The Position of Religious Schools under International Human Rights Law

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This article considers the application of international human rights law to the employment of persons by Australian religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of 'inherent requirements' tests to employees within religious schools appropriately gives effect to the requirements of international law. Part One observes that that law is found in two primary protections: the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians, and the protection against discrimination. Part Two illustrates the domestic implications of these regimes by considering the human rights rationales offered by the governmental proponents of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021. It concludes that the Equal Opportunity (Religious Exceptions) Amendment Act 2021*(Vic) is an inadequate implementation of relevant international human rights law and that similar legislation in development in other States and the Commonwealth should be scrutinised carefully.*

INTRODUCTION

This article considers the application of international human rights law principles in the context of employment decisions made by religious schools. In particular, it considers the claim, increasingly made in support of Australian domestic legislative reform, that the application of an 'inherent requirements' test to employees within religious schools appropriately gives effect to the requirements of international law. The article observes that two primary international law protections are relevant in this context: (1) the protection provided to religious schools as the collective manifestations of the religious beliefs of individuals, including parents and guardians; and (2) the protection against discrimination. The article illustrates the domestic implications of these protections by considering, as an example, the human rights rationales offered by the State government proponents of the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) ('EOREA Bill'). It concludes that the EOREA Bill failed to conform with important principles of international human rights law and that, more generally, closer scrutiny should be given to proposed legislation which would affect the right of private schools to maintain a religious ethos.

Australian discrimination law is a complex interaction of prohibition and exemption, operating within differing, but interacting, overlays of Commonwealth, State, and Territory law. Until recently, all Australian jurisdictions provided exemptions in variant forms to religious educational institutions in both the areas of employment[1] and the supply of services to

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[1] *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i) (although this is a general exemption not specifically addressed to the circumstances of religious schools, it will also apply to those circumstances); *Anti-Discrimination Act 1991* (Qld) s 25; *Equal Opportunity Act 1984* (SA) s 34(3); *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 2010* (Vic) s 83A; *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1).

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students.[2] In the past year alone these exemptions have been the subject of a proliferation of reform proposals.

The Commonwealth Attorney-General has requested the Australian Law Reform Commission ('ALRC') to draft Commonwealth reforms that would 'ensure that' a religious educational institution 'must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy' while also permitting such institutions to 'continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.'[3] In January of 2023 the ALRC released a Consultation Paper[4] that prompted prominent religious leaders to write an open joint letter to the Commonwealth Attorney-General expressing their 'deep disappointment' with the 'severe limits' proposed therein.[5] As the present article went to press, the ALRC's final recommendations are yet to be delivered.

Developments in the states and territories have continued as well. In May and in July of 2022, respectively, the Law Reform Commission of Western Australia ('LRCWA') and the Queensland Human Rights Commission ('QHRC') issued reports that propose reforms to the exceptions for religious educational institutions currently granted under Western Australia and Queensland law.[6] The ALRC, LRCWA, and QHRC proposals claim to replicate amendments to the *Equal Opportunity Act 2010* (Vic) ('*EOA*') that came into effect on 14 June 2022.[7] As the LRCWA recognised, those amendments 'substantially narrowed' the religious exceptions in Victoria. If enacted, they would have the same effect in Commonwealth, Western Australian, and Queensland law.[8] In November 2022, the Northern Territory became the first Australian jurisdiction to remove the distinct exemption that pertains to religious schools in respect of both staff and students. In that jurisdiction such schools may only have regard to the 'genuine occupational qualification' exception available to all employers when seeking to maintain their religious ethos.[9]

In their 2018 report, the Commonwealth Expert Panel on Religious Freedom ('Expert Panel') emphasised 'the pivotal role of exceptions to discrimination laws in the protection of freedom of religion'.[10] In recommending the retention of existing exceptions, with some minor curtailments, the Expert Panel affirmed the legitimacy of the positions expressed to it by religious schools. These included that many schools 'consider that the freedom to select, and

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

[3] Australian Law Reform Commission, 'New ALRC Inquiry: Religious Educational Institutions and Anti-Discrimination Laws' (Media Release, 4 November 2022) <https://alrc.gov.au/news/new-alrc-inquiry/>.

[4] Australian Law Reform Commission, *Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws* (Consultation Paper, 27 January 2023) ('ALRC Paper').

[5] Letter from Michael Stead, Anglican Bishop of South Sydney on behalf of thirty-three signatories to Mark Dreyfus, Commonwealth Attorney-General, 13 February 2023 <https://sydneyanglicans.net/files/2302013_Letter_Faith_Leaders_AG_ALRC_Consultation_Paper.pdf>.

[6] Western Australia Law Reform Commission, *Review of the Equal Opportunity Act 1984* (WA) (Final Report Project 111, August 2022) 16–7, 178–84 ('LRCWA Report'); Queensland Human Rights Commission, *Building Belonging* (Report, July 2022) 467, 575–83 ('QHRC Report').

[7] *Equal Opportunity Act 2010* (Vic) amended by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

[8] LRCWA Report (n 6) 168.

[9] *Anti-Discrimination Act 1992* (NT) s 35(1)(b)(i).

[10] *Religious Freedom Review* (Report, 18 May 2018) 104 [1.419] ('*Religious Freedom Review*').

to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs'.[11] The Expert Panel noted that '[a] key theme in these discussions, was the need for staff to model the religious and moral convictions of the community, and to uphold or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is "caught not taught".'[12] The Expert Panel recognised that '[f]or some religious schools … the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.'[13]

As we will see, these propositions lie at the very heart of the recent contention inspired by legislative reforms that affect religious schools. These assertions by religious schools frame the context for the key consideration of this article: are such practices by religious schools in accordance with the relevant international human rights law?

PART I: INTERNATIONAL HUMAN RIGHTS LAW

A. UNITED NATIONS JURISPRUDENCE

The right to establish private schools is protected by international human rights law that Australia has ratified. The starting place for the consideration of the rights of religious schools is the protection of the right to manifest religion contained in art 8 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'):

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[14]

[11] Ibid 62 [1.245].
[12] Ibid 56 [1.210].
[13] Ibid 56 [1.212].
[14] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('*ICCPR*'). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,* GA Res 36/55, Un Doc A/RES/36/55 (18 January 1982, adopted 25 November 1981) art 6 ('*Religious Declaration*'); Human Rights Committee, *Views: Communication No 1249/2004,* 85th sess, UN Doc CCPR/C/85/D/1249/2004 (18 November 2005).

The right to found religious schools is protected under each of the above sub-articles. As the Expert Panel recognised: '[a] key aspect of the right to manifest one's belief in Article 18(1) of the *ICCPR* is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion'.[15] As Taylor further notes, Article 18(4) protects the freedom to establish independent religious schools: 'Private religious schools may be seen as a means of supporting the religious and moral education of children in conformity with parental convictions'.[16] The United Nations Special Rapporteur on Freedom of Religion or Belief has also recognised that 'private denominational schools' are 'one way for parents to ensure' their Article 18(4) rights.[17] In his commentary on the *ICCPR*, Nowak also concludes that '[w]ith respect to the express rule in Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* and the various references to this provision by the delegates in the Third Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'[18] The *United Nations Universal Declaration of Human Rights* ('*UNDHR*'),[19] the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[20] and the *Convention on the Rights of the Child* ('*CRC*')[21] also provide relevant protections to children and their parents.

In *Delgado Páez v Colombia*,[22] the United Nations Human Rights Committee ('UNHRC') considered a complaint by a teacher within the Colombian Catholic schools system who had received differential treatment by his employer due to his advocacy of 'liberation theology'. In finding that the complainant's 'right to profess or to manifest his religion has not been violated' the UNHRC stated 'that Colombia may, without violating [Article 18], allow the Church authorities to decide who may teach religion and in what manner it should be taught.'[23] Similarly, the UNHRC found no breach of Article 19, concerning the right to freedom of expression by the employee. Subsequently in its General Comment on Article 18, the Committee emphasised the foundational importance of Article 18(4) when it recognised that, unlike the general protection to religious manifestation in Article 18(3), 'the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.'[24]

In 2010 former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt concluded that 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.[25] In 2013 he emphasised that 'the right of persons and

[15] *Religious Freedom Review* (n 10) 59 [1.225].
[16] Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 533.
[17] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/16/53 (15 December 2010) [55].
[18] Manfred Nowak, *UN Covenant on Civil and Political Rights:CCPR Commentary* (N P Engel, 2nd rev ed, 2005) 443.
[19] *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 26(3) ('*UNDHR*').
[20] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 13(3)–(4) ('*ICESCR*').
[21] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (signed and entered into force 2 September 1990) arts 5, 14(2) ('*CRC*'). See also Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 243.
[22] Human Rights Committee, *Views: Communication No. 195/198*, 39th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Páez v Colombia'*).
[23] Ibid [5.7].
[24] Human Rights Committee*, General Comment No 22:The Right to Freedom of Thought, Conscience and Religion (Art 18),* 48th sess*,* UN Doc CCPR/C/21/Rev 1/Add.4 (30 July 1993*)*.
[25] Bielefeldt (n 17) [54].

groups of persons to establish religious institutions that function in conformity with their religious self-understanding … is not just an external aspect of marginal significance.' Without 'an appropriate institutional infrastructure … their long-term survival options as a community might be in serious peril'. In respect of their treatment of staff he acknowledged that for many 'questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith.' The means by which they 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[26] While recognising that 'religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace' than secular institutions, he emphasised that 'much depends on the details of each specific case.' For these reasons the Special Rapporteur concluded that '[t]he autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.'[27] These principles also apply to religious schools, as he noted that limitations on the ability to incorporate private religious schools 'may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions.'[28]

The exercise of control by religious schools over the appointment of staff entails competing rights. Chief among these is the right to equality of staff under Article 26, and the right to maintain a religious school as an effectuation of the rights granted to individuals under Article 18. Other rights that may be enlivened include the right to privacy, the right to family life, and the rights to work and education, where the actions of a religious school would deprive persons of employment opportunities. As the immediate past Special Rapporteur has noted, in such cases 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.[29] However, acknowledging that religious institutions comprise a 'special category' distinct from secular institutions because 'their *raison d'être* is, from the outset, a religious one', successive

[26] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) [57].
[27] Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/69/261 (5 August 2014) [41].
[28] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/19/60 (22 December 2011) [47]. Ireland is the sole State Party that the Human Rights Committee has called to reform its discrimination law as applies to religious educational institutions: Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Ireland*, UN Doc CCPR/C/IRL/CO/4 (19 August 2014) [21]. That recommendation can be considered to be situation-specific, applying to a country in which genuine alternative employment opportunities for teachers that do not uphold the ethos of religious schools are not available. As O'Toole reports, shortly before the Committee's recommendation 'approximately 96% of primary schools remain under denominational patronage.' Barbara O'Toole '1831–2014: an opportunity to get it right this time? Some thoughts on the current debate on patronage and religious education in Irish primary schools' (2015) 34:1 *Irish Educational Studies* 89, 91. Similarly, the Human Rights Committee did not reiterate the recommendations for similar reform made by the Committee on Economic, Social and Cultural Rights in its 2018 *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021), see Human Rights Committee *Concluding Observations on the Seventh Periodic Report of Germany* CCPR/C/DEU/CO/7 (30 November 2021). Neither the Human Rights Committee nor the Committee on Economic, Social and Cultural Rights have rendered any conclusion in their Periodic Reviews that Australia is non-compliant with the *ICCPR* or the *ICESCR* as a result of the current exemptions for religious educational institutions within Federal law.
[29] Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion and Belief*, UN Doc A/HRC/37/49 (28 February 2018) [47]. See also Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief: Civil and Political Rights, Including the Question of Religious Intolerance,* UN Doc E/CN.4/2006/5 (9 January 2006) 'contentious situations should be evaluated on a case-by-case basis' and 'the competing human rights and public interests put forward in national and international forums need to be borne in mind': at [51]–[52].

Special Rapporteurs have confirmed that the applicable standard for determining the permissible limitations upon religious institutions in respect of their employment practices is the strict standard set by Article 18(3).[30] While regard to 'the details of each specific case'[31] is required in determinations of whether the conduct of religious institutions constitutes a permissible limitation on the rights of others, as we will see, much turns on the precise means adopted within domestic law by which those specific circumstances are incorporated.

B. EUROPEAN JURISPRUDENCE

The European Court of Human Rights (ECtHR) provides the most developed body of applied human rights law at an international level. This includes its treatment of the right to maintain private schools. However, important distinctions between the jurisprudence of the ECtHR and that developed under the *ICCPR* should not be overlooked. The UNHRC has specifically eschewed the jurisprudence of the ECtHR in several respects, and in some cases has imposed more stringent protections for religious manifestation.[32] Chief among these distinctions is the UNHRC's eschewal of the margin of appreciation doctrine.[33] As Taylor shows, the UNHRC has also been less willing to adopt the 'progressive' conception of its chief enabling treaty as a 'living instrument' than has the ECtHR.[34]

In domestic reform efforts reliance is also at times placed upon the jurisprudence of the Court of Justice of the European Union applying European Council Directive 2000/78.[35] However, as the United Nations High Commissioner for Human Rights has made clear, that jurisprudence is to be distinguished as 'distinct among international and regional instruments', including on account of its 'limited exceptions' for religious institutions.[36] Aroney and Taylor have recently summarised the key points of the Directive's departure from the relevant human rights law enshrining Australia's obligations.[37] Accordingly, the Directive need not be further considered in this account of those obligations.

1. *Religious Institutional Autonomy*

Returning to the ECtHR, and following the approach of that Court itself, consideration of its jurisprudence concerning religious schools must commence with its framing of the broad

[30] Bielefeldt (n 27) [41] see also [38]; Bielefeldt (n 28) [60]; Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/43/48 (24 August 2020) [59], [66], [74].
[31] Bielefeldt (n 27) [41].
[32] See, eg, Human Rights Committee, *Views*: *Communication No 185/2008,* 106th sess, CCPR/C/106/D/1852/2008 (1 November 2012) ('*Bikramjit Singh v France'*) [8.6]; Cf *Ranjit Singh v France (dec.)* (European Court of Human Rights, Fifth Section, Application No 27561/08, 30 June 2009).
[33] Human Rights Committee, *Views: Communication No 511/92*, 52nd sess, CCPR/C/52/D/511/1992 (8 November 26 October 1994) [7.13], [9.4]; *Bikramjit Singh v France* (n 28).
[34] Taylor (n 16) 19.
[35] See, eg, ALRC Paper (n 4) [53], [55], [60], [66], [103] and [A.47]; *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, as considered in *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018); *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).
[36] Office of the United Nations High Commissioner for Human Rights, *Protecting Minority Rights: A Practice Guide to Developing Comprehensive Anti-Discrimination Legislation* (United Nations and Equal Rights Trust, 2022) 54.
[37] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 42.

philosophical correlation between religious institutional autonomy and plural democratic society. In *Hasan and Chaush v Bulgaria*, the Court stated:

> [T]he believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. … Were the organisational life of the community not protected … all other aspects of the individual's freedom of religion would become vulnerable.[38]

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

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

In that matter the Court stated:

> [R]eligious communities are entitled to their own opinion on any collective activities of their members that might undermine their autonomy and this opinion must in principle be respected by the national authorities. However, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient … It must also show, in the light of the circumstances of the individual case, that the risk alleged is real and substantial and that the impugned interference with freedom of association does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy.[40]

The Court's consideration of the employment practices of faith-based institutions proceeds from these broad principles of democratic liberal political philosophy. A further developed account of this jurisprudence is provided in Part II, where the consistency of reforms within Australian law with that jurisprudence is considered.

2. *Right to Establish Private Religious Institutions*

The provision corresponding to the parental rights protection at Article 18(4) of the *ICCPR* is contained within Article 2 of the First Protocol to the *European Convention on Human Rights* ('*ECHR*'):

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[38] *Hasan and Chaush v Bulgaria* [2000] XI Eur Court HR 117, 137-8 [61] ('*Hasan and Chaush v Bulgaria*'). See also *Serif v Greece* [1999] IX Eur Court HR 73. See also Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153.

[39] *Sindicatul "Păstorul Cel Bun" v Romania* [2013] V Eur Court HR 41, 63 [137] (citations omitted) ('*Sindicatul "Păstorul Cel Bun" v Romania*').

[40] Ibid 67–8 [159] (citations omitted).

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[41]

The seminal ECtHR judgement in *Kjeldsen, Busk Madsen and Pedersen v Denmark* ('*Kjeldsen*')[42] concerned the right of parents to remove children from sex education. Therein the European Court of Human Rights held that Article 2 'aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention.'[43] The Court considered this right took effect as 'the discharge of a natural duty towards their children — parents being primarily responsible for the "education and teaching" of their children — [whereby] parents may require the State to respect their religious and philosophical convictions.'[44] The Court noted the important role private schools play in ensuring parents may excuse their children from education that does not align with their religious or philosophical convictions:

> [T]he Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools … or to educate them or have them educated at home.[45]

In *Ingrid Jordebo Foundation of Christian Schools v Sweden*,[46] the European Commission on Human Rights further articulated the principles set out in *Kjeldsen* with specific application to the context of independent schools. Therein the Commission acknowledged that the *travaux preparatories* [the records of the deliberations of State Parties that led to the *ECHR*] recognise:

> that the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools … In particular, it was pointed out that … the activity in a private school should be allowed 'within very wide ranges to bear the stamp of different views and values'.[47]

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

> [S]eem[ed] to regard the right to keep a school as something entirely within 'le fait du Prince' [permissible acts of government]. … The Government seem[ed] to look

[41] *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as supplemented by *Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 20 March 1952, 213 ETS No 009 (entered into force 18 May 1954).
[42] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 ('*Kjeldsen*').
[43] Ibid [21]. Also affirmed in *Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No 15472/02, 29 June 2007) [84(b)]. See also Rivers (n 21) 245, commenting upon the decision of *Kjeldsen* (n 42).
[44] *Kjeldsen* (n 42) [22].
[45] Ibid [24].
[46] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No 11533/85, 6 March 1987) ('*Ingrid Jordebo*').
[47] *Ingrid Jordebo* (n 46). See also Klaus Beiter, *The Protection of the Right to Education in International Law* (Martinus Nijhoff, 2006).

> at schooling the same way as at military service, where of course no competing 'private regiments' could be tolerated.[48]

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

> In Sweden it is a basic political idea, which has governed the political leaders for a long time, that the State and the local municipal authorities must control the education: what the children have to learn and in which ways they have to receive the education must in every instance be decided by the political majority of the country … The whole Swedish school system is very close to violating Article 9 of the Convention [freedom of religion or belief] when it says that everyone is guaranteed the right to think freely. The idea is that the Swedish school children are in principle led to think only in the directions that are decided by the political majority of the Parliament.[49]

In its conclusion, the Commission held 'the right to start and run a private school' had been breached.[50]

C. SUMMARY OF PART I

In summary, the above rulings, fashioned as extensions of the foundational philosophical conceptions underpinning democratic society, support the offering of strong protections for faith-based schools in respect of their employment decisions. Legislative reforms that fail to afford religious educational associations the ability to maintain their ethos through restrictions on their ability to employ persons who share their beliefs require strict scrutiny to ensure they do not evince a movement towards a society in which children are 'led to think only in the directions that are decided by the political majority of the Parliament', breaching 'the 'guaranteed … right to think freely'.[51] This is because, as the application of these principles to domestic legislation in Part II considers, such limitations may jeopardise the ability of religious schools to offer students a holistic religious education in accordance with the human right that protects the ability of parents to choose a school consistent with their religious and moral convictions. Under both the *ICCPR* and the *ECHR*, regard must be had to the specific circumstances of each case in balancing the rights of individuals to freedom from discrimination, the rights of religious individuals to form collective institutions, and parental rights. However, the limitations standard applicable to the employment practices of the 'special category'[52] of religious educational institutions remains that under Article 18. As will be seen in Part II, the precise means adopted to incorporate the specific circumstances can have a significant impact on the ability of schools to maintain their unique ethos.

PART II: DOMESTIC APPLICATION

[48] Ibid.
[49] Ibid.
[50] Ibid (citations omitted). Having set out these this general statement of rights, the Commission held that on the particular facts that the education provided did not meet the quality control requirements legitimately imposed by the Government.
[51] Ibid. See also *Verein Gemeinsam Lernen v Austria* (European Commission of Human Rights, First Chamber, Application no 23419/94, 6 September 1995).
[52] Bielefeldt, (n 27) [41].

Having outlined the general principles applying to the religious institutional autonomy of Australian private schools under international human rights law, this article now considers the alignment of domestic Australian legislation with that law. The enactment of the EOREA Bill limited the 'exemptions' available to religious institutions and schools found within the *EOA.* The Victorian model is proving to provide somewhat of a template for reform. The ALRC makes the claim that the proposals contained in its January 2023 Consultation Paper are 'generally consistent with amendments to the law … in force in Victoria'.[53] In its May 2022 Final Report, the LRCWA concludes that 'the approach taken in the Victorian Religious Exceptions Act should be adopted.'[54] The Western Australian Attorney-General has confirmed that the Government 'has broadly accepted the recommendations' with reforms 'strengthening equal opportunity protections for LGBTIQA+ staff and students in religious schools' being one of 'several key reforms … expected to be included'.[55] In its response to a review commissioned by the Queensland Attorney-General, in July 2022 the Queensland Human Rights Commission recommended a reform closely aligning with the EOREA Bill.[56] At the time of writing, the Queensland Government is yet to release its response to the Commission's '*Building Belonging*' report.

The following discussion considers the extent to which the Victorian model can be said to be consistent with international human rights law. The Statement of Compatibility ('SoC') provided with the EOREA Bill sets out its key function:

> The Bill promotes the right to equality by amending the religious exceptions in the EO Act to remove the ability for religious bodies and educational institutions to discriminate on the basis of a person's sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment, education and the provision of goods and services.[57]

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

> [C]onformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.[58]

[53] ALRC Paper (n 4) [53], [60].
[54] LRCWA Report (n 6) 182.
[55] John Quigley, 'WA's Anti-discrimination Laws Set for Overhaul (Media Statement, 16 August 2022 <https://www.mediastatements.wa.gov.au/Pages/McGowan/2022/08/WAs-anti-discrimination-laws-set-for-overhaul.aspx>.
[56] QHRC Report (n 6).
[57] Victoria*, Parliamentary Debates,* Legislative Assembly, 28 October 2021, 4368 (Natalie Hutchins) ('*Parliamentary Debate* EOREA').
[58] Ibid 4369. See also 4370.

As the SoC outlined: 'This replaces the current blanket exception with an exception that is tailored to the specific position and restricts the discrimination to only those positions where it is necessary.'[59]

These reforms rely on a particular interpretation of international human rights law in two key respects. First, that non-religious activity can be irrelevant to the suitability of an employee of a religious institution under that law. Second, that an 'inherent requirements test' is consistent with that law. It is noteworthy that for both contentions the SoC that accompanied the EOREA Bill failed to provide one citation expressing reliance on the judgements of international human rights bodies for its interpretation. The following discussion considers the accuracy of these claims.

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

The EOREA Bill sparked significant concerns for religious institutions. One of the primary concerns was associated with the legislation's attempt to limit a religious institution's consideration of non-religious conduct that is inconsistent with the teachings of a religious institution when determining the suitability of employees. While the SoC states that it preserves the ability of faith communities to 'exclude individuals who do not share their faith',[60] it also states that it removes

> the ability of religious organisations and schools to discriminate on the basis of sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity in employment. Teachers and other employees at religious organisations and educational institutions should not need to hide their identity in order to avoid risking their livelihoods.[61]

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

> [T]he Bill also limits the right to equality by allowing religious organisations and educational institutions to continue to discriminate against individuals on the basis of a religious belief or activity (a protected attribute under the EO Act) in employment, education and the provision of government-funded goods and services. The purpose of this limitation is to protect the ability of religious organisations and educational institutions to demonstrate their religion or belief as part of a faith community, and exclude individuals who do not share their faith. The formation of religious schools and organisations is an important part of an individual's right to enjoy freedom of religion with other members of their community.[62]

However, again in apparent tension with that statement, in her second reading speech government minister Natalie Hutchins stated:

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[59] Ibid 4369. See s 83A(2) *Equal Opportunity Act 2020* (Vic) ('*EOA*').
[60] Ibid 4373.
[61] Ibid 4369.
[62] Ibid 4368–9.

> A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee only on the basis that a person's sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body.[63]

However, the Minister then goes on to note:

> Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.[64]

In calling into question the extent to which private conduct of a non-religious nature is relevant to the determination of an employee's suitability, the resulting interaction between non-religious 'activity' and religious 'belief' introduced into the *EOA* has the potential to cause significant uncertainty, both for schools and their employees. Each will now need to consider the extent to which belief can be informed by action that is not inherently religious, but which nonetheless is inconsistent with religious belief. This uncertainty calls into question the ability of the *EOA* to satisfy the requirement that limitations on human rights be 'prescribed by law' under Article 18(3) of the *ICCPR*. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* interprets this requirement as encompassing the dual obligation that '[l]aws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable' and that '[l]egal rules limiting the exercise of human rights shall be clear and accessible to everyone.'[65]

The judgement of the ECtHR in *Obst v Germany*[66] also raises serious questions for the compliance of this aspect of the *EOA* with international human rights law. That matter concerned the director for Europe of the public relations department of the Mormon Church who had engaged in an extramarital affair. No question was raised of any activity or views that would fall within the definition of 'religious belief or activity' under the *EOA*. The private activity of the employee, which would (absent an exemption) fall within the protected attribute of 'lawful sexual activity' under the *EOA*, was not a 'religious activity'. The Court held that the Church was justified in dismissing him, on the ground that to do so was vital for its credibility.[67] The private nature of the conduct was not a decisive factor, as the special nature of the professional requirements imposed on the Applicant was due to the fact that they were established by an employer whose ethos is based on religion or belief.[68] To the extent that the *EOA* requires that a religious institution disregard the same activities of a similarly placed

[63] Ibid 4375.
[64] Ibid.
[65] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984) Annex 4 [16]–[17].
[66] *Obst v Germany* (European Court of Human Rights, Fifth Section, Application No 425/03, 23 September 2010).
[67] Ibid [51].
[68] Ibid.

employee of a religious institution, it is inconsistent with the recognition provided to religious institutional autonomy by the ECtHR.

Fernández Martínez v Spain[69] concerned a Catholic priest and scripture teacher in public schools who, in the context of a campaign against Catholic teaching on clergy celibacy, disclosed to the media that he was married. The decision provides a further illustration of the Court's recognition that, in the case of religious institutions, private conduct may impact upon the ability of an employee to perform their professional activities:

> In the present case the interaction between private life *stricto sensu* and professional life is especially striking as the requirements for this kind of specific employment were not only technical skills, but also the ability to be 'outstanding in true doctrine, the witness of Christian life, and teaching ability', thus establishing a direct link between the person's conduct in private life and his or her professional activities.[70]

In the context of religious schools, it is of particular interest that the Court considered that the concerns of the Church in ensuring alignment between its representatives' private lives and its teachings 'were all the more important as the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion.'[71]

Travaš v Croatia also raises significant concerns as to the compliance of the *EOA* with international human rights principles.[72] That matter concerned a religious teacher at a state school who divorced and remarried, in contravention of Catholic canon law. However, unlike *Fernández Martínez v Spain* where the applicant had voluntarily disclosed the inconsistency in his private life to the media, in *Travaš v Croatia* the applicant teacher's private conduct was not publicly disclosed. The Court noted that the question of the public awareness of the actions of the teacher was not relevant:

> [T]he question is rather whether a particular religious doctrine could be taught by a person whose conduct and way of life were seen by the Church at issue as being at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers.[73]

In answering that question in the negative, the Court concluded 'it does not appear that the decision to withdraw his canonical mandate, justified by the interest of the Church to preserve the credibility of its teachings, was in itself excessive'.[74] In reaching that conclusion the Court reasoned:

> [I]n order for a religion to remain credible, the requirement of a heightened duty of loyalty may relate also to questions of the way of life of religious teachers. Lifestyle may be a particularly important issue when the nature of an applicant's professional

[69] *Fernández Martínez v Spain* (2014) II Eur Court of HR 449 (extracts).
[70] Ibid [111].
[71] Ibid [142].
[72] *Travaš v Croatia* (European Court of Human Rights, Application no 75581/13, 4 October 2016) [97]-[98]. See also *Fernández Martínez v Spain* (n 59) [137], in the context of teachers of religious doctrine.
[73] *Travaš v Croatia* (n 72) [97].
[74] Ibid [107].

> activity results from an ethos founded in the religious doctrine aimed at governing the private life and personal beliefs of its followers, as was the case with the applicant's position of teacher of Catholic religious education and the precepts of the Catholic religion. In observing the requirement of heightened duty of loyalty aimed at preserving the Church's credibility, it would therefore be a delicate task to make a clear distinction between the applicant's personal conduct and the requirements related to his professional activity.[75]

Finally, attention is drawn to *Siebenhaar v Germany,*[76] a decision concerning the German Protestant Church's dismissal of a member of a religious community called the 'Universal Church/Brotherhood of Humanity' from employment as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'.[77] In that matter the Court upheld the determination of the domestic court that

> the applicant did not have the right to belong to or participate in an organization whose objectives were in conflict with the mission of the Protestant Church, which could require its employees to abstain from activities that put in doubt their loyalty to it and to adopt both professional *and private conduct* that conforms to these requirements.[78]

The crucial point arising from the preceding cases is that the ECtHR has emphasized that the credibility of religious institutions whose moral code governs private conduct requires that such institutions be entitled to discipline employees whose conduct does not conform to that moral code, regardless of whether that conduct is inherently religious or publicly known.

If private non-religious activity is not determinative under the newly-amended Victorian regime, even the prominent position occupied by a Church public relations director would not justify disciplinary action, if the conduct complained of was in the employee's personal life (as in *Obst v Germany*) and where the protagonist continued to affirm the beliefs of the religious institution notwithstanding their conduct. Practically speaking, the Anglican Church could not act where a bishop was discovered to have a porn addition, the Catholic Church could not act where a bishop was discovered to be covertly married, and an Islamic institution could not act where an imam was discovered to be in an extra-marital affair (whether heterosexual or otherwise), so long as each of those protagonists were repentant. In this respect, the relevant amended provisions of the *EOA* are not compatible with international human rights law.

B. INHERENT REQUIREMENTS TEST

The second contentious issue contained in the Victorian legislation is the limitation of the exemption for religious institutions and schools to an 'inherent requirements' test for certain roles.[79] In her second reading speech Natalie Hutchins explicated the distinctions that this aspect of the EOREA Bill seeks to draw:

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[75] Ibid [98].
[76] *Siebenhaar v Germany* (European Court of Human Rights, Fifth Section, Application No 18136/02, 3 February 2011).
[77] Ibid.
[78] Ibid [44] [tr author] (emphasis added).
[79] Section 83A *EOA*.

> In most religious schools it would be an inherent requirement of a religious education position that employees must closely conform to the doctrines, beliefs or principles of the school's religion. On the other hand, a support position, such as a gardener or maintenance worker, is unlikely to have religious conformity as an inherent requirement of their role.[80]

The test is intended to protect persons from being 'discriminated against for reasons that have nothing to do with their work duties'.[81] Similar statements have been made by the LRCWA.[82] The QHRC has recommended the adoption of a 'genuine occupational requirements test', with the complementing clarification that '[t]he Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution'.[83] For the purposes of Queensland law 'there is no relevant distinction between the two tests of 'genuine occupational requirements' and 'inherent requirements'.[84] The ALRC's Consultation Paper claims that the imposition of a 'genuine requirement'[85] test (later described as a 'genuine occupational qualification'[86] and a 'genuine occupational requirement' test[87]) or 'inherent requirements'[88] test on religious educational institutions is consistent with Australia's international obligations.[89]

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

> [A] teacher changes their religious beliefs and becomes accepting of marriage equality. They now hold an inconsistent religious belief. The teacher continues to promote the religious views of the school on [traditional] marriage to students but also tells students that there are those in the broader community that hold different views. Depending on the circumstances, it *may not* be reasonable and proportionate to dismiss a teacher who is willing to convey the religious views of the school, even if they differ from their own.[90]

and

> [A] religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the

[80] *Parliamentary Debate* EOREA (n 57) 4374.
[81] Ibid.
[82] LRCWA Report (n 6) 182.
[83] QHRC Report (n 6) 583.
[84] *Toganivalu v Brown and Department of Corrective Services* [2006] QADT 13. See also *Chivers v Queensland* [2014] QCA 141; 244 IR 102 [40]. For the position outside of Queensland see Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [11.2.32]–[11.2.33], where an argument is also made for a subtle distinction between an 'inherent requirement' and a 'genuine occupational qualification'. However, as they say, regard to the 'character of the work', is common to both tests.
[85] ALRC Paper (n 4) 22.
[86] Ibid [66], [A.36].
[87] Ibid [93], [97].
[88] Ibid [96].
[89] Ibid [51].
[90] Ibid 4375 (emphasis added).

> school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the teaching roles.[91]

The latter example illustrates a key effect of the 'inherent requirements' test. If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an 'inherent requirement', there is nothing limiting that evidence from applying to all equivalent teaching positions.[92] Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct potential to 'white-ant' an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the passage of time, the maintenance of the school's ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably-qualified persons who hold the relevant faith.[93] Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel, to inculcate an institutional ethos by applying a *preference* for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is 'caught not taught'.[94]

Further, through their vague and imprecise application, inherent requirements tests risk running afoul of the requirement that limitations on religious exercise be 'prescribed by law', which incorporates the obligation that they be sufficiently clear to enable application. Given these effects, serious consideration is required as to whether the 'inherent requirements' test sufficiently acquits the obligations Australia has accepted under international human rights law. Again, the SoC is notably scant on detail. As noted above, the Special Rapporteur has commented that under the *ICCPR* 'much depends on the details of each specific case'.[95] Similarly, although not ratified by Australia, the ECtHR jurisprudence recognizes that, amongst a range of factors, 'the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned'.[96] However, as the following analysis demonstrates, both of these recognitions do not equate to an assertion that the adoption of an 'inherent requirements' test will assure compliance with the applicable human rights law. Indeed, if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance. This is because, as Aroney and Taylor have summarised:

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

[91] Ibid 4375.
[92] Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.
[93] Greg Walsh, 'The Right to Equality and Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.
[94] *Religious Freedom Review* (n 10) 56 [1.210]
[95] Bielefeldt (n 27) [41].
[96] *Fernández Martínez v Spain* (n 69) [130]. See also *Obst v Germany* (n 66) [48]-[51]; *Schüth v Germany* [2010] V Eur Court HR 397, 427 [69].

> requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.[97]

In contrast, in their review of decisions of the ECtHR, Hilkemeijer and Maguire claim that:

> Since the right to manifest religion expressly protects the right to teach religion, the ECtHR has held that religious organisations may expect a high level of loyalty from persons employed to teach religion. However, employees of religious organisations such as administrators, teachers of non-religious subjects, gardeners and bus drivers, are less likely to owe a heightened duty of loyalty that extends to living their private lives in accordance with religious precepts.[98]

However, as the following analysis shows, the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.

Siebenhaar v Germany[99] directly refutes the assertion that a determinative 'inherent requirements' test that only looks to the functions performed by the particular role in question, the 'work duties' to use the terminology employed by the Victorian Minister,[100] will satisfy the requirements of international human rights law. The matter concerned the dismissal of a person employed as 'a childcare assistant in a day nursery … and later in the management of a kindergarten'[101] run by the German Protestant Church. Critically, the Court recorded that the terms of the contract of employment provided:

> Service in the church and in the diakonia is determined by the mission to proclaim the gospel in word and deed. The employees and the employer put their professional skills at the service of this objective and *form a community of service regardless of their position or of their professional functions* ...[102]

The dismissal related to behaviour outside of work hours, namely Ms Siebenhaar's membership of, and proselytisation for, the Universal Church/Brotherhood of Humanity. The Court restated its jurisprudence that 'except in very exceptional cases, the right to freedom of religion as understood by [lit. "such as intended by"] the Convention excludes any assessment on the part of the State of the legitimacy of religious beliefs or of the methods of expressing them'.[103] From that jurisprudence flowed the Court's affirmation of the Church's own conception of the conduct or beliefs of its employees that would detrimentally impact on its ability to 'form a community of service *regardless of their position or professional functions*'.[104] That jurisprudence is consistent with the frequently adopted approach that courts should apprehend the genuineness, or sincerity, of the religious beliefs in question.[105] The Court saw fit to have

[97] Aroney and Taylor (n 37) 58.
[98] Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination Against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752, 758.
[99] *Siebenhaar v Germany* (n 76).
[100] *Parliamentary Debate* EOREA (n 57) 4374.
[101] *Siebenhaar v Germany* (n 76).
[102] Ibid [9] [tr author] (emphasis added).
[103] Ibid. See also *Hasan and Chaush v Bulgaria* (n 31) 137–8 [62], 140–1 [78].
[104] *Siebenhaar v Germany* (n 76) [9] [tr author] (emphasis added).
[105] See Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill' in Michael Quinlan and A Keith Thompson (ed), *Inclusion, Exclusion and Religious Freedom*

regard to the self-conception of the Protestant Church as to the impact Ms Siebenhaar's private conduct and belief would have on the ethos of the relevant childcare centres. In affirming that the actions taken on the basis of the employment contract (and its clarification that the Church's assessment could be made 'regardless of their position or professional functions'),[106] the Court expressly disavowed an 'inherent requirements' test as a determinative feature of the law concerning religious institutional autonomy. It is also of particular note that the Court specifically referenced both the administrative and managerial duties engaged in by Ms Siebenhaar when acknowledging the Church's concern for the impact on the credibility of the Protestant Church 'in the eyes of the public and the parents of the children'. Regardless of her ability to perform these functions, the credibility issue also arose because of the perceived 'risk of influence' Ms Siebenhaar might pose, notwithstanding the young age of the children. The Court's regard for a religious institution's own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an 'inherent requirements' style test that would have regard to the particular 'work duties'[107] assigned to a role without regard to the wider institutional context in which the employee is placed, as is proposed by the SoC. Instead, the Court acknowledged that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos [lit. 'ethic'] is founded on religion or beliefs'.[108]

In *Rommelfanger v Germany,*[109] the ECtHR found no violation in respect of a Catholic hospital's discipline of staff that had publicly criticized the Catholic Church's position on abortion. The judgement provides a further example of the Court giving credence to the self-conception of a religious institution concerning the fitness of a person to fulfill the responsibilities of their employment and the impact of their extra-work activities on the religious ethos of an institution. Therein the ECtHR held:

> If, as in the present case, the employer is an organisation based on certain convictions and value judgments *which it considers as essential* for the performance of its functions in society, it is in fact in line with the requirements of the Convention to give appropriate scope also to the freedom of expression of the employer. An employer of this kind would not be able to effectively exercise this freedom without imposing certain duties of loyalty on its employees. As regards employers such as the Catholic foundation which employed the applicant in its hospital, the law in any event ensures that there is a reasonable relationship between the measures affecting freedom of expression and the nature of the employment *as well as the importance of the issue* for the employer.[110]

The applicant in question was a physician whose employment contract provided that his conduct would

> be governed by … the duties which flow from charity (Caritas) as an essential expression of Christian life. The employees are required to perform their services in loyalty and to show a behaviour *inside and outside their professional functions*

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

[106] *Siebenhaar v Germany* (n 76) [9] [tr author].

[107] *Parliamentary Debate* EOREA (n 57) 4374.

[108] *Siebenhaar v Germany* (n 76) [46] [tr author].

[109] Human Rights Commission, Application No 12242/86, 6 September 1989.

[110] Ibid (emphasis added).

> which, as a whole, corresponds to the responsibility which they have accepted. It is presupposed that in performing their professional duties they will be guided by Christian principles.[111]

Again, the decision defies the proposition that an inherent requirement test that looks only to the 'work duties'[112] of the role is determinative. Finally, as noted above, in the decision of *Fernández Martínez v Spain,*[113] concerning a Catholic priest and scripture teacher, the Court recognized that 'the requirements for this kind of specific employment were *not only technical skills*, but also the ability to be "outstanding in true doctrine, the witness of Christian life, and teaching ability"'.[114]

C. SUMMARY OF PART II

In applying the broad philosophical principles outlined in Part II, rather than the 'inherent requirements' or 'genuine occupational qualifications' tests, the ECtHR has focused on a range of factors, including whether a 'heightened degree of loyalty' exists;[115] the impact of the impugned conduct or belief on the ethos of the religious institution;[116] 'the proximity between the applicant's activity and the Church's proclamatory mission';[117] whether procedural fairness according to the rules of the religious institution has been afforded;[118] whether the relevant documents sufficiently clarified the expectations of the employer;[119] whether the applicant had knowingly placed themselves in a position of conflict;[120] whether the domestic courts had conducted 'a detailed assessment of all the competing interests and provided sufficient reasoning when dismissing the applicant's complaints';[121] and the availability of alternative employment,[122] all to be exercised with the understanding that the Court is not to engage in an exercise of assessing the legitimacy of the asserted beliefs of the institution, or the means by which they are expressed.[123] In particular, as noted above, the ECtHR's jurisprudence recognizes that personal conduct engaged in within the 'private life' of an employee can impact upon the ethos of a religious institution.[124]

The foregoing authorities establish that the 'real and substantial' risk to religious autonomy test[125] does not preclude a religious community from considering that the private life and beliefs of employees may give rise to a legitimate concern that its religious ethos would be undermined. Further, as *Travaš v Croatia* demonstrates, while the public nature of acts undertaken in the private life of an employee may be relevant, the importance of fidelity to teachings means that for some religious institutions, inconsistent acts need not be public, having regard to the conception of the religious institution employer. As the Court stated in

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[111] Ibid (emphasis added).
[112] *Parliamentary Debate* EOREA (n 57) 4374.
[113] *Fernández Martínez v Spain* (n 69).
[114] Ibid [111] (emphasis added).
[115] *Travaš v Croatia* (n 72); *Obst v Germany* (n 66) [51]; *Schüth v Germany* (n 96).
[116] *Siebenhaar v Germany* (n 76).
[117] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69) [139].
[118] *Schüth v Germany* (n 96).
[119] *Travaš v Croatia* (n 72) [93]; *Siebenhaar v Germany* (n 76).
[120] *Fernández Martínez v Spain* (n 69) [144]-[145]; *Siebenhaar v Germany* (n 76).
[121] *Travaš v Croatia* (n 72) [69] summarising *Schüth v Germany* (n 96).
[122] *Schüth v Germany* (n 96); *Fernández Martínez v Spain* (n 69).
[123] *Hasan and Chaush v Bulgaria* (n 38).
[124] *Siebenhaar v Germany* (n 76).
[125] *Sindicatul "Păstorul Cel Bun" v Romania* (n 39); *Fernández Martínez v Spain* (n 69) [131].

Obst v Germany 'the absence of media coverage … cannot be decisive … the special nature of the professional requirements imposed on the applicant were due to the fact that they were established by an employer whose ethos is based on religion or belief'.[126] Further, as *Siebenhaar v Germany* demonstrates, even where an employee is engaged in managerial tasks and the education provided is directed to small children the Court is willing to recognize that 'the particular nature of the professional requirements imposed on the applicants resulted from the fact that it was established by an employer whose ethos is founded on religion or beliefs' and that the detrimental impact of the employee's beliefs on the credibility of the institution 'in the eyes of the public and the parents' may be a sufficient factor.[127] Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake 'any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them'.[128] As Aroney and Taylor summarise, an 'inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the *ECHR* as interpreted by the ECtHR.'[129] As the Special Rapporteur acknowledges in interpreting the jurisprudence of the *ICCPR*, the means by which religious bodies 'institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.'[130]

CONCLUSION

This article has set out the primary international human rights law that pertains to religious schools. The right to found and maintain private schools is protected by the international human rights law that Australia has ratified, primarily found in Article 18 of the *ICCPR*. It has also considered the developed application of that right, as enunciated within the jurisprudence of bodies exercising jurisdiction under the *European Convention on Human Rights.* In the light of the foundational principles of democratic political philosophy articulated particularly by the latter, it has argued that close scrutiny of any legislative proposals that may impact upon the ability of private education associations to maintain their distinct religious ethos is required. It has considered how restrictions on the ability of a private faith-based school to ensure that those persons appointed as its representatives also share its faith can impact upon its ability to maintain a unique religious identity, and thus breach the right to establish private religious schools. It has demonstrated the domestic application of these principles by consideration of the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021 which has framed the recent recommendations for reform provided by the Australian Law Reform Commission, the Law Reform Commission of Western Australia, and the Queensland Human Rights Commission. That now enacted Bill has served as an important illustration of how domestic legislation may fail to adequately acquit the obligations of international human rights law.

[126] *Obst v Germany* (n 66) [51] [tr author].
[127] *Siebenhaar v Germany* (n 76) [46] [tr author].
[128] Ibid. See also *Hasan and Chaush v Bulgaria* (n 38) 137–8 [62], 141–2 [78].
[129] Aroney and Taylor (n 38).
[130] Bielefeldt (n 27) [57].