AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

Bishops Commission for Life, Family and Public Engagement

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Dr Sean Turner
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Dear Dr Turner

Answers to Questions on Notice: Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

At the Committee hearing on 19 November 2018 for the inquiry into "Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff", a number of senators put questions on notice for the Australian Catholic Bishops Conference.

1. **Question**: Senator Fierravanti-Wells – "provide to the committee actual circumstances where there have been formal complaints against the churches or the educational institutions by students, staff and contractors where those provisions, the exemptions, have actually been invoked?" (Proof Hansard, 19 November 2018, page 22)

   Answer: We are not aware of circumstances where the exemptions have been formally invoked, but the point of the exemptions is that they discourage litigation by making the legal position of religious schools clear. The lack of formal complaints is an indication of the value of the exemptions.

2. **Question**: Senator Pratt – "so where is it that you need to rely on the attribute to uphold this? What I'm trying to drill down to is an example where you must rely on the attribute to uphold the school ethos – any example." (page 30)

Answer: This question from the Chair was an attempt to understand why, if the concern of a faith-based school was behaviour and not a particular attribute, would it need to rely on attribute-related exemption to anti-discrimination law in order to uphold the mission and the ethos of a faith-based school. This is a good question that warrants a detailed explanation.

Firstly, the characterisation of the concerns of the Catholic Church and other religious education institutes as a desire to sack teachers or expel students on the grounds of sexual orientation or gender identity is wrong.

The key difficulties presented by a proposed repeal of section 38 of the *Sex Discrimination Act 1984* (SDA) without any substantive religious freedom protections are found in sections 14(2)(d) and 21(2)(c) of the SDA. There is no clear judicial guidance on how a court might interpret the prohibition against 'any other detriment' in these provisions.

Could, for example, a Catholic school teaching the Church's belief that the appropriate place for sexual activity is between married, heterosexual couples be argued to be subjecting same-sex attracted students to 'any other detriment'?

Secondly, the Catholic Church makes a clear distinction between actions/behaviours and orientations/inclinations. We teach that the human person, endowed with an intellect and free will, can choose whether or not to act on their inclinations.

While we make this distinction, the courts do not. Schools need to rely on attribute-related exemptions because courts are unwilling to see any difference between an attribute and a behaviour.

For example, in the initial ruling for the *Cobaw v Christian Youth Camps* case, Hampel J (with whom Maxwell P agreed on appeal) said:

"To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.

"The respondents' attempt to distinguish between (same sex) sexual orientation and any conduct which accepts or condones it, or encourages people to see it as normal, or part of the natural and healthy range of human sexualities, would require a forced and strained meaning to be given to sexual orientation."

The decision in *Cobaw* puts into doubt a school's ability to make behaviour-related decisions grounded in employment law for a person with a protected attribute, because a court could decide – as it did in *Cobaw* – that religious organisations are not permitted to make a distinction between attribute and activity.

The lack of clear answers on these and other issues is why we ask that the existing exemptions be retained.

3. **Question**: Senator Fierravanti-Wells – "I want to go back to the point that you've made, Archbishop, about the enactment of some form of religious discrimination act or 'protection of religious freedom' legislation as a threshold piece of legislation. Clearly these, of themselves, change the necessity or otherwise of the sorts of circumstances that we've been talking about that are now exemptions – do I understand your point? Because clearly, if you had a religious freedom piece of legislation that put religious freedoms alongside other freedoms or other human rights, then we wouldn't be having some of these discussions. Please take that on notice …" (page 30)

   Answer: In our submission to the Religious Freedom Review early this year, the Australian Catholic Bishops Conference pointed out that in the Australian Law Reform Commission's 2015 report (ALRC 129),[1] the Law Reform Commission drew attention to work of Professor Patrick Parkinson and Professor Nicholas Aroney that addressed the concern that religious freedom is only ever expressed by way of exception, rather than as a right. In a joint submission in 2011 to the federal Attorney-General's Department, on a proposal (later abandoned) for a Consolidation of Commonwealth Anti-Discrimination Laws into one Act, the two authors had proposed a general limitations clause that redefined discrimination.

   The definition was a reformulation of a proposal advanced by the then-Government that endeavoured to have an overarching definition of discrimination and which encapsulated language of the High Court from the implied freedom of political communication, and from European Court of Human Rights jurisprudence – this is, as set out below, "*reasonably capable of being considered appropriate and adapted to achieve a legitimate objective"*.

   As summarised (and edited by the ALRC) the proposed definition is

[1] Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws - Final Report. December 2015.

"… comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and what is not discrimination—due to religious beliefs or other human rights —within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

1. A distinction, exclusion, [preference],[2] restriction or condition does not constitute discrimination if:
    a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
    b. it is made because of the inherent requirements of the particular position concerned; or
    c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
    d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
2. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 1(a)".

Under this clause, there would not be discrimination in hiring a teacher for a religious school or declining to solemnise a marriage if the Church's action was accepted as being "reasonably capable of being considered appropriate and adapted to" the exercise (or protection or advancement) of the freedom of religious belief.

The benefit of this clause is that it recognises that protection, advancement or exercise of another human right (in the present case, religious freedom) is a *legitimate objective* and not inherently discriminatory.

As noted by the ALRC, in 2008 the Senate Legal and Constitutional Affairs Committee recommended that the exemptions in s 30 and ss 34–43 of the *Sex Discrimination Act 1984* (SDA) —including those for religious organisations — be replaced by a general limitations clause[3], of which this is an example.

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[2] As recommended by HRC 1998 (see [66] above), 'preference' should be included. It reflects ILO Convention 111, arts 1(1), definition of 'discrimination', and 1(2).

[3] Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36. The Senate Committee commented that 'such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. This would allow for a more 'flexible' and 'nuanced' approach to balancing competing rights'.

There is merit in adopting the Parkinson-Aroney definition of discrimination, in combination with the existing express exceptions and exemptions in anti-discrimination laws, which have the benefit of established acceptance and meaning and might be preserved by a provision that indicates anything that was lawful or permitted under the pre-existing law is to be taken to satisfy 1(a).

4. **Question**: Senator Rice – "Another question on notice, if I may, because I know that we have definitely run out of time: could you give your reflections or any views that you have on the current law as it exists in Tasmania." (page 30)

   Answer: The Australian Catholic Bishops Conference has not had time to properly review Tasmanian law in this area, but has concerns that the narrow exemptions may restrict religious freedom.

Thank you again for the opportunity to speak with the Committee at the Melbourne hearing earlier this week.

I would be happy to answer any further questions the Committee may have. I can be contacted via

Yours sincerely

Most Rev Peter A Comensoli
Archbishop of Melbourne
Chair, Bishops Commission for Life, Family and Public Engagement