

**GREG WALSH,  
RELIGIOUS SCHOOLS AND DISCRIMINATION LAW  
(Central Press, 2015)**

AUGUSTO ZIMMERMANN\*

Written by Greg Welsh, *Religious Schools and Discrimination Law* discusses the merits of regulating the ability of religious schools to make employment decisions based on an employee's compatibility with the religious ethos of the school. The different approaches are tested according to seven distinct criteria: the promotion of equality; the right of religious freedom; the welfare of children; the basic rights of parents and minorities; the right to privacy; and the right to freedom of association.

A substantial part of this book is devoted to explaining why an approach that provides only minimal protection, or none at all, to the employment decisions of religious schools is not appropriate. Dr Walsh explains that only the "opt-in model" approach can more completely satisfy the rights-based criteria mentioned in the book. This "opt-in model", he says, works more satisfactorily in the regulation of employment decisions of religious schools in New South Wales than those which are termed the "general exception approach" and "the inherent requirement test".

The author argues that the diminishment or removal of protection for employment decisions of religious schools is inconsistent with a broad range of fundamental rights, especially religious freedom, freedom of association, parental rights and the rights of minority groups. Accordingly, the inherent

---

\* LLB (Hon.), LLM *cum laude*, PhD (Mon.). Director of Post Graduate Research, Murdoch University School of Law; Professor of Law (Adjunct), The University of Notre Dame Australia (Sydney); President, Western Australian Legal Theory Association Inc.

requirement test is found to be inconsistent with a vast range of such important rights. This requirement would permit schools to select employees for mission fit although only for the positions where compatibility with the doctrines of the school's religion becomes an "inherent requirement." As Dr Walsh explains, the obvious result is an unreasonably excessive interference in the role of schools to provide religious education, since secular courts will be required to determine the doctrines by which the schools are based on, as well as the relevance to the employment decisions made by the religious schools.

Dr Walsh goes on to state that a society that is committed to equality is one that effectively protects the fundamental right to religious freedom. The democratic state must therefore demonstrate a satisfactory level of support to religious groups wanting to create and manage their schools so as to meet their specific needs and requirements. That being so, introducing an inherent requirement test wouldn't lead to an appropriate respect for religious liberty. To the contrary, such test would require secular bodies to address complex doctrinal issues which are inherently theological in nature, thus attempting to determine the appropriateness of the school's private conduct.

There are considerable problems with having secular courts determining complex issues of an intrinsically theological nature. Such decisions interfere with the determination of religious doctrines, inevitably forcing judges with no theological expertise to provide legal resolutions to complex theological issues. As such, Dr Walsh advocates the adoption of the opt-in model approach, since such model apparently does not require secular courts to determine these theological issues, including the school's religious identity as well as the beliefs that should be attributed to the religion in particular.

In the same way, the opt-in model appears to afford a higher degree of legal protection to religious schools so this can be tailored to the specific needs of each school. This should increase the rights of parents to have their children educated in full conformity with their religious convictions. Therefore, it is suggested by the author that the NSW government should adopt the opt-in model approach and to amend their present Act in order to ensure that employment decisions of religious schools are satisfactorily regulated.

By discussing the role of religious schools in the context of employment decisions, the author notes that Article 18 of the *International Covenant of Civil and Political Rights* (ICCPR) openly acknowledges the central importance of religious education to its religious adherents. Notwithstanding the legal acknowledgement, this book lays in a more critical analysis of the rights of parents to direct and control the upbringing of children. According to U.S. constitutional-law professor, William Wagner, our western legal tradition upholds the natural-law idea that ‘parents are vested with the responsibility and authority to decide matters concerning the raising of their children.’<sup>1</sup>

To disqualify anyone acting according to their religious convictions from political life is tantamount to promoting an intolerant form secular government. However, I was a bit disappointed that the author apparently endorses Reid Mortensen’s controversial argument that ‘legislators exercising a public trust *are not free* to rely on their own religious convictions when crafting legislation for the State as a whole’. He states that Mortensen would have ‘appropriately expressed’ a ‘correct approach’ to the matter. I dare to disagree in this particular respect.

---

<sup>1</sup> William Wagner et al, ‘Revisiting Divine, Natural, and Common Law Foundations Underlying Parental Liberty to Direct and Control the Upbringing of Children’ (2014) 5 *The Western Australian Jurist* 1, 24.

As an academic who writes articles on religious freedom and religious vilification laws, I am particularly interested in the issues addressed by Dr Walsh. His review of the case law is comprehensive, thoroughly elaborating on the relevant cases and the judicial contributions. Undoubtedly, Dr Walsh's *Religious Schools and Discrimination Law* provides a timely contribution to very topical debate in this country – namely, the regulation of employment decisions of religious schools under anti-discrimination laws in Australia.

Dr Augusto Zimmermann  
Perth, 03 June 2017