

Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Commonwealth Funding for Schools

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The Secretary,
Senate Employment, Workplace Relations
and Education References Committee
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Dear Sir/Madam,

I wish to make a late submission to the Senate inquiry into the Commonwealth funding of schools.

Please find enclosed two papers of relevance to this inquiry. The first addresses private school exemptions from anti-discrimination laws, and the second, current problems with the administration of school building funds in some private schools.

The first paper is particularly relevant to the issue of accountability. Private schools receive large grants from the Commonwealth, and yet they are not subject to the same anti-discrimination laws as are public schools.

The second paper goes to the issue of the total volume of resources available to the private school sector. In addition to grants provided by the Commonwealth, private school communities also benefit from tax concessions allowing them to claim donations to school building and library funds as tax deductions. The enclosed report documents a number of cases in which it appears that donations are not being freely given, or where they are being given in lieu of reduced fees. This is a grey area of the law, and it is possible, if not likely, that some schools are operating in breach of taxation rulings and the Tax Act.

Following the publication of this report, we received advice from a taxation lawyer to the effect that non-compliance with school library funds is an even bigger problem in the sector. I would be happy to discuss this information with the Committee if it is of interest. Please also find attached a copy of correspondence from the Australian Tax Office indicating that the ATO will be taking action in relation to the issues raised in our report.

I hope both reports will be of use to you.

Yours sincerely

A handwritten signature in cursive script, appearing to read "R. Denniss".

Richard Denniss
Deputy Director
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Issue date: 28 June 2004

Dear Dr Hamilton,

Tax Deductibility of Donations to School Building Funds

Thank you for your letter dated 28 May 2004 about the tax deductibility of donations to school building funds. The Commissioner has asked me to respond.

I apologise for the delay in getting back to you.

The Tax Office takes issues of compliance with gift requirements seriously, and we will again take action on this particular issue. Compliance with gift requirements is one of a range of areas we continue to monitor.

Thank you for your information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Konza', written over a horizontal line.

Mark Konza
Deputy Commissioner
Small Business



THE AUSTRALIA INSTITUTE

Public Attitudes to Discrimination in Private Schools

1. Background

The debate over the values that should be taught in public and private schools has been heated. But in the face of this conflict, there is little argument about the desirability of teaching all children the value of mutual respect, that is, to respect difference and eschew any discrimination against children on the basis of their ethnicity, race, religion, sexuality or physical characteristics. The Minister for Education, Brendan Nelson, has recently declared:

Australian parents, more than ever, are expecting schools to foster values such as tolerance, trust, mutual respect, courage, compassion, honesty, courtesy and doing one's best (Nelson, 2004).

In recent decades the desire to promote a more tolerant and inclusive society has been enshrined in legislation enacted by both Commonwealth and State governments. Anti-discrimination legislation at Commonwealth and State level regulates the practices of all educational authorities. However, these laws often provide extensive exemptions for private schools, exemptions that enable them to engage in discriminatory practices that are prohibited in public schools and other sectors. Consequently, it is often left to the management of each individual private school to determine whether they will engage in, or condone, discriminatory behaviour.

The different treatment of public and private schools under anti-discrimination laws means that employees, contract workers and students in the public sector have more rights than their counterparts in private schools. Furthermore, by establishing exemptions for some areas of discrimination but not others, legislators have created a *de facto* hierarchy of discrimination, with discrimination on the grounds of sexuality or pregnancy, for instance, more likely to be lawful for private schools than racial discrimination.

With respect to these exemptions, it is ironic that one of the agreed Federal-State Ministerial Council's National Goals for Schooling in the Twenty-first Century is that:

Schooling should be socially just, so that students' outcomes from schooling are free from the negative forms of discrimination based on sex, language, culture and ethnicity, religion or disability; and of differences arising from students' socio-economic background or geographic location (MCEETYA, 1999).

These goals reflect Australia's obligations under several international treaties (including the International Covenant on Civil and Political Rights, the Convention Against Discrimination in Education, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Discrimination (Employment and Occupation) Convention) and were agreed by State, Territory and Commonwealth

Ministers for Education in 1999.¹ They are meant to establish a foundation for action among governments and non-government school authorities. In addition, the recent 'Bullying. No Way' statement from the Australian Education Association declares:

We all have the right to learn in a safe and supportive school environment that values diversity - an environment free from bullying, harassment, discrimination and violence. We all have the right to be treated with fairness and dignity. We all have a responsibility to keep others safe and to treat them in the same way - with fairness, dignity and respect. Australian school communities working together to build safe, supportive, respectful and inclusive environments for every member of the school community - empowering students to be active in the pursuit of justice (AEA 2004).

2. The treatment of public and private schools under anti-discrimination laws

The commentary below concentrates on the differences in the treatment of public and private schools in Commonwealth and State/Territory anti-discrimination laws. As such, it does not provide a comprehensive list of all exemptions that apply to both public and private schools, such as exemptions enabling single sex schools to enrol only students of that sex, or schools catering exclusively for students with disabilities to enrol only such students.

2.1 Commonwealth anti-discrimination legislation

The main pieces of Commonwealth anti-discrimination legislation regulating the conduct of educational authorities are the *Human Rights and Equal Opportunity Commission Act 1986*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and *Disability Discrimination Act 1992*.²

The *Human Rights and Equal Opportunity Commission Act* established the Human Rights and Equal Opportunity Commission and provides the framework for the hearing and conciliation of complaints by the Commission concerning unlawful discrimination under the *Racial Discrimination Act*, *Sex Discrimination Act* and *Disability Discrimination Act 1992*.

In addition to the power to conciliate complaints concerning unlawful discrimination, the Commission also has the power to inquire into any act or practice that is inconsistent with, or contrary to, any human right or that constitutes discrimination

¹ For example, Article 26 of the *International Covenant on Civil and Political Rights* states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

² Section 109 of the Commonwealth Constitution provides that where a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail to the extent of the inconsistency. However, all three Acts mentioned above include provisions that indicate they are not intended to limit or exclude the operation of State anti-discrimination laws that are capable of operating concurrently with the Commonwealth laws (see s.6A(1) of the *Racial Discrimination Act (Cwlth)*; s.10 of the *Sex Discrimination Act 1984 (Cwlth)*; and s.13 of the *Disability Discrimination Act 1992 (Cwlth)*). Note also, at the time of writing a bill outlawing discrimination on the grounds of age was before the Federal Parliament (the *Age Discrimination Bill 2004*).

under the Act. Discrimination is defined for these purposes as including any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, marital status, disability, nationality, sexual preference and trade union activity.³ However, there are two exemptions.

Firstly, discrimination for these purposes does not include any distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job (the ‘inherent requirements of the job exemption’).⁴ Secondly, it excludes any distinction, exclusion or preference:

...in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

This is sometimes described as the ‘religious institutions exemption’. The religious institutions have been held to include organisations that are responsible for the administration of religious schools.⁵ Therefore, if homosexual behaviour is against the teachings of a religion, there is a strong argument a school that is conducted for children of that religion could refuse to employ a person who openly engages in a homosexual relationship without being deemed to have taken an act that constitutes discrimination under the *Human Rights and Equal Opportunity Commission Act*.⁶

The *Disability Discrimination Act*, which makes it unlawful for a person to discriminate against another on the grounds of disability, treats public and private educational institutions equally. However, unlike the *Racial Discrimination Act* which contains no exemptions for public and private schools, the *Disability Discrimination Act 1992* provides exemptions for both the private and public educational institutions.⁷

The *Sex Discrimination Act* makes it unlawful for an educational institution to discriminate against a person on the grounds of sex, marital status, pregnancy or potential pregnancy in relation to employment, contract work and the provision of education.⁸ For students, this means that educational institutions cannot refuse

³ See *Human Rights and Equal Opportunity Commission Act 1986*, s.3; and *Human Rights and Equal Opportunity Commission Regulations*, reg.4.

⁴ For discussion of the scope of this exemption, see HREOC (1998) and International Labour Conference (1998)

⁵ See HREOC (1998).

⁶ See HREOC (1998).

⁷ Under the *Disability Discrimination Act 1992 (Cwlth)*, it is unlawful for an educational authority to discriminate against a person on the grounds of the person’s disability in relation to admission, access to benefits or expulsion, or to subject them to any other detriment. However, both public and private educational authorities can refuse the admission of a student where the person “would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority” (see s.22(4)). Furthermore, both private and public schools are able to rely on the “reasonableness requirement” to avoid liability for indirect discrimination in relation to enrolments and existing students (see s.6, *Finney v Hills Grammar School* [1999] HREOCA 14 (20 July 1999); *Hills Grammar School v Human Rights and Equal Opportunity Commission* [2000] FCA 658 (18 May 2000)).

⁸ See sections 14, 16 & 21.

admission, deny access to benefits, expel a student or subject them to any other detriment on these grounds.⁹ It also prevents schools from refusing to employ, dismissing, or imposing special conditions or restrictions on teachers and other staff on the grounds of sex, marital status, pregnancy or potential pregnancy.¹⁰ However, the Act contains a number of exemptions that are relevant to the administration of public and private schools.

Importantly, public schools, State education departments and other relevant State government agencies are exempt from the prohibitions concerning discrimination on the grounds of sex, marital status, pregnancy and potential pregnancy in relation to employment and sexual harassment.¹¹ While this exemption may seem strange, it stems from an implied Constitutional limitation on the Commonwealth's legislative power, 'which protects the States from an exercise of power that would threaten their existence or capacity to govern or would impose a particular disability or burden upon an operation or activity of a State or the execution of its constitutional powers'.¹² However, as is discussed below, all States have legislation that prohibits discrimination on the grounds of sex, marital status, pregnancy and potential pregnancy in relation to employment.

The *Sex Discrimination Act* also contains several exemptions that only apply to religious private schools and organisations that are responsible for the administration of religious schools.¹³ With regard to students, religious schools are exempt from the prohibitions concerning marital status and pregnancy if the discrimination is done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.¹⁴ Religious schools are also allowed to discriminate against a person in connection with employment or a position as a contract worker on the grounds of sex, marital status or pregnancy. Again, this exemption is subject to the proviso that it be done 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.¹⁵

Therefore, a religious school may be able lawfully to expel a female student on the grounds she is unmarried and pregnant if it is against the doctrines of the religion to give birth out of wedlock. Similarly, it may also be lawful for a religious school to

⁹ s. 21(1) & (2). However, s.21(3) allows a school to refuse to admit a student of one sex where it is conducted solely for students of the opposite sex and where education at the level at which the applicant is seeking admission is provided by the school only or mainly for students of the opposite sex.

¹⁰ ss.14 and 16.

¹¹ ss.12 and 13.

¹² *Australian Education Union v Human Rights and Equal Opportunity Commission* [1997] FCA 1288 (25 November 1997). See also *Re Australian Education Union and Ors; Ex parte the State of Victoria* (1995) 184 CLR 188. It is unclear why there is not an equivalent exemption in the *Disability Discrimination Act* and the *Racial Discrimination Act*.

¹³ See s.38.

¹⁴ s.38(3).

¹⁵ S.38(1) and (2). Note, there is also a broad exemption for 'bodies established for religious purposes' (see s.37). In order to apply, the discriminatory act must conform to the doctrines of the religion or be necessary to avoid injury to the religious susceptibilities of adherents of that religion. While there is uncertainty about the relationship between this exemption and the exemption in s.38, it is arguable it applies to organisations established for religious purposes that are responsible for the administration of religious schools.

refuse employment to a person on the grounds they are in a *de facto* relationship if it is against the teachings of the religion to have sexual intercourse out of wedlock.

Some may argue the exemptions for religious schools are necessary due to section 116 of the Commonwealth Constitution, which provides that the Commonwealth cannot make laws ‘for prohibiting the free exercise of any religion’.¹⁶ However, the High Court has adopted a narrow interpretation of the restrictions in s.116.¹⁷ This narrow interpretation has provided the Commonwealth with considerable scope to make laws that only incidentally affect the free exercise of a religion, particularly where those laws are intended to achieve an ‘overriding public purpose’, such as fulfilling an international obligation to outlaw all forms of discrimination.¹⁸ Therefore, there is a strong argument these exemptions are not necessary to ensure the Constitutional validity of the provisions of the *Sex Discrimination Act* that prohibit discrimination in schools.

2.2 State and Territory anti-discrimination legislation

In all State and Territory anti-discrimination legislation, private schools are provided with exemptions in relation to the treatment of employees (including teachers), contract workers and students that are either not available to public schools or that, in practice, only or mainly apply to private schools. These exemptions vary in breadth (in terms of the areas of discrimination they cover) and scope (in terms of the conditions that must be satisfied for the exemption to apply). Some of the major exemptions that apply in NSW and Victoria are summarised in Table 1.

¹⁶ See, for example, discussion of s.116 of the Constitution in Senate Legal and Constitutional Committee, *Inquiry into Sexuality Discrimination*, Commonwealth of Australia, 1997. Note also, the States are not bound by the restrictions in s.116 of the Constitution. Hence, they are able to pass laws banning or restricting the free exercise of any religion (providing the laws are not inconsistent with a Commonwealth law).

¹⁷ See *Kruger v Commonwealth* (1997) 190 CLR 1, *Attorney-General (Victoria); Ex rel Black v Commonwealth* (1981) 146 CLR 559, *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, and *Krygger v Williams* (1912) 15 CLR 366.

¹⁸ For example, in *Kruger v Commonwealth* (1997) 190 CLR 1, Gaudron J stated: “a law will not be a law for ‘prohibiting the free exercise of any religion’, notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need. Nor will it have that purpose if it is a law for some specific purpose unconnected with the free exercise of religion and only incidentally affects that freedom”. Similarly, in the same case, Gummow J stated: “freedom to act in accordance with religious beliefs is not co-extensive with freedom of religious belief. Action in pursuance of a particular religious belief that is both monotheistic and eager to proselytise may conflict impermissibly with toleration both of other religions and of an absence of religion”.

Table 1 Exemptions from New South Wales and Victorian anti-discrimination laws specific to private schools

| Area of discrimination | NSW | Victoria |
|----------------------------------|-----|----------|
| Age or age group | ✓ | ✓ |
| Disability/impairment | ✓ | ✓ |
| Homosexuality/sexuality | ✓ | ✓ |
| Marital status | ✓ | ✓ |
| Pregnancy or potential pregnancy | ✓ | ✓ |
| Race | X | ✓ |
| Sex | ✓ | ✓ |

Key: X – No exemptions

✓ – Specific exemptions for private or religious schools

Note: Some of these exemptions may not be available due to the operation of inconsistent Commonwealth laws.

New South Wales's *Anti-Discrimination Act 1977* contains the broadest scope for exemptions for private schools. Under this Act, 'private educational institutions' are exempt from the unlawful discrimination provisions concerning sex (including pregnancy), transgender grounds, marital status, disability, homosexuality and age.¹⁹ However, they are not exempt from the provisions that prohibit discrimination on the grounds of race.²¹ So, for example, a private school could expel a student for being a homosexual or transsexual, and could refuse to employ a person on the same grounds.²²

The Victorian *Equal Opportunity Act 1995* includes a number of exemptions that apply to public and private schools. However, in practice, these exemptions mainly apply to religious private schools. In this regard, the *Equal Opportunity Act* allows people to be excluded from a school or school program on the grounds of race or religious belief if the school or program is operated 'wholly or mainly for students of a particular...race (or) religious belief' of which the person is not a member.²³ "In addition, organisations that operate religious schools are explicitly exempt from all of

¹⁹ Respectively, ss.25(3) and 31A(3); ss.38C(3) and 38K(3); ss.40(3) and 46A(3); ss.49D(3) and 49L(3); ss.49ZH(3) and 49ZO(3); ss.49ZYL.

²⁰ Any discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy must also satisfy the requirements in the *Sex Discrimination Act 1984* (Cwlth).

²¹ However, that the Government can make regulations excluding any school, public or private, from the racial discrimination provisions (s.17(3)). Although, any exemption granted under this provision would have to be consistent with the requirements in the *Racial Discrimination Act 1975* (Cwlth).

²² There is also a broad exemption for 'bodies established to propagate religion' (see s.56).

²³ s.38. See also s.56 in relation to the provision of accommodation in schools established "wholly or mainly" for students of a particular race or religious belief. Note, it is arguable the exemptions concerning race are invalid due to the provisions of the *Racial Discrimination Act 1975* (Cwlth).

the prohibitions on discrimination in the Act (which include discrimination on the grounds of age, sex, disability, sexual preference, marital status, parental status, status as a carer, industrial activity, pregnancy, physical features, race, religion, and political belief)²⁴ in relation to ‘establishing, directing, controlling or administering’ the schools, provided the relevant acts are carried out ‘in accordance with the relevant religious beliefs or principles’.²⁵ If the organisation was ‘established for religious purposes’, they are also exempt from all of the prohibitions concerning discrimination in relation to acts or practices that conform with the doctrines of the religion or are necessary to avoid injury to the religious sensitivities of people of that religion.²⁶

Western Australia’s *Equal Opportunity Act 1984* similarly includes a number of exemptions that only apply to religious private schools. In this regard, ‘private educational authorities’ are exempt from the provisions concerning discrimination on the grounds of religion in relation to employment ‘if the duties of the employment or work are for the purposes of, or in connection with, or otherwise involve or relate to the participation of the employee in any religious observance or practice’.²⁷ More importantly, religious schools also have a general exemption from all of the anti-discrimination provisions in the act (i.e. sex, marital status, pregnancy, transgender, family responsibility or family status, sexual orientation, race, religion, political conviction, disability or age) in relation to employment and contract workers so long as the relevant action is taken ‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’.²⁸ They are also exempt from all of the anti-discrimination provisions, other than race, disability or age, in relation to students if they discriminate ‘in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed’.²⁹ In addition, a body established for religious purposes that is responsible for the administration of a religious school may also be exempt from all anti-discrimination provisions in the Act if the discriminatory act ‘conforms to the doctrines, tenets or beliefs of that religion’ or ‘is necessary to avoid injury to the religious susceptibilities of adherents of that religion’.³⁰

The situation under the Australian Capital Territory’s anti-discrimination laws is similar to that in Western Australia.³¹ The *Discrimination Act 1991* (ACT) allows educational authorities to discriminate on the grounds of religious conviction in relation to employment if the duties of the employment involve participation by the employee in the ‘teaching, observance or practice of the relevant religion’.³² It also allows religious schools to discriminate on any of the grounds outlawed under the Act in relation to students, employees, or contract workers if the discrimination is carried out ‘in good faith to avoid injury to the religious susceptibilities of adherents of that

²⁴ See s.6.

²⁵ s.76.

²⁶ s.75. See also s.77, which provides an exemption for acts that are necessary for the relevant person to comply with their genuine religious beliefs or principles.

²⁷ s.66.

²⁸ s.73(1) and (2).

²⁹ s.73(3).

³⁰ s.72.

³¹ However, the protection offered to religions in s.116 of the Commonwealth Constitution applies to laws made by all Territory governments. See *Kruger v Commonwealth* (1997) 190 CLR 1.

³² s.44.

religion or creed'.³³ Further, religious schools are also permitted to refuse to admit a student if the school is conducted solely for students having a religious conviction other than that of the applicant.³⁴

In South Australia, private and public schools are generally subject to the same restrictions concerning discrimination. However, religious schools are exempt from the prohibitions concerning discrimination on the grounds of sexuality in relation to any act that 'arises in the course of the administration' of the school, providing it 'is founded on the precepts' of the relevant religion.³⁵ Bodies established for religious purposes that are responsible for the administration of religious schools may also be exempt from all anti-discrimination provisions in the *Equal Opportunity Act 1984* (SA) in relation to any act that 'conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.³⁶

Religious schools are also treated differently to all other schools in Queensland, Northern Territory and Tasmania. In both Queensland and the Northern Territory, religious schools can exclude people who apply for admission as students who are not of the relevant religion.³⁷ In all three jurisdictions, religious schools are also entitled to discriminate in relation to employment and contract workers.

In the Northern Territory, religious schools are entitled to discriminate against a person in relation to employment on the grounds of sexuality and 'religious belief or activity', providing the discrimination is done in 'in good faith to avoid offending the religious sensitivities of people of the particular religion'.³⁸ Similarly, in Tasmania, religious schools are allowed to discriminate on the grounds of religion in relation to employment if the discrimination is for the purpose of enabling, or better enabling, the school to be conducted in accordance with the 'tenets, beliefs, teachings, principles or practices' of the relevant religion.³⁹ In both Queensland and Tasmania, employers can impose discriminatory requirements on a position, such as being required to practice a certain religion to be a teacher in a religious school, providing they are 'genuine occupational requirements'.⁴⁰ Further, in Queensland, a body established for religious purposes that administers a school can discriminate on any grounds (other than age, race or disability) against a person 'in a way that is not unreasonable' if the person

³³ s.33. See also s.32.

³⁴ s.46.

³⁵ *Equal Opportunity Act 1984* (SA), s.50.

³⁶ s.50(1)(c).

³⁷ *Anti-Discrimination Act 1991* (Qld), s.41 (see also s.89 in relation to the provision of accommodation); and *Anti-Discrimination Act* (NT), s.30(2) (see also s.40 in relation to the provision of accommodation).

³⁸ *Anti-Discrimination Act* (NT), s.37A. See also s.51 in relation to "bodies established for religious purposes" and the appointment of people to perform functions or participate in "any religious observance or practice".

³⁹ *Anti-Discrimination Act 1998* (Tas), s.51(2). See also s.52, which provides two exemptions for discrimination on the grounds of religious belief in relation to the selection or appointment of a person to participate in any religious observance or practice, and acts carried out in accordance with the doctrine of a particular religion that are necessary to avoid offending the religious sensitivities of any person of the relevant religion.

⁴⁰ *Anti-Discrimination Act 1991* (Qld), s.25(1); and *Anti-Discrimination Act 1998* (Tas), s.51(1). Note, s.25(1) of the *Anti-Discrimination Act 1991* (Qld) applies to discrimination on any grounds outlined in the Act and could apply to both public and private schools (although it is far more likely to apply to private religious schools). In contrast, s.51(1) of the *Anti-Discrimination Act 1998* (Tas) only applies in relation to discrimination on the ground of "religious belief or affiliation or religious activity" and, in effect, only applies to religious schools.

openly acts in a way that is contrary to the religious beliefs of the employer and it is a genuine occupational requirement of the employer that the person act in a way that is consistent with the employer's religious beliefs.⁴¹

It is apparent that in all States and Territories, unlike public schools, private schools have considerable scope to engage in discriminatory practices in relation to employment, contract workers and students. However, in most jurisdictions, the relevant exemptions are only available to religious private schools and religious organisations responsible for the administration of private schools.

3. Prevalence of discrimination by private schools

In both the public and private education sectors, there are some schools that are performing well in their attempts to rid their schools of negative forms of discrimination, and others that are performing poorly. As we have seen, while discrimination against students occurs in both public and private schools, private schools are able to discriminate in ways that are unlawful in public schools. Importantly, if discrimination does occur in a public school, those affected can usually seek some form of legal redress. Further, it is often the case that State educational authorities will take steps, for example, through the development of specific policies, to ensure that public schools comply with their legal obligations. By contrast, private schools often have no incentives to develop such policies, because in many cases, they are exempt from anti-discriminatory provisions of the legislation.

3.1 Pregnancy

Compared with many other developed countries, Australia has a high teenage pregnancy rate with 19 live births per 1000 teenage girls per year and an estimated 22 abortions per year per 1000 teenage girls (Skinner *et al.*, 2003).⁴² While there are no data to indicate how many of these teenagers become pregnant while at school, or the number who terminate their pregnancies, if around 12,000 young women below the age of 19 (Boulden, 2000, p. 7) become pregnant each year, it is likely that more than half of these women will be at school at the time they become pregnant. Given that those teenagers who do become pregnant are more likely to live in an area of socio-economic disadvantage (Skinner *et al.*, 2003), and that the majority of students from low-socioeconomic groups attend government schools (Preston, 2003), it is also likely that more than 70 per cent of young women who become pregnant while at school will be in the public education system. However, this still means that there are potentially hundreds of young women who become pregnant each year while attending a private school.

Boulden (2000) provides a comprehensive analysis of the relationship between youth pregnancy and education. She finds that the overwhelming majority of young women who become mothers while at school do not finish their secondary education to Year 12 level (Boulden, 2000, p. 7). While many of those who do become pregnant and elect to continue their pregnancies are already 'at risk', if they do not complete their education, they are put at further risk of a lifetime of poverty and welfare dependency:

⁴¹ *Anti-discrimination Act 1991* (Qld), s.25(2).

⁴² The figures are based on 1997-1999 data. However, the abortion rate is likely to be an underestimate since it is based on Medicare claims.

Other consequences of becoming a young mother and leaving school before completing secondary education include social isolation, a higher than average likelihood of a second pregnancy during the teenage years, a higher risk of involvement in unstable and violent relationships, and poorer than average outcomes for children in terms of health, welfare and educational achievement. There is also clear evidence of an inter-generational trend in becoming a teenage parent (Association of Women Educators, 2004).

It appears, however, that despite the risks, some schools are encouraging pregnant girls to leave. According to Boulden:

Some schools still fear that having pregnant girls and young mums on campus will give the school a 'bad image', and they fail to encourage young women to stay.

Others actively encourage them to leave. In researching this study we heard more than once of pregnant young women who had been told by their schools, 'You've made your bed, now lie in it.' (Boulden, 2000, pp. 7-8).⁴³

As part of her study, Boulden (2000) contacted both public and private educational authorities about the existence of any policies dealing with the continuing education of pregnant and parenting students. While she found there was considerable variation amongst the policies of state education authorities, and that two States had developed no such policies, overall the response of the public sector appears better by comparison to the private sector. Boulden says that in relation to Independent (non-Catholic) schools:

The advice was that no such policies existed at a statewide level, and that such issues were a matter for individual schools.

There appears to be no broad policy framework for Catholic schools either, due to the absence of systemic relationships between Catholic schools. Contact with Diocesan Education Offices around Australia did not reveal any policy in relation to pregnant and parenting students, although the Broken Bay Diocesan Office in NSW did indicate that such a policy was being considered (Boulden, 2000, p. 15).

3.2 Sexuality

The Human Rights and Equal Opportunity Commission's website notes that 'there have been documented cases of both teachers and students being victimised because of their sexual orientation' (Human Rights and Equal Opportunity Commission, 2001). Both discrimination and verbal and physical abuse are reported.

For many gay, lesbian and bi-sexual students, school is an unsafe environment, with one study finding that such students were just as likely to feel unsafe at school as on the street (Hillier *et al.*, 1998, p. 38). According to the authors of the study:

Part of the reason for this was the belief that there was no protection available in the ostensibly regulated school environment. There was evidence that if assault or harassment occurred, procedures and practices would not be set in motion to ensure justice or to prevent such behaviour recurring. A number of

⁴³ None of the 11 schools, which Boulden (2000) described as having developed good quality programs for retaining young mothers, were private schools.

students commented on the inconsistencies between their schools' dealings with racism and sexism as opposed to heterosexism. In many cases, little was seen to be done by school authorities to address the hostility that was directed at gay, lesbian or bisexual students (Hillier *et al.*, 1998, p. 38).

While students involved in the study cited examples of discrimination and abuse in both public and private schools, some commentators suggest the culture of boys' only schools (which tend to be predominantly in the private sector) can be particularly homophobic. Hillier *et al.*, quote Rowan, who was then 19 years old:

I was at an all boys private school which was horribly homophobic until year 11 but moved to a mixed school to do year 11 and 12. There, I was in a very caring and open minded environment, with a lot of other people in my situation both boys and girls (approx. 10% of students were not 'Strait'). So here it was easy to finally find myself and 'Come Out'. I had no problems and all my friends were extremely supportive, as were the teachers who worked it out for themselves (Hillier *et al.*, 1998, p. 40).

As discussed above, while many private schools may be able to expel students because they are gay or lesbian, it appears the more common scenario is for schools to pressure such students into leaving. That is, students feel forced to leave school early due to the constant bullying and the failure of the school to do tackle the abuse. Commenting on the feedback of students involved in their study, Hillier *et al.* suggest 'many young people were hunted out of their schools and driven to attempts at suicide' (Hillier *et al.*, 1998, p. 36).

In 2002, a former student of Hillcrest Christian College in Berwick, Victoria commenced proceedings against the school under the *Equal Opportunity Act 1995* (Vic) on the grounds the school discriminated against him because he was homosexual (ABC News, 2002). The student alleged that the Principal told him that 'I shouldn't be admitting it, I shouldn't be proud of it, and that's the last he wanted to hear about it' (ABC News, 2002). He also alleged another teacher remarked that he 'had the devil in him' (Milligan, 2002a). At the time the claim was lodged he stated that 'he eventually felt he had no option but to leave the school and continue by distance education' (ABC News, 2002).

The Principal of Hillcrest Christian College, Tony Ham denied the allegations, and said:

We [the school] state that we will actively share with them [students] the Christian faith. They [parents] sign on the dotted line. We don't apologise for that... We don't talk about being defective, we talk about sin and disobeying God (quoted in Milligan, 2002b).

He was also reported as saying that he teaches 'mutual respect' for gay people, yet 'stands by the motto "Love the sinner, hate the sin"' (Milligan, 2002b). Obviously, by teaching pupils that homosexuality is a sin, there is the potential for schools to perpetuate homophobic attitudes.

Kelly, a spokesperson for the Rainbow Sash movement who is also a former teacher and seminarian, suggests that teachers can subtly exacerbate homophobia, particularly in religious schools because they do not want to be seen as being too supportive of gay and lesbian students in case they are seen as being gay themselves (Kelly quoted in Milligan, 2002b). According to Kelly, 'bullies in religious schools can readily grab for church teachings to justify their behaviour' (Kelly quoted in Milligan, 2002b).

4. Public attitudes to discrimination by private schools

For this report, public attitudes to various aspects of private schooling have been explored by way of an opinion survey. Newspoll was commissioned to survey a randomly selected sample of 650 adults in New South Wales and Victoria. The survey was conducted by telephone over 19-22 April 2004. In addition to the usual demographic information, respondents were also asked whether they themselves had attended a private or state school for the majority of their high school education, or whether they attended both types equally. Parents were also asked whether they send their children to private or state schools.

Respondents were asked whether they agree or disagree with the following statements:

Private schools should be able to expel students because they are gay; and

Private schools should be able to expel girls if they become pregnant.

If they agreed they were asked whether they strongly agree or partly agree. If they disagreed they were asked whether they strongly disagree or partly disagree.

The responses to the first question are reported in Tables 2-4 below. The Newspoll survey shows that nine out of ten (89 per cent) respondents disagree that private schools should be able to expel gay students – Table 2. Although not shown in the table, 76 per cent *strongly* disagree with the view that private schools should be able to expel gay students. This view is held by both parents with children in private schools (76 per cent strongly disagree) and at state schools (75 per cent strongly disagree). It is a view held consistently by residents of capital cities and country areas, although country Victorians are a little more conservative (Table 3). It is important to note that 89 per cent of those who send their children to private schools disagree that those schools should be able to expel gay students. Interestingly, young adults (18-24) and older people (50+) are more conservative on this issue than those aged 25-34 and 35-49 (Table 4).

Table 2 ‘Private schools should be able to expel students because they are gay’, by high school education and whether send children to private school (%)

| | High school education | | Children in private school | | Total |
|------------|-----------------------|------------|----------------------------|----|-------|
| | Private only | State only | Yes | No | |
| Agree | 9 | 7 | 8 | 6 | 8 |
| Disagree | 90 | 90 | 89 | 90 | 89 |
| Don't know | 2 | 3 | 4 | 4 | 4 |

Figures may not add due to rounding.

Table 3 ‘Private schools should be able to expel students because they are gay’, by area (%)

| | Area | | | | Total |
|------------|--------|-----------|----------|----------|-------|
| | Sydney | Melbourne | Rest NSW | Rest VIC | |
| Agree | 8 | 8 | 7 | 10 | 8 |
| Disagree | 90 | 90 | 88 | 84 | 89 |
| Don't know | 3 | 2 | 5 | 6 | 4 |

Figures may not add due to rounding.

Table 4 ‘Private schools should be able to expel students because they are gay’, by age and whether have children (%)

| | Age | | | | Children | | Total |
|------------|-------|-------|-------|-----|----------|----|-------|
| | 18-24 | 25-34 | 35-49 | 50+ | Yes | No | |
| Agree | 10 | 2 | 5 | 12 | 5 | 9 | 8 |
| Disagree | 90 | 96 | 92 | 83 | 92 | 87 | 89 |
| Don't know | 0 | 3 | 3 | 5 | 3 | 4 | 4 |

Figures may not add due to rounding.

The responses to the second question are reported in Tables 5-7. A large majority, 77 per cent, of respondents disagree with the view that private schools should be able to expel girls who are pregnant (Table 5), with 62 per cent strongly disagreeing. Those who attended private schools or send their children to private schools are just as likely to oppose expulsions. It is perhaps surprising, however, that 17 per cent believe that private schools should be able to expel pregnant girls, twice the number that favour expelling gay students.

Sydney residents appear more tolerant of pregnant girls than those in Melbourne and country areas although, with the exception of country Victoria, the difference is not large (Table 6). High-income households are more tolerant than low-income ones (Table 6), even though pregnant girls are more likely to come from poorer households. Once again, young adults and older adults are more conservative on this question than those in their 30s and 40s (Table 7).

Table 5 'Private schools should be able to expel girls if they are pregnant', by high school education and whether send children to private school (%)

| | High school education | | Children in private school | | Total |
|------------|-----------------------|------------|----------------------------|----|-------|
| | Private only | State only | Yes | No | |
| Agree | 16 | 16 | 17 | 17 | 17 |
| Disagree | 79 | 78 | 76 | 77 | 77 |
| Don't know | 5 | 5 | 7 | 6 | 6 |

Figures may not add due to rounding.

Table 6 'Private schools should be able to expel girls if they are pregnant', by area and income (%)

| | Area | | | | Household income | | | Total |
|------------|--------|-----------|----------|----------|-------------------|--------------------|--------------|-------|
| | Sydney | Melbourne | Rest NSW | Rest Vic | Less than \$30000 | \$30000 to \$59999 | \$60000 plus | |
| Agree | 14 | 18 | 18 | 20 | 26 | 17 | 13 | 17 |
| Disagree | 81 | 77 | 76 | 69 | 65 | 79 | 83 | 77 |
| Don't know | 5 | 6 | 6 | 11 | 9 | 4 | 3 | 6 |

Figures may not add due to rounding.

Table 7 'Private schools should be able to expel girls if they are pregnant', by age and whether have children (%)

| | Age | | | | Children | | Total |
|----------------|-------|-------|-------|-----|----------|----|-------|
| | 18-24 | 25-34 | 35-49 | 50+ | Yes | No | |
| Agree | 18 | 7 | 15 | 22 | 16 | 17 | 17 |
| Total disagree | 82 | 88 | 81 | 69 | 80 | 76 | 77 |
| Don't know | 0 | 5 | 5 | 9 | 4 | 7 | 6 |

Figures may not add due to rounding

5. Conclusions

Under Commonwealth and State legislation private schools are permitted a wide range of exemptions from anti-discrimination laws. The Newspoll survey reported in this paper explores public attitudes to the ability of private schools to expel gay students and girls who become pregnant. There is very widespread and strong opposition in the Australian community to the capacity of private schools to exempt themselves from discrimination on these grounds. There is no difference in the strength of opposition to these laws between parents who send their children to private schools and those who send them to public schools. Opinion is especially strong on the issue of expulsion of gay students.

These findings indicate that these exemptions from laws banning discrimination are out of step with community values. For this reason, there is likely to be strong support for reform of anti-discrimination laws in favour of more consistent treatment of public and private schools under the relevant statutes.

Furthermore, the broad-ranging capacity of private schools to discriminate against their students and staff contradicts the Prime Minister's declaration that it is government schools that are 'values neutral'. While there is no doubt that some private schools uphold the principles of anti-discrimination legislation, there is also no doubt that their students and staff who may be subject to discrimination on the basis of their sexuality, pregnancy or marital status have significantly fewer opportunities for legal redress. If private school students are to learn and practice the same values of tolerance, compassion and mutual respect as their public school peers then the ability of private schools to practice discrimination on the basis of sexuality and pregnancy should be eliminated. There is an extraordinarily high degree of consensus among parents on this question.

17 May 2004

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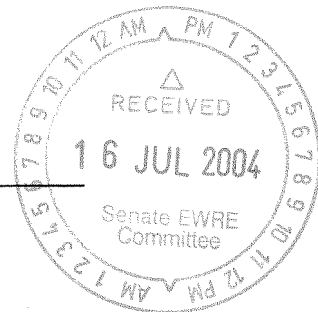
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THE AUSTRALIA INSTITUTE

Tax Deductibility of Donations to School Building Funds

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1. Introduction

Private school fees are not tax deductible in Australia. Nor are fees or levies paid to public schools. However, many private schools and some public schools operate building or library funds to which parents and ex-students are encouraged to make tax-deductible donations.¹ These donations can increase substantially the funds available to the schools and thereby permit fees to be lower than otherwise.

In certain circumstances, donations to school building funds are tax deductible for the donor.² This tax-deductibility of building and library funds stems from the specific provisions of the income tax law (section 30-25 Item 2.1.10 *Income Tax Assessment Act 1997*) and may ultimately be traced to the principle that trusts for the advancement of education are one of the four categories of charitable purposes as defined in the common law. There is also a public policy aspect to the tax incentive, which relieves governments to some extent from demands to fund school buildings. To qualify for tax deductibility, donations must have the following characteristics:

- they must be made voluntarily i.e. be freely given;
- they must not provide a material benefit for the donor, such as a reduction in school fees or receipt of a scholarship;
- they must essentially arise from a benefaction (i.e. be charitable in purpose), and be an act of detached and disinterested generosity; and
- they must be made to a public fund established and maintained solely to provide money for the acquisition, construction or maintenance of a building used or to be used by a school or college which is government or public, or run as a not-for-profit association ('private school').³

¹ Building funds operated by public schools are not considered in this paper as the evidence suggests that the problems here identified are more prevalent in private schools.

² The Australian Tax Office provides detailed guidelines. See 'Making tax deductible donations' and 'School building funds and tax deductible gifts' on the ATO website, www.ato.gov.au.

³ These are based on the ATO documents referred to in note 2.

The ATO has ruled that claims for deduction of gifts to school building funds are not allowed if the school has asked parents to make 'donations' as an alternative to an increase in school fees.⁴ However, this is a grey area as many schools emphasise to parents that they depend heavily on donations to building funds to sustain the level of education quality at the school. For example, The King's School, which like other elite schools has established a separate foundation to administer its building fund, states that:

If all the money made available to the School over the last 20 years had been borrowed, instead of being given by the Foundation and some other endowments, then current tuition fees would need to be at least 13% higher (McGregor 2002).

At The King's School, parents are reminded of the relationship of donations to the quality of education received by their children and are asked to donate each term.

Through termly giving with School fees parents contribute towards building maintenance and refurbishment programmes (McGregor 2002).

Apart from these considerations, there is evidence to suggest donations to some private schools are not being given freely either because parents are unaware that the payment is voluntary or because they are pressured by the school to give. These pressures may include perceptions that their child may be disadvantaged if they fail to make a 'donation'. In addition, there is anecdotal evidence that some donors to school building funds receive a benefit from the gift, namely the enrolment of their children ahead of others on the waiting list. In these cases, claiming a tax deduction for a donation to a school building fund may not be legitimate.

This paper examines some of these practices and concludes that payments into some private school building funds may not meet the conditions required for tax deductibility so that claims for tax deductions for them are not legitimate.

2. Donations associated with fee payments

2.1 Donations are expected

At many schools a request is made to parents to make a tax-deductible donation to the school for building or library works at the time they pay their school fees. Schools often suggest or request specific amounts be donated, and the amounts requested appear to be based on the schools' estimates of the need to fund all or part of the capital or recurrent costs for buildings at the school.

Pressure to pay donations to building funds takes various forms. Often the language used by the school to request the donation belies the fact that the payments are in fact voluntary. At St Aloysius' College in NSW, for example, parents are told that:

⁴ Such arrangements 'do not have the true character of gift for the purposes of section 78 [of the Income Tax Assessment Act]. ... The payments are not, all things considered, voluntary in nature nor is there a situation where the payers do not receive an advantage of a material character in return for making them'. Taxation Ruling No. IT 2071, Income Tax: School Building Funds, see <http://law.ato.gov.au/pdf/it2071.pdf>

While tuition fees cover a major portion of a boy's education at St Aloysius' College, fees do not and cannot provide all the funds we need to undertake building projects and new major capital works. The Foundation Building Fund is vital for the provision of new buildings and resources (St Aloysius' College, 2004b).

The implication is that the school fees alone are inadequate to provide a proper standard of education for pupils at the school. The school also tells parents:

The College Building Fund, *which appears as a voluntary contribution on School fees*, provides for the recurrent expenditure and maintenance (paint, carpet etc) of existing buildings only (St Aloysius' College, 2004b, emphasis added).

The wording 'which appears as a voluntary contribution on School fees' may have been chosen to suggest to parents that, while it *appears* to be voluntary, a contribution is in fact required. The pressure is intensified:

There is a mistaken perception in the community that St Aloysius' College has adequate funds on which to draw. The reality is that without strong and active support of the College Family, the College would not have the financial capacity to complete many major projects that enhance the education of our boys (St Aloysius' College, 2004b).

Finally, in relation to the St Aloysius' Building Fund, the expectation to donate is made explicit:

A Foundation exists at St Aloysius' College and parents are *expected to join* at a level in keeping with their personal circumstances (St Aloysius' College, 2004b, emphasis added).

In order to prompt parents to give generously in relation to their 'capacity to do so', the following table is provided. It is interesting to note that the explicit assumption is that all parents will be in the top marginal tax bracket.

Table 1 Indicative donation to St Aloysius' College Foundation Building Fund

| Total gift over five years | Gift per annum | After tax cost approx. |
|-------------------------------|-------------------|---------------------------|
| \$100,000 | \$20,000 | \$10,260 |
| \$50,000 | \$10,000 | \$5,130 |
| \$30,000 | \$6,000 | \$3,078 |
| \$25,000 | \$5,000 | \$2,565 |
| \$20,000 | \$4,000 | \$2,052 |
| \$15,000 | \$3,000 | \$1,539 |
| \$10,000 | \$2,000 | \$1,026 |
| \$5,000 | \$1,000 | \$513 |

Source: St Aloysius 2004a

It is clear that St Aloysius, which charges parents over \$8000 for Year 12 students and receives a further \$4089 per student from state and federal governments (St Aloysius' College 2004a), relies on the extra money raised from the College Building Fund to cover the day-to-day expenses - 'recurrent expenditure and maintenance (paint, carpet etc)'. Examples of recurrent expenditure are not given, but it is clear that the tax concession is aimed largely at capital items - 'acquisition, construction or maintenance of existing buildings only'. Use of a building fund to pay the cleaners would be patently incorrect.

As a second example, parents with children at the Maranatha Christian School in Endeavour Hills, Melbourne, are asked to accept the necessity of contributing to the building fund.

The 'building fund' amount represents a contribution to school income for certain operating expenditures of the school which can be separately identified for taxation purposes - these are maintenance and financing costs of eligible existing buildings in the school complex. It is not a contribution towards new buildings.

The School has nominated \$300 as the amount of the building fund donation. *We wish parents to recognise and accept the necessity of this contribution in meeting the School's operating budget.*

The donation is tax deductible.

The nominated amount will be indicated on the fees statements issued by the School (Maranatha Christian School, 2004, emphasis added).

In addition to stating that the contributions are a 'necessity' for the school, inclusion of a specified amount on the fee statement implies that a parent must take an active decision to refuse to make a contribution to the school's building fund. Since there is clearly a strong expectation by the school that parents will pay, claiming a tax deduction for contributions to the Maranatha Christian School's building fund may not be allowable.

2.2 Donations are assumed

In a few cases, school fee statements actually suggest or indicate that payments to building and library funds are compulsory *and* that the contributions are tax-deductible. For example, the fee statement on the website of Minaret College, Victoria, provides no indication to parents that building fund donations (which are said to be tax deductible) are optional despite explicitly informing them that bus fees are optional. It also says that the 'composite fee' which, like the tuition fee, is 'payable in advance each term', includes a Library Levy that is tax deductible (Minaret College 2003). A 'levy' is not usually seen as a donation.

Beaconhills College in Victoria goes even further, telling parents that payment to its building fund are an essential part of the cost of educating their child.

The Building Fund Contribution is \$450 per family per year and is a Tax Deductible Donation. Building Fund Contributions are an essential part of the

income of the College in that they are the means by which we are able to finance some necessary Capital Works of the College.

The College regards Building Fund Contributions *as part of the cost to parents of providing an education* for the children in our care. In the same way as school fees are necessary to finance the day to day operation of the school, the *Building Fund Contributions are necessary to finance the Capital Development of the school*, i.e. new buildings.

Consequently, *parents should view their contributions to the Building Fund simply as part of the cost of educating their child or children, and add their Tax Deductible Contribution of \$450 per year or \$112.50 per term to the payment of fees* (Beaconhills College, 2004, emphasis added).

The Christadelphian Heritage College Sydney simply presents its scale of fees on its web site and then informs parents that:

\$300 per child (maximum \$1,200) of the above fees is to be made payable as a tax deductible donation to the building fund. The balance of the fees to be paid to the general fund (Christadelphian Heritage College Sydney 2004).

It would be difficult to maintain that 'donations' paid to these schools are voluntary as they are presented as an essential component of the school fees. Thus claiming a tax deduction for them would appear to contravene the tax laws.

2.3 'Donations' are compulsory

Some schools abandon any pretence that parents have a choice to donate to the building fund. The website for Kardinia International School in Victoria, for example, says of its building levy:

This is a *compulsory* Levy, which is charged annually to families that attend Kardinia International College, with students in Prep to Year 12.

Not Tax Deductible \$185.00

Tax Deductible \$250.00

(Kardinia International School 2004, emphasis added)

2.4 Receiving a benefit

Another practice that raises questions about the legality of some claimed tax deductions relates to the returns that some parents receive for making donations. Places at elite private schools are often filled many years in advance making it difficult even for very wealthy parents to enrol their children at the school of their choice. There is anecdotal evidence to suggest that some parents have 'queue-jumped' waiting lists by offering schools large sums of money in the form of 'donations' to building funds.

The ATO has ruled that payments made to a school building fund for acceptance of an application to a school (or confirmation of an enrolment) are not tax deductible. 'A

fee is not a gift' because there is a benefit to the payer,⁵ although the more likely ground for denying deductibility is the lack of voluntariness. Depending upon the role that schools play in these activities, they too could be encouraging illegitimate claims against the Commonwealth.

3. Implications

Many, perhaps most, schools scrupulously adhere to the spirit and the letter of the law in relation to school building funds. However, there is evidence to suggest that some private schools are urging or facilitating parents to claim tax deductions for contributions to building funds to which they are not entitled. Other schools, perhaps with the benefit of advice from tax experts, do not make false claims but nevertheless apply intense pressure on parents to make 'voluntary' contributions.

As a result of these practices, Australian tax-payers are funding additional payments to schools and tax breaks to parents of children at schools to which they are not entitled under law. There is therefore a need for the Federal Government to enforce the tax laws more rigorously.

At a minimum the Federal Government should require all schools with school building funds to include a clear statement on fee accounts and solicitation material, including websites, that all contributions to building funds that enjoy tax deductible status must be entirely voluntary. There are approximately 2,500 private schools in Australia. The examples cited in this paper were collected with little investigative effort. The ATO should look more closely at the practices of schools and, where breaches are found, recover the tax underpaid. If schools respond that such action would force them to raise their fees, then this would provide further evidence of the extent of tax currently being avoided.

⁵ Taxation Determination TD 93/57 See <http://law.ato.gov.au/atolaw/view.htm?locid='TXD/TD9357/NAT/ATO'>

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