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Schools with Chaplains – Are they independent contractors or employees?

Michaela Vaughn, Lawyer
Natasha Duff, Senior Associate

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Introduction

Corney & Lind Lawyers Pty Ltd

➤ Mid size law firm – 18 lawyers + 30 staff

➤ Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial & Construction Litigation

Migration & Visas

Family Law

Criminal & Traffic

Estate & Elder Law

➤ Our lawyers travel to you if needed

➤ Specialist lawyers committed to delivering “*just redemptive outcomes®*” with care and integrity

➤ Based right next to the CBD opposite the RBWH transport hub



What we will cover today

- Options for engagement of a chaplain:
 - Employee
 - Independent contractor
 - A service provider through a church or religious organisation
 - Employee minister of religion
 - Spiritual appointee
- Exempt fringe benefits?
- Questions?



1. Employee relationship

- Under direction and control of the employer
- The employer would set the hours, location and method of work
- The employee can be expected to work reasonable additional
- Employer has a greater level of control, and chaplain has more legal rights:
 - Entitlements
 - Superannuation
 - Tax withholding
 - Workers compensation coverage
- Employee vs independent contractor vs spiritual appointment?



Minister of Religion

- Is the chaplain a Minister of Religion?
- Minister of Religion is either an employee or a 'spiritual appointee'
- These two positions are vastly different
- Intentions of the parties to the arrangement are critical



Minister of Religion

- Ordinarily not a contractual arrangement
- There used to be a presumption that it was impossible to have a contractual relationship between a minister of religion a church or institution
 - This presumption has changed

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Differences: Spiritual Appointee vs an Employee



Nature of Relationship

“Spiritual appointee”

- Pre-eminently of a spiritual nature
- Duty to God
- Provides the spiritual appointer flexibility in managing the relationship – relief against employer legal obligations

Employee

- Legal relationship
- Duty to employer

Superannuation

“Spiritual appointee”

- No obligation to pay
- Can be personal contributions

Employee

- Payable at the rate required by legislation. Currently 9.5% per annum.



Access to legal remedies

“Spiritual appointee”

- Presumption employment dispute remedies only apply to employees
- No legally binding agreement
- Church would have more freedom to govern its own affairs and disputes.

Employee

- Access to legal remedies under relevant legislation (eg. Fair Work Act)
- Rights under contract law



Minimum Standards

“Spiritual appointee”

- Generally no minimum standards
- Caution should still be exercised – church still owes spiritual appointees duty of care

Employee

- National Employment Standards under the Fair Work Act apply – minimum employment conditions
- Eg. maximum hours, leave arrangements, wages, notice of termination etc.



Long Service Leave

“Spiritual appointee”

- Generally not entitled – not an employee pursuant to *Industrial Relations Act 1999* (Qld).

Employee

- Eligible

Exempt Fringe Benefits

“Spiritual appointee”

Employee

- Both may be eligible, provided meet *Fringe Benefits Tax Assessment Act 1986* (Cth):
 - Religious practitioner
 - Church – religious institution
 - Benefits provided to individual or spouse;
 - Benefit not provided principally in respect of duties other than any pastoral or directly related religious activities.



Insurances

“Spiritual appointee”

- Generally WorkCover Queensland insurance coverage will apply to spiritual appointees on basis stipends are subject to PAYG.
- Contact Insurer to ensure appointee is covered – Group insurance may be required

Employee

- WorkCover insurance applies to employees
- Other insurances – employers vicariously liable for actions of employees



Control

“Spiritual appointee”

- Principal duty to God - may be more difficult for the church to legally exert control or give directions.

Employee

- In an employment relationship, the employee owes its principal duty to their employer.
- Higher degree of control



Rogers v Booth

- ***"It is a relationship pre-eminently of a spiritual character. They are united together for the performance of spiritual work, and, in order to carry out efficiently the ends they have in view, they submit to a very strict discipline, and a very strict command. On the face of that, it appears to me that the necessary contractual element which is required before a contract of service can be found is entirely absent. The parties, when they enter into a relationship of that kind, are not intending to confer upon one another rights and obligations which are capable of enforcement in a court of law."*** [Emphasis added] – Sir Wilfred Green MR

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Teen Ranch Pty Ltd v Brown

- The parties had not intended to enter into legal relations
- There was no contract between the parties; and
- The worker had not worked in order to receive the benefits provided.

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Knowles v The Anglican Property Trust, Diocese of Bathurst

“...consensual compact to which the parties were bound by their shared faith based on spiritual and religious ideas - not based on a common law contract.”



Bellia v Assisi Centre Inc

- he was not engaged in providing services of a purely religious nature
- not a religious organisation but rather an aged care community organisation;
- day to day direction and control of Assisi;
- worked exclusively for Assisi; and
- Father Bellia - received a stipend, motor vehicle and accommodation and PAYG tax installments were deducted by Assisi (which Fair Work Australia noted by themselves are by no means determinative).



Practical Application

1. Carefully word the agreement and policies surrounding the appointment of the spiritual appointee
2. The appointing entity should be a religious body – such as a church or NFP organisation whose primary objects are for the advancement of religion. A Christian school may also be recognised as a religious body.
3. Ensure the duties of the spiritual appointee are primarily spiritual duties of a religious nature.
4. When in doubt - seek legal advice



3. Contract for services with a third party

- A secondment relationship in which the school has a contract with a church or third party to provide a chaplain.
- The chaplain is normally an employee or subcontractor of the third party, therefore any liability for and to the chaplain is normally with the third party and not the school.
- Schools should be careful though, as some liability still rests on the school in relation to their duty of care to all who work at the school.
- Furthermore, in this area the contract for service is key, and so schools should have this contract reviewed by a lawyer prior to entering into the arrangement.



4. What is an Independent Contractor?

- Self employed and contracted to perform a certain job
- Greater control on work:
 - Can generally determine their own hours and method of work provided they do the job.
 - Can contract out to other providers
- No guarantee of continued employment and less rights under law in relation to their employment



4. It looks like a duck, quacks like a duck...

Courts are on occasion called on to determine whether a relationship is that of principal/contractor or employer/employee.

They utilize the “control” test and pay more attention to the true nature of the relationship than the contract itself.



4. What do courts consider?

- What does the contract say?
- Was the contract for a fixed term/ work description?
- Did the worker supply their own tools?
- Could the worker determine their own hours?
- Could the worker determine the location of work?
- Could the worker decide how the job would be performed?
- Could the worker decide to delegate the work to another?
- How was the worker paid? (time/job/salary)
- Could the worker work for others?
- How does the worker's conditions compare to other workers?



4. Why does it matter?

The Employer/Contractor distinction has significant implications for many areas of law:

- Superannuation
- Tax
- Employment Law (termination, adverse action etc)
- Personal injury law (employer can liable for injuries caused to AND by employees, while has significantly less liability for the actions of contractors)
- Contract law (does the worker have authority to enter into contracts?)
- And more...



5. Tax and Exempt Fringe Benefits

Due to recently proposed changes to the legislation, more schools will be able to consider providing Exempt Fringe Benefits to their chaplains.

There are still many “hoops” the school must jump through in order to determine whether these benefits can be provided to a certain chaplain.

We will outline the questions to ask when considering this route, but schools should seek independent legal advice regarding this that takes into consideration the situation of the individual chaplain.



5. Tax and Exempt Fringe Benefits

1. *The employer of an employee is a religious institution;*
2. *The employee is a religious practitioner;*
3. *The benefit is provided to, or to a spouse or a child of, the employee;*
and
4. *The benefit is not provided principally in respect of duties of the Employee other than:*
 - a) *any pastoral duties; or*
 - b) *any other duties or activities that are directly related to the practice, study, teaching or propagation of religious beliefs*



5. Is Your School A Registered Religious Institution?

Registered with the Australian Charities and Not For Profit Commission in the subtype “advancing religion”.

The School may be registered in other areas, but must be registered in this subtype.

This is a change from previous law, which gave the term “religious institution” its ordinary meaning. This left schools outside of the scope, as their predominant purpose was education, not religion.



5. Are They An Employee?

The Chaplain does not need to be a Common Law employee.

They can be a Spiritual Appointee or Independent Contractor, provided they receive, or are entitled to receive, salary or wages.

Section 12-47 in [Schedule 1 of the Taxation Administration Act 1953](#) defines salary or wage as follows:

1. It is a payment made to a religious practitioner for an activity, or a series of activities;
2. The activity, or series of activities, is done by the religious practitioner in pursuit of his or her vocation as a religious practitioner;
3. The activity, or series of activities, is done by the religious practitioner as a member of a religious institution; **and**
4. The payment is made by the entity in the course or furtherance of an **enterprise that the entity carries on.”**



5. Are They An Employee?

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3. The activity, or series of activities, is done by the religious practitioner as a member of a religious institution; **and**
4. The payment is made by the entity in the course or furtherance of an enterprise that the entity carries on.

Provided the Chaplain is a Religious Practitioner and performs their role at the school within that vocation there would be little issue in saying any payment or benefit is a wage or salary, and they are therefore an employee.



5. Are They A Religious Practitioner?

Section 136(1) of the FBTAA defines a religious practitioner as meaning:

1. a minister of religion;
2. a student at an institution who is undertaking a course of instruction in the duties of a minister of religion;
3. a full-time member of a religious order; or
4. a student at a college conducted solely for training persons to become members of religious orders.

In short, Ministers, pastors, or those training to be, are religious practitioners.

If your Chaplain is a Social Worker or other form of professional it is less likely they would be entitled to Exempt Fringe Benefits.



5. What is a Minister of Religion?

The expressions 'minister of religion' and 'member of a religious order' included in the definition of religious practitioner take their ordinary meaning in the context of where they appear. They cover members of the clergy (or their equivalent) across religions.



5. What is a Minister of Religion?

Except in rare cases, a minister of religion would have all of these characteristics:

1. is a member of a religious institution
2. is recognised by ordination or other admission or commissioning, or, where the religion does not require formal ordination, has authority to carry out the duties of a minister based on theological training or experience
3. is officially recognised as having authority on doctrine or religious practice
4. is distinct from ordinary adherents of the religion
5. is an acknowledged leader in spiritual affairs of the institution, and
6. is authorised to act as a minister or spiritual leader, including the conduct of religious worship and other religious ceremonies.



5. What Are You Giving the Benefits For?

The Benefits must be for Pastoral or Directly Related Duties.

Pastoral duties are generally duties associated with the spiritual care of people. Examples include:

1. communication of religious beliefs;
2. teaching and counselling adherents and members of the community;
3. providing adherents and members of the community with spiritual guidance and support;
4. conducting an in-service seminar of a spiritual nature;
5. meeting with or visiting adherents, the sick, the poor, and others who need emotional and spiritual support, and
6. providing pastoral supervision to those engaged in pastoral duties.



5. What Are You Giving the Benefits For?

There would generally be little issue with a School Chaplain's duties being characterized as pastoral.

Other directly related duties the Chaplain may engage in are:

1. Professional development and study that is related to their pastoral duties.

There may be issues if the Benefits are given for activities such as:

1. Teaching a non-Religious Studies class;
2. Running non-religious extra-curricular activities
3. Performing administrative tasks



5. Tax and Exempt Fringe Benefits

Example 5 - duties that are predominantly administrative

29. Kate is a minister of religion who is appointed principal of a private school that is a registered religious institution. Kate's duties are related predominantly to the administration of the school. As part of her remuneration package, Kate is provided with a residence and a motor vehicle.

Those benefits are not exempt, because the benefits are provided principally in respect of duties that are not pastoral duties or directly related religious activities.



5. Tax and Exempt Fringe Benefits

Example 6 - duties that are exclusively or predominantly pastoral

30. Rod is a lay person commissioned to perform the ministerial duties of a church. He is employed by a private school to teach religious studies and to perform other duties as a spiritual guidance officer. The private school is a registered religious institution, which also maintains registration under another ACNC subtype. The school provides Rod with the use of a car in relation to his employment.

The benefit is exempt, as the school is a registered religious institution and the benefit is provided in respect of pastoral and directly related religious activities that Rod predominantly or exclusively performs.



6. What does this mean for you?

1. Be really careful when hiring someone and characterizing them.
2. Make sure what is on paper fits the reality of the relationship.
3. As an employer, make sure you are aware of and fulfill your obligations to and for any workers based on the nature of the relationship, including in relation to tax, liability for negligence and termination of employment.

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6. Any Questions?

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Contact



Name: Natasha Duff
Position: Senior Associate
Email: natasha.duff@corneyandlind.com.au



Name: Michaela Vaughn
Position: Lawyer
Email: michaela.vaughn@corneyandlind.com.au

07 32520011

www.corneyandlind.com.au