



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

3 March 2023

The Hon Justice Stephen Rothman AM
Part-Time Commissioner
Australian Law Reform Commission
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Dear Justice Rothman

Religious Educational Institutions and Anti-Discrimination Laws

This submission from the Australian Catholic Bishops Conference (**the Conference**) is to address the Consultation Paper issued by the Australian Law Reform Commission on Religious Educational Institutions and Anti-Discrimination Laws. The submission is prepared by the Bishops Commission for Catholic Education (**BCCE**) and the Bishops Commission for Life, Family and Public Engagement (**BCLFPE**).

The Conference is a permanent institution of the Catholic Church in Australia and the vehicle used by the Australian Catholic Bishops to address issues of national significance.

The BCCE and the BCLFPE are among several commissions established by the Conference to address important issues both within the Church and in the broader Australian community. The BCCE has responsibility for Catholic education and the BCLFPE has responsibility for religious discrimination legislation.

More than half of Australians profess a faith, and more than one in five Australians are Catholic.

The Catholic Church provides Australia's largest non-government grouping of hospitals, aged and community care services. There are 1,759 Catholic schools with more than 104,000 staff providing education to more than 790,000 Australian students. There are two Catholic universities teaching 50,000 students.

The Conference seeks to participate in public debate by making reasoned arguments that can be respectfully considered by all people of goodwill.

The Conference supports the submission of the National Catholic Education Commission.

Summary

Catholic schools must be free to be authentically Catholic.

Catholic schools operate in the knowledge that, as Pope St. Paul VI said, we listen “more willingly to witnesses than to teachers.”¹ Catholic schools exist to be witnesses of a Catholic mission and ethos by all staff supporting, teaching and exemplifying a Catholic approach to life. Catholic schools exist to provide this education to their students and to parents who choose to send their children to be educated in an environment that upholds and exemplifies a Catholic ethos. In this way, Catholic schools provide an attractive option, freely chosen, by staff and families.

People of all faiths and none who want to work for the Catholic Church in our schools are welcome, but it is essential that they support our mission and ethos. Staff applying for work in our schools are advised of the ethos and mission of the school and the expectation that all staff will be supportive of this mission and ethos.

Catholics share a faith conviction that every child, and more broadly every human being, is made in the image and likeness of God. It is a fundamental part of the mission and ethos of Catholic schools that we do not expel students or sack staff simply on the grounds of sexual orientation, gender identity or any other protected status. Any claim otherwise is false and misleading. Fabricated claims of discrimination against our students on any grounds undermines the good work of Catholic schools and unnecessarily causes anxiety in the community. Where there is a discipline issue or disagreement, principals or other senior staff members will work to try to resolve the issue pastorally.

For these reasons, Catholic institutions want the capacity to employ and manage employment so that staff can be witnesses for the schools’ Catholic mission. Freedom of religious observance, as part of a balance that observes the rights of all, is a fundamental human right that government is obliged to protect.

In our respectful submission, the consultation paper gets the balance wrong by going further than is necessary or proportionate in balancing the freedom of religion with ‘the fundamental rights and freedoms of others’ (art 18(3) of the International Covenant on Civil and Political Rights (ICCPR)). The recommendations in the consultation paper would make it impossible for religious educational institutions to maintain their mission and ethos.

The submission is divided into four main parts in order to respond to each of the four propositions put forward in the consultation paper.

The proposal from Justice Sarah Derrington to “remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos”² may offer a more promising way forward. In that regard, we consider that the consultation paper’s proposals for

¹ Evangelii Nuntiandi: Apostolic Exhortation of His Holiness Pope Paul VI to the Episcopate, to the Clergy and to all the Faithful of the Entire World, #41, 8 December 1975.

² Sarah Derrington, ‘Of Shields and Swords – Let the Jousting Begin!’ Speech, Freedom19 Conference, 4 September 2019, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>.

removal of all exemptions in both the Sex Discrimination Act (s 38) and the Fair Work Act, go further than what is practicable, in the sense of what is necessary and workable to guarantee the right of religious institutions to conduct their affairs consistently with their essential, religious ethos.

The Government should ensure any changes to the law resulting from this inquiry are made as part of a broader religious freedom bill and should work to convince the Parliament to pass balanced legislation in the current term. The introduction of a religious freedom bill would be consistent with the Australian Labor Party 2021 National Platform:

“Labor recognises that the freedom to have or adopt a religion or belief, to change a religion or belief, or not to have or adopt a religion or belief, is absolute. Moreover, Labor believes in and supports the right of all Australians to have and to manifest their religion or beliefs, and the right of religious organisations to act in accordance with the doctrines, tenets, beliefs or teachings of their faith. Such rights should be protected by law and, in accordance with Article 18 of the International Covenant on Civil and Political Rights, subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

“Labor believes that people of faith deserve the same human rights, equality, respect and safety as every other Australian. No Australian should ever be vilified, discriminated against or subjected to violence or threats of violence because of that person’s religion or religious belief. Labor will therefore ensure that Australia’s anti-vilification laws are fit for purpose.”

Substantive propositions

The consultation paper puts forward four propositions.

The Propositions fail adequately to apply the following matters set out in paragraphs 25 and 26 of the Consultation Paper:

- Limitation of a right recognised in the ICCPR must be necessary – that is, the limitation must respond to a pressing social need;
- Limitation of a right recognised in the ICCPR must be proportionate to the specific need it is aimed at addressing;
- The greater the interference with the human right (freedom of religion), the less likely it is to be considered proportionate.

International human rights law provides that only the public manifestation of religion or belief can be limited and only where necessary for limited and defined public purposes and may not be abridged even in times of public emergency.³ This is universally accepted to indicate the status and importance of religious freedom.⁴ The internal regulation of a private religious education institution is not to ‘manifest one’s religion or beliefs’ (ICCPR Art 18(3)) in a public sense which the ICCPR permits to be

³ ICCPR, art 4(2).

⁴ United Nations Human Rights Committee, General Comment 22: Article 18 (Freedom of Thought, Conscience and Religion) (1993) (General Comment 22), §1: Article 18’s ‘fundamental character is reflected’ in art 4(2).

limited. The balance struck between potentially inconsistent freedoms must ensure that the relevant freedom being limited is not 'vitiating' by the limitation (to use the words of the United Nations Human Rights Committee's *General Comment 22*). In altering the status quo, it is essential that the freedom which is to be further restricted as proposed by the consultation paper (in this case, freedom of religion) is impacted to the minimum degree possible.

However, the propositions put forward in the consultation paper fail to find this balance and instead, 'vitiating the rights guaranteed in article 18'.⁵

Proposition A - Students

The Conference supports the repeal of section 38(3) of the *Sex Discrimination Act 1984* provided that sufficient and acceptable provisions are introduced which protect the ability of religious educational institutions to teach their beliefs and implement generally applicable behavioural rules.

The reference in the consultation paper to allowing religious educational institutions to "teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum" (page 17) implies that the mere teaching of religious doctrine may be harmful to students. This approach fosters anti-religious sentiment and is unhelpful.

Every involvement the Catholic Church makes in the community flows from a Christian vision of the human person. This is known as Christian anthropology. What we believe about human beings defines what it means for us to respond in truth and love to the other people around us as we draw our values, practices and spirituality from this foundational understanding. Our vision of the human person can be understood through human reason, whether people have a particular religious faith or not. We also believe that the template of our bodies and our human nature has been designed for us by a loving God for the flourishing of every individual human being and loving participation in a community of other people.

Christian anthropology understands that every human being is unique and precious among all the creatures of the world. As a result, every human being is a person with intrinsic value and has human dignity simply by being a member of the human species. As part of this broad framework of belief, we teach that sexual relationships should be within marriage between a woman and a man.

Catholic and other religious faith schools have a long history of looking after their students pastorally within their faith tradition. The Conference has set out a very clear pastoral approach for schools in the document *Created and Loved: A Guide for Catholic Schools on Identity and Gender*, for "... guiding students through the opportunities and challenges of contemporary culture with a spirit of discernment, engagement and care." This document has been well received by staff, parents and students because it outlines a caring and compassionate response that does not require an unquestioned gender-affirmative approach.

The views of people with a religious faith are often different from those of many people in contemporary culture, but they should not be discounted, dismissed or characterised in negative

⁵ General Comment 22, paragraph 8.

terms because they are not the predominant view or because they are a view associated with religious belief.

In Proposition A, the consultation paper states that “The suggestion that students can enrol in or move to an alternative education option does not take away from the necessity of the reforms, given the fact that this may often not be a realistic option, and the potentially harmful impacts of exclusion on prospective and enrolled students.” (Page 19, no. 49).

In a society where there is universal availability of secular State public schools, kindergartens and universities, there is no need to propose laws that would remove the defining character of religious educational institutions as places where religious belief is manifested and taught.

Propositions A.3 and B.3 and the proposals to give effect to them are unduly and unrealistically narrow. In each case, the reference to a duty of care should not be a condition of the permission to be granted. The permission needs to be stated in unqualified terms -- a duty of care is not a fixed or abstract matter, but is highly fact-specific and, further, is shaped in part by the statutory context within which conduct occurs.⁶

The consultation paper suggests Proposition A would be in part implemented by proposals 6 and 7:

Proposal 6 (extend prohibitions of discrimination against a student or applicant to the attributes of family or carers of students). This depends on the outcome of other proposals. It would be a piecemeal change that potentially greatly complicates the position of religious schools, which would be the only organisations in Australia to be subject to such a law. Such wide-ranging change should not be introduced without economy-wide consideration. Proposal 6 should be withdrawn until the implications of such an amendment across all Commonwealth discrimination laws are studied and considered.

Proposal 7 (clarify that content of the curriculum is not subject to Act). While welcome, this is unlikely to solve problems: the consultation paper makes clear that it sees a distinction between the content of the curriculum and the method of delivery.⁷ It is not likely to be practicable to maintain this distinction: complaints about the curriculum will inevitably morph into complaints about a teacher’s delivery.

Proposition B - Staff

The consultation paper betrays a lack of understanding of the central role that faith and religious belief have in forming the community of faith that is a religious educational institution.

It is vital in forming a community of faith that religious educational institutions and, in particular, religious faith schools have the right to preference the hiring of staff who are of the same religious faith or who are willing to support the religious faith of the school. Catholic schools do this subject to the same market conditions as other educational employers; thus, some situations require a balance

⁶ *Sullivan v Moody* (2001) 207 CLR 562, 579-80, 582; *Hunter and New England Local Health Authority District v McKenna* (2014) 253 CLR 270.

⁷ Consultation Paper, paragraph 92, see also Propositions A.3 and B.3

to be found between the religious identity of the school and the teaching needs of a particular discipline. This is something overlooked in some state-based legislation which is proving detrimental to the freedom of Catholic schools to express their identity and mission.⁸

Preferencing the appointment of staff who adhere to the faith or support its values does not constitute discrimination at all. This is consistent with the view of the UN's Human Rights Committee in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination), which states that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". Section 153(2) of the Commonwealth *Fair Work Act 2009* is to similar effect, and, being consistent with international human rights law, should be maintained.

Proposition B is not consistent with the rights and freedoms in the ICCPR and Australia's international human rights obligations. If implemented, these propositions will eliminate the capacity of faith institutions to govern themselves on matters which are central to their religious identity and ethos.

The longstanding and consistent concern of human rights law is to protect the genuinely held rights of the minority from being overborne by the majority. In this case, Catholic schools operate on the basis of their religious ethos and the parents who wish to send their children there are a minority that should be free to manifest their faith.

We note that there are alternative institutions offering employment to staff who do not share or wish to conform to the religious tenets of a particular institution. As a result, these recommendations add no further protections than already exist in Australian schools and instead remove the opportunity for parents and students who do wish to participate in the entirety of what Catholic schools can offer through their mission and ethos.

The consultation paper suggests Proposition B would be in part implemented by proposal 5:

Proposal 5 (amend *Fair Work Act* to restrict exemptions for religious schools). The Conference submits that Proposal 5 should be withdrawn. The proposal disengages religious education institutions from all other employers and creates the potential for unknown complications.

Proposition C – Preferencing staff

Proposition C provides that religious educational institutions will no longer be able to preference staff who hold the same religious beliefs or who are willing to support the mission and ethos of the religious school unless the school can prove that faith is a "genuine requirement of the role." Effectively, this places a new onus upon a religious faith school to prove that it needs its staff to support its mission and ethos, which is a burden not placed on other organisations with distinctive missions.

The Proposition regards religious schools merely as places where a separate class on religious education is taught and religious ceremonies are conducted, and in which, otherwise, religious belief

⁸ See for example changes made to the *Equal Opportunity Act 2010* (Vic) by the Victorian Government in 2021, which came into effect on 14 December 2022.

has no necessary or apparent role in or bearing on the school's conduct or teaching of the general curriculum. This fundamentally misunderstands how the religious ethos of a religious educational institution is infused and present in every aspect of its conduct.

Staff in Catholic schools have a professional obligation to be supportive of the teachings of the Catholic Church, to act as role models to students and to do nothing publicly that would undermine the transmission of those teachings, so they can help form a community of faith. Parents of Catholic school students trust that their school will pursue its mission faithfully, regardless of the personal faith, or none, held by those parents.

Proposal 11 would appear to give power to the Human Rights Commission to not only determine whether it is a genuine occupational requirement for particular staffing roles to support the mission and ethos of the school, but also to determine what the essential components of that mission and ethos are; quite an extraordinary extension of power over matters of faith granted to a commissioner. This necessarily would decrease the role and importance of faith in the work of religious educational institutions. Faith is part of the very make-up and fabric of religious schools so that they can form a community of faith. This proposition would be a serious over-reach of the Government into the rightful freedoms of faith-based schools.

Proposition C is also fundamentally flawed and potentially internally inconsistent.

The first flaw is to restrict the preference for staff with a religious belief to cases where this is a 'genuine requirement of the role'. While an 'inherent requirement of the position' criterion is widely used in Australian law,⁹ and has its origins in International Labour Organisation conventions and recommendations, it will be ambiguous and misleading in this context, unless it is accepted – and stated expressly – that in a religious educational institution it may be a genuine requirement of a position at the religious school that that religious belief or activity of all staff be supportive of or consistent with the tenets of the relevant religion of the institution.

Proposition C.2 goes some way towards this recognition, but is a mirage: it provides that 'the nature and religious ethos should be taken into account' in determining whether religious belief or observance etc., is a genuine requirement of the role. This is inadequate because it does not make the nature and religious ethos the determinative consideration, nor exclude any other factor, and will leave the matter open to disputation and require case-by-case analysis. The matter should be put beyond doubt by:

- Deleting the genuine requirement test in favour of a provision that provides that all staff selection in a religious educational institution may be based on the consistency of the beliefs and conduct of the applicant, employee or contractor with the tenets of the religion of the school; or
- Creating a rebuttable presumption that it is a requirement of the role of being a staff member of or contractor to a religious educational institution that the applicant/staff

⁹ See, for example, *Fair Work Act 2009* (Cth), ss 153(2)(a) and 195(2)(a) (terms of modern awards and enterprise agreements) and 772(2)(a) (termination of employment)

member/contractor be supportive of the teachings of the religion of the school, act as role models to students and do nothing publicly that would undermine the transmission of those teachings.

The potential internal inconsistency arises in the third dot point of proposition C.1 and Proposals 8 and 9, which appears to propose that preference for religious belief must not constitute discrimination on any other ground prohibited by the Fair Work Act.¹⁰ To fully assess this proposal would require close consideration of the drafting of the amendment to the Fair Work Act. Unless drafted to protect the primacy of religious belief, a staff member dismissed for conduct inconsistent with Catholic belief might claim that they are, in truth, dismissed because they have a protected attribute.

Proposition C would be in part implemented by proposals 8 and 11:

Proposal 8 (amend Fair Work Act to allow provisions in awards and enterprise agreements that permit preference (favourable treatment of staff) on the ground of religion).

This is suggested by the consultation paper as a means of ensuring that religious, educational institutions can advance the religious ethos of the school.

However, the Proposal is not drafted in satisfactory terms: it should be substantially redrafted to be simpler and less conditional. It should not proceed in the form proposed. As drafted, the Proposal is cumbersome, highly conditional and likely to be uncertain and productive of litigation and dispute. Further, as the consultation paper notes (in paragraph 97), it would introduce greater complexity into the Fair Work Act. This is unnecessary, when the present provisions (ss 153 and 195 of the Fair Work Act) are of longstanding and well-understood and have not been productive of complaint.

Proposal 8 also adopts an overly restrictive approach to the ‘inherent requirements of the position’.

The Proposal requires a contestable evaluative assessment of proportionality, in essence judicialising every appointment and every promotion in a religious educational institution.

Finally, the Proposal contains a proviso (that giving more favourable treatment to an employee on the ground of religion does not constitute discrimination provided there is no discrimination on any other ground prohibited by ss 153(1) or 195(1) of the Fair Work Act). Without detailed legislative drafting, it is hard to understand the scope of this provision. If it is to apply to the favoured staff member, it is hardly necessary. Alternatively, the proviso is not practicable if it is intended to apply to non-preferred staff. A non-preferred teacher would be able to allege that the reason that they were not favoured was not the religious belief of the preferred candidate, but the non-preferred person’s attributes. Such a provision will result in

¹⁰ These are: race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin: s 153(1), 195(1), 772(1)(f).

highly artificial outcomes and has the potential to produce frequent litigation every time a staff member is promoted.

Proposal 11 (amendment of *Australian Human Rights Commission Act 1986* to remove the exception from ‘discrimination’ under that Act for religious educational institutions) is consequential on other changes proceeding. It would allow the Australian Human Rights Commission (**AHRC**) to inquire into religious schools and attempt mediation of complaints at religious schools. Referral to the AHRC would increase the risk of lawfare, where religious schools have to bear the cost of dealing with complaints from activists opposed to the operation of religious faith schools.

Proposition D – Ongoing requirements for staff

Catholic schools do not impose their beliefs on anyone, nor do they compel anyone to work in Catholic education. Of the more than 104,000 staff employed in Catholic schools in Australia, none are compelled to take employment in those institutions. Over many years Catholic staff and staff from other religious backgrounds or none have accepted the invitation to work in our Catholic schools and make an invaluable contribution to the vibrant faith community within our schools. Nonetheless, it is entirely reasonable for faith-based schools and the families who choose them to continue to expect that staff support and not undermine their school’s ethos and mission.

Proposition D is claimed to require “all staff to respect the religious ethos of the educational institution” (page 25), but this appears to be limited to relatively extreme examples where “staff cannot publicly denigrate or ridicule the religion” or “that appropriate respect be given by staff to religious observances and practices” (page 27). Schools cannot create a faith community merely by asking staff to tolerate faith and religious beliefs. Proposition C makes it clear that staff do not even have to respect the religious teaching of a school and can, for example, “objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context” as they wish (page 24).

The consultation paper says Proposal 9 would, in part, implement Proposition D:

Proposal 9 (allow termination where the employee ‘actively undermines’ ethos of religious education institution) suggests a new provision in the Fair Work Act. This is a second Proposal advanced in the consultation paper to allow religious schools to advance the religious ethos of the school. As drafted, it is not likely to be practicable. It is unduly narrow and, again, is highly conditional and filled with contestable evaluative criteria that will lead to termination matters being judicialised.

The proviso (that termination does not constitute discrimination on any other ground prohibited by ss 153(1) or 195(1) of the Fair Work Act) is, in this instance, clearer in its effect. It is not practicable or reasonable, and allows termination inevitably and routinely to be challenged on the basis that the undermining conduct for which termination is invoked by the school will be alleged by the dismissed teacher to be, in substance and, in fact, undertaken on the ground of an otherwise protected attribute of the dismissed teacher.

Commonwealth and state and territory law

The consultation paper states that “in general, ... where both apply, duty holders must apply [scil. comply] with the most restrictive law.” (Page 13, no. 29).

While this is expressed generally and is subject to the important qualification ‘where both laws apply’, the consultation paper’s discussion of the interaction of Commonwealth, State and Territory anti-discrimination laws is incomplete.

The fact that a State Act and a Commonwealth Act cover similar ground brings into play a fundamental principle of Constitutional law. Section 109 of the Commonwealth Constitution provides that:

“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

Thus, where the provisions of State law are inconsistent with those of a Commonwealth Act on the same topic, the relevant provision of the State Act is ‘invalid’ (that is, ineffective – it is not repealed, but merely suspended while the inconsistent Commonwealth law is in place). The Commonwealth Sex Discrimination Act underscores this principle, providing in s 10(3):

“This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.”

Accordingly, the relevant question, for both the purposes of s 109 of the Constitution and of s 10 of the Sex Discrimination Act, is whether the State Act is capable of operating concurrently with the Commonwealth Act.

Contrary to the consultation paper, inconsistency necessarily arises where federal law permits conduct, by making provision for an exception or exemption, which in terms is not replicated by State law. In short, if federal law permits conduct, State law cannot limit or restrict that conduct.

State anti-discrimination laws are only currently workable for religious educational institutions because they rely on the s 109 inconsistency and use the conduct permitted in the Sex Discrimination Act. If all the relevant Sex Discrimination Act exemptions were repealed, the situation for religious schools would become unworkable.

Conclusion

Catholic schools want to continue to be able to authentically teach the Catholic faith with staff who support this mission in word and deed. This faith-based education is a vital part of the identity and mission of Catholic schools and has served students and parents to generations of Australians.

The propositions and proposals advanced in the consultation are problematic because they would make it impossible for religious educational institutions to pursue their religious mission and ethos.

We would be happy to answer any questions. We can be contacted via Mr Jeremy Stuparich, Deputy General Secretary of the Conference, at policy@catholic.org.au or 02 6201 9863.

Yours sincerely

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