

Anti-Discrimination Act review

The National Catholic Education Commission (NCEC) welcomes the opportunity to make this submission to the New South Wales Law Reform Commission (NSWLRC) review of the *Anti-Discrimination Act 1977* (NSW). NCEC is an agency of the Australian Catholic Bishops Conference, reporting to the Bishops Commission for Catholic Education.

Background

NCEC is the peak body for Catholic education in Australia and is responsible for the national coordination and representation of Catholic schools and school authorities. Our role is to ensure the needs of Catholic schools are served through funding, legislation, and policy.

Working closely with state and territory Catholic Education Commissions, NCEC advocates at the national level on behalf of the Catholic sector and the hundreds of thousands of Australian families who entrust the education of their children to our schools.

One of the most unique and valuable features of Australia's education system is the wide-ranging availability of genuine, affordable school choice which has been positively supported by Australian families and by both major political parties over successive parliaments.

Catholic education is unique in its provision and scope in the world offering a parallel, alternative system of faith-based schools alongside government. We are the largest single provider of non-government schooling and the major provider of faith-based schooling in Australia.

In 2021, Australian Catholic schools celebrated 200 years since their establishment in Parramatta. Catholic schools are universal in reach and open to all families who seek a Catholic education. Across Australia 1,759 mostly low-fee Catholic schools educate one in five, or nearly 794,000, students and employ more than 104,000 staff.

In NSW almost 600 Catholic schools educate around 265,000 students and employ over 31,500 staff. On the basis of funding arrangements in 2018, Ernst & Young calculated that Catholic schools in NSW enabled an estimated \$2.56 billion in cumulative savings to governments from 2018 – 2022.¹

The mission of Catholic education, since its inception, has been to serve students from a range of socioeconomic backgrounds, particularly the disadvantaged and marginalised. Our schools welcome students from a range of backgrounds including an increase in Aboriginal and Torres Strait Islander students (up almost 63% in the last ten years). Students with disability represent almost 21% of Catholic school enrolments, and 42% of students experience socio-educational disadvantage. Almost 40% of Catholic schools are in regional and remote areas.

NCEC works to foster a thriving Catholic education sector that offers parents a choice of, and affordable access to, faith-based education for their children that is consistent with Catholic beliefs, values, and teachings. Catholic education also continues to advocate for fair and inclusive funding that sustains both government and accessible faith-based schools across Australia.

Catholic schools make a significant contribution to the educational, moral, and social fabric of this nation. Over 200 years, Catholic schools have educated millions of Australian children. Catholic school

¹ Estimation based on 2018 Ernst & Young analysis for Catholic Schools NSW. This calculation includes systemic Catholic schools, which are those run by Catholic Dioceses, and non-systemic schools, run by, for example, religious orders. See <https://www.csnsw.catholic.edu.au/wp-content/uploads/2020/09/The-Case-for-Catholic-Schools-Volume-1.pdf>.

alumni have gone on to make substantial contributions in civic life, in business, in the Church, in community leadership, in social outreach, and among other arenas of public and private life.

Catholic school families, many of whom have a long and multi-generational involvement in our communities, continue to choose a Catholic education because it aligns with their beliefs and values.

The sustained growth of our school communities shows the great importance, and the sacrifice Catholic school families continue to make to choose a school that meets the educational needs of their children. 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.

Our schools are committed to educational excellence and are underpinned by charisms of prayer, witness, catechesis, social justice, and pastoral care. Providing learning opportunities for students, staff, and parents to nurture and display these qualities in service of others, plays a crucial role in the educational, service, and faith formation provided by Catholic schools.

Introduction

NCEC notes that the referral of the *Anti-Discrimination Act 1977* (NSW) to the NSWLRC for review, fulfils a campaign commitment of the NSW Government prior to the March 2023 state election.

The NSW Attorney General, the Hon. Michael Daley MP, requested that the NSWLRC review the *Anti-Discrimination Act 1977* (NSW) in order to consider whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards.

NCEC does not intend to address all the Terms of Reference for this review. Rather, this submission identifies some matters of particular interest to Catholic education from a national perspective. The submission should be read together with the contribution provided by Catholic Schools NSW.

Anti-Discrimination Amendment (Religious Vilification) Act 2023

NCEC welcomes fulfilment of another election commitment by the NSW Government, to prohibit vilification on the grounds of religious belief, affiliation, or activity. The *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) amended the *Anti-Discrimination Act 1977* (NSW) to make it unlawful to, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, because of their religious belief, affiliation, or activity. Under the legislation a public act includes any form of communication to the public, verbal and non-verbal.

The Act, which passed Parliament on 3 August 2023 and will commence on 12 November 2023, also protects people who do not hold religious beliefs or affiliations or who do not engage in religious activity, in recognition that these are also beliefs about religious matters that should be protected.

The amendments made by the *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) are consistent with existing vilification provisions in the *Anti-Discrimination Act 1977* (NSW) and are intended to close a gap in vilification legislation. Banning vilification on religious grounds provides much appreciated recognition and protection for people of faith from growing levels of intolerance.

While the 2023 amendments to the *Anti-Discrimination Act 1977* (NSW) are strongly welcomed by NCEC and are necessary for the recognition and protection of religious belief, affiliation, and activity, this legislation is not sufficient to fully recognise and protect the rights of people of faith and their communities.

Proactive legislation required

Since 2017, successive Australian governments have committed to proactive legislation to protect religious freedoms and the rights of parents to choose a faith-based school for their children, and the right of faith communities to continue to teach and operate faith-based schools.

NCEC has strongly welcomed these bipartisan commitments.

Since late 2019 NCEC has written the following submissions in response to national reviews and inquiries concerning these matters:

- [Australian Government Attorney-General Religious Discrimination Bills – First Exposure Drafts Consultation](#) (October 2019)
- [Human Rights Commission regarding their Discussion paper: Priorities for federal discrimination law reform](#) (November 2019)
- [Australian Government Attorney-General Consultation Regarding Legislative Reforms on Religious Freedom providing feedback on the Second Exposure Drafts](#) (January 2020)
- [Parliamentary Joint Committee on Human Rights regarding Religious Discrimination Bill 2021 and related bills](#) (December 2021)
- [Senate Legal and Constitutional Affairs Legislation Committee regarding Religious Discrimination Bill 2021 and related bills](#) (January 2022)
- [Australian Law Reform Commission’s \(ALRC\) Inquiry into Religious Educational Institutions and Anti-Discrimination Laws](#) (March 2023)
- [Parliamentary Joint Committee on Human Rights Inquiry into Australia’s Human Rights Framework](#) (July 2023)

In each of these submissions, NCEC has explained that the mission of the Catholic school is 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. As such, Catholic schools should be enabled 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 clearly reasonable and fair in a free, democratic, multicultural, and pluralist society.

In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate against any staff or student based on their personal attributes (race, culture, sexual orientation, gender identity, disability, marital status, parental status, pregnancy etc).

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.

Additionally, NCEC has argued that harmonisation of legislation relating to these matters across Australia to provide clarity and certainty, and to ensure all Australians, no matter where they live, are afforded the protections they are due.

NCEC submits that taken together these submissions provide a detailed and comprehensive explanation of Catholic education’s position. NCEC recommends that the NSWLRC obtain and consider the previous submissions as part of the current review of the *Anti-Discrimination Act 1977* (NSW).

Each submission is publicly available on the NCEC website.

Current Review of the *Anti-Discrimination Act 1977*

Undertaking a process of analysis and reform to ensure the law is fit for purpose is an important function of democratic government. As the Attorney General stated when opening the current review for preliminary submissions,

It is essential to conduct reviews of this nature to ensure our laws represent who we are today as a community.

NCEC supports the intent inherent to the Terms of Reference that any reform of the legislation should operate to better promote the equal enjoyment of rights across the community.

Terms of Reference 11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws.

The current review of the *Anti-Discrimination Act 1977* (NSW) is one of a range of inquiries that have, in recent years, been established at both Commonwealth and at state/territory level to identify key issues and potential areas for reform and improvement of anti-discrimination laws.

NCEC has ongoing concerns that many of these reviews result in deficient and inadequate proposals through which some well established internationally recognised and protected human rights are diminished and some favoured.

State legislative over-reach

As an example of the deficient state legislation about which NCEC has raised concerns, the Victorian *Equal Opportunity (Religious Exceptions) Act 2021* 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.

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 the 'inherent requirements' of the position. This provision completely misunderstands the wholistic nature of religious belief and activity as well as the fundamental identity and purposes of religious educational communities.

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 common assertion, the Victorian legislation differs significantly enough from that of Tasmania's to result in narrower exceptions than those recognised under Tasmanian law.

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 Victorian 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.²

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. This is despite s 14 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* purportedly protecting freedom of thought, conscience, religion, and belief.

Terms of Reference 12. the interaction between the Act and Commonwealth anti-discrimination laws

Recent Australian Law Reform Commission Inquiry

Significantly deficient proposals have also been illustrated recently by the Australian Law Reform Commission's (ALRC) Religious Educational Institutions Inquiry.

In 2022, the ALRC was asked by the Hon Mark Dreyfus KC MP, Attorney-General of Australia, to review current exemptions in anti-discrimination laws for religious schools. The proposals outlined in its Consultation Paper seriously threaten the ability of faith-based schools to prioritise the employment of teachers and staff who share their faith and fail to provide protections for faith-based schools to operate and teach according to their religious beliefs or to build an authentic community of faith.

NCEC outlined serious concerns to the ALRC including the lack of understanding of religion and religious freedom in the Consultation Paper, and the serious deficiencies in the ALRC's initial proposals which fail to protect religious rights.³ NCEC indicated that any changes to current anti-discrimination laws must go together with the introduction of laws to protect religious freedom.

NCEC recommended that the ALRC go back to the drawing board on these reforms and consult further with the government's expert advisory group.

The Australian Government's Election Commitment and National Platform

The current Australian Government has committed to ensure appropriate protections for religious freedom in this term of government.

The 2021 National Platform which the Australian Labor Party (ALP) took to the last election made clear that 'Labor recognises that the freedom to have or adopt a religion or belief, to change a religion or belief, or not to have or adopt a religion or belief is absolute'.⁴ In this context, NCEC received correspondence from the ALP stating,

... Labor believes all Australians have the right to live their lives free from discrimination, including people of faith ... we will act on this as a priority if we form government ... the expansion of our anti-discrimination framework to protect Australians of faith (is) an opportunity to unite the nation, not divide it.

Practical commitments included introducing anti-vilification protections to prevent discrimination against people of faith, protect all students from discrimination on any grounds, and protecting teachers from discrimination at work, while maintaining the right of religious schools to preference people of faith in their selection of staff.

² 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.

³ NCEC, Submission 409 <https://www.alrc.gov.au/inquiry/anti-discrimination-laws/submissions/>.

⁴ ALP National Platform (2021), p. 66, nn46 <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>

The 2023 Draft National Platform recommits the ALP to freedom of thought, conscience, and religion:

66. Labor believes that people of faith deserve the same human rights, equality, respect, and safety as every other Australian. No Australian should ever be vilified, discriminated against, or subjected to violence or threats of violence because of that person's religion or religious belief. Labor will work to ensure that Australia's antivilification laws and discrimination framework are fit for purpose.

67. Labor believes in and supports the right of all Australians to have and to manifest their religion or beliefs, and the right of religious organisations to act in accordance with the doctrines, tenets, beliefs, or teachings of their faith.

68. Labor will protect and promote the right to freedom of thought, conscience, and religion in accordance with Australia's international obligations, including our obligations under Article 18 of the International Covenant on Civil and Political Rights.⁵

Conclusion

The challenge of achieving an appropriate balance for the religious freedom rights of faith-based schools with the right to be free of unjust discrimination is an ongoing and important issue for Catholic school parents, educators, and the broader Catholic community.

NCEC has ongoing concerns that many recent reviews have resulted in deficient and inadequate proposals through which some well-established internationally recognised and protected human rights are diminished and some favoured.

It is clearly reasonable and fair in a free, democratic, multicultural, and pluralist society that Catholic schools should be enabled to preference the employment or enrolment of people of the Catholic faith, and those willing to support the ethos and mission of their schools.

Catholic thought emphasises 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. In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate against any staff or student based on their personal attributes.

NCEC will continue to advocate strongly to Australian government and the broader community on the importance of religious protections for families of faith and for Catholic schools that accord with well-established internationally recognised and protected rights.

Should you have any further questions in relation to this submission, please contact me via phone
or via email

Yours faithfully

Jacinta Collins
Executive Director

⁵ ALP Draft National Platform (2023), p. 60

<https://laborconference.org.au/files/ALP%20Draft%20National%20Platform%2049th%20Annual%20Conference%202023.pdf>