## ALRC Religious Educational Institutions and Anti-Discrimination Laws A Submission<sup>1</sup>

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#### Summary

Religious freedom is an inherent right and one of the cornerstones of democratic, liberal societies like Australia. It is essential, in a time of increased absolutist secularism where religious freedom is being compromised, that such rights are endorsed and fully protected.

As stated by the 'Universal Declaration of Human Rights': "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". The 'International Covenant on Economic, Social and Cultural Rights' also endorses religious freedom by including it in the list of rights that must be safeguarded on the basis it is one of the "inalienable rights" governments must protect.

The raison d'être for religious schools, making up the overwhelming majority of the 34% of student enrolments of non-government schools across Australia, is to remain true and faithful to their religious beliefs and convictions. Unlike secular government schools that are not permitted to protolyze, the primary purpose of religious schools is to imbue their students with the tenets of their faith. As such, who such schools employ and who they enrol are crucial issues that impact on the ability of such schools to enact their faith-based purpose and mission.

Parents are their children's primary care givers and moral guardians and, as such, it is crucial that whatever schools they choose for their children have the freedom to reflect and abide by parents' religious convictions. Such rights are protected by international covenants and agreements. Under Article 18 of 'The International Covenant on Civil and Political Rights', signatories are obliged "to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children (is) in conformity with their own convictions". Article 5.1 (b) of the 'Convention against Discrimination in Education' argues parents must be able to choose non-government schools for their children and that such schools must have the freedom to "ensure the religious and moral education of their children (is) in conformity with their children (is) in conformity with their convictions".

Deciding between competing rights and balancing rights with responsibilities is difficult and challenging, no more so than in relation to rights such as freedom of religion, expression and belief. As common sense suggests, not all rights are absolute and there are occasions when particular rights have to be qualified or curtailed. Freedom of expression does not give one the license to shout 'fire' in a crowded cinema if there is no danger. In terms of sex discrimination it is permissible, in the context of women's health centres, to deny men membership. Some customs, such as bigamy, that might be accepted elsewhere in the world are not permitted in Australia and the right to do as one pleases has to be balanced against the

<sup>&</sup>lt;sup>1</sup> This submission is an updated and revised copy of two earlier submissions titled 'A Submission to the Scrutiny and Regulations Committee Review of the Exceptions and Exemptions in the Equal Opportunity Act 1995' and the Religious Freedom Review'.

common good and what the law, enacted by both state and religious bodies, states is permissible. As noted by the Commonwealth's <u>Sex Discrimination Act 1984</u>, section 38, subsection 3 headed 'Educational institutions established for religious purposes', religious schools and bodies are able to discriminate in terms of employment:

Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training 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 so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Notwithstanding arguments by some that the existing exemptions and exceptions are unfair, especially as they relate to employment in religious schools, it is this submission's view that such exemptions and exceptions are crucial in safeguarding the rights of religious schools and their communities. Arguments in support of protecting the right of religious schools to preserve their unique identity and mission to teach the faith include a letter written by religious leaders and organisations addressed to the Commonwealth's Attorney-General, the Hon Mark Dreyfus MP<sup>2</sup> as well as the following arguments:

- Freedom of religion is an essential and fundamental human right that is protected by a number of commonwealth, state and international covenants and agreements.
- The right of parents to choose faith based schools for their children is an essential aspect of freedom of religion and is protected by international agreements. In choosing religious schools, parents have every right to expect that those responsible for teaching their children will be in agreement with the religious doctrines and beliefs such schools have the duty and responsibility to teach and impart.
- Faith-based schools, by the very nature, are religious schools. The obligation to teach the faith not only relates to religious instruction, but also to the curriculum in general. As such all staff, and not simply those teaching religious instruction, need to sympathise with, support and enact religious doctrine.

When detailing the purpose of the current review, the <u>ALRC states</u>:

The Australian Government has committed to reforming Federal anti-discrimination laws to ensure that a religious educational institution:

• must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;

<sup>&</sup>lt;sup>2</sup> See the letter (Appendix A) headed Letter from faith leaders re ALRC consultation paper on religious educational institutions and anti-discrimination law', dated 13 February 2023 and addressed to the Hon Mark Dreyfus MP Attorney-General. The letter is signed by over 30 religious leaders and heads of faith-based organisations.

- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

While the third dot point appears to provide religious schools and institutions the freedom to act according to the tenets and teachings central to their faith, such is not the case. The expression "giving preference, in good faith", if interpreted narrowly to only those staff with specific duties to teach religious instruction and not to a school's staff in general, represents an egregious and unjust attack on religious freedom.

### 1. Freedom of religion is an essential and fundamental human right.

A number of international covenants and agreements endorse religious freedom as a fundamental and inherent right.

Article 18 of the <u>Universal Declaration of Human Rights</u> states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18.1 of the International Covenant on Civil and Political Rights states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 1.1 of the <u>Declaration on the Elimination of All Forms of Intolerance and</u> <u>Discrimination Based on Religion or Belief</u> states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

While the above covenants and agreements stress the vital importance of religious freedom, as noted by Article 18.3 of the <u>International Covenant on Civil and Political Rights</u>, the right to religious freedom is not absolute when it states:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

At the same time, as noted by the Attorney-General's Department guide to the public titled 'Right to freedom of thought, conscience and religion or belief', there are examples of state and territory legislation that currently allow religious bodies exemptions and exceptions to anti-discrimination legislation. The guide states:

Some Australian anti-discrimination legislation provides for exemptions for religious bodies. For example, the Sex Discrimination Act 1984 contains an exemption from the prohibition of discrimination on the grounds of sex, marital status, pregnancy or

potential pregnancy for acts or practices by religious bodies and educational institutions established for religious purposes, where those acts or practices conform to the doctrines, tenets or beliefs of that religion or are necessary to avoid injury to the religious sensitivities of adherents of that religion.

Up until now the consensus has been, when balancing competing rights, it is permissible to give precedence to some rights by limiting or qualifying others. In relation to faith based schools, it is justifiable to include as a condition of employment, that:

- Applicants demonstrate a commitment to and sympathy with the uniquely religious nature of schools and a willingness to abide by the school's faith-based mission and purpose.
- Applicants' beliefs and lifestyle should not be injurious to the religious beliefs and susceptibilities of those committed to working and teaching in a religious school's community and environment.

In relation to Catholic schools, in particular, the right to control staffing is a critical aspect of their mission and function. As argued by Pope Benedict XVI in his <u>address</u> to Catholic educators in America: "Education is integral to the mission of the Church to proclaim the Good News. First and foremost, every Catholic educational institution is a place to encounter the living God who in Jesus Christ reveals his transforming love and truth".

The Pope also argues, every teacher is obliged to "ensure that students receive instruction in Catholic doctrine and practice. This requires that public witness to the way of Christ, as found in the Gospel" and "shapes all aspects of an institution's life, both inside and outside the classroom".

#### 2. Parents' right to choose a faith based school is an integral part of freedom of religion.

It is essential to respect the liberty of parents... firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as approved by the competent authorities and secondly to ensure that religious and moral education of the children in conformity with their own convictions.

Article 5.1(b) of the Convention against Discrimination in Education,

If freedom of religion is to have any meaning, such freedom must embrace parents' rights to educate their children within a moral and spiritual environment that best reflects and reinforces their religious beliefs. As argued in the above extract, freedom to do so is a consequence of the need to "respect the liberty of parents".

The fact that government schools are secular in nature and that they are not allowed to evangelise about religion makes it even more vital faith-based schools have the freedom to best reflect and reinforce parents' expectations about religion.

The International Covenant on Civil and Political Rights also protects parents' rights to educate their children in a religious context, when it states, under Article 18:

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Surveys and anecdotal evidence show that an important reason why parents choose faith based schools is because such schools reflect their beliefs and values. An ACER designed survey of parents investigating school choice concluded that one factor stood out, "... the extent to which the school embraced traditional values to do with discipline, religious or

moral values, the traditions of the schools itself, and requirement that a uniform be worn".<sup>3</sup> A survey carried out by Independent Schools Queensland<sup>4</sup> reveals that parents, when asked what determined their choice of school type, listed religious affiliation as very important. A third survey conducted by the National Council of Independent Schools' Associations<sup>5</sup> also concludes that parents, especially religious parents, want schools to reflect and teach the types of morals and values found in the home. A more recent survey by Independent Schools Australia also concluded 85% or parents interviewed highly rated the ability "to choose a school that was in line with their values and beliefs".<sup>6</sup>

Given that many parents choose to send their children to religious schools because such schools reflect their faith-based values and beliefs, it is vital that such schools have the freedom to fulfil parental expectations by employing teachers and implementing a curriculum that is compatible with parents' religious beliefs. As provided by current exceptions and exemptions, schools must be free to employ staff committed to a school's religious environment and teachings and whose beliefs and actions do not contravene religious doctrine. As noted in a paper prepared by the Australian Catholic Bishop Conference<sup>7</sup>:

All those who choose to work in a religious organisation have a significant responsibility to maintain the religious integrity of the organisation. It is a reality that individuals have an impact on the culture of an organisation and also represent it and Church to the wider community in a variety of ways. It is a reasonable expectation by religious organisations that those who choose to work in them do not compromise or 'injure' by word or action those religious and moral principles from which the agencies derive their foundational beliefs.

#### 3. Catholic schools are religious schools<sup>8</sup>

Education is integral to the mission of the Church to proclaim the Good News. First and foremost, every Catholic educational institution is a place to encounter the living God who in Jesus Christ reveals his transforming love and truth. This relationship elicits a desire to grow in the knowledge and understanding of Christ and his teaching. In this way those who meet him are drawn by the very power of the Gospel to lead a new life characterized by all that is beautiful, good, and true; a life of Christian witness nurtured and strengthened within the community of our Lord's disciples, the Church.<sup>9</sup>

As previously mentioned, Catholic schools are not secular schools. While providing an education that conforms to various state and national requirements (legal, financial and in terms of curriculum), Catholic schools are an integral part of the broader Church community. As such, schools are faith based and those either attending such schools as students or as teachers are expected to sympathise with, support and enact the Church's doctrines. The requirement that those employed in Catholic schools live according to the Church's teachings

<sup>&</sup>lt;sup>3</sup> Why parents choose Private or Public schools, by Adrian Beavis. August 17, 2004

<sup>&</sup>lt;sup>4</sup>What Parents Want. Independent Schools Queensland. March 2007

<sup>&</sup>lt;sup>5</sup> What parents want from their children's education in independent schools. NCISA. 1998

<sup>&</sup>lt;sup>6</sup> School Choice Survey August 2021. Independent Schools Australia.

<sup>&</sup>lt;sup>7</sup> Australian Catholic Bishops Conference: *Some comments on the discussion paper Freedom of Religion and belief in the 21st Century.* 

<sup>&</sup>lt;sup>8</sup> As Catholic schools enrol approximately 20% of Australian students such schools provide a useful illustration of the vital importance of religious freedom.

<sup>&</sup>lt;sup>9</sup> Address of His Holiness Benedict XVI. Meeting with Catholic Educators. Catholic University of America. Washington. 17<sup>th</sup> April 2008. <u>https://www.vatican.va/content/benedict-</u>

xvi/en/speeches/2008/april/documents/hf ben-xvi spe 20080417 cath-univ-washington.html Accessed 23 February 2013.

and that Catholic schools have the freedom to follow the dictates of the Church is especially important given the strong and intimate connection between schools and their communities. As noted by the <u>MACS Statement of Mission</u>:

The good work of educating the young, undertaken in the light of the Gospel, is a coresponsible task led by every member of the Catholic school community. Modelled by parents, principals and teachers, in prayer and with wisdom, through witness and by example, Catholic schooling is at the service of the integral human formation of children and young people in Christ.

Those wishing to work in Catholic schools can have no doubt as to the religious nature of such schools and the need to conform to community expectations of such schools. The Melbourne Archdiocese Catholic Schools' Mission Statement includes the following statements when detailing the purpose and mission of each Catholic school:

A Catholic School:

- is actively embedded in the life of the faith communities of the local Church, which in turn is tangibly manifest in the life of each school,
- is an essential place for the evangelising of children and young people,
- prioritises the forming of missionary disciples of Jesus,
- exists to assist students and their families to integrate faith, reason, life and culture,
- is conspicuously Christian in outlook, explicitly Catholic in faith and practice, and intentionally missionary in orientation.

Prospective employees, reading the purpose and mission statement of Catholic schools, can be in no doubt as the religious nature of such schools and the need to support their mission and abide by the Church's teachings.

The MACS's guidelines relating to the employment of staff also makes it clear that Catholic schools are a critical part of the wider Church community and that teachers in such schools are duty bound to accept and live by Church doctrine. For teachers to achieve accreditation to teach in Catholic schools, they need to agree to the following:

It is vital for the effectiveness of the Catholic school community that all members understand the distinctive purpose and mission of Catholic schools. Principals and teachers need therefore to be accredited to teach in a Catholic school. In pursuing accreditation to teach in a Catholic school, staff will develop a deeper understanding not only of the nature of the school as part of the Church's mission but also of their roles as members of staff. It is expected that accreditation requirements will be met within five years of beginning teaching in a Catholic school in Victoria.

On an historical note, many of Victoria's community schools established during the 70s and 80s (such as Sydney Road Community School and the Swinburne Community School) had freedom in relation to staffing and curriculum. The education department, when establishing post-primary schools during the mid-80s (such as St Helena Post Primary), gave the schools freedom to advertise and appoint staff based their ability and willingness to support the unique character and ethos of each school.

Research related to the school effectiveness movement<sup>10</sup> reinforces the argument that the most successful schools, in terms of learning outcomes, staff morale and community satisfaction, have autonomy over staffing. Such freedom ensures that all the teachers in a particular school can work harmoniously and more effectively as there is a common agreement on the culture and mission of the school. Research carried out by Ludger Woessmann<sup>11</sup> on behalf of the OECD also concludes that a significant characteristic associated with the strongest performing countries in international mathematics and science tests is school autonomy; especially related to staffing.

Of interest is that the Victorian Independent Education Union<sup>12</sup>, while agreeing that Catholic schools should have the freedom to "ensure that religious doctrine is taught to children" and that such schools "have the right to hold their own religious beliefs and to teach these beliefs", also argues that such rights should not extend to employing teachers. The VIEU submission states:

The Victorian Government, through its legislative power should determine that religious schools respect the rights, values and ways of being of job applicants and employees who do not share the same beliefs.

The argument not only appears contradictory (schools have the right to teach religious beliefs, but not the right to employ the staff best able and willing to carry out such a mission), it also begs the question: why would an applicant wish to work in a school if he or she does not share the beliefs central to the school's existence?

One interpretation of the VIEU's position is that Catholic schools should be able to discriminate when employing religious instruction teachers, but not when selecting generalist teachers or those teaching particular subjects like mathematics or English. Given the way Catholic schools are structured and operate, with the requirement that all teachers imbue their subjects with the teachings of the Church and the curriculum, as a whole, needs to reflect each school's faith based mission, such an argument should be dismissed. As <u>argued</u> by Pope Francis:

But to be good workers, you must not neglect yourselves! You cannot give to the young what you do not have within yourselves. The Christian educator, in the school of Christ, is first of all a witness, and he is a teacher to the extent that he is a witness. I have nothing to teach you in this, but only, as a brother, I want to remind you: witness. And above all I pray for you, that you may be brothers not only in name but in fact. And for your schools to be Christian not in name but in fact.

It is also the case that the role and importance of teachers cannot be restricted to their role as subject and curriculum specialists. Equally as important is the role-model teachers present to students and the wider school community, both in terms of their professional lives and their public lives in the broader community. As argued by Fr Norman Ford<sup>13</sup>:

<sup>&</sup>lt;sup>10</sup> See Reynolds. D & Cuttance. P (1992). *School Effectiveness: Research, Policy and Practice*. Cassell. London and Caldwell.B. & Roskam. J. (2002). *Australia's Education Choices*. The Menzies Research Centre. Canberra.

<sup>&</sup>lt;sup>11</sup> See Woessmann, L. et al. (2007). *School Accountability, Autonomy, Choice, and the Level of Student Achievement: Education Working papers No 13*. OECD and Hanushek. E & Woessmann. L. (2007). *The Role of School Improvement in Economic Development*. CESifo Working Paper No. 1911.

<sup>&</sup>lt;sup>12</sup> See Submission to the Review of the Exceptions and Exemptions in the Equal Opportunity Act 1995, dated April 2008, page 26.

<sup>&</sup>lt;sup>13</sup> See, Professional Responsibility and the Private Lives of Teachers in Catholic Schools'. Fr Norman Ford. 1986. Archdiocese of Melbourne.

Teaching cannot be a value free profession on account of the personal teacher pupil relationship. Undoubtedly, the known behaviour of a teacher both in and out of school could affect the moral outlook of his/her pupils for the better or the worse.

#### LETTER FROM FAITH LEADERS RE ALRC CONSULTATION PAPER ON RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAW

13 February 2023

The Hon Mark Dreyfus MP Attorney-General Parliament House CANBERRA ACT 2600

Dear Attorney-General

# RE: ALRC Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper

As leaders of or advisors to a number of religious communities and traditions, we write to convey to you our deep disappointment with the proposed reforms outlined by the Australian Law Reform Commission (ALRC) in their Consultation Paper on religious educational institutions and anti-discrimination laws.

In a letter to you on 8 June last year, we welcomed Labor's commitment to recommence the ALRC's Inquiry into the Framework of Religious Exemptions in Anti-Discrimination Legislation. This was in no small measure because of the assurances that you had given us of the Government's commitment to "*protect teachers from discrimination at work, while maintaining the right of religious schools to preference people of their faith in the selection of staff.*"<sup>1</sup> We were pleased to see that commitment reflected in the third limb of the <u>terms of reference</u>, which asked the ALRC to balance the right of students and teachers not to be discriminated against on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy with the freedom of religious schools "to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff."

The proposals in the ALRC Consultation Paper seek to place severe limits on the application of this principle. These limits are neither expressly nor impliedly called for in the terms of reference themselves.

The Paper proposes that the right of religious schools to preference people of their faith in the selection of staff be strictly limited only to those teaching roles where the "*teaching, observance, or practice of the religion is a genuine requirement of the role, having regard to the nature and ethos of the institution*". For every other teaching role, it would be become unlawful for the school to give preference to employing teachers who share or are willing to commit to supporting the religious beliefs of the school.

If this proposal was implemented, it would introduce a new test into employment law, whose application and meaning are far from certain. In any given case, the onus would be on the school to prove that it satisfied the test. This would greatly expand the scope for future litigation, and would thus have a deterrent effect on any religious school contemplating engaging a candidate for employment who professes the same religion as the school, in preference to other candidates.

<sup>&</sup>lt;sup>1</sup> Your letter to Bishop Stead, dated 21 April 2022.

Faith-based schools in Australia have long been free to give preference to employing staff who share or who are willing to support the faith and beliefs according to which the school is conducted. They do not seek the right to discriminate on the basis of a protected attribute, but simply to be able to employ staff who share or are willing to uphold the religious beliefs of the school. The ALRC is proposing to greatly restrict this freedom by requiring religious schools to employ teachers who may not share or support the religious beliefs of the organisation, and whose employment can only be terminated where they "actively undermine" the religious ethos of the school.

Having carefully considered the proposals in the Consultation Paper we are doubtful that the ALRC process can reach any balanced outcomes, as contemplated by the terms of reference, by starting with these proposals. We agree with the comments from the National Catholic Education Commission that the proposed reforms fail to provide real protections for religious schools to effectively operate and teach according to their religious beliefs and ethos, and that if the proposed reforms were adopted it would be a major blow to authentic faith-based education in Australia.

The purpose of religious schools is not only to impart intellectual knowledge, but also to instil religious values. In addition to teaching the prescribed curriculum, they provide religious activities that seek to demonstrate to students what a life lived in accordance with the relevant religion looks and feels like in practice. Having teachers and other staff at the school who can participate in these activities as a faith community, whether these staff are engaged in religious teaching or not, helps to realise the school's religious purpose, and to develop an understanding by students that religion is not merely an adjunct to core activities, but an integral part of them. These are among the reasons why many parents choose to send their children to religious schools. The right of parents to do so is enshrined in international law. Despite paying lip service to the importance of all human rights, and rejecting any notion of a hierarchy of rights, the ALRC proposals would place unnecessary and unreasonable restrictions on the freedom of religious schools to give effect to the international human right of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The Consultation Paper continually cites the restrictive laws in Queensland and Tasmania as a basis for its claim that these laws "*indicate … that such reforms would not significantly undermine the ability of religious schools to maintain their religious ethos.*" However, this is misleading. Religious schools in those States rely upon the current exemptions in section 38 of the Sex Discrimination Act and depend upon those exemptions overriding the State laws in order to maintain their religious ethos.

We call on the government to ensure the ALRC properly addresses the Terms of Reference, particularly the third limb, through a genuine consultation with input from religious leaders and religious education experts, parents as well as secular experts.

Signed

Rt Rev'd Dr Michael Stead Anglican Bishop of South Sydney

On behalf of:

Most Rev Anthony Fisher OP Archbishop of Sydney Chair, Bishops Commission for Catholic Education Australian Catholic Bishops Conference



Imam Shadi Alsuleiman President Australian National Imams Council



Adel Salman President Islamic Council of Victoria



The Rev Dr Peter Barnes Moderator-General Presbyterian Church of Australia



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Pastor Terry Johnson President Seventh-day Adventist Church in Australia



**Dr Jean Carter** National Director Adventist Education



The Rev Mark Wilson National Ministries Director Australian Baptist Ministries (Baptist Union of Australia Inc.)



Archbishop Makarios Greek Orthodox Church in Australia



Most Rev Peter A Comensoli Archbishop of Melbourne Chair, Bishops Commission for Life, Family and Public Engagement Australian Catholic Bishops Conference



Abdullah Khan Chairperson Islamic Schools Association of Australia



Christopher Duke Convener Church and Nation Committee Presbyterian Church of Victoria



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Mike Southon Executive Director Freedom for Faith



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Al Stewart National Director Fellowship of Independent Evangelical Churches



Rev Jeff Spencer Delegate Christian Community Churches of Australia



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Dr Marshall Ballantine-Jones Secretary NSW Council of Churches

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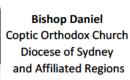
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