroney and Taylor summarise, an 'inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the ECHR as interpreted by the ECtHR.'[136]

Permissible Limitations Under International Human Rights Law - 'Reasonable' vs 'Necessary'

56. The third contentious proposal contained within the Victorian Bill the variously imposed requirement that a religious body's or school's actions must be 'reasonable and proportionate in the circumstances'. A 'reasonableness' test does not align with the strict 'necessity' test for the imposition of restrictions under international law. Article 18(3) of the ICCPR, which contains the relevant standard of limitation that Australia has ratified, permits that only 'necessary' limitations may be imposed on the manifestation of religion or belief (inclusive of the freedom to associate with fellow believers through the formation of 'appropriate institutional infrastructure'[137]) and only on certain circumscribed grounds enunciated therein.

57. The UNHRC has clarified that limitations imposed under Article 18(3) are

> to be strictly interpreted: limitations are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.[138]

Accordingly, the Special Rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must:

> (a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and

[133] *Obst v Germany* (n 43) [51] [tr author].
[134] *Siebenhaar v Germany* (n 42) [46] [tr author].
[135] Ibid. See also *Hasan and Chaush v Bulgaria* (n 37) [62], [78].
[136] Aroney and Taylor (n 105).
[137] Bielefeldt, *Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (n 26) [57].
[138] *Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993)*, [8].

(d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy'.[139]

58. Human rights law recognises that a standard that permits 'reasonable' limitations imposes a lesser standard than one of 'necessity'. For example, the ECtHR has recognised that the term 'necessary' imposes upon the relevant party a high threshold:

> ['Necessary'] is not synonymous with 'indispensable' … neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. … [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.[140]

This principle has also received recognition in domestic law. In a passage later approved by the High Court, in *Secretary, Department of Foreign Affairs & Trade v Styles* Wilcox J stated that 'The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience.'[141] Similarly in *Mahommed v State of Queensland* Dalton P stated:

> The test of reasonableness (of the term) is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh 'the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified in section 11(2)'[142]

Although these statements are made in relation to domestic Australian law, they are illustrative of the differentiation between the requirements of a standard of 'reasonableness' and that of a standard of 'necessity', as applied within anti-discrimination law.

59. However, contrary to these principles the SoC accompanying the Victorian Bill states 'While the right to have or adopt a religion or belief is a matter of individual thought, and considered to be absolute, the right to demonstrate religion or belief impacts others and is therefore subject to *reasonable* limitations.'[143] It also uses the terms 'justified and reasonable' and 'reasonably necessary' when describing the grounds under which limitations may be imposed.[144] These terms are used interchangeably, without any apparent conception of the differing standards they entail, or the fact that they are inconsistent with the relevant standard imposed under the ICCPR. Most simply put, the Bill's standard of 'reasonableness' does not reflect international law. Terms such as 'justified', 'reasonable' and 'reasonably necessary' have no basis within the international human rights law pertaining to religious institutions.

Part III - A Way Forward? - The Religious Discrimination Bill

60. If the Victorian Bill fails to acquit the obligations of international law, can a more acceptable framework be located? In this final Part III I argue that, in several respects, the *Religious Discrimination Bill 2021* (Cth) (RDB) offers a far more appropriate method for the balancing

---

[139] Ahmed Shaheed, *UN Human Rights Council, Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/40/58 (2019) [17] ('*UN Human Rights Council, Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*').

[140] *Handyside v United Kingdom (1976) 1 EHRR 737 ('Handyside v United Kingdom'). <itals>*

[141] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J). applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed. <.>

[142] *Mahommed v State of Queensland (2006) QADT 21, 37.* <itals>referring to *HM v QFG & KG* (1998) QCA 228.

[143] *Victoria, Parliamentary Debates, Legislative Assembly* 28 October 2021, Natalie Hutchins, Minister, 4370 (emphasis added).

[144] Ibid 4370, see also Second Reading Speech 4373.

of competing rights. The RDB differs from the Victorian Bill in several important particulars. As noted above, the first is that it correctly states that the actions of religious bodies are not discrimination.[145] It also takes the approach that a preferencing of positions across the whole organisation is permissible.[146] This directly addresses the concerns expressed above concerning the propensity of an inherent requirements test to 'white-ant' an institution over time through the evidence collated by the temporary placement of non-adherents due to staff shortages.

61. The RDB introduces certainty for staff and the wider community by requiring that the position of the school on its requirements of fidelity to religious belief be declared to potential employees.[147] This focus on the importance of transparency is consistent with the approach of the ECtHR, as stated in *Travaš v Croatia:*

> [B]y engaging in the arrangement between the Church and the State concerning the teaching of Catholic religious education in schools, and knowingly and voluntarily accepting all the above-mentioned privileges and limitations concomitant with that position, the applicant consented to meeting the requirement of special allegiance towards the teachings and doctrine of the Church, including the duty to be "outstanding in true doctrine, in the witness of [his] Christian life, and in [his] teaching ability". His status of a teacher of religious education was related to one of the essential functions of the Church and its religious doctrine...[148]

Similarly in *Rommelfanger v Germany* the European Commission of Human Rights held:

> by entering into contractual obligations vis-à-vis his employer the applicant accepted a duty of loyalty towards the Catholic church which limited his freedom of expression to a certain extent. … In principle, the Convention permits contractual obligations of this kind if they are freely entered into by the person concerned. A violation of such obligations normally entails the legal consequences stipulated in the contract, including dismissal.[149]

It is also consistent with the position articulated in *Fernández Martínez v Spain*:

> the Court takes the view that, by signing his successive employment contracts, the applicant knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations are permissible under the Convention where they are freely accepted[150]

In requiring adequate disclosure the RDB balances competing interests, and affords equity to employees in a manner that provides significantly greater certainty for both employees and employers than an inherent requirements test. In this way the Bill gives effect to the recommendation of the Expert Panel on Religious Freedom that 'the key to the maintenance of existing exceptions is clarity and transparency so that prospective employees understand the precepts of the religion on which the school is based and the school's policies with respect to employment and can make choices accordingly.'[151]

---

[145] RDB, pt 2.
[146] Ibid cl 7(3), 7(5), 9(4), 9(6), 11(1), 40(4) and 40(7).
[147] Ibid cl 7(6), 9(3)(d), 9(5)(d), 11(1)(b)(iii), 40(2)(d), 40(5)(c)
[148] *Travaš v Croatia* (n 89) [93].
[149] *Rommelfanger v Germany* (n 41).
[150] *Fernández Martínez v Spain* (n 44) [134].
[151] Expert Panel on Religious Freedom (n 3) 63 [1.250].

Conclusion

62. This note has set out the primary international human rights law that pertains to religious schools. The right to found and maintain private schools is protected by the international human rights law that Australia has ratified, primarily found in Article 18 of the ICCPR. It has also considered the developed application of that right, as enunciated within the jurisprudence of bodies exercising jurisdiction under the European Convention on Human Rights. It has considered how restrictions on the ability of a private faith-based school to ensure that those persons appointed as its representatives also share its faith can impact upon its ability to maintain a unique religious identity, and thus breach the right to establish private religious schools. It has demonstrated the domestic application of these principles by consideration of the Victorian *Equal Opportunity Amendment Religious Exceptions Bill 2021* and the Commonwealth *Religious Discrimination Bill 2021*. The former Bill has served as an important illustration of how domestic legislation may fail to adequately acquit the obligations of international human rights law, whereas the latter has served to demonstrate how domestic legislation may acquit those obligations.

Bibliography

Articles/ Books/ Reports

Aristotle, 'The Politics' in Robert Maynard Hutchins (ed), *Great Books of the Western World*, tr Benjamin Jowett (Encyclopaedia Brittanica, 1952) vol II,

Aroney, Nicholas, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153

Aroney, Nicholas and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42

Beiter, Klaus, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006)

Bielefeldt, Heiner, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014)

Bielefeldt, Heiner, *Report to the General Assembly of the Special Rapporteur on freedom of religion or belief*, UN Doc A/68/290 (7 August 2013)

Bielefeldt, Heiner, *UN General Assembly, Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/19/60 (22 December 2011)

Bielefeldt, Heiner, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010)

Debeljak, Julie, 'Balancing Rights in a Democracy : the Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422

Expert Panel on Religious Freedom, *Religious Freedom Review*, 18 May 2018)

Finnis, John, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011)

Finnis, John, 'Equality and Differences' (2012) 2(1) *Solidarity*

Foster, Neil, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175

Fowler, Mark, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom in Contemporary Australia* (Shepherd Street Press, 2021)

Hart, Herbert, *The Concept of Law* (Oxford University Press, 2012)

Jahangir, Asma, *UN Economic and Social Council, Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief*, UN Doc E/CN.4/2006/5 (2006)

Nowak, Manfred, *U.N. Covenant on Civil and Political Rights : CCPR Commentary* (N.P. Engel, 2nd rev ed ed, 2005)

Rivers, Julian, *The Law of Organized Religions* (Oxford University Press, 2010)

Shaheed, Ahmed, *UN Human Rights Council, Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/40/58 (2019)

Shaheed, Ahmed, *UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/37/49 (28 February 2018)

Taylor, Paul, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020)

Cases

Althammer v Austria UN Human Rights Committee Communication No 998/01 (2003)

Australian Medical Council v Wilson (1996) 68 FCR 46

Bikramjit Singh v France, CCPR/C/106/D/1852/2008, (1 November 2012)

Fernández Martínez v Spain (2014) European Court of Human Rights, Grand Chamber, no 56030/07

Folgero and Others v Norway European Court of Human Rights, Grand Chamber, Application No 15472/02

Handyside v United Kingdom (1976) 1 EHRR 737

Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)

HM v QFG & KG (1998) QCA 228

Human Rights Committee, Decision: Communication No. 488/1992, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('Toonen v Australia'))

Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, (10 November 1989)

Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993)

Ingrid Jordebo Foundation of Christian Schools v Sweden European Commission of Human Rights, Application No 11533/85

Kjeldsen, Busk Madsen and Pedersen v Denmark (1979-80) 1 EHRR 711

Länsman v Finland, CCPR/C/52/D/511/1992, (26 October 1994)

Mahommed v State of Queensland (2006) QADT 21
Obst v Germany (2010) ECtHR, App. No. 425/03
Ranjit Singh v France (dec.) no 27561/08, 30 June 2009
Rommelfanger v Germany (1989) ECHR 27
Ross v Canada United Nations Human Rights Committee Communication No. 736/1997 (2000)
Schalk and Kopf v Austria (2010) First Section, no 30141/04 Eur Court HR
Schüth v Germany European Court of Human Rights, Grand Chamber, Application no 1620/03
Secretary, Department of Foreign Affairs & Trade v Styles (1989) 23 FCR 251
Serif v Greece Second Section, no 38178/97 Eur Court HR
Siebenhaar v Germany European Court of Human Rights Application no 18136/02
Sindicatul "Păstorul Cel Bun" v Romania (2014) 58 EHRR 284
Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka, Communication No 1249/2004, UN Doc CCPR/C/85/D/1249/2004 (2005)
Thlimmenos v Greece European Court of Human Rights, Grand Chamber, Application no 34369/97 6 April 2000
Travaš v Croatia European Court of Human Rights, Application no 75581/13, 04 October 2016
Verein Gemeinsam Lernen v Austria (1995) 20 EHRR CD 78
Waldman v Canada, Communication No 694/1996, UN Doc CCPR/C/67/D/694/1996 (1999) (5 November 1999)
Walsh v St Vincent de Paul Society Queensland (No.2) [2008] QADT 32
Waters v Public Transport Corporation (1991) 173 CLR 349
William Eduardo Delgado Páez v Colombia Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990)

Treaties

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990)
International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)
UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, A/RES/36/55, (25 November 1981)
UN General Assembly, *Universal Declaration of Human Rights*, General Assembly resolution 217A(III), (10 December 1948)

Other

Victoria, Parliamentary Debates, Legislative Assembly 28 October 2021, Natalie Hutchins, Minister