Catholic Education Tasmania

CATHOLIC EDUCATION TASMANIA RESPONSE TO

CONSULTATION PAPER: RELIGIOUS INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

1 Introduction

Catholic Education Tasmania (CET) welcomes the opportunity to provide a submission in response to the ALRC's consultation paper on the Inquiry into Religious Educational Institutions and Anti-Discrimination Laws (the **Consultation Paper** and the **Inquiry**).

CET directly operates 38 Catholic schools in Tasmania. It has approximately 16,500 students enrolled for the school year 2023, and employs approximately 3,000 employees (full and part-time).

2 Overview

Freedom of religion is a fundamental bedrock of a free, pluralist society such as Australia. It is such a foundational freedom that it is one of the only human rights specifically listed in the Australian Constitution in section 116. Australia is also a signatory to one of the foundational documents of international human rights law, the International Covenant on Civil and Political Rights (**ICCPR**).

Section 18 of the ICCPR sets out that parents have the right *"to ensure the religious and moral education of their children in accordance with their own convictions".*

Parents in Australia in most cases delegate this fundamental human right to the education system. For many, this is given particular expression by seeking out religious schools which conform with their faith, or whose broad ethos they support. Catholic schools have been meeting this need for over 200 years in Australia, during which time they have educated millions of Australians, giving them a strong academic foundation while at the same time imparting the teaching of Christ as expressed through the Catholic faith.

Catholic schools in Tasmania have been contributing to the common good of society since the 1820's, educating hundreds of thousands of students across a diversity of backgrounds - Catholic and non-Catholic, boys and girls, rich and poor, Australian-born and migrant, refugees, Indigenous Australians and those with disabilities or special needs.

What is unique to our schools is that as well as providing a strong academic foundation, we seek to live out and teach the Catholic faith. This teaching includes belief in the dignity of every human being, care for the poor and marginalised, justice for those oppressed, love of neighbour, stewardship of the environment, a belief in the transcendent, the concept of forgiveness and a Christian understanding of marriage and family. It is the totality of this teaching which we present to the community and which has been warmly embraced by so many.

Those who are strongly opposed to these beliefs are free to send their children and young people to a variety of schools who have a different worldview. Teachers and other staff who feel likewise similarly have many other choices to work in settings which align more closely with their personal beliefs and convictions.

In order for this particular form of education, a Catholic education, to be delivered it is essential that a genuine community of believers is able to exist, and that the faith is therefore able to be not just taught in an authentic manner, but also sought to be modelled by those who are entrusted with the care of students in Catholic schools - including teaching and non-teaching staff. This genuine community is established and ultimately governed by the legal and binding contract between CET and parents, by way of the enrolment agreement.

The Discussion Paper demonstrates a fundamental lack of understanding of the nature of faith-based education and what is required for it to remain authentic. Implementation of the Consultation Proposals would render the delivery of such an authentic faith-based education impossible.

Just as Catholic schools in Tasmania teach many students who are not Catholic, they also employ many non-Catholic staff. However, what the Discussion Paper suggests should become law would *force* our schools to employ people who in no way shared or supported the faith-based ethos of our schools, and even those who actively undermined the faith in their words or their actions (contrary to what the Paper claims in parts). It would specifically allow teachers to teach views which are directly contrary to the teaching of the Church. This would represent a special negative treatment of religious schools - providing less freedom than those provided to political parties. Under current law, political parties cannot be forced to employ people who have fundamentally different political beliefs. Why should faith-based schools not have a similar discretion to employ those who are aligned with the mission of the school?

We concur with the conclusion in the faith leaders 13 February letter to the Attorney-General where they say "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"

The Consultation Paper speaks of consulting with about 80 select individuals. The list of those consulted is not easily located on the ALRC website. Regardless of who was in fact consulted, when one considers that across Australia, the Catholic education system:

- Operates about 1755 schools
- Educates about 785,000 students (about 1 in 5 students in Australia)
- Employs about 102,000 employees,

consultation of about 80 "targeted" individuals is seems too narrow to permit the ALRC from being able to reach any form of balanced outcome.

We therefore call for a wholesale re-think, and a genuine, good faith consultation with a representative portion of the entire faith-based education sector in order to achieve a genuinely balanced outcome which does not put the future of faith-based education at risk.

Notwithstanding the above, we present some particular more detailed issues we have with the Consultation Paper below.

3 Key issues with ALRC proposals

3.1 A flawed starting point

The Consultation Paper presents a flawed case, pitching "religion" (in a nebulous sense, but clearly aimed at the "upper levels" of any religion) against the personal attributes of some individuals, on the basis that for one "side" to maintain their freedoms, the other side needs to lose some of theirs.

Framing this as a "zero sum" game with two opposing sides overlooks nuances, including the binding legal and moral obligations that Catholic schools make with parents to educate their children.

Of course, instances can arise where two human rights may appear to be in opposition. In such instances a just and fair society will not choose which right to protect (or put more accurately, which right to undermine), rather it will work to find a fair and effective balance.

In this case, the rights can be both fairly and effectively balanced by acknowledging that acting in accordance with religious beliefs (for example, by the giving of preferential selection of staff in religious education institutions) to be an act of building a community of faith by giving preference to persons of the same religion. This is distinct from viewing these to be an act of discrimination against those who are not of that religion.

In her 2019 speech titled *Swords & Shields,* the president of the ALRC Justice Derrington proposed (as one potential option to achieve a balance, and which was made in her personal capacity) was to repeal s37 and s38 of the SDA such that there is no *a priori* determination of

which attributes should be included in an exemption for religious bodies, and to insert a new section to clarify situations that would not amount to discrimination for the purposes of the SDA.

Such a legislative framework would recognise the distinction between actions taken to build a faith based community and those which are discriminatory. It is the refusal to recognise this distinction which inevitably leads to direct conflict between these two rights through which one must be diminished and made subordinate to the other.

3.2 No proper analysis of the relevant sections of the *Sex Discrimination Act* (SDA)

The Consultation Paper wrongly assumes that religious education institutions presently have carte blanche to discriminate based on sexual orientation or gender identity. In fact, when s38(3) is properly examined, this is not the case at all – nor does anything like it happen in practice, suggesting no need to amend the legislation.

Neither the phrase "*in good faith*", nor the phrase "*avoiding injury to the religious susceptibilities of adherents of that religion or creed*" is analysed in the Consultation Paper any detail at all.

While the Consultation Paper does not examine what is required under s38(3), the ALRC suggests that the only way to achieve the government's stated objectives is to repeal the section.

It is necessary therefore to consider the relevant sections and applicable law:

(a) Section 21 of the SDA makes it unlawful for an educational authority to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship stage, pregnancy or potential pregnancy, or breastfeeding by taking certain actions.

(b) Subsection 38(3) sets out limited exemptions to those prohibitions. In summary, ss38(3) provides that it is not unlawful for a person to discriminate in connection with education or training undertaken by an education institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion "*on the grounds of the person's sexual orientation, gender identity, marital or relationship status or pregnancy*", where it is "*in good faith to avoid injury to the religious susceptibilities of adherents to that religion or creed*.

When considered properly, s38(3) by no means legalises all forms of discrimination prohibited under s21. Indeed it sets out a stringent test which the relevant religious institution has the onus of establishing. Failure to do so means such action is not protected by s38(3).

The elements of s38(3) are not easy hurdles to leap:

- Reference to the "*the adherents*" requires demonstrating that the religious susceptibilities of a significant portion of adherents (without setting a specific number of adherents) would be injured. Thus, demonstrating that the "susceptibilities" of a small number or a particular "faction" of a given religion would be "injured" would not meet this threshold.
- Reference to the "*religious susceptibilities*" is a similarly onerous. It has been held that "*avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to "injury" to religious susceptibilities, would not suffice*" to amount to injury to the religious susceptibilities. That is, hurt feelings, or offence alone does bring the exemption into action. (*Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441).
- "Good faith" is clearly a phrase of limitation and in this context means a belief that what is being done is being done regularly and properly; honestly and conscientiously; and in accordance with the values of the Act. Clearly the exemption does not cover an act that is taken capriciously or in bad faith. (*Bropho v Human Rights and Equal Opportunity Commission and Anor* (2004) ALR 761 at [84] – [87]).

This is perhaps contrary to the public's general understanding of the operation of s38; and certainly contrary to the manner presented by the ALRC.

Thus, s38(3) test balances the rights of individuals in respect of (most relevantly for this inquiry) sexual orientation and gender identity and the rights of individuals (and communities of individuals, more particularly parents of children enrolled in catholic faith based schools), to

freely practice and express their religion. It also protects the ability of Catholic schools to uphold their contractual obligations with parents of children enrolled in the schools.

3.3 Issues with the law as stated in the Consultation Paper

The Consultation Paper also states that to the extent state laws overlap with Commonwealth laws, a duty holder must comply with the "*more restrictive law*"[1] This is an incorrect statement of the law.

On that premise, the Consultation Paper goes on to imply that the changes to be implemented by the proposed amendments to the SDA are of no great effect because they are in force already. This is not the case.

The effect of s109 of the Constitution is that State laws that are inconsistent with Commonwealth laws are invalid to the extent of the inconsistency. In other words, a State law cannot outlaw something that the Commonwealth parliament deliberately left, or has made, lawful.

The result of this is that, where the Commonwealth anti-discrimination legislation deals with the same matter as a state based law, it is the Commonwealth law that operates. The State law is invalid to the extent of the inconsistency. This has been held to be the case in the High Court since at least 1937 when Dixon J stated that "*When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid*": *Victoria v Commonwealth* (1937) 58 CLR 618.

It has been more recently held that a direct inconsistency (between state and commonwealth laws) may arise where a Commonwealth law, by design, leaves open an "area of liberty", which a State law "should not close up". In such a case, a State law that proscribes conduct that has been "left untouched" by a Commonwealth law will "alter, impair or detract" from the operation of the federal law, giving rise to a direct inconsistency for the purpose of s 109 of the Constitution. The result is that the State law is invalid to that extent: *Dickson v R* (2010) 247 CLR 491

Presently, to the extent that a State anti-discrimination law would operate to limit the exception in ss38(3) of the SDA, the state law would be invalid.

This means that the proposed amendments to the SDA would result in wholesale changes to the anti-discrimination law landscape across the country. No doubt it would result in a flurry of costly and time consuming litigation. It is doubtful that most members of the public appreciate this.

3.4 The Consultation Paper minimises the significant effect that the proposals would have on employee selection

In relation to employee selection by religious schools, the proposed amendments would result in "less favourable treatment" of any person being unlawful unless the person was directly involved in the teaching of the religious doctrine. This overlooks that *all* teachers within religious schools form part of the community of the school, and the proposals will undermine the ability of the school to maintain that community in accordance with the teachings of its faith.

Without sufficient exemptions for education authorities to preferentially choose their staff, the very fabric of the underlying ethos will be irretrievably harmed. What is overlooked is that the free religious practice of the families choosing to send their children to Catholic schools is under serious threat by the ALRC's proposals. It is not just teachers of religion within schools that are critical to this ethos.

Catholic schools are open to any student whose parents seek a Catholic education for them. That is, all students are enrolled by their parents, knowing that the school will teach and uphold the beliefs, doctrines tenets, religious practices whilst protecting the sensitivities of adherents of the Catholic faith. Those beliefs are as laid out in the Catechism of the Catholic Church - which remains the sole, single, and most readily accessible authority on Catholic belief and practice.

[1] Page 13 of the Consultation Paper.

CET school/system's commitment to teaching these beliefs and practices is contained within the enrolment agreement, which comprises a binding legal contract between the school/system and the parents.

Relevantly, when enrolling students in Catholic schools in Tasmania, a contract is formed between the parents and the Archdiocese. Amongst other things, the enrolment contract provides that:

> *The school is conducted in accordance with the teachings, doctrines, beliefs, tenets and principles of the Catholic Church. You and the Student acknowledge and accept that the School has an obligation to teach the doctrines, beliefs, tenets and principles of the Catholic Church and will continue to support that obligation while the Student remains enrolled in Tasmanian Catholic schooling.*

In order to faithfully discharge this contract, as required both legally and morally - and in order to properly preserve and protect the beliefs, doctrines, tenets, religious practices whilst protecting the sensitivities of adherents of the Catholic faith - a Catholic school/employer is required to employ only suitably qualified persons who are publicly committed to them, reflecting the building of a community of faith around the school. The Consultation Proposals would make doing so impossible.

Where parents or staff challenge, contravene or agitate against Catholic belief and practice, they make it impossible for the school/employer to discharge their contractual obligations.

Therefore, in such cases, in order for Catholic school/employer to discharge their legal, contractual obligations, anyone who contravenes or publicly opposes these standards will be asked to desist in such behaviour, and if they remain obstinate in it, to leave the school/employer.

The amendments proposed to the SDA would have the effect of stifling the free exercise of religion and the due performance of contracts by making such behaviour unlawful.

As mentioned above, this places religious schools with greater restrictions on hiring practices than apply to political parties. No one would sensibly suggest (for example) that a Labour politician would be obliged to consider equally the job application of a person who is an active and vocal Liberal party member, or vice versa. Clearly, the decision to hire will come down to the political affiliation (a protected attribute) of the individual. Indeed, for a political party to give less favourable treatment, the person needn't be vocal in their support for the other party.

Why then should a Catholic school (or any other religious school) be obliged to consider equally the job application of individuals who may actively promote and espouse values inconsistent with the religion within which the school operates? In reality, the question almost never arises because individuals are free to choose where they choose to send their children for education or where they seek to work.

The Consultation Paper also makes numerous references to Human Rights and particularly the ICCPR. The Consultation Paper suggests that a rationale for the proposals to limit the expression of religion are found in the words of Article 18(3) of the ICCPR. Article 18(3) of the ICCPR states that

> *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.*

That is, Australia is a signatory to an international treaty that says the freedom to manifest ones religious beliefs can *only* be limited where it is *necessary* to protect public safety, health, morals or fundamental rights.

The exemptions in s38 pose no threat whatsoever to the public safety, order, health, morals or fundamental rights and freedoms of others. Conversely, they are critical to the free expression

of religion and carrying out of a parents wish to educate their children in accordance with the values of the Catholic Church, in accordance with rights espoused in the same document.

Article 26 of the ICCPR states that

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Given that it is possible for these two rights to coexist by adopting a more appropriate view of preferential hiring in religious institutions (for example, in the manner proposed by Justice Derrington), it cannot be said the removal of s38(3) is necessary to protect others from discrimination.

Despite that, the Consultation Paper subordinates the right to religious freedom, and the free expression of that religion, in religious schools to the rights of other individuals - even though the rights of those individuals are not under threat by the operation of religious schools in accordance with the doctrines, tenets and beliefs of the schools. There is no evidence that such restrictions are "necessary" to protect the fundamental rights and freedoms of others.

3.5 Response to proposals dealing with students

CET has concerns about how the implementation of ALRC's proposals would impact on the pastoral approach which is applied to students who question or reject the gender which corresponds to their biological sex.

Fundamental to the Catholic Church's anthropology is the belief that every human person is created in the image of God, and therefore has inherent dignity and worth. This worth is respected from the moment of conception through to natural death and at every point in between. This dignity and worth means showing equal respect to all human beings, regardless of race, ability, socio-economic status, sex, sexuality, gender or gender identity.

The Catholic understanding of the person also recognises the complementarity, distinctiveness and equality of the sexes, and that the biological differences between male and female are inherent and fundamental to the nature of the human person. These guiding principles of the dignity and worth of each individual are at the heart of all school communities administered by CET.

The Australian Catholic Bishops Conference has encapsulated the above understanding of the human person in the document *Created and Loved*, which provides practical guidance for Catholic schools dealing with issues of gender and sexuality.

This document is available publicly and can be accessed here: http://cg.org.au/Portals/7/ParishData/Id310/Uploads/Type3/Created%20and%20Loved_Final_2022.pdf

In summary, the approach recommended in *Created and Loved:*

- Affirms the inherent dignity and worth of every person regardless of sex, gender or sexuality;
- Affirms the distinctiveness and equality of the sexes;
- Rejects the notion that sex is arbitrarily assigned and the notion of 'gender fluidity';
- Recognises that there are a variety of ways in which the masculine and the feminine are expressed;
- Supports the bio-psychosocial model of care as opposed to the gender affirming model;
- Recommends a carefully considered, pastoral approach to those students experiencing gender incongruence;

- Rejects the use of hormones and surgery on minors to facilitate gender transition.

The approach taken in *Created and Loved* and reflected in practice in Catholic schools in Tasmania and around Australia is consistent with a growing body of opinion from around the world which takes a 'watchful waiting' approach, rather than a 'gender-affirming' approach.

Such an approach acknowledges the many medical, psychological and environmental factors that may result in a student experiencing discomfort in their biological body and seeks to address these issues in a holistic manner respectful of biological realities.

CET incorporates the principles outlined in *Created and Loved* and recognises that gender dysphoria presents as a complex medical and psychological condition. As a caring Catholic community, CET schools provide confidential and compassionate support for any student and family in our care who may experience gender incongruence.

This approach is consistent with the moves in many jurisdictions to step back from a gender-affirming model in favour of a more cautious approach, most notably the UK, Sweden and Finland.

In the UK, in light of the landmark *Cass Review*, Britain's National Health Service has issued updated guidelines which recognise that engaging in social transition is not a neutral response and will in most cases lead to young people medically transitioning, whereas other approaches will see 80- 90% of pre-pubescent children who don't fit gender expectations living according to their biological sex in the long term.[i]

Here in Australia a recent Westmead Children's Hospital gender clinic study, found "the evidence-base pertaining to the gender-affirming medical pathway is sparce and, for the young people who may regret their choice of pathway at a future point in time, the risks for potential harm are significant".[ii]

CET is concerned that instead of allowing Catholic schools to continue to take a carefully considered pastoral approach to issues of gender dysphoria as outlined above, legal changes being advocated by the ALRC could impose the so-called 'gender affirming' model of care on our schools. This is because it could be argued that not affirming the gender with which a child identifies and accommodating a social transition could be deemed to be discriminatory under the law.

In practice, this could mean that, rather than considering the individual needs of students in consultation with parents and medical professionals, schools would be forced to participate in and support the social transition of gender questioning and gender dysphoric students. This would not only severely impinge on religious freedom, it would ultimately, we believe, end up having highly detrimental consequences for vulnerable students, potentially putting them on a path to lifechanging hormone therapies and gender re-assignment surgery.

This is in no way a fanciful proposition given the discussion paper on page 18 says (under the heading "Example: what could it mean in practice") "*a school could continue to impose reasonable uniform requirements as long as adjustments could be made to accommodate transgender or gender diverse students;"*

The Discussion Paper is silent on the issue of policies in relation to change rooms and bathrooms. However, under the current draft there is a significant risk that schools seeking to ensure that bathrooms and changing facilities are segregated according to biological sex would be deemed to be discriminatory, as requiring a young person of a particular sex to use the appropriate bathroom would be considered "less favourable treatment".

4 Conclusion

In summary, we respectfully urge the ALRC to conduct a major re-think of its approach to this proposed reform. Minor, piecemeal changes will not be sufficient.

As a starting point, this will involve a far more detailed consultation process with a much wider variety of representatives of faith-based schooling. Much greater weight needs to be given to the processes which have preceded this review, including the Ruddock Review and the recommendations of Justice Derrington.

The flawed analysis of the interaction of State/Territory and Commonwealth Laws requires a

thorough reconsideration. The examination of international human rights law conducted by the Commission needs to be expanded to properly recognise the significant international jurisprudence which recognises the fundamental human rights of parents to choose the moral and religious formation of their children- and these fundamental human rights need to be given far more weight in the recommendations which are made to Government.

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[i] Kaltiala-Heino (2018)
[ii] Elkadi et al "Developmental Pathway Choices of Young People Presenting to a Gender Service with Gender Distress: A Prospective Follow Up Study" *Children*, **2023** *10314* https://doi.org/10.3390/children10020314