



**Submission to the Department of Prime Minister and  
Cabinet – Expert Panel**

**Protection of Religious Freedom**

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# 1. Introduction

## A. JobWatch:

Job Watch Inc. (JobWatch) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. The centre is funded by State and Federal funding bodies to do the following:

- Provide information and referrals to workers from Victoria, Queensland and Tasmania via a free and confidential telephone information service (**TIS**);
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Represent and advise vulnerable and disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone informational service. To date we have collected approximately 192,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 10,000 calls per year. Case studies used in this submission are of actual but de-identified callers to JobWatch's TIS.

## B. Reasons for this Submission:

JobWatch welcomes the opportunity to make a submission to the Expert Panel regarding whether Australian law adequately protects the human right to freedom of religion.

JobWatch recognises that the Terms of Reference include instructions for the panel to 'consider the intersections between the enjoyment of the freedom of religion and other human rights'. As an

employment law community legal centre, JobWatch takes this opportunity to discuss the effect of religious exemptions on the *human right to employment*.

### **C. The Problem:**

This submission is informed by the knowledge and experience of JobWatch's Legal Practice and will replicate the position taken by JobWatch in previous submissions, namely:

- Submission to Freedom of Religion and Belief in the 21<sup>st</sup> Century, Race Discrimination Unit: Education and Partnerships Section, HREOC, February 2009;
- Submission to the National Human Rights Consultation Committee, 15 June 2009;
- Submission to the Parliament of Victoria Scrutiny of Acts and Regulations Committee Inquiry into Exceptions and Exemptions in the Equal Opportunity Act, July 2009; and
- Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012.

As an employment law community legal centre that believes in social inclusion and employee rights, JobWatch seeks to address discrimination in Australia's employment law. The focus of this paper is on section 351 of the *Fair Work Act*<sup>1</sup> (**the Act**) and the exceptions/exemptions given to religious bodies to discriminate in ways that are not relevant to the inherent requirements of a particular job.

## **2. Executive Summary**

Whilst the sometimes competing interests of the right to work and the right to the protection of religious freedom need to be balanced, in JobWatch's opinion, the balance is currently tipped too far in favour of protecting religious freedom over the right to work and not be discriminated against on the basis of one's religious beliefs or not.

JobWatch therefore proposes that there should not be any blanket exemptions in the Act that authorise discrimination on the basis of religion but rather there should be one single test that allows discrimination only where an employee or prospective employee cannot perform the inherent requirements of a particular job.

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<sup>1</sup> 2009 (Cth).

### 3. Australia's International Obligations

According to the Terms of Reference, the Expert Panel is to consider the intersection of freedom of religion and other human rights. In balancing protection of religion, the Panel must be aware of Australia's recognition of the right to work.

The right to work is present in the Universal Declaration of Human Rights<sup>2</sup> and in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>3</sup> which Australia has signed and ratified. While these rights have not been comprehensively included Australian law, the Expert Panel should take Australia's international obligations into account. This is of particular importance as the ...

The enjoyment of many human rights is dependent on, and contributes to, the enjoyment of other human rights.<sup>4</sup> Economic, social and cultural rights are often interrelated with, and a prerequisite to, the attainment of other human rights. For example, a person who is employed and paid the minimum wage (the right to work and the right to just and favorable conditions of work) will more easily be able to afford a doctor (right to health) and pay their rent (right to housing). It is particularly important that economic, social and cultural rights are protected as it is the erosion of those rights, rather than civil and political rights, in times of recession and economic hardship that detrimentally impact the most vulnerable people.

It is in Australia's best interest to nurture a socially inclusive society, that is, 'one where all people feel valued, their differences respected and their basic needs are met so they can live in dignity'.<sup>5</sup> Previous Government reports into Social Inclusion noted that all Australians should be given the opportunity to 'secure a job, access services, connect with family, friends, work, personal interests and neighbours, deal with personal crisis such as ill health, bereavement or the loss of a job, and have their voice heard'.<sup>6</sup>

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<sup>2</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) article 23(1).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 6(1).

<sup>4</sup> OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3; United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UNA/CONF.157/23 (1993).

<sup>5</sup> Victorian State Government, Department of Human Services, *What is social inclusion?* (2006) <[www.health.vic.gov.au/agedcare/maintaining/countusin/inclusion.htm](http://www.health.vic.gov.au/agedcare/maintaining/countusin/inclusion.htm)> at 18 May 2009.

<sup>6</sup> Australian Government, *Social Inclusion and a stronger, fairer Australia* (2008) <[www.socialinclusion.gov.au](http://www.socialinclusion.gov.au)> at 18 May 2009.

JobWatch submits that workforce participation is a foundation of social inclusion. Protecting and promoting economic, social and cultural rights supports workforce participation for all people, for example, upholding the right to work and the right not to be discriminated against in the workplace ensures that people with a disability can successfully participate in the workforce.

Workforce participation directly impacts the realisation of other human rights, such as the ability of workers to afford and access medical and social services and participate in leisure activities away from work, such as spending time with family and friends and pursuing personal interests.

Promoting and protecting economic, social and cultural rights in the workplace underpins workforce participation and is therefore a crucial component in combating and alleviating disadvantage in society, for example, issues such as homelessness and employment for people living with a disability or mental illness.<sup>7</sup>

#### **4. Australian Law**

##### **A. Fair Work Act 2009 (Cth)**

The *Fair Work Act 2009* (Cth) regulates employment conditions in Australia. The Act prevents any adverse action being taken against an employee or prospective employee on the basis of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>8</sup>

Adverse action has an encompassing definition, occurring where an employer discriminates between employees or prospective employees.<sup>9</sup> However, the effect of this provision is limited as exemptions are provided. Under section 351(2) of the Act, discrimination may occur where:

- It is lawful where the action is taken (that is, exempted by Federal, State or Territory legislation);<sup>10</sup> or
- It is necessary for the inherent requirements of the particular position concerned;<sup>11</sup> or

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<sup>7</sup> JobWatch's submission to the National Human Rights Consultation Committee, 15 June 2009.

<sup>8</sup> *Fair Work Act 2009* (Cth) s 351(1).

<sup>9</sup> *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 [88]-[102] (Gordon J).

<sup>10</sup> *Fair Work Act 2009* (Cth) s 351(2)(a).

<sup>11</sup> *Fair Work Act 2009* (Cth) s 351(2)(b).

- An action that is taken in good faith against a staff member of an institution that is conducted according to the doctrines, tenets, beliefs or teachings of a particular religion or creed to avoid injury to the *religious susceptibilities* of adherents of that religion or creed.<sup>12</sup>

The next part will discuss the exemptions, how they may be interpreted, and whether this provides an adequate balance against the right to work. The first discussion will focus on the third exemption. This is an un-litigated area, though it is likely that interpretation will follow other similar provisions.

This paper will then discuss the first exception; particularly with respect to the broad exemptions given to religious institutes.

This paper will then finish with a brief discussion on why the inherent requirement test should become the national standard. This is favoured due to its fairness and attuned balancing of religious freedoms and work place rights. The presence of case law, both in the Fair Work Act and in other anti-discrimination legislation also provides greater legal certainty on each party's rights.

#### **I. EXEMPTION: AN INSTITUTION CONDUCTED IN ACCORDANCE WITH THE DOCTRINES...**

JobWatch submits that section 351(2)(c) and other exemptions that mirror these words are uncertain, and if interpreted broadly, will provide unnecessary protection for religious susceptibilities. The exemption provides an allowance for an institution 'conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion' to discriminate to 'avoid injury to the religious susceptibilities of adherents'.

The plain reading of the exemption in the *Fair Work Act* is that the Act provides no limiting factors for *any* institution that acts in *accordance with* the doctrines or tenets of a religious teaching other than it be done in 'good faith'.<sup>13</sup> The absence of proportionality – that the institution does not have to be *established in accordance*, merely *conduct itself in accordance* – provides a broad protection that is of detrimental effect to Australia's overall anti-discrimination legislation. If this is how the provision is to be interpreted, the balance of religious rights and workplace rights is poorly weighted.

It is possible that, if this provision is litigated, a Court will look for ways to limit the scope of the exception. Considering similar legislation and how it was interpreted may provide some clarity. An example may be found in the now repealed provision from Victoria's *Equal Opportunity Act 1995* (Vic):

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<sup>12</sup> *Fair Work Act 2009* (Cth) s 351(2)(c).

<sup>13</sup> *Fair Work Act 2009* (Cth) s 351(2)(c).

75 Religious bodies:

- 1) \*\*\*
- 2) Nothing in Part 3 applies to anything done by a body established for religious purposes that —
  - a. conforms with the doctrines of the religion; or
  - b. is necessary to avoid injury to the religious sensitivities of people of the religion.
- 3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

The *Fair Work Act's* 'institution conducted in accordance with...' may be analogised with 'a body established for religious purposes that – confirms with the doctrines...'. *Christian Youth Camps Ltd & Anor v Cobaw Community Health Services Ltd & Anor* (2014) 308 ALR 615 gave clarity to how section 75(2) and specifically a 'body established for religious purposes that – confirms with the doctrines' was to be defined. In that case, a same-sex suicide prevention organisation attempted to contract and use a youth camp facility that was owned by the Christian Brethren, but run as a separate company. The request was denied, and Cobaw Community Health sued on the basis of discrimination.

Under the Victorian legislation, the Court determined that the company that ran the Youth Camp was *not* established for religious purposes, rather, to make money for the Christian Brethren.<sup>14</sup> This interpretation of the *Fair Work Act* would provide some legitimisation for the need to protect religious freedom, as it requires that the organisation be necessary pursuant to the doctrines of the religion rather than ancillary to the religious purposes.

However, the exemption given under section 75(3) raises the next issue: the blanket exception for religious institutions in Australia.

## II. EXCEPTION: LEGAL WHERE THAT ACTION IS TAKEN:

The allowance for discrimination based upon other statutes creates greater complexity and provides for differences in laws across State and Territory boundaries. For instance, in Victoria, a person may be discriminated against on the basis of their religious belief, sex, sexual orientation, sexual activity,

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<sup>14</sup> *Christian Youth Camps Ltd & Anor v Cobaw Community Health Services Ltd & Anor* (2014) 308 ALR 615, [264] (Maxwell P, Neave and Redlich JJA agreeing).

marital status, parental status or gender identity 'if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion'.<sup>15</sup>

The *Victorian Scrutiny of Acts and Regulations Committee* stated about the earlier provision to section 84 that, while it does require that the discrimination be reasonably necessary, it does not require consideration of the 'weight or seriousness of either the religious belief involved or the other rights that may be overridden by it'.<sup>16</sup> Not only may this law contradict the limitation test in section 7(2) of Victorian Charter of Human Rights and Responsibilities,<sup>17</sup> it exists as a broader exception than deemed necessary by the much of Australia.

This may be contrasted against Queensland's religious exemptions, where an employee 'knows or ought reasonable to know that it is contrary to the employer's religious beliefs' and 'it is a genuine occupational requirement of the employer that the person ... act in a way consistent with the employer's religious beliefs'.<sup>18</sup> This is known as the inherent requirement test and mirrors the exemption under section 351(2)(b) of the Act.<sup>19</sup> JobWatch supports this approach, as will be discussed below.

As to the inclusion of section 351(2)(a) in the Act, this section often serves to provide uncertainty as there are different exceptions and exemptions in different states and territories (as well as the Commonwealth) as the section essentially allows state and territory governments to alter Commonwealth legislation.

#### **(a) Religious Exceptions:**

The *Fair Work Act* allows for exceptions and exemptions to be made by Federal, State and Territory legislation regarding all areas of anti-discrimination law. However, the prevalence of the exemptions is most often seen with unfettered discretion to discriminate being given to religious educational institutes. A cursory glance at Australia's anti-discrimination legislation shows that exemptions are present in:

- *Sex Discrimination Act 1984* (Cth) in ss 37(1)(d) and 38; and
- *Equal Opportunity Act 2010* (Vic) s 83; and
- *Anti-Discrimination Act 1998* (Tas) s 51; and
- *Anti-Discrimination Act 1998* (Qld) s 41.

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<sup>15</sup> *Equal Opportunity Act 2010* (Vic) s 84.

<sup>16</sup> Victorian Scrutiny of Acts and Regulations Committee, 'Final Report Exceptions and Exemptions to the Equal Opportunity Act 1995' (November 2009), 66.

<sup>17</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>18</sup> *Anti-Discrimination Act 1991* (Qld) s 25(3).

<sup>19</sup> *Fair Work Act 2009* (Cth) s 351(2)(b).

Despite not having specific exemptions for religious schools, both New South Wales and Western Australia exempt religious schools from much of their anti-discrimination legislation.<sup>20</sup>

#### Case Study: Religious Schools

Pam worked as a teacher on a permanent part time basis for 7 years in a religious school and resigned when she became pregnant. After being away from the workplace for 12 months she rang the school and asked about job opportunities, The Principal at the time said she would first need to ask the teachers who were currently employed whether they would like the position before Pam or anyone else would be considered.

A few months later Pam spoke to a new Principal who commenced at the school and asked whether she could replace a teacher who was resigning. The Principal told Pam that she could never re-employ her as she had children out of wedlock. Pam submitted a discrimination complaint with the Victorian Equal Opportunity and Human Rights Commission. The matter was unsuccessfully conciliated and was referred to a hearing at VCAT.

The employer's defence is that an exemption for schools exists in the *Equal Opportunity Act 1995* (Vic) which allows them to discriminate against Pam on the basis that she was living in sin.

The current religious exceptions in the area of education are common throughout Australian jurisdictions. In Victoria, under section 83 of the *Equal Opportunity Act 2010* (Vic), the right to discriminate is given to all educational institutions that are conducted in accordance with religious doctrines, beliefs or principles.<sup>21</sup> This is a right given to religious education institutes to discriminate on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity, when these considerations have no effect on the capacity of the person to fulfil the role.

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<sup>20</sup> *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'private educational authority'); *Equal Opportunity Act 1984* (WA) s 4 (definition of 'private educational authority').

<sup>21</sup> *Equal Opportunity Act 2010* (Vic) s 83.

Further, the right is given to *all* religiously affiliated schools, even if their religious association is weak or lapsing. There does not appear to be any true arbiter of how religious the school must be or whether the content must include some religious character. Providing protection to schools that do not have a religious student body to discriminate in areas of employment does not appear to reflect the purport of these protections.

The current law applies the 'one size fits all model', rather than recognising the intrinsic differences between schools and their purported aim. The current paradigm provides a scenario where religious education institutions may claim they are discriminating on religious grounds while discriminating on certain characteristics that are not specific to the school's religious identity. As outlined by Evans and Gaze, some religious institutions were willing to discriminate on the basis of *certain* religious views and not others; being comfortable hiring atheists or from other denominations of their religious order.<sup>22</sup> Pam's story indicates that these exceptions are used to validate the personal feelings of one Principal over another, with little reference to religious doctrine. Protecting bigotry of particular types is not the aim of Australian anti-discrimination law; yet current laws appear to allow this.

This is not a minor issue given that there are around 115,000 independent and catholic staff employed each year.<sup>23</sup> Proportionally, that is 37% of Australia's teaching staff.<sup>24</sup> This is 37% of Australia's teaching staff that have less job protection should their religiosity change or that the school administration decides that their gender or personal situation injures their religious susceptibilities. This also means that 37% of teaching jobs in Australia may be inaccessible to certain people; not on a merit basis, but due to their religious beliefs or other protected attribute/s.

Given the extent of these protections, JobWatch submits that *too much* protection is given to religion freedom in the employment context compared with employment rights. For the reasons of social inclusion and workplace justice, JobWatch submits that these broad protections be wound back and replaced by one test being the 'inherent requirements' test.

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<sup>22</sup> Carolyn Evans and Beth Gaze, 'Discrimination by religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 407.

<sup>23</sup> <<http://isca.edu.au/no-fte-teaching-staff-state-sector-2016/>>.

<sup>24</sup> <<http://isca.edu.au/no-fte-teaching-staff-state-sector-2016/>>.

## PROPOSAL (INHERENT REQUIREMENTS):

Case study: 'Inherent Requirements' in practice

The Queensland Anti-Discrimination Tribunal (**Tribunal**) found that the St Vincent De Paul Society of Queensland (**SVDP Society**) had discriminated against Walsh, a non-Catholic elected president of a local conference of the SVDP Society, when she was told to convert to Catholicism or lose her position.<sup>25</sup>

### ***Facts:***

Walsh was a Christian, but not Catholic, and had worked seven days a week in her voluntary position as president of the local SVDP Society conference from 2001 to 2004. In 2004 a more senior member of the SVDP Society gave her three choices: become a catholic, resign her position and remain a member of the SVDP Society or leave the SVDP Society.

### ***Discrimination Complaint and Response:***

Walsh lodged a discrimination claim alleging that she had been discriminated against in employment because of her religious beliefs. The SVDP Society opposed the claim on two alternate grounds. Firstly, that it was a religious body and therefore exempted from the relevant anti-discrimination law. In the alternative, that being a Catholic was a 'genuine operational requirement' of the position as president of a conference of the SVDP Society and that they were entitled to act towards Walsh in the manner that they did

### ***Decision:***

The Tribunal rejected both of the SVDP Society's arguments Having regard to the constitutional rules and guidelines that governed the SVDP Society, the Tribunal found that firstly, the SVDP Society was not a religious body but was a "Society of the lay faithful". Secondly, that while there was a spiritual aspect of the job, it was not a major part and that being Catholic was not a genuine operational requirement of the position.

Walsh was awarded compensation for pain and suffering, medical expenses and

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<sup>25</sup> *Walsh v St Vincent de Paul Society of Queensland (No 2)* [2008] 32

legal costs.

JobWatch supports the use of the *inherent requirement* test as the sole exception to unlawful discrimination as present in section 351(2)(b) of the *Fair Work Act* and in other anti-discrimination legislation (such as section 25(3) of Queensland's *Anti-discrimination Act*). JobWatch believes that this test finds the appropriate intersection between religious freedom and employee rights.

The benefits of the inherent requirement test allow for a more nuanced determination of whether the religiosity of the employee is necessary for the position and for the employer. Critics of the model have argued against this,<sup>26</sup> despite the inherent requirement test possibly including the intent of the religious school: whether to proselytise or to educate in a secular manner. If it is the former, the religiosity of the teacher may be of an inherent requirement of the role. If it is the latter, the religiosity of the teacher is secondary to their capacity as a teacher.

Either way, the religiosity or not of a cleaner or administration worker employed by a religious school would be irrelevant.

Such a change will also simplify the current legal arrangement, addressing the uncertainty that Evans and Gaze have noted.<sup>27</sup> This report focused on principals and their right to discriminate rather than staff, and it is presumably more difficult for staff to determine whether they have been discriminated against and then whether this is deemed legal under the laws that are meant to protect them. One of the greatest benefits of the inherent requirement test is that it provides simplicity for both employees and employers<sup>28</sup> and is more nuanced as each case will be determined on its own facts thereby further preventing unlawful discrimination in the workplace.

If you would like to discuss any aspect of this submission, please contact Ian Scott on 03 9662 9458.

## **JOB WATCH INC.**

**Per: Ian Scott**

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<sup>26</sup> See Greg Walsh, 'The Merits of the Inherent Requirement Test for Regulating the Employment Decisions of Religious Schools under Anti-Discrimination Legislation' (2015) 6 *The Western Australian Jurist* 34, 57-63.

<sup>27</sup> Carolyn Evans and Beth Gaze, 'Discrimination by religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 419.

<sup>28</sup> Greg Walsh, 'The Merits of the Inherent Requirement Test for Regulating the Employment Decisions of Religious Schools under Anti-Discrimination Legislation' (2015) 6 *The Western Australian Jurist* 34, 40.