

**THE MERITS OF THE INHERENT REQUIREMENT TEST
FOR REGULATING THE EMPLOYMENT DECISIONS OF
RELIGIOUS SCHOOLS UNDER ANTI-DISCRIMINATION
LEGISLATION**

GREG WALSH*

ABSTRACT

This article evaluates the merits of adopting an inherent requirement test for regulating the employment decisions of religious schools in NSW. The inherent requirement test has some significant advantages over the current approach adopted in NSW especially by adapting the protections provided to religious schools to the particular needs of each religious school. However, the inherent requirement test appears to have at least two significant limitations: it will likely fail in operation to adequately respect the importance of an employee's compatibility with the school's religion, and courts will likely experience substantial difficulties in attempting to apply the inherent requirement test to religious schools.

I INTRODUCTION

Under the inherent requirement test an adverse employment decision is not discriminatory if there are aspects of an employment position that are an 'inherent requirement' of the position and the person was unable to fulfill those requirements. In the context of religious schools, the inherent

* BSc/LLB, GDLP (ANU), LLM (Syd), Senior Lecturer, School of Law, The University of Notre Dame Australia. The author welcomes commentary on the article, which can be sent to greg.walsh@nd.edu.au

requirement test would allow adverse employment decisions to be made on the basis of a range of attributes but only when conformity to the school's religion is an inherent requirement of the employment role and an attribute of a person prevents them from fulfilling that requirement.

Due to the wide range of positions that religions adopt on various issues and the different approaches religious schools have to incorporating religion within their schools it is not possible to enact legislation that specifies the inherent requirements of employment positions for all religious schools. Consequently, inherent requirement provisions typically establish a general test for determining the inherent requirements of employment positions and require courts to determine on a case by case basis the inherent requirements of various employment positions at religious schools and whether the person who suffered the detriment was able to meet those inherent requirements.

An example of an inherent requirement test can be provided by the test that was briefly adopted in Victoria. Under the test an employment decision by a religious school is lawful if 'conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position' and 'the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement'.¹

¹ *Equal Opportunity Act 2010* (Vic) s 83(3)–(4). With a change of government the legislation was amended to remove the inherent requirement test before it began operating: *Equal Opportunity Amendment Act 2011* (Vic) s 19. At the time of writing the Victorian Labor party has indicated that it will reintroduce the inherent requirement test when it next forms government: John Ferguson, 'Labor vows to get tough on religious discrimination at school', *The Australian (Online)* 21 November 2014 <<http://www.theaustralian.com.au/national-affairs/state-politics/labor-vows-to-get-tough-on-religious-discrimination-at-school/story-e6frgczx-1227096591487>>.

The aim of this article is to assess the merits of introducing an inherent requirement test similar to the Victorian test into New South Wales (NSW). Under the current approach adopted in NSW it is unlawful for a person or organisation when making an employment decision to discriminate on the grounds of race, sex, transgender status, marital or domestic status, disability, a person's responsibilities as a carer, homosexuality or age.² Religious schools, however, are not regulated by most of these provisions due to an exception provided to private educational authorities. A 'private educational authority' is defined as:

a person or body administering a school, college, university or other institution at which education or training is provided, not being: (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or (b) an agricultural college administered by the Minister for Agriculture.³

Under the exception religious schools are permitted to make employment decisions that would otherwise be unlawful on the grounds of sex, transgender status, marital or domestic status, disability and homosexuality.⁴ No exceptions are provided to religious schools on the grounds of race, age or a person's responsibilities as a carer.⁵ In contrast to the inherent requirement test, under the approach adopted in NSW (the 'general exception approach') there is no test for a court to apply to

² *Anti-Discrimination Act 1977* (NSW) ss 8–16, 25–31, 38C–J, 40–6, 49D–K, 49V–ZC, 49ZH–N, 49ZYB–K.

³ *Ibid* s 4 (definition of 'private educational authority').

⁴ *Ibid* ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).

⁵ *Ibid* ss 8, 49ZYB, 49V.

determine the legality of an adverse employment decision made by a religious school.⁶

The article is structured in three parts. It begins with a discussion of the advantages of an inherent requirement test especially in comparison to some of the major limitations of the general exception approach. It then assesses two of the major criticisms of the inherent requirement test. Firstly, that it may impair the operation of religious schools by failing to account for the important role that all employees can play in assisting religious schools achieve their religious objectives. Secondly, the courts may encounter major difficulties in appropriately applying an inherent requirement test to employment positions at religious schools.

A range of additional factors would need to be considered to reach an informed conclusion on the merits of introducing an inherent requirement test into NSW. Some of these factors would include the right to equality and religious liberty, the welfare of students, the right to privacy, parental rights, and freedom of association. Nevertheless, a detailed analysis of the merits of two of the most significant criticisms of the inherent requirement test is useful as a determination that these criticisms are valid would provide a strong indication that the inherent requirement test may not be an appropriate alternative to the current approach.

II THE MERITS OF THE INHERENT REQUIREMENT TEST

A central argument in favour of the inherent requirement test is that compared to the general exception approach it provides a much more limited protection for the employment decisions of religious schools. The limited scope of the protections substantially reduces the number of

⁶ Ibid.

individuals who can be adversely affected by religious schools while still allowing religious schools to be established and operated by religious communities.

A *The Protections are Adapted to the Needs of Religious Schools*

A major problem with the general exception approach is that legal protections are provided to religious schools that do not need or want the protections, and to non-religious schools that cannot justify receiving the protections (at least not on the grounds of religious liberty). Under the inherent requirement test the protections would only be provided to religious schools rather than to some broader category such as private educational authorities.

Considering the theological perspective of these religious schools it is likely that under the inherent requirement test a court would find that these schools are legally unable to make employment decisions on these grounds. Such an outcome would result in a significant reduction in the provision of unnecessary protections to religious schools that do not want these protections and also reduce the scope for the protections to be fraudulently abused. For example, a principal who decided not to hire a woman for an employment position involving religious leadership on the grounds of her gender would be acting unlawfully if the school's religion is committed to gender equality in all roles including those relating to religious leadership.

A further, and more controversial, aspect of the inherent requirement test is that courts are provided with the role of determining the validity of a religious school's claim that religious compatibility is an inherent requirement of a particular employment position. This aspect of the test is considered by its proponents to be one of its major advantages on the

understanding that most employment positions within religious schools—such as teaching positions for non-religious subjects, administrative and maintenance positions—are not typically religious. Rayner, for example, notes that:

[r]eligious bodies argue that limiting blanket exemptions will destroy religious freedoms ... [the exceptions are] defended on the basis that any service can be a religious vocation and that a 'religious environment' requires certain purities of everyone in employment. With respect, it is difficult to see the relevance of the beliefs or lifestyles of, say, a cleaner, gardener or clerk, in an independent, para-religious school.⁷

Some supporters of the inherent requirement test also find it difficult to understand how a religious school can justify making an adverse employment decision against someone who may act contrary to the teachings of religion in their private life, but do not actively contradict the religion's teaching in the school environment. Such a view was adopted by Debra James, General Secretary of the Victorian Independent Education Union, who stated:

But does the cleaner have to be a practising Catholic or a practising Jew or a practising Christian? Does the maths teacher? Does the phys. ed. teacher? A person with a private lifestyle that is known by some in the school to be contrary to the teachings of the church, but is not a public lifestyle to

⁷ Moira Rayner, 'Limiting discrimination won't harm religious freedoms', *Eureka Street* 13 August 2009

<<http://www.eurekastreet.com.au/article.aspx?aeid=15737>>. See also Michael Kirby, 'Religious Liberty in Multicultural Australia: Past Tolerance - Present Indifference - Future Problems' (Paper presented at the International Religious Liberty Association, Fiji, 1993)>

<http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol29/1013-Religious_Liberty_in_Multicultural_Aus_-_Past_Tolerance_-_Present_Tolerance_-_Present_Indifference_-_Future_Problems.pdf> 20; Gay and Lesbian Rights Lobby Inc, Submission to the Attorney General's Department, *Law Reform Commission Report 92 (1999) Review of the Anti-Discrimination Act 1977 (NSW)* (2000) 13.

students, a person who is otherwise exemplary in their conduct and behaviour, who is not actually agitating for an alternative lifestyle to their students — why is it that that person, if their personal situation were found out, could be in a position of being terminated in their employment or injured in some way in their employment?⁸

B The Reduced Potential for Persons to be Harmed by Employment Decisions

The substantial reduction of the scope of the protections provided to religious schools under the inherent requirement test is one of its major advantages compared to a general exception approach. The limited scope of the protections would greatly reduce the number of persons who could be adversely affected by the employment decisions of religious schools, which would likely assist a substantial number of individuals avoid the serious physical and mental harm that can be suffered from adverse employment decisions.

The major harm that can be caused to an individual from an employer relying on protections such as those provided in the general exception approach is demonstrated in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.⁹ The case involved a Christian arts academy that terminated the employment of a music teacher when it was discovered that he was living in a same-sex relationship. In finding against the Christian organisation Basson J held that it ‘would not have

⁸ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Victorian_Independent_Education_Union.pdf>, 5 August 2009 (D James and T Clarke, Victorian Independent Education Union), 4 (Debra James, Victorian Independent Education Union).

⁹ [2009] 4 SA 510.

been devastating to the church to keep the complainant on in his teaching position ... [and] if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the Constitution that they not discriminate'.¹⁰ His Honour ordered the church leaders to pay compensation and make an unconditional apology. On the harm that the man suffered from the employment decision Basson J stated:

being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination ... his dignity was impaired when his contract was terminated on the basis of his sexual orientation ... he suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house.¹¹

C Appropriate Protection is Provided to Religious Schools

Although a more limited protection is provided to religious schools under the inherent requirement test compared to the general exception approach, religious schools are arguably still appropriately respected as religious groups can still establish religious schools in fulfilment of their obligations to teach their religious beliefs and to engage in charitable works. It is also important to note that the burden placed on religious schools in complying with the model will often be insignificant as in many situations it will be straightforward for religious schools to demonstrate why a religious component is an inherent requirement of particular employment positions. A substantial number of religious schools, for example, would set aside time during the school term for

¹⁰ Ibid [23]–[24].

¹¹ Ibid [25], [33].

religious ceremonies for the benefit of students and employees of the school. If the position of the school's religion was that these ceremonies can only be performed by men then it is very likely that a court would hold that this is an inherent requirement of the position.

Furthermore, under the inherent requirement test a religious school would still be able to regulate the conduct of its staff to ensure that its employees act respectfully towards the religious commitments of the school. An employee who is openly critical of the school's religious commitments and actively lobbies for change could be disciplined, or even dismissed. In support of this aspect of the inherent requirement test James argued that:

[e]very employee should be aware of their obligations to their employer; the obligation of fidelity; these things that come with the common law contract of employment. Wearing a T-shirt that supports abortion is obviously not going to go down well in a Catholic school, and it would be an employee who, with peril, would take such an action.¹²

D *The Limitations of an Inherent Requirement Test*

Few would dispute that the adaptability of the inherent requirement test has the significant advantage of allowing the protections provided under anti-discrimination legislation to be adapted to the particular needs of each school. However, there is a substantial dispute about the claim that a further advantage of the approach is that it will require religious schools to satisfy a court that a religious component is an inherent requirement of a position and that the complainant was unable to fulfill that requirement. The remainder of the article focuses on the concerns that the inherent requirement test will likely fail in operation to adequately respect the

¹² James, above n 9, 4.

importance of an employee's compatibility with the school's religion, and that courts will experience substantial difficulties in applying the inherent requirement test to religious schools.

III THE IMPORTANCE OF MISSION FIT FOR RELIGIOUS SCHOOLS

The compatibility of employees with a school's religion (their 'mission fit') can be of central importance to the operation of many religious schools. For some religious schools employment positions are considered to be religious vocations making it essential that an employee has good mission fit. Even when most, or even all, employment positions are not considered to have the characteristic of a religious vocation, the mission fit of employees is still critical considering the central role staff members can play in assisting religious schools achieve their religious objectives and in creating an authentic religious environment within the school.

A *Employment Positions at Religious Schools can be Religious Vocations*

Many of the individuals who work for religious schools do not consider their role as simply an employment position, but rather they understand it as a type of religious vocation that that they have been called by God to fulfill. Durie explains as follows:

For a secular person, teaching mathematics has nothing to do with religion. However, for a religious person – and indeed for a religious organisation – all actions can be considered to be worship. What distinguishes many religious organisations is that they see their whole activity as a corporate act of worship, done in devotion and service to God, in accordance with the doctrines and principles of their faith. One reason they want to employ

people of faith is that they want the whole organisation to corporately serve God through its activities.¹³

The case of *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* ('*Hosanna-Tabor*') decided by the United States Supreme Court provides a good example of a religious community that considers that teaching positions—even when they involve teaching non-religious subjects—can be a religious vocation.¹⁴ In *Hosanna-Tabor* a school classified its school teachers into 'called' and 'lay' teachers. Called teachers, who were given the title 'Minister of Religion, Commissioned', were regarded as having been called to their vocation by God and were required to meet certain religious requirements, including completing a course of theological study, and having their position approved by the religious congregation. 'Lay' teachers were not required to be trained by the Church, or even to be Lutheran, and were appointed for one-year renewable terms.¹⁵ Both categories of teachers generally performed the same duties, although lay teachers were hired only when called teachers were unavailable.¹⁶

The respondent, Cheryl Perich, was a called teacher and taught a variety of subjects including maths, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and religious exercises each day, attended a weekly school-wide chapel service, and led the chapel service about twice a year.¹⁷ Perich went on disability leave after developing narcolepsy and the school

¹³ Mark Durie, *Equal Opportunity Law Revisited* (17 April 2010) St Mary's Vicar's Blog <http://stmarysvicar.blogspot.com.au/2010_04_01_archive.html>.

¹⁴ *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 132 S Ct 694.

¹⁵ *Ibid* 699–700.

¹⁶ *Ibid* 700.

¹⁷ *Ibid*.

decided to offer her the option of being released from her ‘call’.¹⁸ Perich refused and after a series of exchanges the relationship deteriorated resulting in the congregation rescinding her ‘call’ and dismissing her from employment.¹⁹

The Supreme Court held that the dismissal was valid and not in violation of laws prohibiting disability discrimination as it was covered by the ‘ministerial exception’—a constitutional prohibition on government limiting the freedom of religious groups to make employment decisions relating to their ministers.²⁰ Despite Perich teaching a variety of non-religious subjects, her role being very similar to that of lay teachers and her formal religious duties only occupying approximately 45 minutes of the work day, the Supreme Court held that due to the process she underwent in becoming a called teacher, that she held herself out as a minister of the Church, and her additional religious duties it was appropriate for her to be classified as a religious minister and so covered by the exception.²¹ The Court concluded their judgment stating that ‘[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’.²²

The scope of the ministerial exception was also addressed by the US Court of Appeals for the District of Columbia Circuit in *EEOC v Catholic*

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid 701, 710.

²¹ Ibid 707–10.

²² Ibid 710. Relying on the ruling in *Hosanna-Tabor* the United States Court of Appeals subsequently held that a music director at a Catholic Church was a ‘minister’ for the purposes of the ministerial defence and so was unable to rely on anti-discrimination legislation to pursue a claim against the Church: *Cannata v Catholic Diocese of Austin*, 700 F 3d 169 (5th Cir, 2012).

University of America.²³ In the case the Court held that a religious sister teaching theology at the Catholic University of America could not rely on legislation prohibiting gender discrimination to contest a decision by the University to deny her tenure.²⁴ The Court found that her role was covered by the ministerial exception and consequently held that State intervention in the employment decision would be in violation of the free exercise clause of the US Constitution.²⁵ Importantly the Court affirmed that a broad understanding should be adopted regarding who should be regarded as a minister in a religious institution declaring that ‘the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission’.²⁶

These cases are useful demonstrations of how employment positions at religious educational institutions can appropriately be considered to be religious vocations. Laws that limit or remove the freedom of these religious groups to appoint persons to employment positions as the religious group considers appropriate according to their religious convictions can be a major violation of their right to religious liberty. Under the inherent requirement test this may occur if a court concludes that an employment position at a religious school is essentially non-religious even if the religious groups considers these employment positions to be religious vocations. Such an outcome is especially likely in relation to employment positions that many individuals would consider to be non-religious such as an administrative assistant, a teacher of mathematics or English, or a maintenance officer.

²³ (1996) 83 F3d 455.

²⁴ Ibid 470.

²⁵ Ibid 460–7.

²⁶ Ibid 463.

B *The Central Role of Employees at Religious Schools*

The ability to select employees according to their mission fit is important for religious schools for many of the same reasons that it is important for any organisation. Employees with good mission fit will likely be more effective in their employment roles as they will often have a more detailed understanding of, and commitment to, the organisation's values and objectives, a higher level of motivation, a greater willingness to work longer hours, and a desire to remain as an employee of the organisation for a longer period of time. These qualities in employees are important not just to religious schools but to all organisations.

Mission fit, however, is particularly important for religious schools considering their focus on religious education and formation. A central reason why religious schools are established is to assist students and others involved with the school to learn about the religion, appreciate its merits, and develop the character necessary to live an ethical, fulfilling life as understood by that religion. Employing persons with good mission fit is essential to achieving this goal as such employees will often have a detailed understanding of, and commitment to, the religion, which will play a key role in helping the school achieve its religious objectives.

The view that religious schools should be able to select employees for mission fit for employment positions involving school leadership (such as the principal), religious education and positions involving the performance of religious ceremonies and other rituals is widely held. Such an approach is supported by strong proponents of the inherent requirement test who consider that courts should recognise a religious

component as being an inherent requirement for these positions.²⁷ The Victorian Independent Education Union, for example, stated in its submission to the Victorian government's inquiry into the merits of exceptions in the *Equal Opportunity Act 1995* (Vic) that anti-discrimination legislation 'should permit a church to discriminate only in limited circumstances namely in relation to the ordination of religious officials, such as priests or rabbis and probably also in the employment of religious education teachers and faith leaders depending on the circumstances'.²⁸

However, considering the central importance of religious education and formation to many religious schools it is important that religious schools can also employ individuals for both teaching and non-teaching employment positions according to their mission fit. The need to have a broad discretion regarding employment decisions for a range of employment positions is essential considering the impact that all employees can have on a school's ability to achieve its religious objectives.

1 *The Importance of Mission Fit for Teaching Positions*

The control teachers have over the formal teaching environment provides them with significant influence in developing the knowledge, skills and character of their students. The religious knowledge and commitment of a teacher with good mission fit will likely make the teacher more effective in presenting the school's religion in an accurate and persuasive manner

²⁷ See, eg, James, above n 9, 4.

²⁸ Victorian Independent Education Union, Submission to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, July 2009 <http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/submissions/763%20-%20VIEU%20-%2031.07.09.pdf> 4.

to the students. Considering this influence it is important that religious schools can employ teachers according to their mission fit to assist religious schools in more effectively achieving their religious objectives.

The importance of a teacher's commitment to the doctrines of a school's religion, especially in regards to the education of students, was addressed by the European Court of Human Rights in *Fernández Martínez v Spain*, which concerned the employment of a Catholic priest as a religious education teacher six years after he had decided to marry even though his application to be relieved of the requirement of celibacy had not been approved.²⁹ Although the authorities of the Catholic Church knew about the man's personal situation he was allowed to remain in the role, and the decision to not renew his contract was only made after it became widely known that he was involved in a public campaign against a range of doctrinal issues including mandatory clerical celibacy.³⁰ The Court held that the decision to not renew the applicant's contract was appropriate due to:

the special nature of the professional requirements imposed on the applicant stemm[ing] from the fact that they were established by an employer whose ethos was based on religion ... [Moreover] the duty of reserve and discretion was all the more important as the direct recipients of the applicant's teaching were minors, who by nature were vulnerable and open to influence.³¹

The significance of religious education teachers was emphasised in the case on the basis that there is a special bond of trust between religious

²⁹ *Fernández Martínez v Spain* (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [9]–[10].

³⁰ *Ibid* [10]–[17].

³¹ *Ibid* [87]. The decision was upheld by the Grand Chamber of the European Court of Human Rights in *Fernández Martínez v Spain* (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014).

authorities and religious teachers. The Court argued that this particular relationship ‘necessarily gives rise to certain specific features that distinguish teachers of Catholic religion and ethics from other teachers ... [i]t is therefore not unreasonable to impose a heightened duty of loyalty on religious education teachers’.³²

In *William Eduardo Delgado Páez v Colombia* the Human Rights Committee similarly held that religious schools have the freedom to determine whether a religious education teacher should be employed and what they should teach.³³ The Committee held that the decision by a religious school to remove an employee from the position of a religious education teacher for his unorthodox theological positions did not violate either his freedom of religion or his freedom of expression:

With respect to [freedom of religion], the Committee is of the view that the author's right to profess or to manifest his religion has not been violated ... [the State can] allow the Church authorities to decide who may teach religion and in what manner it should be taught ... [similarly] the requirement, by the Church authorities, that Mr. Delgado teach the Catholic religion in its traditional form does not violate [his freedom of expression].³⁴

Individuals concerned about the possible harm that can be caused by religious schools through their employment decisions might argue that

³² *Fernández Martínez v Spain* (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [85].

³³ *William Eduardo Delgado Páez v Colombia*, Communication No. 195/1985, UN Doc CCPR/C/39/D/195/1985 (1990).

³⁴ *Ibid* [5.8]–[5.9]. Although the Human Rights Committee placed importance on the special relationship that existed between the Church and State in Columbia it is unlikely that the Committee would reach a different conclusion in a State without such a relationship considering the centrality of religious education to religious communities and the persuasive influence that decisions such as *Fernández Martínez v Spain* and *Hosanna-Tabor* would likely have on the Committee.

employing a person according to mission fit might be appropriate for religious education teachers, but it would be inappropriate for teachers of subjects such as mathematics, geography or physics as it is unlikely that issues of faith and ethics would arise in these classes. Such a position is adopted by Tobin who argues that in relation to discussions of matters involving faith and ethics ‘there are very few subjects that would offer such a setting especially in primary schools. It would certainly not arise in any of the key learning areas such as Maths or English — unless the texts being studied gave rise to issues of sexual orientation and marriage’.³⁵

Although it is to be expected that religious issues will mainly be discussed within religious education classes, theological and ethical issues will inevitably arise in a variety of subjects often held to be non-religious. For example, the study of science will often lead to queries regarding the existence of God, and the role God plays, if any, in the natural world; the study of geography can lead to disputes about the proper division of state boundaries between different groups with clear religious identities; the study of history will often cover religiously sensitive topics such as the Reformation or the history of conflicts between religious groups; while the study of literature will often include the presentation of views on theological and ethical issues that have been strongly influenced by the author’s religious commitments. On the need for broad protections to be provided for the employment decisions of religious schools the Islamic Council of Victoria stated:

³⁵ John Tobin, 'Should Discrimination in Victoria's Religious Schools Be Protected? Using the Victorian Charter of Human Rights and Responsibilities Act to Achieve the Right Balance' (2010) 36(2) *Monash University Law Review* 16, 41.

It is vital that school boards have the freedom and choice of being able to employ the most appropriate person based on their religious belief, because Islamic values touch almost all of the disciplines taught in school and parents consider teachers to be role models for their children. For example, when the concept of interest is taught in maths and commerce, it must be taught that there are alternative methods of banking because Muslims are forbidden to deal with interest.³⁶

Furthermore, for many teachers at religious schools their duties are much broader than simply teaching Maths or English and include assisting with the operation of religious schools in a variety of ways—many of which will inevitably be of a religious character. Martin Dixon, a Victorian Parliamentarian, in a speech to Parliament explained that one of the key reasons why he considered that the proposed inherent requirement test was flawed was that it failed to appreciate the various ways religion is expressed in the life of religious schools. He argued that:

[t]he vast majority of teachers -- and staff, not just teachers -- working in these schools do not simply teach a particular subject. Many other responsibilities within the school and even within the community come with those jobs. An example of this would be a mathematics teacher who also has a home room. Part of the duties of a home room teacher would be to talk to the students about their behaviour, the values and beliefs of the school and also the various activities the school is taking part in and how they refer to the values and beliefs of that school. Classroom teachers and other staff are also required to attend religious ceremonies associated with

³⁶ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Islamic_Council_of_Australia.pdf>, 5 August 2009 (H Ibrahim and H Gulam, Islamic Council of Victoria) 2.

the denomination of the school. They are expected not only to attend but also to actually plan, organise and take part in those ceremonies.³⁷

Although the formal education provided by teachers in the classroom is of significant importance in assisting the religious school fulfil its religious objectives, the influence teachers can have on students and others involved in the religious school through the manner in which they live their lives is likely to be of even greater importance. The capacity of a teacher to act as a religious role model is a key justification for why mission fit should be understood as an inherent requirement for teaching positions at religious schools regardless of the particular subjects that they teach. The significant influence that a teacher can have as a religious role model was emphasised by the Supreme Court of Canada in *Caldwell v St Thomas Aquinas High School*, which confirmed the legality of a decision by a Catholic school to not renew the contract of a teacher of mathematics and commercial subjects for marrying a divorced person in violation of Catholic doctrine.³⁸ The Supreme Court held that:

[i]t is a fundamental tenet of the [Catholic] Church that Christ founded the Church to continue His work of salvation. The Church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including education in the Catholic faith. The relationship of the teacher to the student enables the teacher to form the mind and attitudes of the student and the Church depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour. The teacher is expected to be an example consistent with the

³⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2010, 1112 (Martin Dixon).

³⁸ *Caldwell v St Thomas Aquinas High School* [1984] 2 SCR 603, 606.

teachings of the Church, and must proclaim the Catholic philosophy by his or her conduct within and without the school.³⁹

Out of all of a school's employees teachers will often have the closest relationships with students due to the substantial amount of time they spend with students, the theological and ethical significance of many of the topics covered in a variety of classes, and the expectation that many schools have that teachers should aim to develop not just the knowledge and skills of their students but also their character. A teacher's genuine commitment to the particular religion expressed in formal and informal discussions and in the example they set by their conduct can play a powerful role in positively influencing the views of students — and others at the school — about the school's religion. Thus Parkinson states from a Christian perspective that '[m]odelling Christianity within a faith community is as important as teaching Christianity within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people's lives'.⁴⁰ Similarly Lenta argues that the importance placed on the ability of teachers to act as role models recognises that:

moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous, with the corollary that it is wrong to place pupils with teachers who are not virtuous ... teachers teach moral values not didactically, as in the case of arithmetic, but through example.⁴¹

2 *The Importance of Mission Fit for Non-Teaching Staff Members*

³⁹ Ibid 608.

⁴⁰ Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 97.

⁴¹ Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 126 *South African Law Journal* 827, 853.

Considering that non-teaching staff positions (other than those involving leadership or religious functions) do not have the same position of authority and ongoing contact as employees in teaching positions many would consider that it would be inappropriate to provide a school with protections for non-teaching positions. Such a position was expressed by Lenta who stated that:

the work of teachers in a religious school includes transmitting the beliefs and values of the school, didactically in the case of those involved in religious instruction and by example in the case of all teachers. This is why it is correct to say that the work of typists or janitors is distant from the religious beliefs of the religious association for which they work, but that the activities of teachers of non-religious subjects in a religious school have a close connection to the religious beliefs of the church that runs the school. On this argument, an exemption in respect of all teachers, even those not involved in religious instruction, may be justified, but an exemption in respect of typists and janitors will not be.⁴²

However, mission fit is important not just for teachers but also for non-teaching employees considering the significant role that they can play in assisting religious schools fulfil their religious objectives. A person with good mission fit can be particularly effective in a non-teaching employment position in a religious school due to their understanding of the religion, personal contacts within the religious community, commitment to the religious identity of the school, and ability to assist with religious education through formal and informal discussions. As with teachers at the school, non-teaching staff members can also make a valuable contribution through acting as role models, especially for students, through being able to demonstrate how a committed religious

⁴²

Ibid 855.

adherent can express their religious convictions in roles other than those of a teacher. As O'Brien states 'a person who is employed at a school is not just there to teach maths or to cook. They are there as leaders, counsellors, role models, people who guide and shape the ethos of the school'.⁴³

Non-teaching staff members can be even more effective than teachers in educating others about the religion and inspiring them to lead lives that are more consistent with the religion's teachings. In an empirical study undertaken by Evans and Gaze on the views of leaders of religious schools regarding anti-discrimination legislation, a principal of a Christian school reflected on the positive and unique religious impact of a Christian cleaner who 'has a great pastoral heart, has a great gift of pastoring and builds important and very valuable relationships with students, which the teacher, as an authority figure, can't do'.⁴⁴ Similarly, Mr Robert Johnston from the Australian Association of Christian Schools gave evidence in a public hearing held by the Commonwealth Legal and Constitutional Affairs Legislation Committee that 'a gardener in the school in which I was principal for 27 years ... was a very significant player in terms of some of the pastoral work [at the school]'.⁴⁵ While Rob Ward, the Victorian State Director of the Australian Christian Lobby, in the evidence he gave in the public hearings held in Victoria by the Scrutiny of Acts and Regulations Committee stated that:

⁴³ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 1055 (Michael O'Brien).

⁴⁴ Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views From The Coal Face' (2010) 34 *Melbourne University Law Review* 392, 415.

⁴⁵ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) 60.

one of my children, who shall remain nameless, received greater pastoral care and made a greater connection in some of his struggles through school with the maintenance guy at the school ... There was a chaplain there, there were teachers there and there was pastoral care, but this maintenance guy connected with one of my children and made a huge difference in their life, because he shared the values of the school.⁴⁶

3 *The Adverse Impact of Employees with Poor Mission Fit*

A person who is not an adherent of the religion, or is not living a life that is consistent with the religion's teachings, can still teach maths or science or perform the technical work of a receptionist or a maintenance officer. However, they are unable to be an effective witness for the religion to the students, other employees, and members of the community involved with the religious school. Some supporters of the inherent requirement test reject this view and argue that the worldview of the teacher or their conduct outside the religious school does not matter so long as they accurately present and support the school's religion in any situation where it arises within or outside of a classroom setting, and avoid saying or doing anything that contradicts the school's religious commitments. Along these lines James argues that:

a maths teacher who is living in a de facto relationship in a Catholic school might be required to participate in school mass and prayer assembly with students and will be able to do so. In these circumstances, the maths teacher will still be able to get the inherent requirements of the job done in that he/she can teach the students maths and participate in the religious life of

⁴⁶ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Australian_Christian_Lobby.pdf>, 5 August 2009 (R Ward and M Sneddon, Australian Christian Lobby), 7 (Rob Ward, Australian Christian Lobby).

the school in relation to its students. It would, therefore, be unlawful to refuse to deny that teacher a job simply on the grounds of his/her marital status.⁴⁷

The difficulty with the views expressed by James is that they fail to adequately account for the capacity of all employees to act as role models simply through the manner in which they live their life. Even if the staff member attempted to support a school's religion while in the work environment their views on various aspects of the religion would inevitably be expressed by their actions, omissions and the statements they make to students, staff members and members of the public. Although one staff member with poor mission fit employed for a short period of time may have little impact on a school, multiple staff members employed over many years could have a significant adverse influence on the ability of a religious school to achieve its religious objectives.

The claim that James makes that religious schools can include employees with poor mission fit into the religious life of a school is also deeply problematic. There may be religious restrictions that prevent participation, or at least full participation, by the employee. Even when such prohibitions do not apply, or the person can be accommodated in others ways, involving a person with a different worldview could serve as a distraction from the religious event and a reminder that the claims of the religion are rejected by those outside the religious community.

C *The Importance of a Religious Environment*

As the inherent requirement test would likely limit the ability to make employment decisions on the basis of mission fit to employment positions with a substantial religious component — such as senior

⁴⁷ Victorian Independent Education Union, above n 29, 12–13.

management positions, religious education teachers and those involved in performing religious ceremonies — religious schools would only be able to employ a person for mission fit for a minority of employment positions. If the staff body consisted of a substantial minority or majority of individuals with different worldviews then it would be difficult for the religious school to create a religious environment where religious adherents were comfortable in organising religious events, discussing religious matters and expressing their opinions on various theological and ethical issues relevant to their religion in a group setting. Such a result is likely to occur when a religious adherent realises that there are individuals within the staff body who are unfamiliar with the teachings of the religion and may have theological or ethical views that strongly conflict with those promoted by the religion.

Moreover, if a substantial number of employees at a religious school have poor mission fit then the school's identity as an institution that respects and adheres to the teachings of the particular religion can be undermined. For example, if a majority of staff members at a school based on a religion with mandatory dietary restrictions do not adhere to any of the restrictions in the food they consume then the credibility of the school as an authentic religious institution is undermined. The ongoing employment of the staff members by the religious school may even contribute to a view that the dietary restrictions are an optional, or even obsolete, practice of the religion. If a religious school's identity as an authentic religious community is weakened then the incentive for religious adherents to become involved in the religious school as a way of expressing, developing and promoting their religious beliefs decreases. Such an outcome can be particularly harmful to a religious school when it causes religious adherents to be unwilling both to work for the school and

to send their children to the religious school because they are no longer confident that their child will receive a formation that is consistent with their religion. This point was emphasised in relation to religious organisations in general by Bishop Christopher Prowse in the hearings conducted by the Victorian Scrutiny of Acts and Regulations Committee where he stated that:

weakening or eliminating the religious exemptions would, in effect, force the secularisation of service delivery by religious agencies. The likely effect of such proposals would be a profoundly negative effect on two fronts. It would go to the heart of the religious motivation that leads people to be involved in ownership and governance and as an employee or volunteer. It would also go to the heart of the motivation that leads people, whether Catholic or not, to prefer the services of many Catholic providers. The popularity of Catholic providers is, I suggest, largely attributable to the mission and witness those providers demonstrate in what they do, how they do it and why they do it.⁴⁸

Smaller religious schools will likely be particularly adversely affected by the inherent requirement test as their limited resources would make it less able to afford to defend any legal action taken against them. Consequently, they will be under significant pressure to avoid claiming mission fit is a requirement for employment roles that do have a substantial religious component but not to such a degree that the school would be confident that a court would find in their favour. Further the smaller size of the staff body would likely mean that employing staff

⁴⁸ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing* <http://www.parliament.vic.gov.au/images/stories/committees/sarc/EOV/transcripts/5_August_-_Catholic_Bishops.pdf>, 5 August 2009 (C Prowse, Catholic Bishops of Victoria and F Moore, Catholic Archdiocese of Melbourne), 3 (Bishop Christopher Prowse, Catholic Bishops of Victoria).

members with poor mission fit would have a more substantial impact on the religious culture of the school compared to larger religious schools that may be part of an association of schools based on the same religion.

It is important to note that many religious schools do not want to create a staff body consisting solely of adherents of that religion. Many religious schools consider it desirable to have staff members with a variety of different worldviews and attributes considering that it provides many benefits including preparing students and others involved with the school to interact respectfully with the diversity that exists in the community. On the value of employing a diverse staff body a principal of an Anglican school stated:

One thing that is certain is that the 18 year olds that leave here are going to mix and move within a fairly diverse community as soon as they leave school and where they have had the opportunity perhaps to confront a variety of worldviews, if not specifically of lifestyles, their education is going to be more rounded than had they say been educated in a school where all the staff was Anglican.⁴⁹

This viewpoint was also expressed by some of the Catholic principals who were interviewed for a report produced by the NSW Anti-Discrimination Board entitled ‘Discrimination and Religious Conviction’.⁵⁰ The ADB stated in the report that ‘[d]espite the high proportion of Catholics on their staffs, most of the principals said that they preferred to see a balance in the teaching staff between the older and younger, male and female, inexperienced and experienced, and Catholic

⁴⁹ Evans and Gaze, above n 45, 416.

⁵⁰ Juliet Sheen, *Discrimination and Religious Conviction: A report of the Anti-Discrimination Board in accordance with Section 119(a) of the Anti-Discrimination Act 1977* (NSW Anti-Discrimination Board, 1984) 414.

and non-Catholic teachers'.⁵¹ A similar situation was found in the Evans and Gaze study with one principal stating that 'there's a richness for more young people to have a multi-faith environment'.⁵²

However, the problem with the inherent requirement test is that it is the courts, and not the religious schools, that are given the power to determine whether a religious component is an inherent requirement for a particular employment position. Often the decision will be made by a judge who has only briefly heard evidence on the matter, has only a superficial understanding of the relevant factual and theological issues, and due to their limited knowledge is unable to accurately appreciate the impact their decision may have on the religious culture of the school.

The reality that religious schools often select persons for employment positions despite them not having a strong mission fit raises an interesting issue. Supporters of the inherent requirement test use these employment practices as evidence that mission fit is not important for many employment positions at religious schools as the schools are able to operate effectively with such persons as employees. James, for example, argued that '[i]t is an undisputed fact that there is a diverse range of employees working in schools ... The schools have not fallen over, as the religious authorities would put to this committee. They do not fall over because they currently employ non-Catholic staff or non-religious staff'.⁵³

The diverse employment practices of religious schools should not be seen as evidence of the limited importance of mission fit for employment positions at religious schools. As discussed, a person's mission fit is

⁵¹ Ibid.

⁵² Evans and Gaze, above n 45, 419.

⁵³ James, above n 9, 3.

important for religious schools as it allows them to play a more effective role in religious education, to act as a positive role model for students and others involved with the school, and to promote the identity of the schools as authentic religious institutions. A person with poor mission fit may be able to effectively perform the technical aspects of various employment positions, but they will be limited in their ability to contribute to these religious aspects of the employment role, and may even have a detrimental impact on them. A religious school still committed to its religious identity may employ someone with poor mission fit due to operational necessity or because they consider that some diversity in the staff body will not have a significant adverse impact on the religious environment of the school. However, these decisions by religious schools should not be considered to be evidence that mission fit is not important for teaching and non-teaching employment positions at religious schools.

D *The Likely Interpretation of the Inherent Requirement Test*

The view that the inherent requirement test will fail in operation to adequately respect the importance of mission fit for the operation of religious schools is based on the understanding that a strict interpretation of the meaning of ‘inherent requirement’ will be adopted by the courts so that a religious component will not be an inherent requirement for most employment positions at religious schools. However, the possibility that the inherent requirements of a position can extend beyond a person’s ability to perform the merely technical aspects of an employment role is well established. Such a view was approved by the High Court of Australia in *Qantas Airways Ltd v Christie*, which considered the meaning of an ‘inherent requirements’ provision in the context of a rule adopted by some countries that prohibited from their airspace planes

flown by persons who had reached 60 years of age.⁵⁴ On the appropriate approach to adopt in determining the ‘inherent requirements’ of an employment position Brennan CJ held that:

[t]he question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.⁵⁵

Confirmation of the appropriateness of this approach was provided in *X v The Commonwealth*, a case that addressed whether a soldier with HIV was able to meet the inherent requirements of his employment.⁵⁶ On the scope of the inherent requirement test McHugh J stated that:

the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment ... [t]hat is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. ... in determining what the inherent requirements of a particular employment are, it is necessary to take into account the surrounding context of the employment and not merely the physical capability of the employee to perform a task.⁵⁷

Further support for the possibility that courts would adopt a broad approach to the meaning of ‘inherent requirement’ in religious organisations may also be provided in the actual wording of the

⁵⁴ (1998) 193 CLR 280, 292.

⁵⁵ Ibid 284.

⁵⁶ (1999) 200 CLR 177, 177.

⁵⁷ Ibid 187–9.

provisions used to introduce the inherent requirement test. For example, section 83(4) of the *Equal Opportunity Act 2010* (Vic) required that '[t]he nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement' for employment positions at religious schools. If a similar provision were introduced into NSW it would provide support to courts in holding that mission fit is an inherent requirement for a wide range of employment positions at particular religious schools.

In light of these sources it is possible that courts when considering the scope of the inherent requirement provisions could adopt a broad approach to its coverage and consistently uphold claims made by religious schools that mission fit is an inherent requirement of most, if not all, of the employment roles at their schools. However it is unlikely that such a broad approach to the inherent requirement test would be adopted in NSW. The inherent requirement test is an approach that is being strongly promoted by individuals who consider that a narrow approach to the scope of the inherent requirement test should be adopted that would focus exclusively on the technical requirements of most employment positions at religious schools. This can clearly be observed by the examples such individuals use of employment positions for which they consider mission fit should be irrelevant including teachers of non-religious subjects, administrative positions and maintenance staff.⁵⁸

Even if a narrow approach to the inherent requirement test were not clearly expressed in the legislation introducing the test, it is likely that courts would interpret any ambiguities in such a way that a narrow approach was adopted. Such an outcome is likely as courts when

⁵⁸

See, eg, Rayner, above n 8 and accompanying text.

considering how to interpret any ambiguity contained in the inherent requirement provision will be strongly influenced by the support for a narrow approach that will likely be found in various extrinsic materials including the second reading speech of the Minister introducing the inherent requirement test and the various reports of parliamentary inquiries produced before the test was implemented. The Victorian parliamentarian, Jill Hennessy, for example, stated the following about the merits of the inherent requirement test:

where an attribute such as religious adherence was relevant ... then discrimination, where it was reasonably required, would be lawful. However, in circumstances where discrimination was not reasonably required it would not be lawful. An example might be that for a gardener working in a religious school it would not be an inherent requirement of the role for them to be an adherent to the particular religious principles or philosophy of that school.⁵⁹

There is also support in case law in Australia that a narrow approach should be adopted in relation to the religious component of employment positions. Some support for advocates of a narrow approach could be provided by *Walsh v St Vincent de Paul Society Queensland [No 2]*, which held that the Society had discriminated on the ground of religion by requiring a person to be Catholic if they held the position of President.⁶⁰ The complainant was successful in the discrimination complaint as the employment role was not considered to have had a sufficiently religious content despite it being a leadership position with religious duties in an organisation with spiritual aims. The Tribunal concluded that the Society was unable to rely on an exception for

⁵⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2011, 1449–50 (Jill Hennessy).

⁶⁰ [2008] QADT 32, [125]–[127].

religious bodies and that being Catholic was not a genuine occupational requirement of the employment role.⁶¹ The Tribunal held that:

the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, [does not mean] that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves 'religious observance or practice'.⁶²

Further support for proponents of a narrow approach can be provided by *Hozack v Church of Jesus Christ of Latter Day Saints*.⁶³ The case concerned the legality of a decision to dismiss a member of the Church working as a receptionist at the Church's national office after she breached an express term of her employment contract that required her to comply with the doctrines of the religion.⁶⁴ The complainant breached this term of the contract by entering into a sexual relationship while she was separated but not divorced from her spouse, and by refusing to agree with Church leaders that her conduct was inappropriate.⁶⁵

The essential issue for the case was whether dismissing the complainant on the ground of religion was a valid reason connected with 'the employee's capacity' or 'based on the operational requirements of the undertaking'.⁶⁶ The court adopted a narrow approach to the meaning of 'operational requirement' holding that adherence to the religion's doctrine could not be considered an operational requirement as the Church employed non-adherents in various employment roles, the role of a receptionist was not 'a position from which anyone would normally

⁶¹ Ibid [70]–[78]; [79]–[126].

⁶² Ibid [77].

⁶³ (1997) 79 FCR 441.

⁶⁴ Ibid 442–3.

⁶⁵ Ibid.

⁶⁶ *Workplace Relations Act 1996* (Cth) s 170DE(1).

expect any particular leadership or example’, and employment positions such as a receptionist are not intrinsically religious in nature.⁶⁷ Similarly the term ‘capacity’ was narrowly construed to refer only to the functional requirements of an employment position with the court stating that ‘Ms Hozack was not a minister of her religion. No one doubted her ability to do her work as a receptionist. Her “capacity” ... was not wanting’.⁶⁸

Even if a broad interpretation were adopted resulting in the courts regularly deferring to the claims of religious schools that mission fit is an inherent requirement of all of their employment roles, it is likely that the proponents of an inherent requirement test would intervene and amend the legislation. A failure by proponents to intervene to ensure a stricter approach was taken would result in the inherent requirement test failing to produce the desired result of limiting the protections to those roles that are considered by the proponents to be substantially religious.

Considering these factors if the inherent requirement test were introduced into NSW it is likely that a strict approach would be adopted in the legislation introduced by Parliament or through the interpretation of any ambiguities in the legislation by the courts. Such an interpretation would damage the religious identity of many schools, impair their ability to provide effective religious education and formation, and undermine the operation of those schools that understand that at least some of their employment positions are religious vocations.

⁶⁷ *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441, 452.

⁶⁸ *Ibid* 452–3.

IV THE DIFFICULTIES COURTS WILL FACE IN APPLYING THE INHERENT REQUIREMENT TEST

The adoption of an inherent requirement test for religious schools will likely cause courts to encounter significant difficulties when they attempt to determine the entity responsible for the adverse employment decision, the religion on which the decision was allegedly based, and the relevant ‘doctrines, beliefs or principles’ that should be understood as forming a part of the religion.

A *The Allocation of Responsibility for the Employment Decision*

A preliminary step for a court in determining the merits of a defence based on the inherent requirement test would be to identify the school and the persons or bodies that established, directed, controlled or administered the school. In many situations this will not be difficult, but in other cases it may be a highly complex issue for a court to resolve. As Evans notes: ‘complications arise because many religious entities have complex administrative and legal structures, that may not be “bodies” in the legal sense, and which can make it difficult to identify who the respondent should be in any discrimination claim’.⁶⁹

A useful example that demonstrates the difficulties that courts can face in determining the relevant entities is *OW & OV v Members of the Board of the Wesley Mission Council* (‘Wesley Mission’), which concerned a Christian adoption agency’s refusal to provide adoption services to a same-sex couple on the grounds that it would be contrary to their

⁶⁹ Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (2009) [4.4.1].

religious beliefs.⁷⁰ The case was appealed and reheard multiple times with the courts experiencing great difficulty in determining the appropriate respondents in the matter.⁷¹ The initial finding of the Administrative Decisions Tribunal (ADT) on the appropriate respondents was appealed, on appeal their finding was set aside, and even after the matter returned to the ADT the resolution of the issue of the appropriate respondents still resulted in the ADT devoting half of their judgment to the issue.⁷² Admittedly, the determination of how the law should operate in relation to complex organisations is a common task for courts. However, few of the proponents of the inherent requirement test would realise how complex this initial step in applying the test could be if the inherent requirement test were to be introduced.

Once the relevant persons or bodies have been identified another issue may arise in relation to the further requirement that the school be an educational institution conducted in accordance with religious doctrines, beliefs or principles. A complainant may argue that a school cannot rely on the inherent requirement defence as the school is essentially a non-religious commercial enterprise conducted according to secular considerations.

An argument along these lines was successfully made by the complainant in *Cobaw Community Health Services v Christian Youth Camps Ltd*

⁷⁰ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 [34].

⁷¹ *OV v OW v QZ* [2006] NSW ADT; *OV v QZ (No.2)* [2008] NSWADT 115; *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5; *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293. For the purposes of the article the cases will be collectively referred to as the ‘*Wesley Mission*’ case.

⁷² *OV v QZ (No.2)* [2008] NSWADT 115, [6]–[67].

(‘*Cobaw*’), a case that held that that Christian Youth Camps had breached the *Equal Opportunity Act 2010* (Vic) by refusing to provide weekend accommodation to a welfare organisation aimed at helping same-sex attracted youth.⁷³

There were a range of grounds on which Christian Youth Camps Ltd could have been found to be a religious organisation including that it was established by the Christian Brethren, there were multiple references to it being a Christian organisation in both structure and function in its constitution, the common religion of staff members was Christian Brethren and staff members were required to subscribe to a statement of faith.⁷⁴ Despite these factors, Hampel J held that the respondent was not a body established for religious purposes as religion was rarely, and sometimes not at all, mentioned on their website or on their promotional material and strategic planning documentation.⁷⁵ Furthermore, the accommodation facilities were provided to non-religious groups without any religious supervision or there being any requirement for a religious component to be incorporated into their activities.⁷⁶

Similarly in *Walsh* the attempt by the St Vincent de Paul Society to rely on a provision that excluded the operation of the *Anti-Discrimination Act*

⁷³ *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [211]–[356]. The decision of the Tribunal was affirmed in a majority judgment by the Victorian Supreme Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75. Special leave to appeal the matter to the High Court of Australia has been sought by Christian Youth Camps.

⁷⁴ *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [231]–[255].

⁷⁵ *Ibid* [240]–[254].

⁷⁶ *Ibid* [240]–[254]. This finding was confirmed in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 [158] (Maxwell P); [441] (Redlich JA).

1991 (Qld) for religious bodies was unsuccessful. The Tribunal held that the organisation is:

a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) is a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. That is not enough, in my opinion, to make the Society a religious body.⁷⁷

Although *Cobaw* and *Walsh* dealt with the religious identity of organisations providing accommodation and charitable services, a similar argument could be made that in a discrimination action against a particular school that it should not be able to rely on the defence as it is not conducted in accordance with religious doctrines, beliefs or principles. Such an argument could be supported through focusing on the extent, if any, that a school mentions religion on its website, in its promotional material and annual reports, the lack of religious commitment among staff members and students, any decisions made to hire out its facilities to non-religious groups during school vacations, and in the general operation of the school.

While such an argument could be raised in a discrimination complaint against a religious school it is unlikely to be an issue that courts will be required to frequently resolve. For most schools based on a religion there will normally be sufficient religious components incorporated into their structure and operation to satisfy the requirements that the school is conducted in accordance with a religion. Furthermore, if a religious school has become secularised then it is unlikely that the authorities of

⁷⁷ *Walsh v St Vincent de Paul Society Queensland [No 2]* [2008] QADT 32, [76].

the religious school would want to rely on the inherent requirement defence for their employment decisions. However, some situations may arise where school authorities of a secularised school do attempt to justify an employment decision that was made on the basis of a relevant attribute through relying upon the protections provided to religious schools. In these cases a further challenge that courts would have to face in applying the inherent requirement test is whether the claim made by the school authorities that their school is religious can be accepted considering that the school is substantially secular in operation.

B *The Identification of the Religion of the School*

Another essential task for a court applying the inherent requirement test is to determine whether the school is based on a religion, and if so, the religion of the school or other relevant body controlling the school. In most situations this will not be difficult due to the school having a simple organisational structure controlled by a religious organisation that clearly identifies as belonging to a particular religious tradition. For example, courts will have little difficulty in concluding that a school that is part of the Catholic school system is based on Catholicism.

However, for many other schools the courts will face a significantly more difficult task in determining the religion on which the court should hold that the school is based. If a school simply identifies its religion using a broad label — such as Christian or Jewish — then a court will be faced with a dilemma. One approach would be to hold that the school is a generic Christian or Jewish school. However, considering the great diversity of beliefs within the Jewish and Christian religions such an approach would create difficulties for the court when trying to determine the religious ‘doctrines, beliefs or principles’ of the school. Alternatively

the court could conduct a more detailed analysis of the school's origins, history, marketing material, staffing profile, and any other relevant issue to allow the court to situate the school within a particular denomination or branch. Sometimes such a detailed review will overwhelmingly support a particular conclusion, while in other situations there may be conflicting documents and evidence from key witnesses leaving the court with the difficult task of determining in which particular religious group or sub-group the school should be situated.

This difficulty was confronted in *Wesley Mission* as the Christian organisation attempted to rely on a provision in the *Anti-Discrimination Act 1977* (NSW) that provides a defence to an act of a religious organisation 'that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.⁷⁸ The respondent provided a number of different descriptions of their religion, but the ADT held that the respondent was claiming that their religion was 'the religion of the Uniting Church as practised by Wesley Mission'.⁷⁹ The ADT rejected the respondent's claim and held that the Act did not recognise Christian denominations and that the relevant religion for the purposes of the Act was Christianity, but that even if the Act did recognise denominations the relevant religion was the 'religion of the Uniting Church' and that the further specificity argued for by the respondent could not be accepted.⁸⁰ On appeal the Tribunal's approach was rejected and the Appeal Panel held that the relevant religion for the purposes of the provision was Wesleyanism, a term the Appeal Panel used to refer to the more precise religious beliefs of the

⁷⁸ *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁷⁹ *OV v QZ (No.2)* [2008] NSWADT 115, [88].

⁸⁰ *Ibid* [89]–[121].

respondent.⁸¹ On a further appeal to the NSW Court of Appeal the use of the label ‘Wesleyanism’ or any religious label was considered inappropriate with their Honours holding that the preferable approach was to simply focus on the religious commitments of the respondent at the time of the decision to not provide foster care services.⁸² When the matter was reheard by the ADT detailed evidence was given about the respondent’s religious beliefs at the time of the decision, the influence of the teachings of John Wesley, and the position of the respondent’s religious commitments within the broader Uniting Church.⁸³ The case is a useful example of how the apparently simple task of determining an organisation’s religion can in reality be a complex and time consuming endeavour for the court and parties.

C *The Determination of the Doctrines of the Religion*

If the inherent requirement test were implemented it would require a court to address a range of theological issues including the validity of the religious school’s claims that a particular doctrine, belief or principle was a part of their religion, whether the religious commitment could validly be held to be an inherent requirement of a particular employment position, and why the particular attribute(s) of the complainant meant that they were unable to conform to that requirement. Requiring courts to engage in this kind of analysis is problematic as judges will often lack the necessary knowledge and training to properly understand the religious sources of authority and the acceptable methods for their interpretation. As the development of expert knowledge of any religion will often take

⁸¹ *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57, [18], [40].

⁸² *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, [53]–[55].

⁸³ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [18]–[20].

years to develop, a court will be in a position of hearing (often conflicting) lay and expert evidence regarding the nature of the religion and having to reach a conclusion regarding the actual position of the religion on the basis of a superficial understanding.

Even in the rare situations where judges do have expertise in a particular religious tradition, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of the religion. Expecting judges to provide certainty regarding the actual position of a religion on a particular theological issue is not just inappropriate for a secular body but also unrealistic considering that there may be an ongoing conflict between religious experts on the correct theological position.

The US Court of Appeals for the District of Columbia Circuit addressed the substantial difficulties such cases can create for courts in *EEOC v Catholic University of America*. Particular emphasis was placed on the difficulties the Court would encounter in assessing the conflicting theological evidence regarding the lecturer's qualifications given by eighteen witnesses in the case including fourteen who were clergy or members of a religious order.⁸⁴ The Court quoted with approval a statement of the trial judge who stated that '[t]here are such competing expert opinions as to the quality and, necessarily, the religious substance of [the appellant's] writings in this record. I find and conclude that it is neither reasonably possible nor legally permissible for a lay trier of fact to evaluate these competing opinions on religious subjects'.⁸⁵

⁸⁴ Ibid 465.

⁸⁵ Ibid 465. See also *Watson v Jones* (1871) 80 US 679, 729, which addressed a contractual and property dispute between adherents of a Presbyterian Church. On the

For those religions with a decentralised approach to religious authority where there is a greater focus on individual adherents determining for themselves the correct interpretations of holy texts and other religious sources the task of determining the religion's teachings on a particular issue will create even greater challenges for the courts. Durie comments on these challenges stating that 'for some "religions" this will be a big ask ... A lot of people will be interested to discover from our courts' rulings what is the doctrinally correct Anglican, Baptist, Unity Church or Lutheran position on gay marriage'.⁸⁶

A related concern is that courts might use the views of other religious adherents as evidence to reject the validity of the religious understanding of the respondent in a discrimination complaint, especially in situations where the judge considers that they all belong to the same religion. The legitimacy of such a concern is supported by *Wesley Mission* in relation to the attempt by the adoption agency to rely on the statutory defence for conduct that was 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.⁸⁷ In the case the Tribunal held that the religion on which the adoption agency was based was Christianity and that due to widespread disagreement within Christianity on the significance of homosexuality the adoption agency could not rely on the protection.⁸⁸ The Tribunal further held that even if it

comparative incompetence of secular courts to determine theological issues compared to the relevant religious authorities Justice Miller appropriately stated that different religious bodies 'each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so'.

⁸⁶ Durie, above n 14.

⁸⁷ *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁸⁸ *OV v QZ (No.2)* [2008] NSWADT 115, [142].

were appropriate to regard the religion of the adoption agency as Uniting Church, rather than a generic Christianity, the same result applied due to similar disagreements over the issue of homosexuality occurring within the Uniting Church.⁸⁹ In support of this further finding the Tribunal referred to the practice of a different religious group noting that:

a designated agency operated by the Uniting Church (not Wesley Mission) has authorised as ‘authorised carers’ persons who are openly homosexual and placed children in their care. There is no evidence that this has caused injury to the religious susceptibilities of the members of the Uniting Church.⁹⁰

A further difficulty that would arise from the inherent requirement test is that religious groups can change their views on the significance of various attributes. In particular, many Christian denominations underwent profound changes in their social teachings in the twentieth century with many adherents of different denominations rejecting previous theological positions and deciding that according to a correct interpretation of the Bible there are no significant theological or ethical differences between persons on the grounds of attributes such as gender or sexuality.

A relevant example to demonstrate the difficulties that a change in theological views can have is a situation where the near universal view of adherents of a particular religious group is that only men can perform religious ceremonies and teach religious education in the schools established by the religion. A female applicant is unhappy about being denied an employment position as a religious teacher at the school, but her complaint is rejected by the courts as the position regarding gender is held to be a belief of the religion. However, some adherents of the

⁸⁹ Ibid [143].

⁹⁰ Ibid.

religion begin to challenge this belief and are successful in slowly changing the views of the majority of the community. Female applicants periodically launch legal challenges against the position of the school, and courts are faced with the difficult task of determining when the belief can no longer be appropriately held to be a part of the religion. Particular difficulties would be faced in situations where the overwhelming majority of adherents no longer consider gender to be a significant factor, but a minority of believers who continue holding this belief are the ones holding leadership positions and controlling the religious group's assets. A court would have to resolve the complex issue of deciding whether to favour the majority of the adherents or the minority who have the leadership roles, financial control of the relevant organisations, and the weight of tradition in support of their position.

The reverse of this situation could also occur where a minority of adherents of a religious group believe gender to be significant for religious leadership positions, and over time their view becomes the one held by a majority of adherents. Such a situation is not fanciful as often those religious adherents who have traditional views on issues such as gender and sexuality have a much higher birth rate than those adherents who do not consider the variations in these attributes to be significant. For example, the more traditional Haredi Jews, a minority in most Jewish communities, typically have a much higher birth rate than other Jewish groups and are rapidly increasing as a percentage of the Jewish population.⁹¹ Not only would such a change in a religious community pose similar problems for a court as the previous situation, but it would

⁹¹ Matti Friedman, 'Haredim birthrate presents problems', *The Washington Times* (Washington), 18 January 2011
<<http://www.washingtontimes.com/news/2011/jan/18/haredim-birthrate-presents-problems/?page=all>>.

also pose problems for employees at religious schools whose employment positions could become increasingly insecure as the viewpoint about the significance of gender increases in popularity within the religious community.

The difficulty of deciding the theological position that can properly be attributed to a religion was confronted in *Wesley Mission*. The respondent argued that the relevant doctrine for the religious susceptibilities test was the belief that monogamous heterosexual marriage is both the norm and ideal of the family.⁹² However, in light of the considerable diversity of opinions regarding sexuality among adherents of Christianity, and more specifically the Uniting Church, the Tribunal held that this could not be held to be a doctrine of the Christian religion, nor could the theological views of the respondent be evidence of the existence of the doctrine as it was not possible to regard the respondent's views as those of the religion of the Uniting Church.⁹³ This conclusion was overturned on appeal and when the matter was reheard the ADT focused specifically on the religious beliefs of the respondent and held that a valid defence applied to the claim as the respondent's position that they were unable to provide foster care services to a gay couple conformed to a doctrine of their religion.⁹⁴

Another case that illustrates some of the challenges courts can encounter when they attempt to determine the doctrines of a religion is *Griffin v Catholic Education Office*.⁹⁵ The case concerned a refusal by the NSW

⁹² *OV v QZ (No.2)* [2008] NSWADT 115 [122].

⁹³ *Ibid* [127]–[132].

⁹⁴ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [18], [34].

⁹⁵ [1998] AusHRC 6; Chris Sidoti, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation* (March 1998) Human Rights and Equal Opportunity Commission

Catholic Education Office of the Archdiocese of Sydney to approve a woman's application for classification as a teacher in Catholic schools on the basis that her high profile activism for gay rights was contrary to the teachings of the Catholic Church.⁹⁶ The Commissioner of the Australian Human Rights Commission rejected the Catholic Education Office's evidence obtained from Catholic experts who supported the theological appropriateness of the employment decision by the NSW Catholic Education Office.⁹⁷ Instead the Commissioner, after referring to various Catholic documents, held that being a lesbian and an activist against discrimination was not inconsistent with Catholic teaching, that there was no evidence that she was engaging in homosexual activity, and therefore there were no grounds to hold that she did not meet the inherent requirements of a teaching position.⁹⁸ Further any injury caused to religious adherents by the Catholic Education Office employing Ms Griffin would not be relevant as 'it would be not an injury to their religious susceptibilities but an injury to their prejudices'.⁹⁹

The decision of the Commissioner to reject the submissions of Catholic experts regarding the theological appropriateness of the CEO's decision indicates some of the problems that can arise when courts are required to determine the doctrines that should be assigned to religions. The Commissioner in the case was clearly familiar with the various official documents of the Catholic Church, and consequently was able to reach an informed conclusion about the merits of the theological submissions.

<http://www.humanrights.gov.au/pdf/human_rights/discrimination_sexual_pref.pdf> 5–9. As the Commission had no powers to enforce its finding of discrimination the case was part of a formal report prepared by the Human Rights Commissioner for the Commonwealth Attorney-General.

⁹⁶ Ibid 5.

⁹⁷ Ibid 16–19.

⁹⁸ Ibid.

⁹⁹ Ibid 22.

However, his decision to prefer his own understanding of the doctrines of Catholicism and their relevance to the case resulted in the undesirable situation of a secular body rejecting the views of expert theologians of a religion and determining for itself the doctrines that should and should not be ascribed to the religion. The approach adopted by the Commissioner led Evans to describe the case as ‘a startling decision, particularly the notion that a secular body is competent to determine the real teachings of a Church’.¹⁰⁰

Another example of the problems that can be encountered when courts attempt to assess whether a particular belief can legitimately be held to belong to a certain religion is the case of *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)*.¹⁰¹ The case involved a complaint made by the Islamic Council of Victoria that comments made by Pastor Daniel Scot at a seminar organised by Catch the Fire Ministries breached the *Racial and Religious Tolerance Act 2001 (Vic)*.¹⁰² The judge in the case decided to evaluate whether particular claims made by Christian pastors about Islam were accurate.¹⁰³ The attempt by the judge to determine which beliefs could legitimately be held to belong to a particular faith was widely criticised including by some of the judges who heard the matter on the appeal to the Victorian Supreme Court.¹⁰⁴

¹⁰⁰ Evans, above n 71, 161.

¹⁰¹ [2004] VCAT 2510 (22 December 2004).

¹⁰² Ibid [33]–[81].

¹⁰³ Ibid [383]–[395].

¹⁰⁴ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [36]. For another example of a case involving judges rejecting the understanding of religious adherents that a particular view is a doctrine, belief or principle of their religion, see, *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [263]–[307].

D *The Impact of the Operation of Courts on Religious
Organisations*

The requirement under the inherent requirement test for courts to decide on whether a particular religious doctrine can appropriately be ascribed to a religion can significantly undermine the operation of religious organisations by interfering with their freedom to determine for themselves the correct interpretations of their sources of religious authority. The test can further undermine religious organisations due to the pressure that it will place on religious communities to limit the religious freedom of their members. If theological disagreements between members of a religious community are used by courts to justify rejecting a claim by a religious body concerning the inherent requirements of an employment position then it will create a disincentive for the religious community to be tolerant of diversity in religious views among religious adherents.

The inherent requirement test could also encourage religious schools to strengthen their religious identity through employing fewer, if any, employees of different faiths, and to integrate the religion more fully into every employment position to avoid courts relying upon a diverse staff body or a lack of substantial religious content in employment positions as evidence to reject a claim regarding the inherent requirements of employment positions. Consequently, the introduction of the inherent requirement test might, instead of encouraging diversity, tolerance and respect for minorities, actually lead to the opposite result by producing religious schools that have less diversity among their employees and are even more committed to emphasising the particular religious commitments of the school.

A further issue of concern is that a court decision to reject the theological claims of a religious group on the basis that it is part of a broader religious group that disagrees with those claims could create a powerful incentive for the smaller religious group to formally separate from the larger religious group in order to protect its religious freedom. Thus Durie argues that the inherent requirement test:

could have the effect of pressuring denominations to be less diverse in their theology: otherwise they might only receive the 'lowest common denominator' exception, which will be the minimum needed by their least rigorous adherents. The legal processes triggered off by the new Act [introducing an inherent requirement test] could increase pressures on denominations like the Anglicans or the Uniting Church to divide rather than continue to tolerate their internal theological diversity.¹⁰⁵

Considering the various issues that courts will have to address in applying the inherent requirement test religious schools will rarely be in a position where they will be confident that a court will uphold a claim that mission fit is an inherent requirement of a particular employment position. The uncertainty regarding the likely outcome of a court hearing will place pressure on religious schools to adopt a restrictive approach in relation to the employment positions claimed to have a religious component in order to avoid devoting substantial resources to defending a discrimination complaint that may result in a court finding in favour of the complainant. The pressure to adopt a restrictive approach in relation to the inherent requirements of employment positions—with the accompanying loss to the school's ability to provide effective religious education and formation—will likely be particularly felt by schools managed by smaller religious communities as their limited resources will make them even less

¹⁰⁵

Durie, above n 14.

able to meet the costs involved in unsuccessfully defending a claim for discrimination. McConnell warns of the dangers of excessive judicial review of the employment decisions of religious organisations arguing that if :

difficult personnel decisions are subject to constant judicial second-guessing, the risks of liability and the financial and morale costs of litigation are sufficient in themselves to substantially erode autonomy rights. The mere threat of litigation may thus be sufficient to chill [the] exercise of legitimate autonomy rights.¹⁰⁶

The possibility that providing courts with a role in determining theological issues might have an adverse impact on the operation of religious groups was recognised by the United States Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*.¹⁰⁷ The case concerned a decision by the managers of a religiously affiliated gymnasium to dismiss an employee on the basis that he did not conform to the requirements of the Mormon religion.¹⁰⁸ On the potential adverse impact Justices Brennan and Marshall argued that:

[w]hile a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a

¹⁰⁶ Michael McConnell, 'Fernández Martínez v Spain—Written Comments of Third-Party Intervenors—Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center' <<http://religiousfreedomnews.org/wp-content/uploads/2013/01/Third-Party-Comments-in-Fernandez-Martinez-v-Spain-Final.pdf>> 10.

¹⁰⁷ *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* (1987) 483 US 327.

¹⁰⁸ *Ibid* 330, 337.

result, the community's process of self-definition would be shaped in part by the prospects of litigation.¹⁰⁹

V CONCLUSION

The inherent requirement test has some significant advantages over the general exception approach especially as it appropriately limits protections provided under anti-discrimination legislation to religious schools and only to those religious schools that want protections for their employment decisions. However, the claim that is often made by proponents of the inherent requirement test that a further advantage of the approach is that it appropriately requires religious schools to prove that religious compatibility is an inherent requirement of particular employment position should not be accepted as a significant benefit of the approach.

The inherent requirement test would significantly undermine the freedom of religious schools in NSW to employ individuals who are supportive of their religious commitments. This freedom to hire individuals with good mission fit is of central importance to the operation of some religious schools considering that employment positions at these schools can be regarded as religious vocations by religious groups. Furthermore, all teaching and non-teaching employees at religious schools can play a significant role in determining the religious culture and identity of schools and in influencing the religious commitment of students, staff and other persons involved in the schools.

¹⁰⁹

Ibid 343–4.

Requiring courts to determine the validity of a religious school's claim regarding the religious content of employment positions is problematic. Judges will rarely have an adequate theological understanding of the relevant religion, and, even when they do, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of the religion. There are further problems that can be caused by the inherent requirement test, especially the pressure that it can place on religious groups to respond to the legal threat by becoming more doctrinally orthodox and even dividing from a larger religious group that permits theological diversity.

It is important to recall that there are many other factors that need to be considered in order to reach an informed conclusion about the merits of the inherent requirement test. However, these other factors would need to be strongly supportive of the merits of the inherent requirement test considering that it appears to suffer from two major flaws.