



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

Bishops Commission for Life, Family and Public Engagement

21 December 2021

The Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

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Dear Sir/Madam

Religious Discrimination Bill 2021 and related bills

This submission from the Australian Catholic Bishops Conference (**the Conference**) on the *Religious Discrimination Bill 2021 and related bills (RDB)* is prepared by 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 BCLFPE is one of several commissions established by the Conference to address important issues both within the Church and in the broader Australian community. The BCLFPE has responsibility for religious discrimination legislation.

More than 60 per cent 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, providing approximately 10 per cent of health care services in Australia. It provides social services and support to more than 450,000 people across Australia each year. There are 1,755 Catholic schools with more than 100,000 staff providing education to more than 770,000 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.

Summary

The Conference welcomes the *Religious Discrimination Bill 2021 and related bills (RDB)* as positive and modest steps forward to limit religious discrimination in Australia. Anti-discrimination laws

rightly protect people from being treated unjustly on the basis of personal characteristics, and it is important that religion be recognised in Australia as one of these characteristics.

While it is neither the intention nor the effect of the RDB to protect religious freedom comprehensively, and it has nothing to say about freedom of conscience, protection from discrimination because of one's beliefs is at least one aspect of the religious freedoms that governments ought to protect.

We consider that in general terms, the Explanatory Memorandum to the RDB properly states how the Bill is compatible with Australia's international human rights obligations at the federal level. However, Australia stills falls well short of protecting the human right to religious freedom, particularly in certain States and Territories, and the RDB does not go far enough to ensure that, within the limits of federal legislative power, this fundamental human right is protected.

In the last decade, studies and reports have been commissioned that reveal that religious discrimination is a problem in Australia, especially for minority faiths. These studies reveal that up to 1 in 4 Australian children have been on the receiving end of discrimination on the basis of their religion.¹ We note the work of members of other faiths in bringing awareness to the discrimination that people of faith suffer in this country. We also note the increased governmental restrictions on the ability of ability of Catholics and other people of faith to profess and practise the teachings of their faith publicly, such as the Victorian *Equal Opportunity (Religious Exceptions) Amendment Act 2021*. This conflicts with Australia's international human rights obligations, and for this reason we welcome the intent of clause 11 of the RDB and the contingent amendment contained in the consequential provisions Bill.

Across its many varied entities and works, including in our many schools, the Catholic Church is a substantial employer and has many staff who may not share our religious faith but, importantly, see and support the value of our mission to serve others. People 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.

Catholic schools want to continue to be able to teach the Catholic faith. This faith-based education is a vital part of the identity and mission of Catholic schools.

Catholic schools do not expel students or sack staff simply on the grounds of sexual orientation, gender identity or any other protected status. Suggestions that they do have gravely misrepresented and undermined the good work of Catholic schools and unnecessarily caused anxiety in the community. Where there is a discipline issue or a disagreement, principals or other senior members of staff will work to try to resolve the issue pastorally.

¹ M.Z. Sharif et al. (2021), The association between experiences of religious discrimination, social-emotional and sleep outcomes among youth in Australia, *SSM – Population Health*, available at <<https://www.sciencedirect.com/science/article/pii/S2352827321001580>>

In short, Catholic institutions want the capacity to employ and manage employment on the basis of mission.

This is not simply a right being exercised by Catholic institutions and should not be viewed as such. The ability of Catholic institutions to uphold their ethos through employment and enrolment policies is more appropriately described as the manifestation of the freedoms of religion and association of the individuals who use the services of these institutions. People often seek services provided by Catholic institutions because of their Catholic culture and failing to protect institutional freedoms results in an undermining of the rights of individuals.

We note the RDB does not displace the operation of other Commonwealth anti-discrimination laws and does not provide a basis for discrimination on the grounds of a protected attribute (for example, sexual orientation). It adds a new ground for someone to complain about discrimination without removing the right to complain on other grounds.

Religious beliefs are fundamental to a person's identity and their decisions about how they wish to live their lives. Freedom to hold, express and act on one's religious beliefs as a citizen is fundamental to civilised democratic societies. In aid of this, we commend the RDB.

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

Principles of religious freedom

Freedom of religion is a fundamental human right. Its existence and importance are acknowledged in the Australian Constitution, in the common law, and in international covenants to which Australia is a signatory. Religion is a natural human good that contributes to and fosters the flourishing of the human person and their physical, social, emotional and spiritual wellbeing.²

For these reasons, freedom of religion must not be ignored, treated with embarrassment or suspicion by policy and decision-makers. It must not be read down and so narrowly interpreted that it is reduced to mean nothing more than freedom of worship within the confines of places of worship.

While ensuring that the rights and freedoms of others are protected, governments are also obliged to ensure that freedom of religion and the freedom to manifest religious beliefs in public are recognised and protected by law. Freedom of religion applies equally to participation in religious observances and to the delivery of services by religious people and agencies.

Most people who adhere to a religious belief exercise their religious freedom in the service of the common good. Overwhelmingly they do so in a spirit that respects the rights and liberties of others, and as Australian citizens, they expect in fairness that they will be accorded equal respect in the exercise of their rights to practice and manifest their religious beliefs.

The right to religious freedom is partially enshrined in our Constitution and in international law. Section 116 of the Australian Constitution states: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise

² J.M. Finnis (2011), *Natural Law and Natural Rights* (2nd ed, Oxford University Press).

of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

According to the UN Human Rights Committee, freedom of thought, conscience and religion “is far-reaching and profound. The fundamental character of these freedoms is also reflected in the fact that the freedom to hold a belief cannot be derogated from, even in time of public emergency.”³

The right of religious freedom is also captured in the Universal Declaration of Human Rights (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR):

- “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (UDHR, Article 2)
- “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” (UDHR, Article 18)
- “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” (ICCPR, Article 18(2))
- “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” (ICCPR, Article 18(3))
- “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.” (ICCPR, Article 18(4))
- The right to religious freedom (ICCPR, Article 18) is a “non-derogable” right under Article 4(2), meaning that governments may not act to restrict or suspend this right even in times of public emergency.
- The right to religious freedom is not an absolute or unlimited right. Like many other rights – including the right to be free of unjust discrimination – it must be balanced against the fundamental rights and freedoms of others (ICCPR, Article 18(3)).

Australia would be in breach of international law were these rights and freedoms be insufficiently recognised. This breach would not be vitiated simply because it arose under the law of a State, rather than a law of the Commonwealth.

³ UN Human Rights Committee, *General Comment 22 (48) – The Right to Freedom of Thought, Conscience and Religion – Art 18* (1993), §§ 1, 3, Available at <<https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-thought-conscience-and-religion-or-belief>>

“Freedom of thought, conscience and religion” is not just freedom to worship (important as that is) and not just about protecting the rights of ministers of religion or places of worship (important as that also is). Instead, freedoms of thought, conscience and religion, and consequent freedoms of association, speech, worship and religious practice, are positive liberties essential to human flourishing. Most people of faith are not ministers of religion; most people of faith carry their beliefs with them beyond the church, synagogue, mosque or temple into the choices of their daily lives.

Governments must recognise that when talking about people of faith, they are talking about their own citizens, whether from a Christian, Jewish, Muslim or other faith tradition. Far from being ‘exceptional’, religious believers are in fact the majority of Australians.

Like many other faiths, the Christian faith is not just a private spirituality, restricted to rituals in churches and prayers behind closed doors. The Christian faith is something to be lived publicly in our lives, both with our family and friends and in the broader community. Communities are strengthened when people come together in various projects around shared beliefs, as well as when they respect a similar freedom for others. Limiting respect for religion and for religious freedom to ministers of religion or places of worship is to radically fail to understand the meaning and good of religion.

The Conference contends that, rather than privileging one group over another, adopting binary mindsets, or seeking a victory in a zero-sum game, the focus of lawmakers and the general community should be on the common good. This requires recognition that the assertion of any individual right will sometimes, in practice, conflict with respect for other rights. In such circumstances, the objective of the law should be to take into account the interests of all and strike a fair balance between competing rights so that, for example, the right to be protected from unjust discrimination is not pursued in a way that undermines religious freedom or vice versa.

Religious discrimination laws are needed because Commonwealth law has only recognised religious liberty in exemptions to anti-discrimination legislation and in similar form in the Fair Work Act 2009. When anti-discrimination law was introduced in Australia, exemptions were provided to a wide variety of organisations.

Exemptions have the positive purpose of allowing religious groups to operate in conformity with their beliefs. Yet this system of exemptions gives the wrong impression that religious freedom is a negative, lesser right, rather than a positive, fundamental right.

In the case of educational institutions established for religious purposes, exemptions were provided to ensure the laws did not have the perverse effect of curtailing religious freedom. For example, while it would be unjust in most contexts to exclude a person on the basis of their religious or ethical beliefs, it would be equally unjust to insist that a religious organisation employ a person who was opposed to its religious and ethical beliefs.

To avoid the perception that religious freedom is a lesser right, and recognising that exemptions are often under review, our strong preference is that the law recognise religious freedom as a positive right in religious discrimination law, alongside other rights. The way that the RDB is drafted gives effect to this by making clear that actions by religious bodies, for example 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 federal *Fair Work Act 2009* is to similar effect.

Recent examples of discrimination against people who have a religious faith

There are many Australian examples of discrimination against people who have a religious faith. We are presenting a selection.

According to a report from The Longitudinal Study of Australian Children (**LSAC**), roughly 1 in 20 Australian children has experienced discrimination based on their religion, which was a higher than the rates of discrimination based on disability, mental health, or sexual identity.⁴

A study published in the journal *SSM – Population Health*, and using data from the Speak Out Against Racism (**SOAR**) project, found that 27 per cent of New South Wales and Victorian public school students in 2017 reported experiences of religious discrimination. Experiences of religious discrimination was linked to significant socio-emotional disruption and sleep loss in students. This study found that higher levels of religious discrimination were found in students from minority faiths.⁵ One possibility for the discrepancy in the statistics between the LSAC and the SOAR studies is that people of minority faiths are hesitant to report incidents of religious discrimination to official bodies.

A peer-reviewed study, published in 2019, investigated cases of bias crime in New South Wales. The study defined bias crime as a crime that was motivated by prejudice, bias or hatred towards a presumed characteristic of the victim. The study found that crimes on the basis of religion were the most common types of reported bias crime, with over 40 per cent of reported cases between 2013 and 2016 featuring discrimination based on the victim's religion.⁶

The Executive Council of Australian Jewry has recorded reports of antisemitic discrimination, violence and abuse in Australia. According to their most recent report, in the twelve-month period between October 2019 to October 2020, there were 331 antisemitic incidents in Australia with 188 attacks and 143 threats.⁷

⁴ T. Evans-Whipp, (2021), Teenagers' experiences of discrimination. *Growing Up in Australia Snapshot Series - Issue 1*, (Melbourne: Australian Institute of Family Studies). Available at <<https://growingupinaustralia.gov.au/sites/default/files/publication-documents/lsac-snapshot-1-discrimination.pdf>>

⁵ M.Z. Sharif et al. (2021).

⁶ G. Mason (2019), A Picture of Bias Crime in New South Wales, *Cosmopolitan Civil Societies Journal*, available at <<https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/6402>>

⁷ J. Nathan (2020), *Report on Antisemitism in Australia 2020*, available at <<https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2020.pdf>>

Research headed by Dr Derya Iner on Islamophobia in Australia reported 349 verified incidents of discrimination, harassment and violence against Muslims in the two-year period of 2016-2017. The report found that 72 per cent of victims of anti-Muslim attacks were women.⁸

In 2016 Hobart Archbishop Julian Porteus and the entire Australian Catholic Bishops Conference was required by the Tasmanian Anti-Discrimination Commission to answer a complaint that a document, which respectfully and sensitively expounded Church teaching on marriage and which was distributed to parents of Catholic school students, was discriminatory. The Archbishop was threatened with serious penalties unless this church teaching document was changed. This case was not accidental; the complaint was made following activists encouraging supporters who resided in Tasmania to make a complaint to the Anti-Discrimination Commission⁹. While the case was eventually dropped, it was foreshadowed that similar cases may be brought in the future. The Tasmanian legislation, as interpreted by the Commissioner who allowed this complaint to go forward, is incompatible with Australia's international human rights obligations and offensive to people of faith. For this reason we support the modest provision in clause 12 that addresses this issue.

The Victorian *Equal Opportunity (Religious Exceptions) Amendment Act 2021* is a current and egregious example of legislation that oversteps the appropriate limits of Government involvements in matters of religious belief and practice. Similar legislation which might be introduced in the future would magnify such an over-reach further in other Australian jurisdictions. The Act is an example of discrimination against people who have a religious faith.

Under the new laws, religious bodies and educational institutes will no longer be able to employ staff who hold the same religious beliefs and values unless they can prove that it is an "inherent requirement" of the job. The law grants power to a government-appointed commissioner or a court to ultimately determine whether particular staffing roles carry an "inherent" religious requirement or not. This means that in places like schools, and especially where government funding is attached, employers 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 do. Faith is part of the very make-up and fabric of Catholic services like schools.

The new legislation diminishes the ability of faith organisations to confidently manage employment matters according to their faith and conscience. As a point of principle, this is a serious over-reach of the Government into the rightful freedoms of faith-based organisations in Victoria. Organisations of care and charity, including religious and church agencies, have a right to practice their faith without new administrative burdens and pressures. We urge the federal Parliament to introduce nationally consistent legislation through the *Fair Work Act 2009* which protects the rights of faith-based organisations to maintain their identity and ethos through their employment practices and in so

⁸ D. Iner ed. (2019), *Islamophobia in Australia Report II* (2017-2018), (Sydney: Charles Sturt University and ISRA), available at

<https://researchoutput.csu.edu.au/ws/portalfiles/portal/49094688/36368975_Published_report_final_version.pdf>

⁹ R. Croome. (2015). [Media Release]. Gay students at risk from denigration. Educators who allow distribution violate duty of care. Australian Marriage Equality. Available at: <https://www.australianmarriageequality.org/2015/06/24/media-release-church-school-marriage-booklet-likely-violates-anti-bias-law/>

doing to cover the field in Australian law. We also think the RDB should be clear it automatically prevails over inconsistent State or Territory laws. As a second best, we support the intent of clause 11 as at least providing a mechanism to address the issue.

Catholic organisations are inclusive and welcoming places, not despite, but because, they are Catholic. Across all sectors in Catholic organisational contexts, the introduction of an ‘inherent requirement’ test is a serious intrusion into the expression of faith and an unnecessary instrument of power. It may lead to vexatious claims being adjudicated by a Commissioner or the Courts, neither of which have the competency to define religious matters for believers. The laws would also undermine freedom of association. The Victorian Government has been unable to identify a single problem in Catholic schools with which this legislation is meant to address. The Victorian Attorney General, Jaclyn Symes, said “the government acknowledges that it is not aware of discrimination by religious providers in the provision of government funded goods and services ... However, the changes have great symbolic importance and ensure government funding cannot be used in a discriminatory manner in the future.”¹⁰ Many in the Victorian community are therefore concluding that the Government means to diminish the rights of large religious communities and concurrently target religious minorities.

Schools and parents’ rights

The right of parents to send their children to the school of their choice and be taught in accordance with their religious convictions, must be respected and protected. Parents, of all faiths and none, choose Catholic schools for their children because they expect that this education will be provided by school staff in a manner consistent with the Gospel of Jesus Christ and the teachings of the Church. This goes to the very heart of the identity and mission of the Catholic school.

Fundamental to this mission is that Catholic schools want to maintain the capacity to teach our faith according to our faith tradition, including in matters of religious belief, life, marriage and sexuality.

The freedom of Catholic schools to employ staff that embrace a Christian mission and ethos is essential to ensure our schools are educational communities that express and operate within our faith tradition. 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.

Catholic social teaching uses the enduring principles of the Catholic faith to engage with the changing political and social circumstances of the real world. The fundamental principle for Catholic social teaching is the Christian belief that all human beings are made in the image and likeness of God. This principle serves as the Catholic foundation for relating to the modern world in truth, love, and justice by advocating for the dignity of every individual, the interconnectedness of all human beings and the common good of the whole society. Catholic social teaching seeks to use this foundation to respond to the pressing needs of society, such as helping people in poverty, welcoming the stranger who may

¹⁰ Speech delivered by the Victorian Attorney General, Jaclyn Symes, on 19 November 2021. Available at https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2021/Legislative_Council_2021-11-19.pdf

be a refugee, looking after our natural environment and the human ecology of marriage and family. In this way, Catholic social teaching encompasses the whole experience of human life and promotes a practical vision for human flourishing.

Catholic schools do not impose their beliefs on anyone, nor do they compel anyone to work in Catholic education. We are indeed fortunate that over many years Catholic staff and staff from other religious backgrounds 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 not unreasonable 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.

Religious Discrimination Bill 2021

Clauses 7(7) and 9(7) and 40(3) provide that the Minister may determine the requirements for publicly available employment policies. There does not seem to be any guidance in the Explanatory Memorandum about how this power will be used and whether there are any limits to these requirements. It is unclear if there is any limit to the Minister's power to make requirements about an institution's employment policies (e.g. can the Minister override certain aspects of religious ethos?) We would prefer in clauses 7, 9 and 40 that the Minister's power should be limited to a power to make requirements about how an institution's policy is made publicly available but not its content. This question might be better dealt with in legislation than regulation, but either way, without this limit, the legislation may become another type of inherent requirements law by the back door.

There is also a question about what happens to the hundreds of thousands of existing employees of religious institutions. If the RDB only offers protections if the institution has a publicly available employment policy, how does the law apply to existing employees?

The *Equal Opportunity (Religious Exceptions) Act 2021* (Victoria) will have significant negative impacts on all faith-based employers in Victoria, especially faith-based schools, and could become a model for similar legislation in other states or territories.

It is gratifying that clause 11 of the Religious Discrimination Bill 2021 seeks to correct this with regard to schools. However, we see an urgent need for the creation of a Commonwealth legislative inconsistency with this law, not just involving schools but all religious organisations and employers. This would provide employment freedoms for all religious bodies (churches, mosques, synagogues, religious charities and mission agencies) to preference people with the same religious beliefs. This could be done by making clear that faith-based organisations have a right to select or prefer staff who adhere to the beliefs or values of the organisations, and to declare that state and territory laws are invalid to the extent of any inconsistency with that right. To express the position in these terms involves only minor changes to the wording of the relevant clauses in the Bill, but is necessary to make clear that s.109 of the Constitution is engaged.

The RDB does not include a rule that the discriminator has the onus of proving the defence of reasonableness in indirect discrimination. This rule featured in every Commonwealth anti-

discrimination act and so should be included in the RDB. Not including this rule means the person discriminated against must show the discrimination was unreasonable.

The *Disability Discrimination Act 1992* has a reasonable adjustments clause in section 6 of the legislation. This provides that organisation should make reasonable changes to accommodate people with a disability unless it would cause the organisation great hardship. The RDB should include a similar provision to apply to religious beliefs, where an organisation can accommodate for example a person with a religious faith that requires them to attend a religious ceremony on a particular day or a person with a religious or conscientious objection to performing a certain medical procedure or dispensing a certain drug. If the employer can make reasonable changes to staff rosters to accommodate that person with a religious belief without substantial hardship, they should do so.

The clause 12 provision still does not operate to protect religious speech in other circumstances. It should be noted that the failure to place any meaningful constraint on an employer's right to discriminate on the basis of religious belief will mean that workers are still not protected for statements of belief outside the workplace.

The lack of employment protections contributes to a fear amongst ordinary people of faith of adverse action from employers, such that they engage in self-censorship. This chilling effect on freedom of religion is in addition to reported incidents of religious discrimination in the workplace and other areas.

The RDB should protect the right of an employee to make moderate statements of belief without being penalised by their employer provided the statements meet the RDB's test of not harassing, threatening, intimidating or vilifying a person or group.

Conclusion

We commend the *Religious Discrimination Bill 2021 and related bills* in their intention to "introduce comprehensive federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, the provision of goods, services and facilities, and accommodation. This is a modest and fair protection for Australians to hold and manifest their faith, or lack thereof, in public without interference or intimidation."¹¹

We are pleased to see that the RDB seeks to protect the freedom to have or adopt (or not) a religion or belief and the freedom to manifest (or not) that belief in religious activities, and to prohibit discrimination on the ground of religious belief or activity. This accords with international human rights law and sound policy. The proposed legislation is important because it sets out a positive expression of the right to religious freedom and protects against discrimination on the grounds of religious belief or activity.

¹¹ Explanatory Memorandum, *Religious Discrimination Bill 2021* (Cth) 7.

Because the proposed RDB, at this time, is a modest and reasonable legislative proposal, we look to the Parliament to avoid any watering down of its content, or a diminishment of its fundamental intentions.

We are pleased to see the proposed legislation and explanatory materials reaffirm and seek to give some modest legislative protection to the long-standing Australian view that all citizens, regardless of their religious belief or activity, should be able to participate fully in our society, not be discriminated against on the basis of their religious belief or activities in public life, and be entitled to the equal and effective protection of the law.

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

Yours faithfully

Most Rev Peter A Comensoli

Archbishop of Melbourne

Chair, Bishops Commission for Life, Family and Public Engagement