

5 January 2022

Submission to the Senate Legal and Constitutional Affairs Legislation Committee regarding Religious Discrimination Bill 2021 and related bills

The National Catholic Education Commission (NCEC) offers this submission to the Senate Legal and Constitutional Affairs Legislation Committee regarding Religious Discrimination Bill 2021 and related bills.

This submission should be read jointly with the submission made by the Australian Catholic Bishops Conference (ACBC) which is also relevant to Catholic schools. Catholic Education supports and endorses the ACBC submission and has limited our comments in this submission to those parts of the Religious Discrimination Bill 2021 and related bills that apply to education.

The Committee can also refer to evidence given by NCEC Executive Director The Hon Jacinta Collins and Deputy Director Ms Sally Egan at the recent Joint Parliamentary Committee on Human Rights Hearing on 21 December 2021 for further information.

The NCEC is the peak body for Catholic Education in Australia and is responsible for the national coordination and representation of 1,755 Catholic schools and school authorities. The NCEC was established in 1974 by the ACBC through the Bishops Commission for Catholic Education (BCCE).

In presenting this submission, Catholic Education notes this is now our fifth (5) submission addressing religious freedom in recent years.

Additionally, the ACBC will have made ten (10) submissions, attended four (4) hearings and participated in the Expert Panel on Religious Freedom and the Religious Freedom Roundtable since 2015.

Given the importance of this issue for Australians who come from a faith background, another two inquiries to consider the legislation dampens the confidence in this process and delays the introduction of laws to protect the religious freedom of Australian citizens.

This submission is divided into four sections.

1. The role of Australian Catholic schools - their distinctive nature and characteristics and the role of Catholic schools as an education provider
2. Principles regarding freedom of religion and the mission and evangelising role of Australian Catholic schools
3. Crucial elements that Catholic Education believes should inform and underpin legislation which seeks to protect the religious freedom of Australian Catholic schools to continue to operate as Catholic schools
4. Response to the proposed legislation:
 - The [Religious Discrimination Bill 2021](#)
 - The [Religious Discrimination \(Consequential Amendments\) Bill 2021](#)
 - The [Human Rights Legislation Amendment Bill 2021](#)

In summary, Catholic Education supports:

- The inherent dignity of the human person irrespective of personal attributes, values or beliefs and their inalienable right to freedom, while supporting the common good
- The introduction of proactive Commonwealth legislation to ensure religious rights are protected in the same way as other rights in Australia and, at the same time, ensuring a fair and reasonable balance with other protected rights
- The codification of the universal right of freedom of religion to address this gap in Australian legislation and the harmonisation of religious freedom legislation across Australia
- Australian governments should respect and protect the right of parents who choose to send their children to a faith-based school where they will be taught in accordance with their religious beliefs and values
- The right of faith-based schools to operate according to their religious beliefs, values and teachings
- In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate based on an individual's personal attributes

1. The role of Australian Catholic schools

Catholic Education in Australia has been operating since 1820 and officially celebrated our Bicentenary in 2021. Australia's 1,755 Catholic schools enrol over 777,000 students and employ over 100,000 teaching and non-teaching staff.

Australian Catholic schools are universal in their reach and open to all families who seek a Catholic Education. Our schools welcome students from a range of backgrounds including an increase in Aboriginal and Torres Strait Islander students (up 168% since 2000). Students with disability represent around 19% of the student population and 40% of students attending Catholic schools experience socio-educational disadvantage.

Catholic schools are located in nearly every major town and city across Australia with almost 40% in regional, rural and remote communities.

Faith-based schools are significant providers of education in Australia. The first 'official' Catholic school was opened in 1820 in Hunter Street, Parramatta and taught 31 students - seven of whom were Protestants. By 1833, there were 10 Catholic schools in Australia.

The growth in Catholic schools is a considerable achievement given that for over a century they were entirely funded by parents and local parish communities. It was the Catholic parents and families who built, and taught, in our earliest schools because of their desire for a faith-based education for their children.

Approximately 30% of Australian students are educated in faith-based schools. Australian 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 a significant contribution to the educational, moral and social fabric of this nation. Our schools ensure that parents can choose an affordable education that is consistent with Catholic beliefs, values and teachings. Catholic schools are committed to educational excellence and are underpinned by charisms of prayer, witness, catechesis, social justice and pastoral care.

Findings from a recent survey shows Catholic schools are the most highly regarded sector, with 87% of Catholic school parents rating them as excellent or good. i

On the specific question of whether religious schools should be “entitled to require employees to act in their roles that uphold the ethos and values of that faith and the school should be free to favour hiring employees who share these values”, 82% of Catholics, 79% of Catholic school parents and 63% of the general population were supportive. ⁱⁱ

2. Freedom of religion and Australian Catholic schools

To assist with this consultation, Catholic Education outlines below some general principles on freedom of religion 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. Freedom of religion 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. Freedom of religion 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.

Catholic Education endorses these international principles.

2. Catholic Education supports the indivisibility and universality of human rights and their equal status in international and local law, and the principle that every person is free and equal in dignity and rights.

When marking the 50th anniversary of the [UN Declaration of Human Rights](#), Pope John Paul II called for a collective examination of conscience. He said “the tendency of some to choose one or another right at their convenience, while ignoring those which are contrary to their current interests occurs too frequently. Others do not hesitate to isolate particular rights from their context in order to act as they please, often confusing freedom with licence, or to provide themselves with advantages which take little account of human solidarity”. ⁱⁱⁱ

3. In a free Australia, Catholic Education believes society can support a range of views and beliefs and the rights of individuals to gather and associate based on those common views and beliefs.

The right to freedom of association has been an enshrined part of Australian industrial relations and fair work policy and practice over many decades. It protects the rights of all people to voluntarily associate on common values and goals – it’s these protections that underpin trade unionism. Religious rights need the same protections.

Parents and families of students and staff, who share the same religious beliefs, should have the right to gather and associate for the purposes of education, formation and worship in a sympathetic and supportive environment. For Catholic schools this means preferencing the enrolment or employment of students or staff who are Catholic, or who are willing to support and share in the ethos and mission of the school.

4. Catholic Education also recognises that the right to freedom of religion is not absolute and legal restrictions may sometimes be necessary to protect the freedoms of others. To be valid, such restrictions should be principled, necessary and universally applied so as not to diminish the importance of some rights over others. Restrictions that do not balance the rights of all in a pluralist society are unjust and should not be supported.

5. 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. ^{iv}

6. Australian 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. [v](#)

7. 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 places of *evangelisation*, of complete formation, of inculturation, of apprenticeship in a lively dialogue between young people of different religions and social background. [vi](#)

It is worth defining what the Catholic Church means by *evangelisation*. It is not about proselytising, forcing or inducing people to a particular religious belief or teaching, *evangelisation* simply means to "live by and share the Good News". [vii](#)

In the context of the Catholic school, this means inviting families and their children into a personal journey of faith through, not only religious education, but through participation in the spiritual life of the school. As Pope Francis states:

"Religious freedom certainly means the right to worship God, individually and in community, as our consciences dictate. But religious liberty, by its nature, transcends places of worship and the private sphere of individuals and families. Because religion itself, the religious dimension, is not a subculture; it is part of the culture of every people and every nation." [vii](#)

8. Australian Catholic schools do not stand apart from other educational providers. Our schools have always operated in a pluralist society and are open to all who support and seek to share in the mission of the Catholic school including those from no religious background.

9. The mission of Australian 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 quality learning and living a Christian life. 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 Catholic schools are places of pastoral ministry. All present within a Catholic school, in particular the staff who choose to be employed, are expected to be sympathetic to, supportive of, and reflect in their role, the life and work of the Church.

10. Catholic Education seeks 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 beliefs, values, teachings and doctrines.

11. Governments should respect and protect the freedom of religion of parents to choose to send their children to a school where they will be taught in accordance with their religious convictions.

3. Freedom of religion to operate as Catholic schools

In 2021, Australian Catholic schools celebrated 200 years since their establishment in Parramatta, New South Wales. The fact that one in five children today are educated in a Catholic school is a testament to the desire of families to seek a faith-based education and the regard in which Catholic schools are held.

The Australian Catholic Bishops' pastoral letter, [200 Years Young](#), released in the bicentennial year, recognises the challenges for Catholic schools of a changing and ever-increasingly secularist society in maintaining a Catholic identity and mission. [ix](#)

Part of this challenge is for Catholic schools to retain a 'critical mass' of Catholic students and staff in our schools, even as we welcome those from other religious backgrounds or none.

In section 2 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. x

In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate based on an individual's personal attributes (e.g. race, culture, sexual orientation, gender identity, disability, marital status, parental status, pregnancy etc).

This is not what the Religious Discrimination Bill 2021 is legislating. It does not give schools the right to discriminate against people based on their personal attributes, and Catholic schools are not seeking to do this.

The proposed legislation simply enables Catholic schools to preference the employment or enrolment of people of the Catholic faith, and those willing to support the ethos and mission of their schools. This is reasonable and fair in a free, pluralist society.

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 in recognising the dignity of each individual as a fundamental principle.

There is no solid evidence to show that the proposed legislation will lead to direct or indirect discrimination of people based on their personal attributes (e.g. sexual orientation).

Anecdotal reports of discrimination don't allow for the veracity of such claims to be tested to identify whether they are a true incidence of discrimination or a matter in breach of a school's code of conduct. Those matters could be in relation to conduct that is inconsistent with the mission and ethos of the religious school, but they might also be in relation to the breach of school policies or practices (e.g. curriculum and pedagogy, child safety, work health and safety requirements, etc).

Despite the recent introduction of amendments to the Victoria Equal Opportunity Act that were designed to limit the ability of faith-based schools to continue to operate according to our ethos, State Attorney General, Jaclyn Symes acknowledged that discrimination by government-funded religious providers is not an issue and that the Victorian amendments are 'symbolic' in nature.

"The government acknowledges that it is not aware of discrimination by religious providers in the provision of government funded goods and services. And, religious service providers generally do not discriminate in how they provide privately funded secular services, such as welfare and housing services. As such, the changes are not expected to have significant impacts for religious service providers. However, the changes have great symbolic importance and ensure government funding cannot be used in a discriminatory manner in the future." xi

At the recent Parliamentary Joint Committee on Human Rights public hearing on 21 December 2021, the National Catholic Education Commission was asked to respond to "a dozen statements" from teachers employed at Catholic schools who claimed to have lost their jobs because of their sexuality. The accounts were said to be included in [Equality Australia submission](#) to the Committee.

Firstly, Equality Australia's submission does not present a dozen accounts from Catholic school staff nor is the submission "signed by thousands of people with personal stories from the signatories" as indicated by Senator Janet Rice at the hearing. There appears to be only one account from a "former Catholic school teacher" providing a second-hand report of the alleged treatment of a pregnant, unmarried, heterosexual teacher.

The small number of accounts contained in the Equality Australia submission are not able to be verified because they are not formal complaints, are anonymous, rely on second-hand claims or are opinion. As NCEC Executive Director Jacinta Collin's noted during the hearing, it is impossible to respond to these types of claims in an accurate or meaningful way.

While there is a lack of solid evidence to test the veracity of claims of discrimination on the basis of personal attributes in faith-based schools, unfortunately that does not mean Catholic schools do not

have to manage local examples of bigotry or intolerance at times, as would be the case in all schools, not just faith-based schools.

As noted above, the human dignity of each individual lies at the heart of Catholic social teaching which informs our pastoral approach in dealing with local intolerance or any issue that might arise regarding the employment and conduct of staff or the enrolment of students. Our schools and staff work hard to eliminate intolerance and to educate and foster inclusive, welcoming and hospitable communities.

As with all human rights legislation, there may be exceptional examples where the protection of rights is not balanced in a fair or reasonable way. This is what case law helps to establish. However, this should not constitute a basis for undermining Australia's commitment to freedom of religion as outlined in Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

The use of anecdotal reports of discrimination appears to underpin the desire to introduce unreasonable limitations on how faith-based schools may operate in Australia. Catholic Education is concerned about the potential for unintended consequences and unnecessary lawfare resulting from inconsistent legislation or regulation in the area of religious freedom.

For example, the Victorian amendments to the Equal Opportunity Act are a serious over-reach by the Victorian Government into the rightful freedoms of faith-based organisations in that state. This has the potential to result in a 'tiered' system of religious rights across Australia narrowing the freedoms for faith-based schools in some jurisdictions.

The lack of harmonisation also opens the door to unnecessary lawfare against faith-based schools resulting 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.

Regrettably, the protection of freedom of religion in Australia has been used unfairly as a political football in recent years with the recent incongruity between federal and state Labor Party positions on this issue an obvious example.

The Commonwealth legislation must be enacted with bipartisan support to ensure freedom of religion is supported universally and equally in this nation.

4. Response to the proposed legislation

Section 4 outlines Catholic Education's response to the draft legislation and should be read jointly with the comments in the ACBC's submission which applies to Catholic schools.

Part 1 – Preliminary

In keeping with the principles outlined above, particularly those regarding freedom of religion as recognised in international treaties and agreements, Catholic Education endorses the Objects of the Bill as set out in Clause 3.

In particular, Catholic Education strongly supports the inclusion of Subclause 3(2) which provides that in giving effect to the objects of the Bill, regard is to be had to the indivisibility, universality, interconnectedness and interdependence of human rights, their equal status without hierarchy in international law, and the principle that every person is free and equal in dignity and rights.

Importantly, in the view of Catholic Education, the inclusion of this subclause rightly highlights the presence of freedom of religion within these recognised human rights.

Similarly, Catholic Education welcomes the recognition in Clause 4 that conduct by religious bodies in some circumstances, in seeking to exercise the right to freedom of religion and act in accordance with their faith, is not discrimination.

Part 2 – Conduct etc. that is not discrimination

Clause 7 provides that certain conduct engaged in by religious bodies, acting in accordance with their faith, is not discrimination under this Bill. The clause sets out certain circumstances under which a religious body's conduct is not discrimination and therefore not unlawful under the Bill in any area of public life, including education.

This approach outlining religious freedom in a positive manner, rather than by exemption, is very welcome.

While being strongly supportive of the provision in Clause 7, Catholic Education highlights the example provided under Note 1 of Subclause 7(1), in which all staff and students at a Catholic school would be required to be practicing Catholics, is not in line with the reality of Catholic schools. As noted above, Catholic Education is open to all in the community willing to support the ethos and mission of the school, including those from other religious traditions and those from no faith background. This continues to be reflected in the religious diversity represented in our staff and student populations, which has been a feature of Catholic schools since our earliest days.

At the same time, Catholic Education respects and supports the religious freedom of parents who wish to send their children to a Catholic school where they will be taught in accordance with their Catholic beliefs, values, teachings and doctrines, and employs staff who choose to support the mission, ethos and values of Catholic schools.

Catholic Education believes it is also important that we retain a 'critical mass' of Catholic students and staff in our schools, even as we welcome those from other religious backgrounds or none. Catholic Education therefore strongly welcomes and supports the provisions in Subclauses 7(3) and (5) that religious bodies, including educational institutions, are able to preference persons of the same religion as the religious body. Such a provision accords with community expectations, freedom of religion, natural rights and common sense.

In welcoming all to be employed or enrolled in Catholic school communities, Catholic Education does not and is not seeking to discriminate against any staff or student based on their personal attributes. As is the case for other educational institutions across Australia, whether government or non-government, Catholic schools expect students and staff to be sympathetic to and supportive of the mission and ethos of the school, and to comply with a reasonable code of conduct and other such relevant policies. As with other educational institutions, Catholic schools may need to address conduct which is not in keeping with these policies and does this pastorally and in a way that respects the human dignity of each person.

Catholic Education holds no significant concerns regarding Subclause 7(6)(a) which provides that conduct engaged in by an educational institution must be in accordance with a publicly available policy. Catholic Education agrees this requirement adds to transparency and certainty for Catholic educational institutions, those who choose to join a Catholic school community and also for the wider public. Many Catholic schools across Australia would already have publicly available policies outlining the school's religious beliefs and activities and related expectations of the school community.

However, further clarity is required about how this provision will operate in practice. As noted above, Catholic Education currently employs over 100,000 staff in teaching and non-teaching positions across Australia. While it is clear from Subclause 7(6)(a) and the associated paragraphs in the Explanatory Memorandum that this provision is intended to provide information for current and prospective employees, greater clarity is required for how the publicly available policy will operate in practice for existing employed staff.

Further clarity of the practical operation of Subclause 7(7) is also required. While Catholic Education does not, in principle, object to the Minister determining the requirements for the provision of a publicly available policy, neither the Bill nor the Explanatory Memorandum are clear regarding the breadth of the Minister's power under Subclause 7(7) or provide examples of how this power will operate in practice.

Catholic Education believes that while it may be reasonable for the Minister to have the power to determine the manner in which the policy is made publicly available, it would not be legitimate for the Minister to determine the content of the policy. Catholic Education recommends that the Bill should be amended to ensure that the powers of the Minister in this regard are limited. At the very least, examples of how the Minister could exercise this power should be provided for greater clarity, transparency and certainty.

Clause 11 - Conduct in relation to employment by religious educational institutions — overriding certain State and Territory laws

Catholic Education is strongly supportive of the inclusion of Clause 11 in the Bill which overrides certain state and territory laws concerning conduct by religious educational institutions in relation to employment.

As noted above, Catholic Education holds no significant concerns that conduct engaged in by an educational institution must be in accordance with a publicly available policy and strongly supports the ability of religious educational institutions to preference persons of the same religion. Subclause 11(1) provides for Catholic schools to employ according to their mission, values and ethos and accords with common sense.

Catholic Education has significant concerns that the recently enacted *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* limits the ability for Catholic educational institutions in Victoria to preference the employment of staff who are Catholic and/or are willing to support the ethos and mission of the Catholic school. Catholic Education's concerns regarding the Victorian legislation extend, not only to the content and the practical application of the Act, but also to the process in which it was pushed through the Victorian Parliament with no Parliamentary inquiry and little substantial or meaningful consultation with faith groups.

The ALP (Vic) Party and parliamentary party processes have also raised concerns. Reflection upon the current ALP (Vic) policy platform highlights the wrongheaded approach. It outlines that Labor "would require all schools to employ teachers without discrimination based on inherent characteristics while upholding the right of all schools to choose teachers who respect their values".

Not only does the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* violate practical realities, natural rights and common sense, it is also a clear example of legislative over-reach by government and an intrusion by government into the affairs of religious bodies. This legislation goes further in its limitation of the ability of faith-based schools to operate in accordance with their beliefs, than that of any other anti-discrimination legislation in any jurisdiction in Australia.

Contrary to what has been claimed by the Victorian Government, the amendments introduced by the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* create a narrower definition of 'inherent requirement' than was present in the *Equal Opportunity Act 2010 (Vic)* and overturned in 2011. Similarly, the amendments go beyond the Bill which was introduced but defeated by the Victorian Parliament in 2016 (*Equal Opportunity Amendment (Religious Exceptions) Bill 2016*).

As highlighted above, even the Victorian Government acknowledged that it is not aware of discrimination by religious providers which the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* seeks to remedy. The legislation unfairly targets religious bodies and faith-based educational institutions such that they may be forced to violate their inherent beliefs and values in managing employment matters. The *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* clearly does not strike a balance between fundamental human rights.

The *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* includes a strict provision which requires that any staffing decision based on religious beliefs must be justified by demonstrating that the 'inherent requirements' of the position. This provision completely misunderstands the wholistic nature of religious belief and activity, the fundamental identity and purposes of religious educational communities as well as what is reasonable and fair in a free, liberal, democratic, multicultural and pluralist society.

Member of the Victorian Government and highly experienced Catholic school teacher and principal, Mr John Kennedy MP outlined during the parliamentary debate an optimistic and very generous interpretation of the 'inherent requirement' provision when he suggested that it would enable a Catholic school to employ a 'critical mass' of teachers who are adherents to the Catholic faith. Unfortunately, the Victorian Attorney-General has failed to confirm such an interpretation in any way.

It is worth noting that the *Equal Opportunity (Religious Exceptions) Bill 2021 (Vic)* does not place similar restrictions on other groups or organisations, such as political parties, who are freely able to associate and manage their own employment matters and day-to-day operations.

The Victorian Government has claimed that the provisions introduced by the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* are similar to those which have existed in Tasmania for over a decade. This claim is clearly false. As opposed to the extremely narrow 'inherent requirement' of the Victorian legislation, the *Anti-Discrimination Act 1998 (Tas)* provides an exception for a 'genuine occupational qualification' and "in order to enable, or better enable, the educational institution to be conducted in accordance" with its religious "tenets, beliefs, teachings, principles or practices".

As outlined recently by Fr Frank Brennan SJ AO, who Chaired the National Human Rights Consultation Committee established by the Rudd Government (2008) and served as a member of the Ruddock Expert Panel on Religious Freedom (2017-18), the exception provided for in the Tasmania legislation is very different from what is now the situation in Victoria. [xii](#) The Victorian legislation goes further than the *Anti-Discrimination Act 1998 (Tas)* in its restriction on the ability of faith-based schools to operate in accordance with their beliefs. As previously noted, the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* goes beyond any other anti-discrimination legislation in any jurisdiction in Australia.

Most importantly, the Victorian legislation creates a legal situation whereby a state tribunal or court will be required to determine the internal 'inherent' religious beliefs and requirements of an educational institution and whether the action of the school is reasonable and proportionate based on the circumstances. Not only does the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* represent an intrusion by government into the affairs of religious bodies, it provides no indication of the basis on which a state tribunal or court should determine what is 'reasonable and proportionate'.

Archbishop of Melbourne, Most Rev Peter A Comensoli has argued that faith-based schools have a "right to practice their faith without new administration burdens and pressures". The inherent requirement test is "serious intrusion into the expression of faith and an unnecessary instrument of power". [xiii](#)

The Victorian legislation will grant power to a government appointed commissioner or a court to ultimately determine whether particular staffing roles carried an 'inherent' religious requirement or not. For the 500 Catholic schools in Victoria, this will mean employers will have an extra burden of administration placed on them and leave them vulnerable to a decrease in the role and importance of faith in the work they carry out.

The Victorian legislation certainly does not accord with the position of the Federal Australian Labor Party as expressed by Senator Penny Wong in response to the *Discrimination Free Schools Bill* proposed by the Greens in 2018. As Senator Wong stated:

"We respect the right of parents to send children to the school of their choice and to have their children educated in accordance with their religious convictions. We respect that many parents choose religious schools because they want their children to be grounded in the identity and mission of a particular faith. We also respect that religious schools, and parents of students, are entitled to require employees to act in their roles in ways that uphold the ethos and values of that faith, and that this requirement may be taken into account when a person is first employed and in the course of their employment." [xiv](#)

This is not a position which is supported in the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)*.

Claims that the provisions of the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* have been well canvassed since 2010 are simply inaccurate and fly in the face of ample evidence of the lack of substantial or meaningful public consultation or discussion undertaken by the Victorian Government with faith groups.

The Victorian Government's admission that this legislation is "symbolic" in nature appears to single out faith-based schools and diminish the rights of religious bodies. Without clear direction from Commonwealth legislation, faith-based schools will be exposed to unnecessary discrimination lawfare to justify employment decisions.

In their [submission](#) to the Joint Parliamentary Committee on Human Rights, Equality Australia apply an extremely narrow definition of 'inherent requirement' to assert the importance of restricting the ability of faith-based schools to operate according to their religious beliefs, values and teachings by preferencing the employment of staff who are willing to support the ethos and mission of the school. However, Equality Australia have not provided a cogent argument for why their narrow definition should be preferenced.

The comments of the majority in the identified Australian case law on 'inherent requirements' (*X v Commonwealth* [1999] HCA 63) do not support a narrow and restrictive characterisation for the phrase. Catholic Education remains concerned that the *Equal Opportunity (Religious Exceptions) Act 2021 (Vic)* adopts an unsupported narrow definition and the Victorian description may become a precedent for other Australian jurisdictions. The views of the majority in *X v Commonwealth* indicate that a more detailed examination of the issues is required before such a construction is accepted as the standard for subsequent legislation to follow.

The claim that any staffing decision based on religious beliefs must be justified by demonstrating the 'inherent requirements' of the position completely misunderstands the wholistic nature of religious belief and activity, the fundamental identity and purposes of religious educational communities, as well as what is reasonable and fair in a free, pluralist society. It also neglects the importance of a 'critical mass' of staff to support the faith formation of students, which is a feature inherent to Catholic Education.

Applying this kind of narrow test to employment matters in faith-based schools creates a potential legal situation whereby a state tribunal or court will be required to determine the 'inherent' religious beliefs and requirements of an educational institution and represents an intrusion by government into the affairs of religious educational bodies.

Catholic educational institutions are inclusive and welcoming places, not despite but *because* they are Catholic organisations. Our religious beliefs and values underpin every aspect of the educational work we do, especially in our commitment to educating the most vulnerable, including Aboriginal and Torres Strait Islander students, students with disability and communities experiencing socio-educational disadvantage, as well as our efforts to contribute to a more just and cohesive society.

There are a small number of active voices in the community, antagonistic to the protection of religious rights, who wish to push Australia to adopt a monoculture of thought under the banner of diversity. By seeking to exclude the internationally-recognised right of freedom of religion from the suite of rights Australia protects, is in itself discriminating against people who hold religious views and is the antithesis of diversity.

This push has led to a serious over-reach in the Victorian Government's legislation limiting the freedom of faith-based schools. Catholic Education fears this model of legislation may set a precedent for other jurisdictions. Given this legislative context, Catholic Education strongly welcomes and supports the inclusion of Clause 11 in the Bill which seeks to correct governmental over-reach in some jurisdictions.

Part 3 - Concept of discrimination on the ground of religious belief or activity

Part 3 of the Bill sets out the concept of discrimination on the ground of religious belief or activity. Clauses 13 and 14 provide for discrimination on the ground of religious belief or activity to be defined to include both direct discrimination and indirect discrimination.

Catholic Education notes that in keeping with general principles of anti-discrimination law, the legal and evidential burden of proof would rest with the respondent as the party seeking to establish the non-discrimination or the reasonableness of the particular act. While acknowledging that this principle is a feature of anti-discrimination law, Catholic Education would welcome the inclusion of a statement in the Bill to explicitly recognise the principle. Such an explicit statement would be in accordance with other anti-discrimination legislation, such as the *Sex Discrimination Act 1984*.

Final Comments

The focus of Catholic Education's submission has been limited to those sections in the Religious Discrimination Bill 2021 and related bills that are related to schools and school systems, specifically:

- Part 2 – Conduct etc. that is not discrimination
- Clause 11 – Conduct in relation to employment by religious educational institutions—overriding certain State and Territory laws
- Part 3 – Concept of discrimination on the ground of religious belief or activity

As noted above, the National Catholic Education Commission supports and endorses the Australian Catholic Bishops Conference submission and also reserves the right to provide additional comment during this consultation.

Catholic Education looks forward to working constructively with all to achieve this important reform.

ENDNOTES

- i. Finding from a large community issues survey on a range of issues from school funding to religious freedom undertaken by a respected national pollster, John Utting Research (November 2021).
- ii. Ibid.
- iii. Pope John Paul II, Message To His Excellency Mr Didier Operti Badán, President of the 53rd Session of the UN General Assembly (1998) Available at https://www.vatican.va/content/john-paul-ii/en/speeches/1998/november/documents/hf_jp-ii_spe_19981130_50th-onu.html
- iv. 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
- v. 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
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