

EQUAL OPPORTUNITY TRIBUNAL  
OF WESTERN AUSTRALIA

Matter Number: 2 of 1998

IN THE MATTER OF A COMPLAINT BY:

**GARY GOLDBERG (as next friend for  
GREGORY GOLDBERG)**

Complainant

- against -

**G KORSUNSKI CARMEL SCHOOL**

Respondent

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**REASONS FOR DECISION**

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BEFORE:            Mr N Hasluck, Q.C.            President  
                             Ms R Kean                        Member  
                             Ms M Fadjar                    Deputy Member

Counsel for the Complainant            Mr A Jenshel

Counsel for the Respondent            Mr. W Martin, QC  
    Mr P McCann

HEARD:                                        3 & 4 August, 1999

REASONS FOR DECISION:            (Delivered: 14th September 1999)

## **REASONS FOR DECISION**

The Complainant, Gary Goldberg as next friend for his son Gregory Goldberg, claims that the Respondent, The G Korsunski Carmel School, discriminated against Gregory Goldberg on the grounds of religious conviction, race and family status. The complaint brought pursuant to provisions of the Equal Opportunity Act 1984 (WA) arises out of an approach made by the Goldberg family to the Carmel School in February 1996 to have Gregory enrolled as a student at the school. It will be useful to begin by looking briefly at the history and circumstances of the Carmel School.

### **Carmel School**

The school prospectus says that after World War II and the destruction of the central European Jewish communities, a revival of Jewish consciousness became apparent all over the world. This was reflected in Perth, Western Australia, with the establishment, in February 1957, of the Seeligson Kindergarten. Eighteen months later, a meeting of parents of prospective pupils resolved to start a day school. These entities functioned in premises known as the Monash Hall and the Perth Hebrew School next to the Shule in Brisbane Street. In 1962, assisted by the generosity of Mr G Korsunski (whose name the school still bears), the Seeligson Trust and a major community appeal, a new school building was completed. By 1978, assisted by additional donations and Government grants, the school was catering for all levels of tuition from kindergarten to tertiary education. The school was situated at Cresswell Road, Dianella. According to the prospectus, students leave Carmel School as self aware, self assured, well educated and articulate people who are confident of a bright future in their chosen career paths. It adds:

"All this is achieved within the framework of an Orthodox Jewish education. Carmel School students graduate with the indisputable bonus of knowing who they are and where their roots lie. A strong Jewish identity is instilled and nurtured, underpinning the values of Judaism and in particular those of the light of the Torah. Staff, students, parents and community forge close links resulting in a high level of commitment to Judaism on the part of the students, a close and easy familiarity with all aspects of Jewish life and a respect for a rich heritage."

Further on, in defining the school's reason for being, the prospectus observes that:

"A commitment to traditional Judaism is the cornerstone of the philosophy of the School. It has achieved its aim when its students graduate proud of their heritage and enriched by a strong Jewish identity and knowledge with which to face the world. Each graduating class has attested to this success on the part of the School."

In dealing with the objectives of the curriculum the prospectus includes the following passage:

"The Jewish ethos of the School is respected and enhanced."

The prospectus goes on to say:

"Students are encouraged to view personal and social relations, achievements and responsibilities in the light of Torah. Studies in Tanach, Dinim, the Hebrew language and Jewish history help to complete a well-rounded Jewish education from kindergarten to Year 12. The School has a daily T'fillah (prayers) programme which is led by staff and a student T'fillah committee. Pre-Barmitzvah services are held regularly for Bar Mitzvah boys. An annual Batmitzvah ceremony is held at the completion of the School based Batmitzvah programme. Families are also involved in the celebration and preparation of all Chagim. The School uniform, which includes the wearing of kippot, projects a proud image of Jewish identity."

The prospectus also notes that school fees are set every year by the School Board in accordance with budgetary requirements. "It is fundamental to the

School philosophy that no Jewish child should be excluded from the School by the inability of his or her parents to pay fees in full. Fees assistance is available in appropriate cases on application, and is dealt with in the strictest confidence by the Administrator.”

Further details concerning the structure and credo of the Carmel School can be found in its constitution and rules. The school was incorporated as an association under the provisions of the Associations Incorporation Act 1895 (WA) on 18 October 1960. The effect of the constitution is to allow to the school's governing Board the usual powers to acquire property and to handle funds. By clause 5 the income and property of the school shall be applied solely to the promotion of its objects. No part thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of pecuniary profit to the members of the association provided that remuneration may be paid in good faith to employees of the school or other persons in return for services actually rendered. By clause 19, if, upon dissolution of the school, any property remains after satisfaction of the school's debts and liabilities, the same shall not be paid to or distributed amongst the members of the school but shall be vested in the Perth Hebrew Congregation Inc to be held in trust for educational purposes.

Clause 6 of the constitution provides that any person who is interested in the welfare of the school and subscribes by voluntary contribution such amount as shall be determined by the Board shall be a member of the association for the current year. By clause 6(b) “both parents of any child attending the school shall be members.” This provision suggests that students of the school are not members of the association. The significance of this will become apparent in due course.

The credo reflected in the prospectus - that the school operates “within the framework of an Orthodox Jewish education” - is underpinned by the objects set out in the constitution. In particular, clause 2(b) reads as follows:

"The conduct and religious instruction in all institutions under the authority of the School shall be in accordance with the standards of orthodox Judaism as established by the Chief Rabbinate of the United Hebrew Congregations of the British Commonwealth of Nations. Nothing in this clause shall limit the discretion of the Board in respect to the enrolment of children."

### Mr Lenny

The Tribunal received evidence from Mr Peter Lenny who has had a long association with the Carmel School both as a parent and as a member of its governing body. He was President of the Carmel School Board between 1994 and May 1996. He said that throughout his association the school has endeavoured to implement the religious ethos and objectives set out in the prospectus and in its constitution.

Mr Lenny told the Tribunal that as at 1994 the total student body of the school was in excess of 550 students of all ages from kindergarten to Year 12. The school has always been a co-educational school. On 2 August 1996 the school's total enrolment was 609. He said also that the school's major source of revenue was from students' fees, with additional funding flowing from donations made by the community and from Federal and State grants. He said that fees generally were not sufficient to meet the expenses of the school with the result that donations were needed to make up the shortfall. The aim of the budget process each year was to break even. The school could not be regarded as a profit making venture. He confirmed that the powers of the school are exercised by the school Board in accordance with clause 7 of the constitution. The Board was responsible for the enrolment policy, under the constitution and in fact.

Mr Lenny provided a number of examples of the way in which the Orthodox Jewish faith is reflected in the daily life of the school. Only Halachic Jews may participate fully in certain religious rituals, such as being called to the Torah, wearing T'fillin or leading prayers. Certain dress requirements apply for boys,

that is to say, a Kippah (head wear) must be worn at all times whilst on school grounds or at official school functions. Halachic dietary rules apply at school functions, camps and at the school. All students are required to study Jewish studies as part of the school curriculum. About a quarter or a third of the school's formal curriculum is related to Jewish religious studies in one form or another. Prayers are said daily. Boys and girls are kept separate in the school Synagogue in accordance with Halachic Jewish customs. The leadership group of the school includes a Director of Jewish Studies who is most often (and presently) a Rabbi, being, in effect, second to the school Principal. On all Halachic Jewish festivities and occasions the school is either closed (if that is required by Jewish law) or the occasion is commemorated or celebrated by all students at the school.

### Judaism

In order to appreciate the significance of these examples and the effect of clause 2(b) of the school's objects upon the enrolment procedure, it becomes necessary for the Tribunal to look briefly at some of the principal features of Judaism, and the history of its adherents. In doing so, the Tribunal does not purport to reflect the entire range of learning in this field or to explore the subtleties of various doctrinal issues; indeed, it would be presumptuous for the Tribunal to attempt to do so. It is obliged by the rules of natural justice to confine itself to the evidence given by Rabbi Philip Heilbrunn, an expert witness, called on behalf of the Carmel School, and to the evidence of Rabbi Joshua Aaronson, an expert witness called on behalf of the Goldberg family. These two witnesses expressed different views in regard to certain issues but, at this stage, for the sake of an orderly narrative, the Tribunal will concentrate upon what seems to be common ground. The matters in controversy will be identified in due course.

Rabbi Heilbrunn's qualifications include degrees in Arts and Law from the University of Witwatersrand, and ordination at the South African Rabbi's Training College in 1977. He arrived in Australia in 1979 and has held various senior

positions in the Jewish Community of Australia. He has been Chief Minister of the St Kilda Hebrew congregation and has been President of the Association of Rabbis and Ministers of Australia for the past seven years, being presently spokesman for the Australian Rabbinate on matters of local and international concern. He has also acted as arbitrator and mediator for the Jewish Community of Australia on disputes involving Jewish law.

Rabbi Aaronson's qualifications include a B.A. from the University of Michigan, the degree MAHL from the Hebrew College-Jewish Institute of Religion, New York, followed by Rabbinic ordination at the same institution. He served for five years between 1990 and 1995 as Director of Education at Temple Beth Zion. He then became Associate Rabbi, Anshe Chesed Fairmount Temple Rabbi, and since April 1997 has been Acting Senior Rabbi, Anshe Chesed Fairmount Temple. The Tribunal understands that in August 1998 he was appointed Rabbi, Temple David, Perth in the State of Western Australia and continues to occupy that position.

#### **Rabbi Heilbrunn's Evidence**

According to an affidavit sworn by Rabbi Heilbrunn, the faith of Judaism originates in the Torah as revealed to the Israelites at Mt Sinai and taught to Moses by G-d during the 40 days he spent on the Mount. The Torah text is very succinct, precise and considered to be a divine and perfect document. The nature of the Torah text is governed by the fact that it is written in Hebrew. Every word and letter is crucial to the Torah's code and if one is missing or even damaged it renders the scroll ritually unfit. The plain meaning of Torah text is fairly straight forward and provides an understanding of G-d's expectations of the Israelite people at a basic level. However, there exists an Oral Law which was given by G-d to Moses at Sinai. This Oral Law serves to elucidate and expand the ramifications of the Torah's text to make it applicable to the infinite number of situations which might arise in real life. It was studied and handed down faithfully by teachers to students for generations traceable back to Moses himself.

Around the time of the destruction of the Second Temple and exile, the vicissitudes and great insecurities of life so endangered the continuity of this way of handing over the tradition that Rabbi Judah the Prince, a descendent of King David, authorised and edited the commitment to writing of the Oral Law as the Mishnah. Later sages would debate this material and the minutes of their debates are called G-marah. Mishnah and G-marah together are known as Talmud. The Talmudic debates were later "resolved" in various codifications and formed the precedent of Jewish law known as Halacha.

Rabbi Heilbrunn's affidavit goes on to say that the Jewish faith distinguished the Jews. The original covenant of the Jewish faith with Abraham and again with his descendents at the revelation at Mt Sinai, established the eternal bond between G-d, Torah and Israel, and those who joined this covenant as converts at later stages. They and their descendents are Jews. Since time immemorial the Jewish status of the biological mother (exclusively) determines the Jewish status of the child. If the biological mother is Jewish, then, regardless of the status of the biological father, all her children are Jewish. If the mother is not Jewish, regardless of who or what status the father has, all her children are not Jewish either. The father's status is altogether irrelevant in determining Halachic Jewish status, for Judaism recognises only matrilineal descent.

Rabbi Heilbrunn says further that Judaism includes the entire life of its adherents as being subject to its regulations. Every aspect of human life is therefore subject to Jewish law known as Halacha. Conversion to Judaism is possible, and means a full acceptance of the principles, teachings and practices of Judaism. It signifies a total, profound and comprehensive transformation of one's inner nature. Only then can the prospective convert move to the formal, ritualistic induction into the faith of Israel under the supervision of qualified and duly authorised officials. There are thus two parties involved: the People of Israel and the convert. Membership in Israel, even as in any other association, cannot be a unilateral act.



It was apparent from the evidence of both expert witnesses that over time different schools of thought have evolved within Judaism. Often, the ruling powers in whose midst Jews lived had little to do with them apart from levying duties, taxes or instituting other repressive measures. Following the French Revolution and liberalisation in many European societies, Jews too were accorded limited rights and opportunities hitherto denied them. The ability to attend schools and universities, to become involved in general commerce, the arts and professions was seized on by young Jews with unprecedented enthusiasm and in great numbers. According to Rabbi Heilbrunn, in these circumstances the strictures of Jewish law and custom, dietary laws, their mode of dress, the Sabbath and many other Jewish practices were regarded as an embarrassment especially when viewed against the slick and sophisticated non-Jewish upper middle classes whom these young Jews aspired to join. Some Jews abandoned Judaism completely, such as the family of the composer Felix Mendelssohn whose grandfather had been a Rabbi who had pioneered reforms. Those who did not want to abandon Judaism completely, sought to radically change Judaism into a new cultural mould and in the image of the dominant religion, Christianity, or to modify observance to become more convenient.

Rabbi Heilbrunn went on to say that after almost two centuries the condition of Jews and their Judaism "presents a very complicated picture". Theologically, a great void has developed between Orthodox Judaism and the various reform groups. The abandonment of the eternal immutability and validity of the Torah in a direct sense are at the heart of this difference. He says at paragraph 4.29 of his affidavit:

"On a communal or peoplehood level, the fact that vast numbers of the members of these denominations are and remain Halachically Jewish means that, in spite of all the major theological differences, most of the Jews are a single people with all the implications of that notion: all feel a care and responsibility for each other as brothers and sisters, there are cultural and social ties which bridge the communities, and there is a common care for the state of Israel. On the other hand, the theological

differences give rise to serious difficulties in Halacha engendering intense feelings of hostility and which are virtually insurmountable.”

Both expert witnesses seem to agree that the broad division is between Orthodox Jews and those known as progressives or reform Jews. The Tribunal was led to believe that there may be various other subdivisions within these broad categories. However, as both experts were, for present purposes, and for ease of reference, prepared to contrast the position of “Orthodox Jews on the one hand, and non-Orthodox Jews on the other”, the Tribunal will use a similar form of language.

Rabbi Heilbrunn contended that the basic difference between Orthodox and non-Orthodox Jews is their attitude to Jewish law and tradition. His affidavit contains this passage:

“The Orthodox accept the entire Torah, the written Torah (the Bible) and the Oral Torah (recorded in Talmud and Midrashim), as divinely revealed. As a creation of G-d who is perfect and eternal, so his Torah is perfect, eternal and immutable. All the commandments and laws of the Torah (codified in the Shulchan Aruch) are and remain obligatory and binding for all time. The non-Orthodox do not ascribe the attributes of divine revelation, eternity and perfection to the Torah, written and oral: ‘what does progressive Judaism say about the Torah and the Bible? We, as progressive Jews, find ourselves confronted with an ancient document, the historical outline of which we can regard as true, but whose many stories often bear the imprint of their environment as well as of the authors (sic) own particular and sometimes fallible view of the world.’ – Australia and New Zealand Union for Progressive Judaism (ANZUPJ) Home page on the Internet.”

Rabbi Heilbrunn went on to say that all movements readily recognise Orthodox Judaism as the historically original, valid and legitimate expression of Judaism and that at all times vast numbers of Jews were Orthodox in terms of the definition just mentioned. They may disagree with Orthodoxy and its view of Torah or whether the Mitzvot (commandments of the Torah) are binding and obligatory laws of G-d himself, or human conventions, but even they concede

that nothing is lost of "Jewishness" by following the Mitzvot. Orthodoxy too acknowledges the existence of religious pluralism, but will never grant it any legitimacy. In other words, peaceful co-existence and cooperation on a communal plane is desirable, but there can be no common ground on the religious-doctrinal level. Reform and conservative can live with Orthodox standards and recognise the titular status of Orthodox Rabbis, but this will not work in reverse since conservative and reform ordination are altogether different.

Conversion to Judaism is greatly affected by these differences. The spiritual leadership of the non-Orthodox movements set their own requirements for issuing conversion certificates. Invariably their requirements are not nearly as stringent and encompassing as those required for Orthodox conversion.

Rabbi Heilbrunn summed up the doctrinal differences in this way:

"The problem of 'who is a Jew' is a problem about basic principles and Jewish survival. It affects issues that preclude compromise for the Orthodox position. In sum, anyone born of a Jewish mother is a legitimate Jew. Anyone who has converted to Judaism according to the requirements of the universal Halacha is a legitimate Jew.

It is entirely in accordance with the school's constitution, the practice of Orthodox Judaism according to Halacha, and its standards, conventions and customs to carefully determine the Jewishness according to Halacha of any prospective student. It is equally entirely in accordance with Halacha to exclude an applicant student from admission to the school, or if admitted, to limit or to define or prescribe precisely how that student will be able to function within the activities of the school."

The Tribunal notes that Rabbi Heilbrunn's account of the history of Judaism and the emergence of doctrinal differences did not go unchallenged. Controversy centred on the exact nature and effect of these differences. It will therefore be useful to turn now to evidence given by Rabbi Aaronson, the expert witness called by the Goldberg family.

Rabbi Aaronson

Rabbi Aaronson said in evidence that he was a member of the Australian and New Zealand Union for Progressive Judaism. He said that, in general, the term Halacha refers to a body of text known primarily as the Talmud, and to this must be added compendia of discussions that took place over the course of several generations in a variety of Rabbinical learning centres. The Jewish law, in his opinion, was a very expansive body of work. It is appropriate to speak of a distinction between what Jewish law requires and what is supportable by Jewish law. In his view, a child who is Jewish would be a child whose mother is Jewish, or one who is appropriately converted under appropriate auspices. When asked whether he was speaking of conversion according to Orthodoxy or in accordance with some other precept he said:

"I would suggest that there is no such thing as Orthodox Jewish law. There is Jewish law, or there's not Jewish law. I would suggest to you that my conversions that I supervise are done in accordance with Jewish law. Do they meet the criteria set down by an individual group of Rabbis who consider themselves Orthodox? You'd have to ask that group of Rabbis. But I certainly would think that my conversions, the process I just outlined to you, is in line with what my understanding of Jewish law requires in these matters."

Put shortly, Rabbi Aaronson was the proponent of a view that although all Jews respect and feel bound to observe the precepts of Halacha, non-Orthodox Jews see Halacha as an evolving body of doctrine. He indicated that there has always been a spectrum of practice and belief within Jewish communities and this was true of Western Australia at the present day. The spectrum "begins with people who have, what we might call a very literal understanding of sacred scriptures, and the other side of the spectrum would be people who have a more figurative interpretation." He went on to say that "the vast majority of Jews in Western Australia, regardless of how they affiliate, are, in practice, progressive Jews, meaning they have a rather wide ranging and expansive understanding of ritual and practice, and that's how they lead their lives."

He went on to say that a person might be an Orthodox Jew by birth, but a progressive Jew according to the level of their conviction or practice. He agreed that there were certainly people in the Jewish community of Western Australia who would posit that there was one appropriate understanding of Jewish law and tradition to the exclusion of all others. He identified various examples of the way in which Orthodoxy might be manifested, one such example being that "some Orthodox Jews may chose to wear head covering at all times". When asked to comment on the suggestion that the difference between Orthodox Jews on the one hand, and non-Orthodox Jews on the other was that the latter did not obey Halacha he said:

"In my personal opinion, I would not agree with that assessment. I think that all Jews are Halachic Jews in that all parts of Jewish custom and ritual come from what is classically construed as the body of Halacha. Progressive Jews have an understanding of Halacha as an ongoing process that is subject to change and interpretation over the course of generations."

When the proposition was put to Rabbi Aaronson for comment that on a strict view of the matter non-Orthodox Jews might be regarded as being no different than the general population, he said: "I obviously don't think it's true."

According to Rabbi Aaronson, progressive Jews were divided from the gentile community by various rituals, festivals, dietary customs and in their manner of dress. Further, the child of a Jewish woman will be able to claim the status of being Jewish, even if the mother's active connection to the Jewish faith had been eroded by marriage to a man of some other faith. He said that this, of itself, would be a significant point of distinction between a non-Orthodox, albeit lapsed Jewish mother, and a member of the general community. He said:

"Your Judaism can be imparted by birth right, so if your mother is Jewish, you are Jewish, provided it's from a permitted union. There are some

slight qualifiers on that. But that's basically the way we acknowledge who is a Jew."

When asked to summarise the relationship between Halacha and reform Judaism he said that the latter "takes the attitude that the Jewish law is ever changing, and that it is an organic entity that responds to the needs of a contemporary generation, as well as linking a contemporary generation to the past."

It was apparent from the evidence given by the two expert witnesses that there was broad agreement as to the origins of Judaism and as to the presence within that faith in the contemporary era of a school of thought described as Orthodox Judaism which adopted a rigorous approach to the lessons of the Torah. There were clearly profound differences of opinion as to the requirements of Halacha, but the evidence tended to suggest that if a newcomer to this State of a Jewish background read the Carmel School's prospectus and constitution carefully, he or she would be able to give a meaning to the concept reflected in clause 2(b) of the constitution that religious instruction would be "in accordance with the standards of Orthodox Judaism" as contrasted with the standards of non-Orthodox Judaism. In other words, a person of Jewish background, irrespective of whether that background be Orthodox or non-Orthodox, would be aware of the doctrinal differences reflected in the dichotomy just mentioned. It would not come as a complete surprise to such a person to learn that the child of a non-Jewish mother might be viewed differently by the Carmel School to the child of a Jewish mother.

It is against this background that the Tribunal turns to the policies and practices of the Carmel School concerning enrolment.

### Enrolment

Mr Lenny said that, for many years, the school's policy was to confine enrolments to Halachically Jewish students (ie those who are Jewish according to Halacha). This stance was consistent with a fundamental article of Orthodox Jewish faith that Jewish law or Halacha must be observed. Halacha stipulates that a person is Jewish if his or her mother is Jewish (ie Jewish according to Halacha). The religion of the person's father is irrelevant. Halacha requires that the mother either be born Halachically Jewish or convert to Judaism in accordance with requirements of Halacha. It is not sufficient to undergo conversion through a non-Orthodox procedure or congregation.

On 16 August 1992 the School Board met and resolved to change the enrolment policy to admit students regardless of their religion. Clause 2(b) of the school's constitution permitted such a change, for, notwithstanding that the school is to be conducted in accordance with the standards of Orthodox Judaism, "nothing in this clause shall limit the discretion of the Board in respect of enrolment of children". There was not unanimous agreement to the change of the policy in that some members of the school (ie parents) and Board members were of the view that only Halachically Jewish children should be admitted.

The lack of unanimity is apparent in what took place at the meeting of the Board on 16 August 1992. Two alternative resolutions were put to the Board. The first alternative provided that children could be enrolled "whether or not they are Jewish according to Halacha". This resolution opened the school to all students, irrespective of their religion. The second alternative provided for enrolment of children who are Halachically Jewish and children who are Jewish by other standards. This second alternative contemplated, in effect, that only persons who were Halachically Jewish or otherwise considered themselves to be Jewish, could enrol in the school.

In the result, the first alternative was passed so as to allow enrolment of all children whether or not they were Jewish according to Halacha, subject to one amendment. The amendment was that children who are not Jewish according to Halacha could be enrolled "subject to the approval of the Halachic authority of the school". A second resolution was passed to the following effect:

"Nothing in the above policy shall limit or be implied or interpreted as limiting the Board's discretion regarding the establishment and implementation of appropriate criteria and priorities for or in relation to:

- (a) other qualifications or prerequisites for enrolments or continued enrolment at the school;
- (b) waiting lists for places in the school; and
- (c) remission, reduction or deferment of fees, fee subsidies and scholarships."

The Halachic authority of the school is a reference to a Rabbi selected by the Board to provide Halachic guidance when required. At all material times this Rabbi was Rabbi Freilich. Thus, the school's enrolment policy as of 16 August 1992 was to allow the enrolment of children who are Halachically Jewish and, subject to the approval of the Halachic authority, other children. This meant, in effect, that all children, irrespective of religion were able to enrol in the school provided that students who were not Halachically Jewish (according to the Orthodox view of the requirements of Halacha) needed to be "approved" by the Rabbi. This approval was intended to ensure that families who sought to join the school supported the school's ethos and objectives.

The School President at that time, Mr John Walters, circulated letters to parents and supporters of the school outlining the change in policy, and these letters were produced in evidence. Thus, in February 1996, being the moment when the Goldberg family approached the school, enrolment in the school was open to children irrespective of their religion provided that parents of children who were not Halachically Jewish (according to the Orthodox view) were required to first have an interview with the Rabbi, so that the Rabbi could explain the school's



ethos and practices and indicate how those could impact on a non-Jewish child. In particular, the Board wished to ensure that non-Halachically Jewish families enrolling their children in the school were aware of the potential problems. The school also prepared a pro forma letter setting out certain restrictions applicable to non-Halachically Jewish students.

The Tribunal pauses to note that under cross examination Mr Lenny agreed that the expansion of the enrolment policy was affected by financial considerations. The intention was to draw additional students from the Jewish community, although the hope was that increased enrolments would be received from Jewish families with children who were Halachically Jewish according to the school's understanding of that doctrine.

One of the potential problems related to fee relief. The Carmel School is a full fee paying private school and all families are charged substantial fees. Mr Lenny said that it has always been the policy of the school to allow fee relief, either wholly or in part, to Halachically Jewish families who cannot afford to pay the fees. This policy exists to ensure that Halachically Jewish children are able to obtain a Halachically Jewish education if they want one. Once the enrolment policy was amended to allow enrolment of children irrespective of their religion, the Board considered that only Halachically Jewish students should be entitled to fee relief. It was felt that it was necessary to bring this to the attention of families who were proposing to enrol non-Halachically Jewish students in the school and to prepare a document – eventually called “The Enrolment Policy Procedures” – which could be used by Rabbi Freilich as a checklist of matters to discuss during the pre-enrolment interview and which would also be reflected in the pro forma letter to be given to the parents of the prospective student.

The policy was drawn up so as to apply to all potential students who were not Jewish according to Halacha, irrespective of their religion. The policy contemplated, moreover, that all such students would participate in normal activities, except to the extent that they were precluded from doing so on

religious grounds. According to Mr Lenny, the policy contemplated three categories of students being "J" for Halachically Jewish, "C" for non-currently Halachically Jewish but in the process of a Halachic conversion and "N" for not Halachically Jewish and not proceeding with a conversion.

It was against this background that Mr & Mrs Goldberg approached the Carmel School in February 1996 with a view to enrolling their son Gregory Goldberg as a student. The Tribunal pauses to note that although Mr & Mrs Goldberg did not give evidence it was common ground at the hearing that Mrs Goldberg was considered by Rabbi Freilich as the School's Halachic authority not to be Halachically Jewish with the result that her son Gregory Goldberg, consistently with the Orthodox doctrine was also thought to be non-Halachically Jewish.

#### **The Goldberg Application**

The pleadings subsequently filed on behalf of the parties and related documents, including the complaint form subsequently lodged with the Commissioner of Equal Opportunity, set out the facts and matters relevant to the approach made by Mr & Mrs Goldberg to have their son Gregory enrolled as a student at the Carmel School. The pleadings reflect a broad consensus as to what took place and most of the documents in an agreed bundle were tendered at the hearing by consent. The Tribunal draws upon these materials in reconstructing the exact sequence of events.

On 22 February 1996 Mr & Mrs Goldberg attended Ms Johnston, the Vice Principal of the Carmel School in order to ascertain whether Gregory might be admitted as a student. They were provided with an overview of the school's educational philosophy including reference to the fact that it was an Orthodox Jewish school. They were then directed to the school's enrolment secretary, Ms Thelma Niese, to complete enrolment forms. At this time they were requested to provide the school with documentary proof of Mr Goldberg's Barmitzvah and Mrs Goldberg's conversion to Judaism. They were also informed that they were

required to be interviewed by Rabbi Freilich. Ms Niese made an appointment for them to see Rabbi Freilich and forwarded the relevant documentation to the Rabbi's office by facsimile. The fax reads as follows:

"I have made an appointment for Mr & Mrs Goldberg to see you tomorrow (Friday 23<sup>rd</sup> February) at 10.30 am at the PHC. Please let me know their status and procedure ASAP as they have indicated that they would like the child to start on Monday 26 February 1996."

It is apparent from the application for enrolment form dated 22 February 1996 that Gregory was about to turn 12 years of age having been born on 27 February 1984. Mr & Mrs Goldberg completed that part of the form marked "Information only required for Jewish applicants" and in the course of so doing indicated that their child had attended Hebrew School, namely at Temple David. On the day the form was signed they provided documentary proof of Mr Goldberg's Barmitzvah as requested.

At the appointed time on Friday, 23 February 1996, Mr & Mrs Goldberg attended the arranged meeting with Rabbi Freilich. It was common ground at the hearing that discussion at the interview proceeded upon the basis that Mrs Goldberg was not Halachically Jewish because she was not born Jewish and had not converted to Judaism according to the Orthodox view of Halacha. It followed from this that Gregory, in the view of Rabbi Freilich, was not Halachically Jewish with the result that Rabbi Freilich made it clear to Mr & Mrs Goldberg that there were aspects of school life in which Gregory would not be able to participate. The details in that regard were conveyed to them by Rabbi Freilich proceeding to read aloud from a letter which was subsequently handed to Mr & Mrs Goldberg, this letter having been signed by Mr Lenny, as School President, and referring to matters contained in the school's enrolment policy and related pro forma letter. The letter (omitting inessential parts) reads as follows:

"Every effort will be made to accommodate your child and make him or her feel at home, however there are certain aspects of enrolment for children

who are not Jewish according to Orthodox Jewish law (Halacha) that must be brought to your attention at the outset to avoid any misunderstanding ...

We confirm the following matters discussed with Rabbi Freilich regarding your child's/children's enrolment and attendance at Carmel School. These restrictions will apply at all school activities such as camps as well as in the course of the daily school programme.

1. Children who are Jewish according to Orthodox Jewish law will take precedence over other children in class waiting lists.
2. Fee assistance will not be available to you.
3. Your child will not be eligible for any scholarships.
4. Your child will not be eligible to become head boy or head girl of the school.
5. Your child's participation in religious activities and rituals will be restricted. For example:
  - i Your child will be required to attend daily prayers but will not be able to participate fully, lead the prayers or be called to the Torah.
  - ii If your child is a boy he will not wear T'fillin at morning prayers as do other boys who have reached their Barmitzvah. He will also not be able to have the usual Pre-Barmitzvah ceremony at the school.
  - iii If your child is a girl, she will be required to participate in the Year 7 Batmitzvah course of study but will not be able to join the other girls in the ceremony and ritual to celebrate her Barmitzvah.
6. The student body is eligible for election or appointment to special student committees usually at senior school level. Your child will not be eligible to be on any committees that are concerned with religious activities, such as the student committee for the prayer programme.
7. We draw your attention to the booklet entitled "Information for Parents" and in particular to those pages which make reference to the observance of dietary laws and consideration of religious observances both at school and outside the school. These rules need to be adhered to by all students.

All aspects of your client's/children's enrolment are regarded by the school as strictly confidential and will be treated accordingly. You need to be aware however that for administrative purposes certain people directly involved with the processing of enrolments will be made aware of your child's status.

In addition, in order to preserve the tenets of Orthodox Jewish law it will be necessary from time to time for particular staff within the Jewish Studies Department to be made aware of your child's/children's status. The school fully respects the confidentiality of the matter. In the course of the school's every day activities however your child's/children's status may become obvious to other students and members of the school community.

We understand that you have met with the Halachic authority of the school, Rabbi Freilich. At that meeting you may have indicated to the Rabbi that you intend to proceed with an Orthodox conversion. If this is the case, the Rabbi will advise the school of the arrangements made with respect to your conversion. The school is fully supportive of and encouraged by the desire to fulfil the process of conversion and all restrictions and limitations referred to above will be removed upon confirmation that your child has become Jewish according to Orthodox Jewish law."

It is apparent from the correspondence forming part of the agreed bundle of documents that Mr & Mrs Goldberg felt affronted by the presence of the restrictions referred to in the letter. During 1995 Gregory had been attending the Camboon Primary School in Noranda but he had got to know a lot of the students at Carmel School through playing soccer for the local Jewish soccer club. By the end of 1995 he had decided that he wanted to go to Carmel School because he had a number of friends there and was impressed by the school. He said in evidence to the Tribunal:

"I remember Mum telling me that Carmel School was putting conditions on my enrolment and that this had happened through the Rabbi. I remember either Mum or Dad showing me a letter from the school which set out the conditions that the school was putting on my enrolment. I remember Mum and Dad talking to me later explaining that I would not be enrolling in the school because of the conditions which were being put on by the school. I really wanted to go to the school and I felt sad when Mum and Dad told me that I could not go. I felt depressed that I did not get to go to the school because I was excited about going there. I was really

embarrassed because I had told all my friends and teachers at Camboon School that I was leaving to go to Carmel School and that was my last day.”

It is apparent from the agreed bundle of documents that various meetings took place between Mr & Mrs Goldberg and representatives of the Carmel School, and that other persons with an interest in the matter attempted to propose solutions including a review of the school’s enrolment policy.

On 2 December 1996 Mr & Mrs Goldberg lodged a complaint with the Commissioner of Equal Opportunity complaining of discrimination on the ground of religious conviction in the area of education and further correspondence then ensued.

By letter dated 3 December 1996 the President of the school Board wrote to Mr & Mrs Goldberg a letter which includes the following passages:

“We reiterate that while you are welcome to apply to enrol your children as students, the ethos of the school and many of its essential policies and practices are based on the tenets of Orthodox Judaism. Accordingly, in the implementation of the enrolment policy – as in certain aspects of the general management of the school as an educational institution – the school Board will not deviate from the relevant precepts of Orthodox Jewish law which have been part and parcel of the school’s existence since it was established almost 40 years ago.

You will no doubt be aware (from information which you have obtained from the school and elsewhere) that the very reason for the school’s existence is (and always has been) to provide Orthodox Jewish religious education for children who are Jewish according to Orthodox Jewish law. Accordingly, the school Board will not (even if it could) conduct the affairs of the school (including the enrolment of children) in any way other than to achieve the aims of its founding fathers, in accordance with its constitution.

Accordingly, we do not accept your assertion that any of the school’s policies are “discriminatory” since any religion or group is entitled to establish and run a school designed to cater to the needs of its adherents. That is in no way discriminatory, but the very essence of a tolerant society which recognises a diversity of religious affiliation. It is for this very reason

that the law expressly allows a voluntary body (such as the incorporated association which runs the school) to apply a specific religious philosophy of its choice, both in its teaching and in the management of the school's affairs."

The Tribunal pauses to note in passing that as a consequence of pre-trial procedures a question arose as to whether the enrolment procedures policy was being rigorously applied. Evidence was received from Mr Lenny on this point after an opportunity had been afforded to him to search the relevant records. He confirmed that the procedures were being rigorously applied, although he conceded that two students, described anonymously as A and B, had received some fee assistance without being Halachically Jewish. He said that "the grant of fee assistance to A & B's family appeared to slip through the system, in that a decision was made by representatives of the Board to grant fee assistance without being fully apprised of the Halachic status of the children." Counsel for the Complainant did not in the conduct of his case at the hearing press any suggestion that there had been a selective application of the policy concerning fees assistance.

The Commissioner of Equal Opportunity conducted an investigation but was unable to resolve the matters in dispute with the result that the complaint was then referred to this Tribunal. As a consequence of directions given by the Tribunal, pleadings were brought into existence in the form of Points of Claim (with a Reply being filed in due course) on behalf of Mr & Mrs Goldberg and Points of Defence on behalf of the Carmel School. The Points of Claim raised three principal issues being, first an allegation of discrimination on the ground of religious conviction in that the conditions or restrictions in the February letter were imposed by reason of the matters pleaded in paragraph 10. The relevant paragraph contains a plea that "Gregory is not Halachically Jewish by reason of Helen not having been born Halachically Jewish and not having converted to Judaism in a manner or under supervision of a Rabbi acceptable to the Respondent". In response to that plea, the Carmel School admitted in its Points of Defence that "Gregory is not Halachically Jewish because Helen was not born

Halachically Jewish or has not converted to Judaism in accordance with Orthodox Jewish law”.

The school went on to plead in answer to the allegation of discriminatory conduct that it was set up as a voluntary body and is conducted in accordance with the doctrines of Orthodox Judaism. As a matter of Orthodox Jewish faith, persons who are not Jewish according to Orthodox Jewish law (Halacha) are not Jewish. Gregory Goldberg was not a member of the Jewish religion according to Halacha and the conditions reflected in the February letter were not unlawful having regard to those provisions of the Act, especially Section 73 concerning educational institutions established for religious purposes, which provides an immunity where a body discriminates in good faith in favour of adherents of a particular religion or creed generally. Reference was also made to Section 71 of the Act which excuses voluntary bodies from liability in certain circumstances.

By their Points of Claim Mr & Mrs Goldberg also contended that the imposition of the conditions in the February letter constituted unlawful discrimination on the ground of family status in that the conditions were allegedly imposed by reason of the family relationship of Gregory to his mother Helen Goldberg. It was said further that the conditions were imposed by reason of the Halachic status imputed to Gregory by reason of the relationship to his mother who had not been born Halachically Jewish. In its Points of Defence the school denied liability and again relied upon the provisions just mentioned concerning educational institutions and voluntary associations.

Finally, by the Points of Claim Mr & Mrs Goldberg contended that the imposition of the conditions in the February letter constituted unlawful discrimination on the ground of race in that the conditions, so far as they differentiated between students having a mother who was considered by the school to be Halachically Jewish and those who do not have such a mother, are solely dependent on maternal lineage. Those students who are considered by the school to be Halachically Jewish constitute a “race” for the purposes of the Equal Opportunity



Act. Mr & Mrs Goldberg gave notice that they would rely on the following matters as particulars of race, that is to say, the cultural, historical and traditional distinctiveness of Halachic Jews by comparison with non-Halachic Jews and, further or alternatively, by comparison with the general population of Western Australia; and the extent to which maternal lineage is a pre-condition to Halachic Judaism. The pleading went on to say that those students such as Gregory who were not Halachically Jewish were discriminated against by reason of their alienation from such race.

The Carmel School contended in its Points of Defence that in the circumstances of the present case the alleged discrimination did not occur on the ground of race. In regard to this claim also the school sought to rely upon the immunity available to voluntary associations. It was not able to rely upon the exception to liability allowed for by Section 73 concerning educational institutions because that provision is not available in circumstances where an allegation of racial discrimination is pursued. The school did, however, rely upon Section 51 of the Act where a defence is provided in respect of measures intended to achieve equality. In this case it was said that having regard to the fact that the conditions provided Halachically Jewish children with access to facilities, services and opportunities to meet their special needs in relation to their education, welfare and ancillary benefits, that is to say, a Jewish education, no liability could be attached to the school.

The Tribunal pauses to note that the complaint originally lodged with the Commissioner of Equal Opportunity was confined to an allegation of discrimination on the ground of religious conviction. It was therefore open to the Carmel School to argue that the matters in issue before the Tribunal should be confined to that ground, notwithstanding that previous rulings of this Tribunal have suggested that where the jurisdiction of the Tribunal is enlivened by a valid complaint then it is desirable that all matters possibly in controversy should be disposed of as part of a single inquiry provided they arise out of substantially the same transaction, so that in this way a multiplicity of proceedings will be avoided.

In the event, nothing turned on this, because Counsel for the Respondent made it clear at the hearing that the Respondent had no objection to the manner in which the case was pleaded in the Points of Claim and had come prepared to meet all the issues raised by the Points of Claim. Accordingly, the Tribunal will deal with the various issues reflected on the pleadings.

Against this background it will be useful to look briefly at a number of evidentiary issues which are relevant to matters raised by the pleadings. The Tribunal has previously identified evidence relevant to the constitution and daily operations of the school as an incorporated association and has endeavoured to draw out of the evidence those features of Judaism and doctrinal differences which have a bearing upon the dispute between the parties. It is now necessary to examine other and more specific facets of the evidence.

### **Evidence Concerning Religious Conviction**

By Section 53 of the Equal Opportunity Act a person discriminates against another person if, on the ground of the religious conviction of the aggrieved person or a characteristic that appertains or is generally imputed to persons of the religious conviction of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances the discriminator treats or would treat a person of a different religious conviction. By Section 5 the discriminatory conduct alleged does not have to be the dominant or substantial reason for the doing of the act complained of. By Section 61 it is unlawful for an educational authority to discriminate against a person on the ground of a person's religious conviction in the conditions on which it is prepared to admit the person as a student or by limiting the students access to any benefit provided by the educational authority.

The Tribunal has already noted that the Points of Defence in the present case rely upon some special provisions of the Act. The Tribunal will deal with Section 71 of the Act concerning voluntary bodies separately. Section 73(3) provides

that nothing in the Equal Opportunity Act renders it unlawful for a person to discriminate against another person on the ground of religious conviction in connection with the provision of education by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first mentioned person discriminates 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.

The Tribunal has described the tenets of Judaism in general terms but it now becomes necessary having regard to the provisions just mentioned, to review the evidence as a preliminary to making a determination as to whether the conditions imposed by the February letter were imposed in good faith in the circumstances of the present case, having regard both to the requirements of Halacha and to the objects of the school. This in turn will require some attention to be given to the notion of acts done in favour of the "adherents" of the religion or creed in question.

Rabbi Heilbrunn agreed under cross examination that Orthodox and non-Orthodox Jews can be regarded as a group with communal ties in that people of Jewish background share feelings of cultural identity, notwithstanding the existence of doctrinal differences. The cultural identity is reflected in the presence of the Yiddish language which he described as "an amalgam of old German and with various Hebrew and other terms mixed in". People of Jewish background have been subjected to repressive measures in which respect one notices that the Nazis did not draw any distinction between Halachic Jews and non-Halachic Jews. In other words, people who were not strictly speaking Halachically Jewish by birth might share a common history of persecution with Jews who were Halachically Jewish by birth.

Nonetheless, consistently with the evidence in his affidavit (referred to earlier in these Reasons for Decision) he continued to maintain, under cross examination

that there were profound differences between Orthodox and non-Orthodox Jews, and that it was consistent with the requirements of Halacha for the school to have insisted upon conditions of the kind imposed by the February letter. He agreed that he had not undertaken a detailed study of the way in which the school operated. The instructions he received from the solicitors representing the school were to provide an opinion as to whether the conditions were justifiable or reasonable by reference to the constitutional objects of the school, the doctrines, tenets, teachings and beliefs of Orthodox Judaism, the wider policies, standards and conventions of Orthodox Judaism. In his view the conditions were justifiable or reasonable.

It was put to him under cross examination that one consequence of such a stance would be that (in a hypothetical case) an Orthodox Jew who took no interest in his studies and devoted little time to ritual might nonetheless be advantaged by way of assistance with fees and in other respects as against an extremely conscientious student who did not happen to be born of a Jewish mother, even though Judaism generally presumed that devotion to scholarship and ritual was a most worthy pursuit. In answer to this line of questioning he replied as follows:

"No. I think what's missing in your understanding of Judaism in this part is the concept of Tshuvah. A child is being brought to a school to be educated. In other words, if this child is non-observant the intention of the school is to create out of this child someone who is constructively, perhaps religiously Jewish, and the concept of Tshuvah means that irrespective of what your status is now in terms of your observance, a Jew can always do Tshuvah, and indeed change his non-observance, change even a situation of rejection of Jewish values and Jewish principles and Jewish ideals and become a different person, or become a repentant person ... I never in my assessment write off anyone who at this stage might look like probably lost to Judaism because you never know what goes on in the human mind and soul and spirit."

In other words, the evidence of Rabbi Heilbrunn reflected in this and other passages suggested that once born into the status of Judaism, as a

consequence of the ancient observances concerning the matrilineal line, a person of Jewish birth should always be regarded as an adherent of the Jewish faith even though all the outward forms of that faith had been abandoned, because no one was ever lost to Judaism and the prospect of repentance left open a prospect of a return to an active engagement at some time in the future. It was therefore not inconsistent with the precepts of Orthodox Judaism that a non-observant Halachic Jew should be favoured as against an observant non-Halachic Jew.

Mr Lenny provided more specific evidence on behalf of the school in regard to the various restrictions in the February letter.

The first restriction concerned precedence in class waiting lists being afforded to children who were Jewish according to Orthodox Jewish law. Mr Lenny said that this restriction was not applicable to the Goldberg family, as they had been informed that a place was available for Gregory. But the reason for this aspect of the policy lay in the school's desire to ensure that every Halachically Jewish child who wanted a Jewish education was able to get one. The Board had to allocate limited resources and believed that it was obliged by its responsibilities under the rules and objects of the school to give preference to Halachically Jewish children.

In regard to the second and third conditions concerning fee assistance and scholarships not being available to children not Jewish according to Orthodox Jewish law, Mr Lenny said that Carmel School was a full fee paying school established to enable Halachic Jewish persons to obtain a Jewish education. The Board of the school did not consider it to be appropriate to provide a subsidised, or even a free education to non-Halachically Jewish children. The policy of fee relief only existed to enable Halachically Jewish families who could not afford the fees to obtain a Jewish education for their children. The same reasons lay behind the policy in relation to scholarships. He went on to say that in any event, fee assistance was a privilege and not a right. There were very onerous requirements to be satisfied by families seeking fee relief, relating

principally to their financial means and circumstances and the number of their children in the school.

As to the condition concerning ineligibility to be head boy, Mr Lenny said that the head boy of Carmel School fulfilled an important religious role in the eyes of the school Board. He was required to be a role model and from time to time to lead religious services and participate in services. For instance, the tradition of the school had always been that the head boy leads the afternoon service at the annual Donors Memorial Services. From time to time the head boy might be asked to lead other prayers or Jewish ritual. According to Halacha, only a Halachically Jewish male could do so.

In regard to the restriction upon participation in religious activities and rituals, Mr Lenny reiterated that a non-Halachically Jewish child could not be "called to the Torah". Halacha dictates that a non-Halachically Jewish child could not lead prayers. It was not appropriate for a non-Halachically Jew to lead Halachic Jews in Jewish prayers. As to the wearing of T'fillin (also known as Phylacteries), according to Halacha only a Halachically Jewish male who has reached his Barmitzvah may do so. A Phylactery is a small leather box containing Hebrew text which is worn by Halachic Jews at morning prayer on the arm and forehead. It would be a clear contravention of Halacha for the school to permit or encourage a non-Jew to wear T'fillin and, according to Halacha, Gregory Goldberg was not a Halachic Jew.

Mr Lenny went on to say that the pre-Barmitzvah ceremony is not a requirement of Halacha. However, the school has a tradition of conducting a small ceremony for each boy to celebrate or honour his Barmitzvah. This is a religious ceremony which takes place in the school's Synagogue. A Bar or Batmitzvah ceremony is the celebration of the age at which a Halachically Jewish child becomes obliged to observe the commandments of the Torah. A non-Halachically Jewish child is not obliged to keep the commandments of the Torah at all. The ceremony may

also include the leading of prayers which is prohibited for a non-Halachically Jewish child.

In regard to the eligibility for membership of religious committees, Mr Lenny said that the role of these committees was to meet on a regular basis with the Jewish Studies Director of the school and other Jewish Studies staff to plan appropriate programmes during the year. A committee is also responsible to conduct certain religious programmes unsupervised at times. The Board felt that it was inappropriate for non-Halachic Jews to have such a role in determining or leading the religious activities of the students.

Mr Lenny was challenged as to a number of these matters in cross examination. He accepted that there probably were people who regarded themselves as Jewish and would be so regarded by the non-Jewish community, but in his perception if they were not Jewish according to the Orthodox view, not having been born of a Jewish mother, then they were simply under a misapprehension as to their status. He said that he saw such persons as simply part of the general community. He agreed that as a consequence of the incident with the Goldbergs the school did review some of its enrolment procedures and restrictions. In particular, the restriction concerning eligibility for the position of head boy and eligibility to serve on committees was dropped but this was not because they had not been imposed in good faith in the first place. The school formed a view that they could "get round" some of the restrictions in a way which would not offend Halacha. In other words, if a non-Jewish student became head boy then some changes might have to be made to the nature of his duties, or a second head boy appointed.

Rabbi Aaronson also addressed each of the restrictions in turn and doubted that they could be justified by the requirements of Halacha. He drew a distinction between looking to Halacha to support a practice and looking to Halacha for a rule requiring that a practice be observed. Under cross examination, he agreed that his testimony was limited to determining whether the various prohibitions

implicit in the conditions imposed by the February letter could be derived from Halacha doctrines. By implication, he conceded that he had not been briefed to consider the broader issue as to whether it would serve the objects of the school to favour Orthodox Jewish students. He also appeared to concede under cross examination that a respectable argument could be made that Halacha supported some of the conditions.

### **Evidence Concerning Family Status**

Section 35A of the Equal Opportunity Act provides that a person discriminates against another person if, on the ground of the family status of the aggrieved person or a characteristic that appertains or is generally imputed to persons having the same family status as the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who does not have such a family status. Again, Section 5 provides that the allegedly discriminatory conduct need not be the dominant or substantial reason for the doing of the act complained of. By Section 35I it is unlawful for an educational authority to discriminate against a person on the ground of the person's family status in the conditions on which it is prepared to admit the person as a student or by denying the student access to any benefit or by subjecting the student to a detriment. Here too, an educational institution will be excused from liability if the ground of discrimination relied on is carried into effect in good faith in favour of adherents of that religion or creed generally.

It became apparent as the hearing before the Tribunal proceeded that in regard to the allegations of discriminatory conduct "on the ground of" family status and race that the Tribunal would have to give careful attention in the circumstances of the present case to the effect of the legal concept "on the ground of" as a matter of law – the causation issue – and to review the evidence accordingly. The Tribunal will therefore pause for a moment to look briefly at the legal principles to



be found in previously decided cases concerning causation in the field of anti-discrimination law.

The decided cases indicate that proper weight must be given to the concept of doing something "on the ground of" family status or race or any other alleged ground of discrimination, this being a form of language used throughout the Act, with the result that as a matter of evidence a causal connection must be established between the alleged discriminatory conduct and the adverse consequence. It is not necessary to identify a malign intention because, in some circumstances, discrimination can arise from thoughtlessness and neglect. Nonetheless, in establishing the existence of a causal relationship, a number of cases suggest that more is required than a mere sequential link between alleged discriminatory conduct and the consequence complained of. The alleged discriminatory conduct must be the true justification, reason or basis for the relevant decision. The treatment in question must be based on an unlawful consideration and not merely flow from or be proximate to some allegedly "discriminatory" act. *University of Ballarat v Bridges* (1995) 2 VR 418 at 436.

These principles can be usefully illustrated by reference to *Ferguson v Central Sydney Area Health Service* (1990) EOC 92-272. In that case the complainant was a sexually active male homosexual who was admitted to hospital in order to have a lump removed from his chest. A medical practitioner, on examining the patient and observing certain symptoms, considered that the antibody status of the complainant should be found out before the operation proceeded, this being for the sake of accurate diagnosis and in order to take certain safety precautions. The complainant's claim that he had been discriminated against on the grounds of his homosexuality was dismissed. The Tribunal held that whilst the discovery of the complainant's homosexuality was the first step in a chain of events which led to the decision to postpone the operation, it was merely a necessary rather than a sufficient cause of the decision to defer surgery. The causally operative factor in the decision to postpone was not the complainant's homosexuality but his medical status.

The decided cases also indicate that it is often necessary to rely upon inferences in order to identify discriminatory conduct. In the absence of direct evidence, the complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probably innocent explanations are available on the evidence. *Fenwick v Bevridge Building Products Pty Ltd* (1986) EOC 92-147. Inferences may prove to be important in those circumstances where a causal connection has to be established between the alleged discriminatory acts and the detriment complained of by the aggrieved person, as illustrated by *Ferguson's case* (supra) just mentioned.

It is apparent from this review of the statutory provisions and related principles that the Tribunal must look closely at the facts and matters bearing upon the school's decision to impose the conditions reflected in the February letter. The sequence of events are not in controversy and all the witnesses seem to accept as a well known fact that there are significant doctrinal differences between those who adhere to the Orthodox faith and those who regard themselves as progressive or non-Orthodox Jews. In essence, as appears from earlier discussion, and from paragraph 4.3.2 of Rabbi Heilbrunn's affidavit, Orthodox Judaism holds that precepts found in the Torah are divinely revealed. Their strict observance is therefore of paramount importance and cannot be altered in any way to suit modern needs or sensibility. Progressive Judaism views the Mitzvot (the commandments of the Torah distilled to 613 precepts that form the prescriptions of the Torah for a Jewish way of life) as personal, ethical and social imperatives. Non-Orthodox Jews may concede that observance of these precepts may provide cultural identify and ethnic continuation, but they do not consider them obligatory or binding.

It emerges, then, that a crucial question is whether Gregory was being subjected to special conditions because he had the status of being a relative of a particular person, namely his mother Mrs Goldberg, or because of his own status? It was common ground between the parties that Gregory was not Halachically Jewish in

the eyes of the school's Halachic authority, Rabbi Freilich, by reason of his mother Helen Goldberg not having been born Halachically Jewish and not having converted to Judaism in a manner or under supervision of a Rabbi acceptable to the school. Gregory's birth to such a mother is obviously an important sequential link in the chain of events leading up to the imposition of the conditions reflected in the February letter but the critical question is whether that event can be characterised in law and on the evidence as the operative cause of what occurred. The Tribunal pauses to note that, as to this issue, the burden of proof lies upon the complainant as the party advancing the claim to satisfy the Tribunal on the balance of probabilities that Gregory was discriminated on the ground of family status, that is to say, to use the language of the Act, because of his status "of being a relative of a particular person", in this case his mother Helen Goldberg.

In regard to this issue the Tribunal notes in passing that both expert witnesses seemed to accept that if a person was not born Halachically Jewish, and was therefore not Jewish according to the Orthodox view, such a person was not irretrievably characterised by the circumstances prevailing at the time of his birth. In a hypothetical case of this kind, such a person could convert to Judaism, provided the required spiritual transformation and subsequent procedures took place, with the result that his or her admission to the Orthodox congregation could not then be said to be dependent upon the status he inherited at birth. Counsel for the Respondent school relied upon this kind of example to argue that the conditions relevant to Gregory Goldberg's enrolment were imposed not because of Gregory's relationship to his mother but because of the binding effect of the Orthodox tradition which required him to be viewed as not a Jewish person. It was this view of the matter, and the binding effect of the Orthodox tradition, which should truly be regarded as the operative cause of the conditions being imposed.

Counsel on both sides accepted that a different position applies concerning the burden of proof when one turns to the exception to liability allowed by Section

73(3) concerning discriminatory conduct in an educational institution that is conducted in accordance with the doctrines of a particular religion or creed. Here, the burden of proof upon the balance of probabilities lies upon the party seeking to rely upon the exception, in this case, the Carmel School. In that respect, evidentiary considerations of the kind mentioned earlier concerning the plea of discrimination on the ground of religious conviction were pertinent. The Carmel School pointed to the credo of Orthodox Judaism reflected in the provisions of its constitution, and in various passages of the prospectus, and relied upon the evidence of Mr Lenny that this credo was evident in the daily life and activities of the school. The Tribunal is obliged to note in passing that evidence presented on behalf of Mr & Mrs Goldberg did not challenge in any effective way the evidence given by the other side in regard to this aspect of the matter. Indeed, the Complainant seemed to accept that the school was being conducted in accordance with the tenets of Orthodox Judaism generally. Their case was principally directed to the details of the enrolment procedure, contending that the special conditions were not justified by Halacha and this, plus the relaxation of the enrolment procedure in 1992 and subsequent to February 1996, indicated a lack of good faith.

#### **Evidentiary Issues Concerning Race**

By Section 36 of the Equal Opportunity Act discrimination occurs if, on the ground of the race of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race. Here too the Tribunal is obliged to take account of Section 5 of the Act. Consistently with previously mentioned provisions, Section 44 renders it unlawful for an educational authority to discriminate on the ground of race in the conditions on which it is prepared to admit a student or by denying a student access to any benefit or by imposing any other detriment. It is important to notice, however, that the exception to liability set out in Section 73(3) concerning educational institutions is not available where discrimination occurs on the

ground of race. The Tribunal has already noted that, as with the family status issue, it will be important for the Tribunal to be satisfied by the Complainant if the claim is to succeed on this ground, that race was an operative cause of the conditions complained of being imposed by the school.

Much of the evidence concerning this aspect of the matter has already been reviewed. It is important to note, however, that the expertise of the two principal witnesses was confined to theological matters. They did not purport to be anthropologists and both were naturally diffident about expressing decisive views as to whether adherents of Judaism, in former and in modern times, could or should properly be defined as constituting a distinct race. Nonetheless, both witnesses seemed to agree that Orthodox and non-Orthodox Jews had been subjected to repressive measures in times past and the sharing of common values derived from the Jewish heritage, including language, meant that Jewish people, generally described had a common cultural identity. Counsel for the Complainant therefore sought to rely upon broad definitions of race of the kind commonly found in dictionaries whereby a group of people, regarded as of common stock and sharing cultural values, can be regarded as a distinct race. Reference was also made to Section 4 of the Act which provides that "race" includes colour, descent, ethnic or national origin or nationality and the fact that a race may comprise two or more distinct races does not prevent it being a race for the purposes of the Act.

The Tribunal was conscious from the outset that, having regard to the particular circumstances of the present case, it might not be necessary to resolve this complex issue. If the weight of the evidence suggested on the balance of probabilities that the operative cause of the school's decision to impose the conditions was due essentially to an Orthodox Jewish view of doctrinal matters then it would be difficult for the Complainant to persuade the Tribunal that the alleged discrimination was "on the ground of" race. In that regard the example mentioned earlier becomes important. If, in a hypothetical case, being a matter taken up with the expert witnesses, and with Counsel, a prospective student at

the school was a person of, say, French or Norwegian descent, but was eligible to be admitted as a student because a recognised process of conversion had been undertaken by the prospective student (or even by his mother prior to his birth) then it might be difficult to argue that he or she was being characterised by reference to his membership of a Jewish race.

Further, and in any event, in the circumstances of the present case, it became necessary for the Complainant to assert that Gregory was discriminated against because he did not form part of a distinct race comprised of Orthodox Jews. In other words, it was because he did not belong to a "race" of that description that the special conditions were imposed. Rabbi Heilbrunn certainly made it clear in the course of his evidence that any person who was not Halachically Jewish was not Jewish. Under cross examination he said of such persons:

"How do I feel about them? I would treat them basically like I treat anybody else ... when it comes to theological matters they're just non-Jews."

He agreed, however, that many non-Orthodox Jews thought of themselves as adherents of Judaism and observed the forms of the Jewish faith. Rabbi Aaronson pointed out in his evidence that non-Halachically Jewish people according to the Orthodox view could not simply be regarded as part of the general community for, independently of the strict doctrinal differences, non-Orthodox Jews had and observed customary and dietary habits which were distinctive. An evidentiary issue therefore arose as to whether the Complainant was in a position to satisfy the Tribunal on the balance of probabilities that Orthodox Jews (not just Jews generally) should be regarded as a separate race, with the result that Gregory Goldberg had been discriminated against because he was not of that race, in circumstances where both expert witnesses seemed to agree that people of Jewish descent, irrespective of whether they were Orthodox or non-Orthodox, shared common ties and the history of doctrinal debate over many centuries reflected various phases of theological debate. In other words,

against this background, it might seem artificial to characterise Orthodox Jews as a distinct race when it was quite apparent, as manifested in the tragic circumstances of the Holocaust, that the outside world was not accustomed to act on the basis of fine points of theological debate and, faced with political realities adverse to Jewish people considered as a whole, the likelihood was that both Orthodox and non-Orthodox Jews would be affected and respond as a group.

### **Findings**

The High Court in *IW v City of Perth* (1997) 191 CLR 1 ruled that although a liberal construction is to be given to the discrimination provisions of the Equal Opportunity Act with a view to facilitating the purpose of the legislation, it is not a comprehensive anti-discrimination statute: it is confined to particular fields and to particular activities within those fields. In that respect, the Tribunal notes that the Equal Opportunity Act in Section 73 (and in other provisions) allows an exception to liability where an institution is conducted in accordance with the doctrines of a particular religion or creed. Further, the Tribunal is conscious that a statute should be interpreted consistently with the Federal Constitution which contains an entrenched right in respect of freedom of religion.

Against the background of these general observations, and earlier discussion, the Tribunal will now deal with the various issues reflected in the pleadings in turn.

### **Religious Conviction**

The Respondent school seems to accept that it did discriminate against Gregory Goldberg on the ground of his religious conviction. According to the Orthodox Jewish view, it is only persons born of a Jewish mother or converts who can truly be regarded as Jews. All others, even those who purport to be Jews (such as the Goldbergs), are simply non-Jews. As restrictions were imposed upon Gregory at the time of his proposed enrolment by the February letter, those

restrictions were clearly referable to matters of religious conviction. The Carmel School was determined to uphold and give precedence to the strict requirements of Halacha, this being consistent with the objects of the School. The enrolment form revealed that Gregory had been attending Hebrew School at Temple David, and it is apparent from the surrounding evidence that, as the son of a woman not born Jewish, the characteristics, and thus the religious convictions, of a non-Orthodox Jew, were attributed to him.

The Tribunal therefore has little difficulty in finding that Gregory was discriminated against on the ground of his religious conviction. This brings into focus the main line of defence advanced pursuant to Section 73(3) of the Act in which respect the Respondent school seems to accept that the evidentiary burden lies upon it as the party relying upon an exception to the general prohibition.

Section 73(3) provides that nothing in the Act renders it unlawful for a person to discriminate against another in connection with the provision of education by an educational institution that is conducted in accordance with the doctrines of a particular religion or creed if the discriminator acts 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 who are not adherents of that religion or creed.

The weight of the evidence favours a conclusion that the Respondent school has been acting in good faith according to its own particular view of who is a Jew and what the doctrines of Judaism require of its adherents. In this context, the Tribunal finds that the term "adherents" extends to all those regarded as Orthodox Jews by those in authority, irrespective of their current level of commitment to or observance of the prescribed religious forms, because, as Rabbi Heilbrunn explained, the teachings of the Torah allow for the possibility of redemption.



The only evidence put up to show a lack of good faith was in respect of those resolutions of 1992 which allowed for non-Jewish students to be admitted to the school. Was the school acting not "in good faith" because it was using the fees from the wider pool of students to advance the interests of the Orthodox Jews? The answer seems to be that the true reason underlying the relaxation of the strict rule was to try and attract to the school students born of Jewish mothers who therefore fell within the class of Orthodox Jews, even though attitudes of some families might be progressive. In other words, the School was still essentially intent upon carrying into effect the Orthodox doctrine.

On that basis the School could be said to be discriminating in good faith in favour of "adherents of that religion", and with this being done in a manner which did not discriminate against a particular class who are not adherents because all prospective students who were non-Jews in the Orthodox view (including those such as Gregory Goldberg with an apparently Jewish background) were treated in the same manner, ie they were all subject to certain restrictions.

One further matter bears upon this point. Counsel for the Complainant pointed to some relaxation of the restrictions concerning the head boy and participation in committees, but, again, the answer to this plea is (as manifested in the evidence of the former President of the School Council) that these were small changes or compromises which could be made without compromising the general determination to maintain the Orthodox Jewish faith.

Can it be said that the School was acting in good faith in favouring "adherents of that religion" if it was willing to give preference to those sons and daughters of Jewish mothers who do not in fact participate in religious forms over and above an outwardly Jewish student (but not the son or daughter of a Jewish mother) who devoutly observes all the Jewish forms? The Tribunal has already noted that one can be an "adherent" of a religion so long as the possibility exists that at some later stage in life the lapsed adherent returns to the fold (and there is provision for this within Halacha).

It follows from discussion to this point that the Tribunal is also obliged to find that the issue of whether or not there was direct Halachic authority for the conditions imposed by the February letter are not decisive. Differences between Rabbi Aaronson and Rabbi Heilbrunn as to their approach to Halacha can certainly be identified. The crucial question is, however, whether the School was generally acting in accordance with its objects with a view to upholding and passing on the tenets of Orthodox Judaism. It clearly was, and there was very little evidence to the contrary. The Act does not require an educational institution to justify its actions by reference to a particular prescription of its creed, and it is in the nature of religious freedom that what is thought to be important is essentially a matter for those concerned with the traditions of the faith to determine, rather than outsiders. The educational institution is excused from liability if, in good faith, it is generally upholding the religious cause it seeks to advance. The complaint of discrimination on the ground of religious conviction will be dismissed.

It follows from this reasoning that in the circumstances of the present case the Tribunal was not required to determine who comprises the full range of adherents of Judaism, and these Reasons for Decision should not be taken to suggest that non-Orthodox (or progressive) Jews do not belong to Judaism. It is sufficient for the Tribunal to be satisfied that Orthodox Jews are adherents of the Jewish religion. The question of whether non-Orthodox or progressive Jews are also adherents of that religion is an issue for another day. It does not necessarily arise for decision in the context of the present controversy.

### **Family Status**

The Tribunal has already indicated that in regard to family status the threshold issue is whether Gregory Goldberg was discriminated against because of his connection to his mother (in which case there is a basis for alleging discrimination on the ground of family status) or whether the conditions were imposed because of his own status.

In the course of argument reference was made to a number of previously decided cases and, as the Tribunal has already noted, those cases bear upon the issue of causation. The Tribunal has to identify the operative cause of the alleged discriminatory conduct.

The Tribunal finds that a plea of discrimination "on the ground of" family status is not available in the circumstances of the present case. The Tribunal is persuaded, for the reasons foreshadowed earlier, that the conditions were imposed not because of Gregory's link to his mother but as a consequence of the application of a body of religious doctrine which had the effect of characterising him as a non-Orthodox Jew.

Even if the Tribunal be wrong in that view, the exception allowed for in Section 73(3) is still available to the school and in that respect the same line of reasoning applies as is reflected above in the Tribunal's finding concerning religion. The school was acting in good faith in favour of the adherents of its own religious doctrines. It follows that in the circumstances of the present case Section 73(3) will enable the Carmel School to defeat the allegation of discrimination on the ground of family status.

### **Race**

The Respondent school seeks to defeat this claim by placing particular emphasis upon the requirement that the discrimination be "on the ground of" race. In other words, the Complainant, Gregory Goldberg, must establish a clear causal connection between the restrictions that were applied to him and racial considerations. The Tribunal has already noted that the logic of this plea in the circumstances of the present case requires the Complainant to assert that Orthodox Jews comprise a distinct race, they view themselves as such, and were therefore inclined to impose special conditions upon Gregory because he was not of that race. The Tribunal has also noted that the exception to liability

allowed by Section 73(3) does not apply to an allegation of discrimination on the ground of race.

In regard to the causation issue the Respondent school says that race was irrelevant. The true ground of their decision was simply the religious consideration that Goldberg on the Orthodox view, was not a Jew and therefore was subjected to the same restrictions as would be applied to students of other faiths.

Generally, in cases of racial discrimination, there are overt signs that race was the basis of discrimination or else this can be clearly inferred from the surrounding evidence. However, in the present case, there were no overt references to race. The school purported to impose the conditions complained of by reference to religious precepts. Further, the surrounding documents do not provide a clear foundation for inferences to be drawn because they are mostly concerned with religious matters and doctrinal differences.

The general rule is that inferences adverse to the Respondent can only be drawn when there is an absence of innocent explanations for what occurred. In the present case the Respondent school is able to rely upon the explanation that what took place was due to religious considerations. It is true that Section 5 (which provides that discrimination on the ground alleged need not be the dominant or substantial reason for what occurred) widens the net to some extent, but there must still be a basis for drawing reliable inferences. It is also important to note that in this case the Respondent school is not relying upon an exception and therefore does not bear the evidentiary burden of proof. The contrary is the case. It is for the Complainant to satisfy the Tribunal on the balance of probabilities that the restrictions were imposed upon Goldberg "on the ground of" his race.

The Tribunal is not satisfied that this ground has been made out. The Tribunal finds that the operative causes of the conduct complained of were the religious

considerations mentioned in the February letter which reflected the declared objects of the school as set out in its constitution and prospectus. The school did not go so far as to assert that Orthodox Jews constitute a separate race, and the evidence led by the Complainant was not sufficient to support such a finding. Indeed, both experts seemed to accept that Orthodox and non-Orthodox Jews shared common cultural ties with the result that it might seem artificial to confer the status of a race upon a portion of the whole when it is apparent that the outside world draws no such distinction, as evidenced by repressive measures in times past.

Some further observations are also relevant. Against the background of comparatively limited evidentiary materials, one has to be cautious in making a determination that adherents of Judaism should be regarded as a race in circumstances where (as argued by Counsel for the Respondent), the opportunity exists for a person of any racial background to become a Jew by completing the necessary conversion requirements.

Put shortly, then, even if one accepts that the Jews are a race within the dictionary meaning of that term, as they are a group bound together by various cultural ties, such a finding is not enough in the circumstances of the present case. Here, in order to find discrimination against Gregory Goldberg on the ground of race, the Tribunal would have to conclude that non-Orthodox Jews comprise a separate race, because the weight of evidence suggests that it was the characterisation of Gregory Goldberg as a non-Orthodox Jew which led to the restrictions. The Tribunal is not satisfied that the evidence is sufficient to make out such a plea. If the evidence is insufficient, as it appears to be, then this weighs against the Complainant Gregory because, as indicated earlier, the Complainant bears the burden of satisfying the Tribunal that a finding in his favour is available on the evidence.

It follows from this line of reasoning that the Tribunal was not required to determine whether the adherents of Judaism generally should be regarded as a

race within the meaning of the Equal Opportunity Act, although there is much to support such a conclusion. That is a question for another day. This part of the claim will be dismissed on the basis that the special conditions were imposed because of theological considerations.

### Voluntary Association

The preceding findings are all subject to the general exception contained in Section 71 of the Act that it is not unlawful for a voluntary body to discriminate against a person in connection with the provision of benefits, facilities, or services to members of the body.

The Tribunal finds, additionally, that this provision, of itself, is sufficient to defeat Gregory Goldberg's claim in the circumstances of the present case. The constitution of the school reveals that it has been set up for educational purposes and there is no provision to return a profit or dividend to any member of the body either during the course of its operations or upon dissolution. Thus, prima facie, it is a voluntary association.

It is true that, technically, the student Gregory Goldberg, being a student, is not a member of the association for, by the constitution, it is his fee paying parents who occupy that status. Nonetheless, this seems to be an unduly restrictive interpretation of the relevant provision. The Tribunal noted in the recent case of *Thompson v Evans* (unreported) that the parents of a sick child were also beneficiaries of the services being provided by a doctor because they had an undoubted interest in the welfare of their child. Likewise, the Tribunal finds that Section 71 is available to exclude liability because, as contended by Counsel for the school, it should be interpreted upon the basis that the provision is essentially directed to all of those who are beneficiaries of the services, that is to say, both parents and children.

For this reason also, the various claims advanced on behalf of Gregory Goldberg will be dismissed.