



2 October 2019

Human Rights Unit  
Integrity Law branch  
Integrity and Security Division  
3-5 National Circuit  
Barton ACT 2600  
By email: [FoRConsultation@ag.gov.au](mailto:FoRConsultation@ag.gov.au)

**Submission to the Attorney-General's Department  
Consultation regarding legislative reforms on religious freedom**

The National Catholic Education Commission (NCEC) welcomes the opportunity to provide this submission to the Attorney General's draft legislation on religious freedom. The NCEC is the representative body of Australia's Catholic schools. Working closely with the state and territory Catholic education commissions, the NCEC advocates for and influences policy at the national level on behalf of Australia's Catholic schools. The NCEC was established in 1974 by the Australian Catholic Bishops Conference (ACBC) through the Bishops Commission for Catholic Education (BCCE).

This submission is divided into four parts.

- Part A sets out some details about Australia's Catholic schools, their distinctive nature and characteristics and the role of Catholic schools as an education provider.
- Part B presents some principles about freedom of religion and seeks to explain the mission and evangelising role of Australia's Catholic schools.
- Part C proposes a list of crucial elements that the NCEC believes should inform and underpin legislation which seeks to protect the religious freedom of Australia's Catholic schools to continue to operate as Catholic schools.
- Part D provides specific comments about the exposure draft of the *Religious Discrimination Bill* 2019. The NCEC recommends some amendments to the draft which we believe will achieve the Government's objectives to:
  - Eliminate discrimination on the ground of religious belief or activity (or lack thereof)
  - Ensure everyone is equal before the law regardless of religious belief or activity
  - Ensure that people can make statements of belief.

## Part A The role of Australia's Catholic schools

Australia's 1,748 Catholic schools enrol over 764,000 students and employ over 96,000 teaching and non-teaching staff. Australia's Catholic schools are universal in their reach and open to all families who seek a Catholic education. Our schools welcome students from disadvantaged backgrounds, growing proportions of Aboriginal and Torres Strait Islander students and students with disability. Catholic schools are situated across Australia with almost 40% outside major metropolitan areas. In some remote communities, a Catholic school is the only school available.<sup>i</sup>

Faith-based schools are significant providers of education in Australia. Historians believe the first Australian school was a Catholic school located in Hunter Street, Parramatta and taught 31 students - seven of whom were Protestants. By 1833, there were 10 Catholic schools in the colony. The growth in Catholic schools is an achievement considering that for most of their operation they were funded by parents and their local parish communities.

Approximately 30% of students are educated in faith-based schools. Australia's Catholic schools are the largest faith-based provider of education in the country and enrol about 60% of students in the non-government sector.

Catholic schools make (and have made) a significant contribution to Australia's educational and social ecology. Our schools ensure that parents can choose an affordable education that is consistent with Catholic values, teachings and doctrines, committed to educational excellence and underpinned by charisms of prayer, witness, catechesis and pastoral care.

## Part B Religious freedom and Australia's Catholic schools

To assist with this consultation, the NCEC outlines below some general principles about religious freedom and its expression in the Catholic school context. The history of Catholic schooling in Australia, both in its establishment and continued operation, is testament to the importance of the Catholic school as a communal expression of the Catholic religious faith.

1. Religious freedom is a universal human right which is recognised in international treaties and agreements such as Article 18 of the International Covenant on Civil and Political Rights (ICCPR) which was ratified by Australia in 1972. Religious freedom includes:
  - a. Possessing/adopting religion or belief
  - b. Manifesting religion or belief individually or in community
  - c. Manifesting religion or belief in worship, observance, practice and teaching
  - d. Establishing seminaries or religious schools
  - e. The right of parents to ensure the religious and moral education of their children in conformity with their own convictions.

The NCEC endorses these international principles.

2. As stated in *Dignitas humanae*, the Second Vatican Council's Declaration on Religious Freedom (1965), religious beliefs and teachings are not to be imposed on anyone:  
*no one is forced to embrace the Christian faith against his own will.*<sup>ii</sup>

3. Australia's Catholic schools do not stand apart from other educational providers, our schools have always operated in a pluralistic society. Our schools are open to all who appreciate and wish to share in the mission of the Catholic school.
4. The NCEC recognises that the right to religious freedom is not absolute and legal restrictions may sometimes be necessary to protect the freedoms of others. To be valid such restrictions should be principled and universally applied. It is unfair if a focus on one right diminishes the importance of the right to freedom of religion. Restrictions that do not balance the rights of all in a plural society are unjust and are not supported.
5. Australia's Catholic schools are inspired by an educational philosophy built on a Catholic understanding of the human person:
 

*The person of each individual human being... is at the heart of Christ's teaching: this is why the promotion of the human person is the goal of the Catholic school.<sup>iii</sup>*
6. Australia's Catholic schools play an important role in educating students in accordance with the doctrines, tenets, beliefs, teachings and mission of the Catholic faith:
 

*Catholic schools are at one places of evangelisation, of complete formation, of inculturation, of apprenticeship in a lively dialogue between young people of different religions and social background.<sup>iv</sup>*
7. The mission of Australia's Catholic schools is similar but distinct from other Australian schools. Through their culture, ethos, mission and commitment to educational programs, Catholic schools represent the harmonisation between learning and living a Christian life.<sup>v</sup> Australia's Catholic schools seek to manifest the Catholic faith by providing education which advances human flourishing including truth, goodness, love, work, leisure and faith. Education in a Catholic school *presupposes and involves a definite concept of* all people and life. The work and life of the Catholic school (its ecclesial and cultural identity) is imbued with Catholic values and Australia's Catholic schools are places of pastoral ministry. All present within a Catholic school, in particular the teachers who choose to be employed, are expected to be committed to and reflect in their role the life and work of the Church.
8. Australia's Catholic schools seek to support the religious freedom of parents who wish to send their children to a Catholic school where they will be taught in accordance with Catholic values, teachings and doctrines.
9. Governments are obligated to respect and protect the religious freedom of parents to choose to send their children to a school where they will be taught in accordance with their religious convictions.

### **Part C Protection of the Catholic school in Australia's education sector**

In 2020, Australia's Catholic schools will mark 200 years since their establishment in the Sydney suburb of Parramatta. The fact that one in five children today are educated in an Australian Catholic school is an achievement and testament to the esteem in which Catholic schools are held.

In part B of this submission, the NCEC has sought to present the mission of the Catholic school as a manifestation of the Catholic faith. This communal manifestation is not the only role of the Catholic school, but it is fundamental to its identity and purpose.<sup>vi</sup> If Catholic schools are to have the freedom to operate as Catholic schools, they must be free to:

1. Hold Catholic beliefs and express them in the day to day operations.
2. Speak, preach and teach the tenets and beliefs they hold without hindrance from the state or unnecessary litigation.
3. Give preference to the enrolment of students baptised in the Catholic faith.
4. Give preference to employing staff who are baptised Catholics or are supportive of the teachings of the Catholic Church, act as role models to students and do nothing that would undermine the transmission of those teachings.
5. Cease the employment of staff who by their public words or actions display views that are totally at odds with the mission of the Catholic school.
6. Decline to enrol or cease the enrolment of students who behave in a manner that is totally at odds with the mission of the Catholic school including the refusal to participate fully in the life of the Catholic school.

These elements should be viewed holistically. Catholic schools are not exclusive communities and the environment in which they operate is pluralistic. At a local school level, the occasional decision might be seen by some to be contrary to the above elements. Sometimes external factors such as the location of a school might impact some decisions around the employment of staff and enrolment (or otherwise) of students.

At all times Catholic schools seek to engage on any issue that might arise regarding staff or the enrolment of students pastorally, with respect and care as necessitated by the individual circumstance. This might mean that a decision on pastoral or other grounds might seem inconsistent with one of the elements above. This is not evidence that these elements are not essential to the identity of a Catholic school, rather they demonstrate that Catholic schools understand that decisions are sometimes best made on a case-by-case basis. Our schools require the legislative support to continue to be free to make decisions in this way. Their experience is that workplace and enrolment policies are useful (and essential) tools to ensure that expectations of all are understood and managed. The lack of complaints of discrimination from staff or students at Australia's Catholic schools demonstrate that these policies and processes work well.

Finally, the NCEC is cautious about the potential for unintended consequences. Regrettably, the protection of religious freedom in Australia is used unfairly as a political football or an opportunity to make unsubstantiated assertions. The complaints process is also becoming, for a small minority, a tool to wage "lawfare" against religious individuals and institutions.

The NCEC wishes to avoid a situation where this legislation results in costly and lengthy litigation, requiring Courts and Commissions to adjudicate increasing numbers of complaints. In this respect, the experience of the Wesley Mission as described in *OV & OW v Members of the Board of the Wesley Missions Council* [2010] is illustrative. The complaint took seven years to resolve with the Wesley Mission incurring enormous expense to justify their position.

The NCEC is encouraged that the Attorney General has acknowledged that the *process* of adjudication can become *the punishment* for those with different views.<sup>vii</sup>

This legislation should be carefully drafted, ideally in a bipartisan way. The NCEC calls on the Government (and all Members of Parliament and Senators) to ensure that any unintended consequences from this legislation are minimised.

#### **Part D Comments about the draft legislation**

The NCEC's comments about the **Religious Discrimination Bill 2019 (the RDB)** are set out below. Given the role that the NCEC plays in the education sector, we have limited our comments to those parts of the RDB that apply to schools. The ACBC has also made a submission to this consultation which is also relevant to schools. The NCEC supports and endorses the ACBC submission. We also reserve the right to provide further submissions about the RDB as may be necessary.

##### **Clarity**

The existing framework of federal, state and territory anti-discrimination legislation which may (or may not) provide protection against discrimination on the basis of religious activity (and other related issues) is complex. It seems that clause 60 of the RDB seeks to clarify the relationship between state and territory laws and, unless provided by section 41(1) (statements of belief), the RDB does not *exclude or limit* any existing anti-discrimination legislation (see section 29(3) also).

The NCEC believes this is problematic. The RDB should include clearer provisions about the applicability of existing state and territory law. Some states and territories have already passed provisions which encroach upon religious freedom and notwithstanding actions at the federal level to protect religious freedom, state and territories may continue to do so unless restrained by an item of overriding legislation. For example, the governments of the Northern Territory and Western Australia are both considering removing exemptions for religious schools from their anti-discrimination legislation.

We understand this is complex, but the NCEC believes the time is right to consider the harmonisation of state and territory legislation with Commonwealth legislation which helps to protect religious schools from laws that would restrict their ability to pursue their mission.

We also have concerns about the decision to continue with the Australian Law Reform Commission (ALRC) religious freedom inquiry. This consultation should deal with all issues relevant to religious freedom. While the work of the ALRC has narrowed, there is a risk that following the ALRC process, further work (including new legislation (or amendments)) will be required. It would be better for all issues to be dealt with at once rather than requiring revisiting in the future. To illustrate the point, we refer to the amendments required in 2015 to the *Anti-Discrimination Act 1998* (Tas) to ensure the legality of enrolment policies at Catholic schools in Tasmania.

As far as the RDB is concerned, if the ALRC makes recommendations about the operation of the exemptions in the *Sex Discrimination Act 1984*, amendments might be required. Such recommendations (if enacted) could prevent Catholic schools from continuing to operate in a way that is consistent with their Catholic ethos unless enough protection is contained within the RDB.

### **Section 5 Definition of religious belief or activity:**

The NCEC supports the intention of the RDB to apply to all who hold (or do not) religious belief or engage (or do not) in religious activity. However, we are concerned about the inclusion of *lawful* and the risk of unintended consequences.

While understanding the sentiment, the inclusion of *lawful* opens the possibility that religious activity (and even belief) may in future become unlawful because of legislation by states and territories or ordinances by local authorities. In addition, governments might seek to impose unreasonable conditions in contracts and even funding agreements that might have the effect of making the activity of the Catholic school unlawful. These provisions would negate protections under the federal legislation.

The NCEC suggests that the definition of belief or activity in the RDB does not require the word “lawful”. Legislation already exists which criminalises certain activities. The word *lawful* is unnecessary and it should be deleted. Furthermore, section 27 of the RDB ensures that expressions which encourage *serious offences* are not protected. This should be sufficient to achieve the government’s aims (see explanatory notes page 5) or amended to ensure that it does.

### **Section 10: Religious bodies may act in accordance with their faith**

The principle underpinning section 10 of the RDB is welcome. The NCEC acknowledges the support of the federal government and the expression in the RDB of religious freedom as a positive rather than a negative right. The broad statement that religious bodies do not engage in discrimination *by engaging... in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings* of their religion is welcome. However, the wording of the clause is a concern.

The stated aim of the RDB is to operate as a shield or protection for religious bodies including schools. In complaints handling processes, the extent to which this shield or protection could be relied upon will depend in large part upon the interpretation by Courts and Commissions. Utmost care must be taken to ensure that any legislation is drafted in such a way that interpretations are consistent with the aims and objectives of the RDB and protections are available to Catholic schools.

We have reviewed the explanatory notes that accompany the RDB. In respect of schools, we are concerned that some parts of the notes suggest that section 10 is to be interpreted narrowly on an “all or nothing” basis. This does not provide our schools with the flexibility they require. It is suggested in parts of the notes that the conduct protected must be of an *intrinsically religious character* (paragraph 177) to be *reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a particular religion*. Is this the intention of section 10?

In other parts of the notes (paragraph 167), it is suggested that section 10(2)(a) will capture schools currently captured by section 38 of the *Sex Discrimination Act 1984*. This is not clear to the NCEC given the current drafting of section 10.

In a Catholic school context, the values of the Gospel underpin all aspects of the school even the day to day operational matters. Imprecise drafting of section 10 (and the explanatory notes) may risk a secular authority viewing standard operational conduct at a Catholic school as not being in

accordance with the *doctrines, tenets, beliefs or teachings* of the Catholic Church because the conduct is not of an *intrinsically religious character*. In this case protections under the RDB would not be available.

For example, Catholic schools employ some staff who are not baptised as Catholics. In common with all staff, non-Catholic staff are required to be supportive of the teachings and mission of the Catholic Church, act as role models to students and do nothing that would undermine the transmission of those teachings. On a narrow reading of section 10, a secular authority may regard certain employment decisions as outside section 10 even though such decisions are vital to ensuring that a Catholic school operates as a Catholic school.

Another example is a decision by a school to decline to hire out a school facility for a public purpose which is contrary to the mission or ethos of a Catholic school. This decision might be seen by a secular authority as operational and therefore on a narrow reading, not protected by section 10. Catholic schools do not see such decisions as just 'operational'. Ensuring that school facilities are only used for purposes consistent with the ethos and mission of a Catholic school are vital to ensuring the Catholic identity of the school.

Additionally, the inclusion of the requirement in section 10 that the conduct be regarded as "reasonable" invites Courts or Commissions to determine what is and is not a "reasonable" application of religious faith. This is a significant concern to the NCEC and risks imposing a secular test of a religious doctrines, tenets, beliefs or teachings. With respect, the determination of the limits of religious faith is outside the competence of the judiciary.

To avoid uncertainties and the involvement of schools in unnecessary and costly litigation, the NCEC suggests that consideration be given to amending section 10 of the RDB to include:

1. In addition to *doctrines, tenets, beliefs or teachings* the words *or for a religious purpose* be included in section 10.
2. A test for "reasonableness" that is determined by reference to a reasonable adherent of the relevant religious faith.
3. In respect of *conduct* in section 10, it be defined to include but not limited to:
  - a. Teaching activity that includes teaching in accordance with particular doctrines, tenets and beliefs of the school; or
  - b. Setting school rules and standards of behaviour; or
  - c. Employment matters; or
  - d. The enrolment (or continuing enrolment) of students; or
  - e. The hiring out of facilities for activities which are known to be in contravention of the particular doctrines, tenets, beliefs, teachings, evangelising mission and ethos.

### **Final comments**

The focus of the NCEC's submission has been limited to those sections in the RDB which relate to schools. If the matters referred to above (particularly around section 10) are not adequately covered in the final legislation, our schools may need to rely upon the other provisions in the RDB to avail themselves of protection. The sections that would concern our schools include:

- Section 18: Education
- Section 31(2): Inherent requirements
- Section 41: Statements of belief in particular some of the qualifications in section 41(2).

The ACBC has included comments about these sections in their submission to this consultation. As noted above, the NCEC supports and endorses the ACBC submission and also reserves the right to provide additional comment during this consultation.

The NCEC looks forward to working constructively with all to achieve this important reform. Please contact us on the details below should you require further information or clarification of this submission.



**National Catholic Education Commission contact details**

Should you have any further queries in relation to this submission, please contact:

**Jacinta Collins** Executive Director

**Telephone:** 02 8229 0800

**Email:** [jacinta.collins@ncec.catholic.edu.au](mailto:jacinta.collins@ncec.catholic.edu.au)

**Patrice Daly** Policy Advisor

**Telephone:** 02 8229 0800

**Email:** [patrice.daly@ncec.catholic.edu.au](mailto:patrice.daly@ncec.catholic.edu.au)



## ENDNOTES

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<sup>i</sup> For more information about the NCEC and Australian Catholic schools see <https://www.ncec.catholic.edu.au/>

<sup>ii</sup> Pope Paul VI Declaration on Religious Freedom *Dignitatis Humanae*. Available at: [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)

<sup>iii</sup> Congregation for Catholic Education (1997) *The Catholic School on the Threshold of the Third Millennium*. Available at: [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_27041998\\_school2000\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_27041998_school2000_en.html).

<sup>iv</sup> Pope John Paul II *Apostolic Exhortation Ecclesia in Africa*. Available at: [http://w2.vatican.va/content/john-paul-ii/en/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_14091995\\_ecclesia-in-africa.html](http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_14091995_ecclesia-in-africa.html)

<sup>v</sup> A more detailed explanation about Australia's Catholic schools is available in *Australian Catholic Schools: Why we have them and what they aim to achieve*. Available at <https://www.ncec.catholic.edu.au/advocacy/submissions?limit=15&limitstart=15>

<sup>vi</sup> For a comprehensive discussion on religious liberty in the context of religious schools see Greg Walsh (2015): *Religious Schools and Discrimination Law*. Central Press, Sydney.

<sup>vii</sup> Speech delivered by the Attorney General, Christian Porter MP on 29 August 2019. Available at: <https://www.attorneygeneral.gov.au/Media/Pages/religious-discrimination-bill-speech-29-aug-2019.aspx>