

**Australian Human Rights Commission consultation on  
*Protection from Discrimination on the Basis of Sexual  
Orientation and Sex and/or Gender Identity***

**A Submission from Bishops,  
Dioceses and Agencies of the Catholic Church**

**10 December 2010**

**Introductory Observations**

1. The Catholic Church is deeply committed to the defence of human dignity and the human rights of every person. This commitment is demonstrated by the efforts of the Church to protect and promote the rights of people around the globe against political oppression and other forms of injustice, and by the Church's defence of the poorest and most vulnerable in societies like our own. The Church's commitment to human rights is based on the inherent and inalienable dignity of every human person, which also provides the foundation for respect for human rights in international law and in every significant United Nations human rights instrument.
2. The Church defends the right of every human being to be treated justly. No one, including people dealing with issues associated with sexual orientation or sex or gender identity, should be subject to unjust discrimination or vilification. Individuals should be treated with "respect, compassion and sensitivity" and "every sign of unjust discrimination in (this) regard should be avoided".<sup>1</sup>
3. Under the *Australian Human Rights Commission Act 1986 (Cth)* (**Act**), the Australian Human Rights Commission (**Commission**) is responsible for the promotion and protection of the human rights in Australia. Among the international instruments annexed to the Act are the International Covenant on Civil and Political Rights (**ICCPR**) and the

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1. *Catechism of the Catholic Church* n. 2358.

International Labor Organisation Convention (No.111) Concerning Discrimination in respect of Employment and Occupation (**ILO 111**). The Commission is obliged therefore to actively promote and protect not only the right of all people to equality before the law without discrimination, but also to actively promote and protect the right of every individual without discrimination to freedom of thought, conscience and religion. This bears restating in the light of the Commission's consultation on *Freedom of Religion and Belief in the 21st Century* which at times seemed to suggest that religious freedom may not be compatible with human rights, or acts as an impediment to other rights.<sup>2</sup>

### **The Fundamental Human Right to Freedom of Thought, Conscience and Religion**

4. The fundamental right to religious freedom is expressed in Catholic teaching as follows:

*"The right to the exercise of freedom, especially in moral and religious matters is an inalienable requirement of the dignity of the human person. This right must be recognized and protected by civil authority within the limits of the common good and public order."<sup>3</sup>*

5. The Church's teaching on religious freedom is entirely consistent with the beliefs and values set out in the major international human rights instruments, and also with the recognition of religious freedom in section 116 of the Australian Constitution.<sup>4</sup> International human rights instruments,<sup>5</sup> together with law and public policy in Australia,

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2. In a conference paper presented in August 2009, Tom Calma (at that time the Commissioner overseeing the religious freedom consultation) and Conrad Gershevitch stated: "The **compatibility of religious freedom with human rights** is the subject of the most comprehensive study ever undertaken in Australia in this area . . ." (our emphasis). Tom Calma & Conrad Gershevitch, "Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right?". Paper presented to the Unity in Diversity Conference, Townsville, 12-14 August 2009. Another example is found in Part 7 of the *Freedom of Religion and Belief in the 21<sup>st</sup> Century*, which refers to "tensions between human rights, religious expression and cultural expression" and poses questions which include, *inter alia*, "How can faith communities be inclusive of people of diverse sexualities? (at p.14).

3. *Catechism of the Catholic Church* n. 1738.

4. Section 116 of the Australian Constitution states that:

*"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth"* (our emphasis).

5. For example, the Universal Declaration of Human Rights 1948; the Convention against Discrimination in Education 1960; the International Covenant on Economic, Social and Cultural Rights 1966; the International Covenant on Civil and Political Rights 1966; the International Convention on the Elimination of All Forms of Racial Discrimination 1966; the United Nations Resolution Adopted by the General Assembly on the Elimination of all Forms of Religious Intolerance 1997; and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.

also recognise the right of parents to educate their children (or to have them educated) according to their religious and moral beliefs and traditions.

6. The right to practice and publicly manifest religious belief is protected by Article 18 of the ICCPR. It is important to note that Article 18 of the ICCPR expressly recognises “the rights of parents “to ensure the religious and moral education of their children in conformity with their own convictions” as a particular manifestation of religious freedom<sup>6</sup>. This means the state has no right to determine the content of the moral education of children in a way that subverts the rights of parents. One of the major reasons that the state must respect, and the law must protect, the right of Catholic and other religious schools to select staff and volunteers and to teach in accordance with the doctrines, beliefs and tenets of their faith, is because these schools exist to assist parents in exercising their rights and discharging their responsibilities as the primary educators of their children.
  
7. Religious freedom, including the right of parents to determine the religious and moral education of their children, is a fundamental human right; so fundamental that the ICCPR (which has been ratified by Australia), provides that it cannot be suspended or limited, even “in time of public emergency which threatens the life of the nation”.<sup>7</sup> This

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6. Article 18 of the ICCPR provides that:

*“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”*

*2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*3. 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.*

*4. **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**” (our emphasis).*

7 . ICCPR, Article 4 provides:

*“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

*2. No derogation from articles 6 [right to life], 7 [prohibition of torture], 8 (paragraphs 1 and 2) [prohibition of slavery], 11, 15, 16 [right to be recognised as a person before the law] and 18 [right to freedom of thought, conscience and religion] may be made under this provision.*

no-derogation provision does not apply to other important rights usually identified as being at the heart of a free society, including the rights to equal treatment under the law and to be protected from discrimination on various grounds.<sup>8</sup>

8. Like all rights, freedom of religion is not absolute and is subject to limitations prescribed by law as “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>9</sup> In the context of the discussion paper, and particularly its implications for religious freedom, we consider that the Commission should be guided by the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**), recognised in September 1984 by the United Nations Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>10</sup>
9. The Resolution adopted by the United Nations General Assembly on the Elimination of all Forms of Religious Intolerance on 12 December 1997, recalls Article 18 of the ICCPR and urges member States to, *inter alia*, ensure through their constitutional and legal systems, adequate and effective guarantees of freedom of thought, conscience, religion and belief and effective remedies where such rights are violated.<sup>11</sup>
10. Aside from ILO 111 which proscribes sexual preference discrimination in employment, Australia has not signed or ratified any international convention or covenant that specifically refers to “gay, lesbian, bisexual, trans or intersex” rights, or the elimination of discrimination against persons on grounds of “sexual orientation” or “sex/gender identity”. The Yogyakarta Principles, described by the Commission in its discussion paper as “an interpretation of already binding agreements from the viewpoint of sexual

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*3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”*

8. ICCPR, Article 26.

9. ICCPR, Article 18.3.

10. United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984 (1984).

11. United Nations Resolution adopted by the General Assembly on the Elimination of all Forms of Religious Intolerance, 12 December 1997, Article 2.

orientation and gender identity”,<sup>12</sup> have not been negotiated nor agreed to by member states of the United Nations but reflect the views of a small group of representatives from non-government organisations and members of the United Nations treaty monitoring committee. They are not included in the statutory schedule of international human rights instruments attached to the Act, which are meant to guide the Commission’s work, and are not binding in international law. They are not in our view persuasive. As there is no international human rights treaty that mentions “sexual orientation” or “sex/gender identity”, it will be necessary for the Commission to identify the binding agreements to which it refers in the discussion paper to clarify the basis for an exercise of the external affairs power in s51(xxix) of the Constitution, if this is the proposed basis for the Commonwealth Government to enact any proposed legislation in this area.

11. The teachings of the Catholic Church and international and Australian law give rise to a number of foundational principles and beliefs:
  - a) The right to religious freedom is grounded in respect for human dignity;
  - b) Individuals should not be forced to act in a manner contrary to their religious beliefs, nor should they be restrained from acting in accordance with their religious beliefs;
  - c) Religious bodies have a right to demonstrate and teach the social relevance of their religious beliefs;
  - d) Religious bodies have a right to manifest their religious beliefs by corporately establishing and maintaining institutions and services, and conducting them in accordance with those religious beliefs and values;
  - e) Because the right to religious freedom is exercised within society, it ought to be subject to certain ordinary laws designed to safeguard justice and civility;
  - f) Governments do not have a right to command or inhibit [religious belief and activity], which are outside their proper competence.<sup>13</sup>

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12. Australian Human Rights Commission, “Sexual orientation and sex and/or gender identity” *Discussion Paper*, October 2010, at pp. 5-6.

13. NSW/ACT Catholic Bishops, *Statement on Religious Freedom*, April 2001, at p.7.

## **Foundations of Religious Freedom**

12. In short, religious freedom means that adherents of a religious tradition have the right to bring their beliefs to public discussion, to argue for them on philosophical or religious grounds, and to try to persuade others, even when some of these beliefs may not be popular or may collide with other ideas or values. Religious freedom also means that when believers come together to provide a hospital or school or other service for the wider community, they have the right to operate it in accordance with the beliefs which led them to take on this work for others, and to appoint staff who share these beliefs and commitments.
  
13. Religious freedom is not a gift of the state. It is a fundamental human right which governments and human rights commissions are obliged to respect and protect, as they do other rights. Exemptions that allow (say) a Catholic school to appoint only Catholic teachers are not a special permission to discriminate, but a protection of religious freedom, and the fundamental right of parents to determine the religious and moral education of their children. What it protects specifically is the right of religious agencies to exercise a preference in selecting staff for people who share the convictions at the heart of the agency's work, and who consistently live out those convictions in public and private—because that is what the agency depends on to meet the purposes it was created to serve.
  
14. This statement provides an important clarification of what the Catholic Church is seeking in this submission. The Church is not advocating the right to freedom of religious belief as an absolute right of religious organisations and individuals to practise their beliefs regardless of any resultant physical or emotional harm to individuals, or injury to public health, safety and order, or the rights and freedoms of others. These qualifications are built into the right to freedom of thought, conscience and religion by Article 18.3 of the ICCPR and cannot be separated from it. The right to freedom of religious belief must be qualified, for example, in circumstances where religious belief or custom condones child marriage or female circumcision or the denial of proper education or medical treatment to children; circumstances in which an individual is brutalised and denied the right to self determination.

15. The Catholic Church claims the right to protections of freedom of religious belief in any proposed legislation as part of defending the rights of all Australians who adhere to a faith tradition, including the millions of Australians who are Catholic. What this means in practical terms for the Catholic community is that the law must respect its right to select for employment and accept as volunteers in its organisations and agencies people who are practising Catholics. A practising Catholic is someone who accepts Catholic faith and teaching, and in the way they live and the choices they make, upholds the beliefs, doctrines and tenets of the Church and bears witness to them. These criteria are the same for everyone, including Catholics who are of non-heterosexual orientation or transgender or transsexual.
16. The right to prefer practising Catholics as employees or volunteers in Catholic agencies does not diminish the right of anyone, including people of different sexualities or who are transgender, from obtaining gainful employment outside the Catholic Church. Nor does it in anyway detract from the commitment of the Church to provide care to any person in need regardless of their sexuality or sex- or gender identity. Protections for religious freedom in this context do not require qualification. The greater and more real the choice given to people to gain employment in non-religious agencies and to parents and children to choose non-religious schools, the less constrained protections for religious freedom should be.
17. It is formally submitted that the language which characterises protections of religious freedom in anti-discrimination legislation as “exemptions” does not accurately reflect the purpose they are meant to serve. Characterising these protections as exemptions or exceptions encourages the profoundly mistaken view that religious freedom is merely a favour granted by the state or a special permission to discriminate, rather than a fundamental human right. This mistaken understanding is reflected in the clear tendency to apply existing religious freedom protections very narrowly or only to the most limited extent necessary, as if they are merely concessions to an institution rather than what is required to protect the fundamental rights of the individuals it serves.
18. In accordance with the requirements of international human rights instruments and the guidance offered by the Siracusa Principles, existing provisions for the protection of religious freedom should be given an expansive reading to take into account the

indivisibility of faith and service for Christians (and other people of faith), and their right to organise and provide services to the wider community in accordance with their religious and moral beliefs. They should also be construed to acknowledge the necessity of a broader environment of witness among the staff and volunteers of religious agencies to maintain the inspiration and commitment which makes their services to the community possible. This is why Catholic agencies must be free in employing staff and accepting volunteers to prefer practising and faithful Catholics even in support roles, and not just in roles directly concerned with pastoral work or the teaching of religion.

19. In any new legislation in this area, exemptions should be described as “protections of religious freedom”. Consideration should also be given to including in new legislation a general provision which expressly states that nothing in the legislation is intended to impede or diminish religious freedom, or the right of religious agencies to practise and publicly manifest their beliefs and teachings.

### **Catholic Belief and Teaching on Sexual Orientation and Gender Identity**

20. The Church respects and defends the dignity and rights of all persons regardless of sexual orientation. The teaching of the Church on family and sexuality is well known and does not require detailed exposition in this submission. In brief, sexual complementarity, love and procreation are all essential aspects of sexual intimacy. It is for this reason that Church teaching preserves sexual activity to marriage between a man and a woman. This can be a difficult teaching for people to accept because our society has radically separated these three aspects of sexual intimacy from each other, but the teaching that they should be treated as an inseparable unity is reasonable. It is based not only on revelation but on reason, and is comprehensible to believers and non-believers.
21. The growing body of evidence, both international and Australian, suggesting that non-heterosexual people experience anxiety and depression at higher rates than their heterosexual peers and are at greater risk of suicide and self-harm is a source of serious pastoral concern. Two areas of particular need in relation to mental health and depression have been suggested: managing the effects of hostility and prejudice towards non-heterosexual people and its consequences on a daily basis through the life course; and gaining access to mental health services that are able to respond to their needs in socially

and culturally competent ways.<sup>14</sup> The Catholic Church supports efforts to address both these factors, and offers non-heterosexual people support, compassion and respect, free from personal judgements.

22. At the same time, in situations where issues associated with sexual orientation might prevent a person from giving coherent witness to Catholic teaching about sexuality, marriage, family, and the complementarity of male and female, or where a person chooses to act in a way which is inconsistent with this teaching, it may not be appropriate to offer them employment, or to continue their employment or to accept their services as volunteers, in a Catholic agency. Particular concerns are likely to arise in the setting of a Catholic school, where students have a right to receive the teachings of the Church, including those on sexuality and family, in their entirety, and to receive the witness of the teachers and staff at the school to these teachings, rather than having these teachings undermined by their teachers' contrary behaviour.
23. The Catholic Church approaches the questions of sex- and gender identity from the belief, drawn from revelation but also from the conclusions of philosophy and science, that men and women are created with distinct and complementary sexual identities; that sexual identity is ontological (that is, given, deep-seated and permanent, rather than chosen, socially-invented or medically manufactured); and that this is founded in a biological reality of maleness and femaleness in every person, which is also the foundation of marriage and the family. (The situation is different in the rare case of an intersex person where it is not a matter of sexual orientation *per se* but of a condition where an individual possesses anatomical features of both genders to an extent to which their sexual identity is unclear). The Church's view of human sexual and gender identity is reasonable, based not only on revelation but on reason and medical science. Again it is comprehensible to both believers and non-believers.
24. The Church is genuinely concerned that many transgender and transsexual people experience a sense of alienation from their own bodies and difficulties with interpersonal relationships which can be a source of social isolation and emotional distress. According to

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14. "Feeling Queer and Blue: A review of the literature on depression and related issues among gay, lesbian, bisexual and other homosexually active people." A report from the Australian Research Centre in Sex, Health and Society, La Trobe University, prepared for *beyond blue: the national depression initiative*, December 2008.

the American Psychological Association, the transgendered suffer from a higher than average rate of depression, anxiety, suicide and self-mutilation. Although transgender people experience the same kinds of mental health problems that non-transgender people suffer, the stigma, discrimination, and internal conflict that many transgender people experience may place them at increased risk for certain mental health problems. Unjust discrimination, lack of social support, and inadequate access to care can exacerbate mental health problems in transgender people, while support from peers, family, and helping professionals may act as protective factors.<sup>15</sup> Again, the Catholic Church is responsive to the suffering endured by many transgender and transsexual people and committed to offering any person who is working through issues of sex- and gender identity our care, compassion and respect, free from personal judgements.

25. At the same time, there may be situations where issues associated with gender identity might prevent a person from giving coherent witness to Catholic teaching about inherent sexual identity based on one's physical sex, the permanence of gender, and the complementarity of male and female, and the nature of marriage and the family, or where a person chooses to act in a way which is inconsistent with this teaching. In these situations it may not be appropriate to offer them employment, or to continue their employment, or accept their services as volunteers in a Catholic agency. Particular concerns are likely to arise, for example, in the setting of a Catholic school, where students have a right to receive the teachings of the Church, including those on sexuality and the body, in their entirety, and to receive the witness of the teachers and staff at the school to these teachings, rather than having these teachings undermined by their teachers' contrary behaviour. Depending upon the precise circumstances, however, particular care should be taken to avoid unjust discrimination against people with a medically diagnosed intersex condition or gender identity disorder.<sup>16</sup>

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15. APA Task Force on Gender Identity, Gender Variance, and Intersex Conditions, "Answers to your questions about transgender individuals and gender identity" <<[<>](http://www.apa.org/topics/sexuality/transgender.aspx#)>>.

16. According to the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*, the standard classification of mental disorders used by mental health professionals in Australia, the diagnostic criteria for Gender Identity Disorder are: a) A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex); b) Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex; c) The disturbance is not concurrent with a physical intersex condition; d) The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

26. The Catholic Church does not impose its values and beliefs on anyone, and everyone is free to accept or reject them as they see fit. Expecting the law to protect religious freedom does not require the state to endorse a religious community or its particular beliefs or values, or to impose them on people who do not share their faith. Nor should support for protecting vulnerable people from unjust discrimination and vilification be made to conflict with the requirements of religious freedom, or the historic understanding of marriage, family and sexual complementarity. The Catholic community expects government to honour religious freedom and acknowledge the right of the Catholic Church to promote its beliefs and to establish and operate educational, cultural, charitable and social organisations which give expression to those religious purposes and beliefs.

### **The Treatment of Protections for Religious Freedom (Exemptions) under Current Law**

27. Parliaments in Australia have usually accepted that laws against discrimination on certain grounds can create significant threats to the independence of religious communities and their freedom to organise their affairs in accordance with their doctrines, tenets, beliefs and teachings.
28. Accordingly, at both State and Federal level, anti-discrimination laws make some provision to protect religious freedom, usually described as “exemptions” or “exceptions”, most of which relate to employment matters. While s116 of the Australian Constitution prohibits the Commonwealth Parliament from making any law that “prohibits the free exercise of any religion”,<sup>17</sup> the Commission’s discussion paper,<sup>17</sup> and the research paper

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17. See the judgment of Latham CJ in *Adelaide Company of Jehovah’s Witnesses, Inc. v Commonwealth* (1943) 67 CLR 122–134, and of Rich J at p.149. See also discussion of freedom of religious belief in the joint judgment of Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (“Scientology case”) [1983] HCA 40; (1983) 154 CLR 120 (27 October 1983) at pars 3–5, in which the High Court granted special leave to appeal against a decision of the Supreme Court of Victoria that the Church of Scientology was not a religion. Their Honours said:

*“6. Should special leave be granted in order to consider that question? Two circumstances combine to give an affirmative answer: the legal importance of the concept of religion and the paucity of Australian authority. Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.”*

on which it is based,<sup>18</sup> make only passing reference to the current protections for religious belief in anti-discrimination legislation. The discussion paper states that:

*“It is important to note that anti-discrimination legislation is remedial in character, and is designed to achieve the public purpose of redressing discrimination and upholding equal opportunity. Accordingly, the courts interpret exemptions narrowly.”*<sup>19</sup>

This treats the rights to freedom of thought, conscience and religion and to the elimination of discrimination on grounds of religion as impediments to preventing discrimination. This is inherently contradictory because it implies that preventing discrimination and promoting equality before the law requires discrimination against some people on the grounds of their religious beliefs (by narrowly construing the “exemptions” which are meant to protect their rights, and so limiting their right to act in accordance with their religious beliefs).

29. There are two exceptions protecting religious freedom which are of particular importance to the Catholic community, and which are contained in most anti-discrimination legislation. Despite some differences in wording and variation in coverage, they can be summarised as the “inherent requirements” and the “religious susceptibilities” exceptions.<sup>20</sup> In some legislation, the religious susceptibilities exception takes the form of a broader protection for religious freedom under the legislation.<sup>21</sup>
30. The exemptions and exceptions provided in anti-discrimination legislation should be interpreted broadly so as to provide full protection to the fundamental human right to freedom of religion. However, increasingly, these exemptions have been interpreted

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18. Anna Chapman, “Protection from discrimination on the basis of sexual orientation or gender and/or sex identity in Australia”, Research Paper, University of Melbourne, October 2010, at pp.14 – 16.

19. *Ibid.* n.12 at p.12.

20. See for example *Discrimination Act 1991* (ACT) s33(1); *Equal Opportunity Act 1984* (WA) s73(1); *Equal Opportunity Act 1995* (Vic) s76; s52 *Anti-Discrimination Act 1991* (Tas). Note that s77 of the *Equal Opportunity Act 1995* (Vic) also makes lawful “discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.” Some jurisdictions also include a requirement that the religious body or organisation is acting in good faith: see *Discrimination Act 1991* (ACT) s33; *Equal Opportunity Act 1984* (WA) s73; and *Anti-Discrimination Act 1991* (Qld) s25(3).

21. See *Anti-Discrimination Act 1977* (NSW) s56(d) which contains a general protection for religious bodies and *Anti-Discrimination Act 1977* (NSW) ss25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c) respectively, providing protections for private educational authorities.

narrowly by courts and tribunals, particularly in cases about employment within Catholic organisations providing services in education, health care and social services. Limitations to religious freedom have increasingly been imposed by narrowing the categories of employment to which the religious susceptibilities and inherent requirements exceptions can be applied.<sup>22</sup>

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**22. Case example:** *Kerry Anne Hozack v The Church of Jesus Christ of Latter-Day Saints* [1997] FCA 1300.

Ms Hozack was employed by the Church as a part-time receptionist. Part of her employment contract stated that she must live by the Church's teachings to prove her worthiness for the position. The Church later discovered that Ms Hozack had been having a relationship with another man during her separation from her husband. She was warned that if it did not cease she would be excommunicated from the Church and most likely lose her job. She was given three weeks to consider her options and was called before the Church's Disciplinary Council, where she admitted that the relationship had ceased but not on account of the Church's warning.

Consequently Ms Hozack was "disfellowshipped" for a year and hence was no longer "Temple-worthy". Shortly after, Ms Hozack was told that due to the fact that she was no longer "Temple-worthy" she was in breach of her contract of employment and her employment was terminated.

Ms Hozack made an application for unlawful termination under the former *Workplace Relations Act* on the grounds that she had been discriminated against on the grounds of her religion. The Federal Court found that due to Ms Hozack's affiliation with the Church it was likely that her conduct would offend the religious susceptibilities of other members of the Church community, and hence the termination was valid in that regard. However, the Court found that Ms Hozack's failure to be "Temple-worthy" did not prevent her from performing the inherent requirements of her position, because as a part-time receptionist she was not in a position in which her lifestyle could influence others within the Church. For example, she was not in leadership or teaching role in which it would be expected that she would model the values of the Church. The termination was therefore held to be unlawful.

**Case example:** *Griffin v Catholic Education Office, Archdiocese of Sydney (1998) HREOC*.

Ms Griffin alleged that the decision of the Catholic Education Office of the Archdiocese of Sydney (**the CEO**) to refuse her application for classification as a teacher in Catholic schools in the Archdiocese was discriminatory on the grounds of sexual preference. As a result of the refusal she could not be employed in schools administered by the CEO. In its response to the Commission the solicitors for the CEO provided the following reasons for rejecting Ms Griffin's application: "*In considering her application, our client was aware of Ms Griffin's high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles. It is an inherent requirement that teachers within the Sydney Catholic School System strive by their teaching and personal example to develop in students an appreciation and acceptance of Catholic teaching and values. Ms Griffin's prominent public stance on the question of homosexual rights and behaviour is contrary to the teachings and values of the Catholic Church*".

The CEO took the view that the employment of Ms Griffin within the Catholic School System would be likely to injure the religious susceptibilities of adherents to the Catholic faith, and in particular students within that system who, as explained above, have the right to receive the witness of the teachers and staff at their school to Catholic teaching, rather than having these teachings undermined by their teachers' contrary behaviour. The complainant submitted, in summary, that her sexual preference was improperly taken into account by the CEO in assessing her application for classification as a teacher in Catholic schools in the Archdiocese of Sydney. The CEO submitted, in summary, that its decision to refuse the complainant's application for classification was based on her inability to meet the inherent requirements of the job. The CEO stated that the inherent requirements of the job are best enunciated in the Principles of Employment which provide that a "*Catholic school is more than an educational institution: it is a key part of the Catholic Church's mission. Thus, the teacher in the Catholic school is more than an employee: he or she ministers in the name of the Catholic Church*". The Commission rejected the

31. The narrow interpretation of the religious susceptibilities exception has been supported by an artificial separation between private and public life and the arbitrary distinctions drawn between so called “core activities” or “non-core activities” of the religion concerned. These distinctions have the effect of unjustly limiting the right of church organisations to exercise a preference in the employment of staff and the selection of volunteers for those who believe and live in accordance with the teachings of the Church.
32. An example of the core activities/non-core activities distinction is the frequently made argument that only religious education coordinators and teachers of religion in a Catholic school perform a religious activity, and so have to be faithful practising Catholics. In this way, the government and the judiciary define what is required for individuals and communities to live out their faith, and excise what they consider to be not essential – an area of decision-making clearly outside their competence. As the Catholic Bishops of NSW/ACT observed in 2001:

*“Any claim by non-religious agencies to make decisions about the nature of religious bodies and about the relationship between religious beliefs and practices is inappropriate. A civil authority moves beyond its area of competence when it attempts to judge what is or is not relevant to the practice of religion. Religious freedom means nothing if secular bodies are able to determine what does and does not constitute religious practice.”<sup>23</sup>*

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CEO’s argument that Ms Griffin’s openly lesbian lifestyle prevented her from performing the inherent requirements of the job.

**See also** *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).

This decision of the NSW Court of Appeal remitted some rulings concerning the application of protections for religious freedom under the *Anti-Discrimination Act 1977* (NSW) (**ADA NSW**) to the Equal Opportunity Division of the Administrative Decisions Tribunal (**ADT**) for reconsideration. The Court of Appeal ruled that, in considering whether the conduct of the Wesley Mission (in declining to consider the application of a homosexual couple to become foster carers) was conduct necessary to avoid injury to the religious susceptibilities of its adherents, the ADT must have regard to the doctrines and tenets of the Wesleyan tradition to which Wesley Mission adheres (rather than those of a generic or omnibus “Christianity” which the ADT used when it first heard the case). The Court also ruled that while the protection for church agencies in appointing staff under s56(c) of ADA NSW does not extend to the appointment of foster carers, the meaning of “appointment” under this section should not be read narrowly and “limited [only] to functions or capacities relating to religion” or “functions having a religious character”.

23. NSW/ACT Catholic Bishops, *Statement on Religious Freedom*, n.13 at p.8

33. For Catholics and Christians in general (along with believers from other traditions) faith is lived out in service to others. Private devotion and public service are indivisible:

*“The core/non-core distinction reflects a misunderstanding of the nature and mission of certain religious bodies whose distinguishing qualities must be seen in the context of a particular religious culture and ethos. All those who choose to work in a religious organisation have a significant responsibility to maintain the religious integrity of the organisation. It is a reality that individuals have an impact on the culture of their organisations and also represent the organisation and the Church to the wider community in a variety of ways. It is a reasonable expectation by religious organisations that those who choose to work in them do not compromise or injure by word or action those religious and moral principles from which the agencies derive their foundational beliefs.”<sup>24</sup>*

34. Religious freedom includes the freedom to live in accordance with one’s beliefs in all areas of life; not just in private but in public activities and engagements as well. The notion that religion is a private and personal matter that should not be expressed publicly is incoherent because no human being lives this way. It is also discriminatory, because it places religious people in the position of having to justify their participation in the public domain. How a person lives away from their work or other areas of public activity can have a bearing on the witness they provide in their work for a Catholic agency. It is not a matter of intruding into the private lives of individuals, but when some private behaviours become publicly manifest they can raise questions about the suitability or appropriateness of a person continuing in a certain role (such as that of a judge, a politician or even a sportsperson). It is the same when it comes to employment or volunteering in a religious agency. The strength or weakness of adherence and commitment to the Catholic faith among the staff of an agency determines the strength or weakness of the religious culture or ethos of that agency, and the quality and character of the services it provides.
35. To provide an example, in anti-discrimination case law support staff or outdoor and maintenance staff in a Catholic school are treated differently from teaching staff because it is argued that the roles they perform do not place them in a position in which their

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24. *Ibid.* at p.9

lifestyle can influence others; whereas those in a leadership or teaching role are expected to model the values of the Church and must therefore adhere to Church teaching in both their public and private life.<sup>25</sup> But Catholic schools exist to provide an integral Catholic education to their students, in accordance with the right of parents to determine the religious and moral education of their children. They are built and maintained by the Catholic community, which provides significant funding for them. The parents, students and the Church community have the right to expect that the principals, leaders, teachers and other staff of the school will teach and live in accordance with the teachings of the Church as part of providing an integral Catholic education, which is the purpose for which the school was founded and why parents entrust their children to it.<sup>26</sup>

36. As set out at paragraphs 12-19 above, protections for religious freedom should be expanded in discrimination law to protect the right of religious organisations and individuals to freely practise and manifest their beliefs, including in the services they provide to the wider community. Existing protections (exemptions and exceptions) should be construed expansively, and the restrictive definitions of what is necessary to meet the “inherent requirements” and “religious susceptibilities” exceptions which currently apply should be broadened to take account of the reality of what makes Christian service to the community possible in the first place.
37. Existing models which provide broad protection for religious freedom in their wording include: sections 75, 76 and 77 of the *Equal Opportunity Act 1995 (Vic)*, s37 of the *Sex Discrimination Act 1984 (Cth.)* and s56 of the *Anti-Discrimination Act 1977 (NSW)*<sup>27</sup>

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25. See n.22.

26. The only Australian jurisdictions which expressly protect the freedom of religious schools to exercise a preference for practising adherents of their faith in the selection of staff are Tasmania and the Northern Territory. In Tasmania, the *Anti-Discrimination Act 1998 (Tas)* at s51 protects the exercise of such a preference as lawful if “the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment”, or if it “is in order to enable, or better enable, the educational institution to be conducted in accordance with the tenets, beliefs, teachings, principles or practices” according to which it is conducted. In the Northern Territory, under s37A of the *Anti-Discrimination Act 1992 (NT)* the exercise of such a preference need not be in furtherance of an occupational requirement to be lawful, but it must be “in good faith” and in order to “avoid offending the religious sensitivities of people of the particular religion.”;

27. Section 56 of the *Anti-Discrimination Act 1977 (NSW)* and s37 of the *Sex Discrimination Act 1984 (Cth)* are in similar terms and provide:

“Nothing in this Act affects:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order,

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion

(**ADA (NSW)**), as well as the exceptions provided for private educational authorities in that Act concerning the grounds of sex (s25(3)(c)), transgender (s38C(3)(c)), marital status (s40(3)(c)) and homosexuality (s49ZH(3)(c)).<sup>28</sup> As discussed above, how these protections are interpreted and applied by courts and tribunals is another question.

38. Section 77 of the *Equal Opportunity Act 1995 (Vic)* provides:

*“Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.”*<sup>29</sup>

Unfortunately, in Victoria, courts and tribunals have made determinations of their own limiting the extent to which protection for religious freedom is available under this provision.<sup>30</sup>

39. In addition to providing protections for religious freedom in these sorts of broad terms, anti-discrimination legislation should also stipulate expressly that it is the religious body or organisation concerned which determines the “inherent requirements” of employment in a church agency (including volunteer roles), along with the acts and practices that are necessary to comply with its religious beliefs or principles or to “avoid injury to the religious susceptibilities” of its adherents. To maintain the separation of church and state, courts and tribunals should not be determining what is and is not in accordance with a religious organisation’s stated religious doctrines, tenets, beliefs and teachings. This determination should be left to the religious organisation itself.

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*or members of a religious order,  
(c) the appointment of any other person in any capacity by a body established to propagate religion, or  
(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”*

28. See also *Anti-Discrimination Act 1992 (NT)* s37; *Equal Opportunity Act 1984 (SA)* s50(2) in relation to sexuality.

29. Part 3 of the *Equal Opportunity Act 1995 (Vic)* contains provisions defining all the areas in which discrimination is prohibited under the Act including employment, employment-related areas, education, the provision of goods, services and disposal of land, accommodation, clubs, club membership, sport and local government. The breadth of this exemption in relation to discrimination on the grounds of sexual orientation, gender identity and marital status will remain with the commencement of the *Equal Opportunity Act 2010 (Vic)* in August 2011.

30. See for example, *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010).

## Anti-vilification Laws and Religious Freedom

40. Anti-vilification provisions currently exist in the *Racial Discrimination Act 1977 (Cth)* (**RDA**) and state anti-discrimination legislation.<sup>31</sup> The Victorian Parliament has enacted the *Racial and Religious Tolerance Act 2001 (Vic)* (**RRTA**) to deal specifically with vilification on the grounds of race and religious belief or activity. The aim of the legislation is to strike a balance between the right to express one's views in a robust fashion and the obligation to ensure that what is said or done does not vilify others. Hatred and violence directed towards any person, whether in word or action, is repugnant and completely unacceptable and it is acknowledged that the groups that the Commission proposes should be protected by legislation are particularly vulnerable to vilification. The objects of vilification legislation are commendable, but before including vilification provisions the question of whether existing legislation has been effective in preventing vilification is one that requires further inquiry and consideration. For example, since its enactment, few cases have been brought under the RRTA,<sup>32</sup> and one of these, *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*, has become notorious as an example of the adverse impact that anti-vilification laws can have on religious freedom and freedom of speech<sup>33</sup>.
41. Generally, vilification legislation provides that a person must not, on specified grounds such as the religious belief or activity of another person or class of persons, engage in a public act that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. Conduct that is exempted includes fair reporting of a public act of vilification, communications which attract absolute privilege, and acts done reasonably and in good faith for academic, artistic, scientific or research (but

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31. *Racial Discrimination Act 1975 (Cth)* Part IIA (racial hatred); *Anti-Discrimination Act 1977 (NSW)* Part 2 Division 3A (racial vilification); Part 3A Division 5 (transgender vilification); Part 4C Division 4 (homosexuality vilification), Part 4F (HIV/AIDS vilification); *Racial and Religious Tolerance Act 2001 (Vic)* (racial and religious vilification); *Anti-Discrimination Act 1991 (Qld)* s124A (racial and religious, sexuality and gender identity vilification); *Anti-Discrimination Act 1998 (Tas)* s19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991 (ACT)* Part 6 (racial, sexuality and HIV/AIDS vilification); *Racial Vilification Act 1996 (SA)* s4 (racial vilification).

32. For example, *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 (Deputy President McKenzie, 13 March 2003), concerning an advertisement placed in the *Australian Jewish News* newspaper.

33. See the decision of the Victorian Court of Appeal, *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284. It is noteworthy that even with the exception for public acts done reasonably and in good faith for religious purposes in s11 of the Act, referred to in n.34, the Appellant was still unsuccessful.

generally not *religious*) purposes<sup>34</sup>, or any other purpose in the public interest, including discussion about any matter or act. Some statutes contain civil proscriptions and processes alone while others establish criminal offences. The criminal proscriptions usually require the additional element that the perpetrator has threatened, or has incited others to threaten, physical harm to a person or their property.

42. A key concept in both the ADA (NSW) definition of “public act” and the RDA definition in s18C(2) and (3), is “the public”. In short, the ADA (NSW) covers conduct that is a communication to the public, is observable by the public, or is the distribution of material to the public, with knowledge that the material is vilifying. The RDA covers conduct that causes material to be communicated to the public, or is done in “a public place”, or is done within sight or hearing of people who are in a public place, which is defined as a place to which the public have access as of right or by invitation. Although central to an understanding of the scope of the provisions in both statutes, “public” is not defined in either Act. The public-private distinction is unclear. This lack of clarity has not been addressed by courts and tribunals to the extent necessary to avoid inconsistent outcomes in cases brought under these statutes.<sup>35</sup>
43. For a complaint of vilification to succeed in all jurisdictions, the question is: “could the reasonable person understand from the public act that he/she is being incited to hatred towards or serious contempt for or serious ridicule of a person on one or more of the protected grounds of race, religious belief, homosexuality, HIV/AIDS status or because he or she is transgender?”<sup>36</sup> The test is not whether the reasonable person agrees or disagrees with the sentiments expressed but whether a reasonable person who is not malevolently inclined or who is free from susceptibility to prejudice would be inclined to

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34. Exceptions exist in ss38S and 49ZT(2)(c) of the ADA (NSW) which respectively provide that a public act done reasonably and in good faith for the purposes of “*religious instruction*” or “*religious discussion and instruction*” is not unlawful under the homosexuality / transgender vilification provisions. Section 11(1)(b)(i) of the RRTA contains exceptions for public conduct if the person establishes that his or her conduct was engaged in reasonably and in good faith “*in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for any genuine academic, artistic, religious or scientific purpose*”. Sub-section 11(2) provides that “*a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.*”

35. Relevant cases include *Gibbs v Wanganeen* [2001] FMCA 14; (2001) 162 FLR 333 at 337–338; *Beling v Stapels* [2001] FMCA 135 (McInnis FM, 10 December 2001); *Anderson v Thompson* [2001] NSWADT 11, 5 February 2001; *R v Marinkovic* (1996) EOC 92–841; *Burns v Dye* [2002] NSWADT 32 (12 March 2003); *Malco v Massaris* [1998] EOTrib (NSW) 226–229 of 1998, (12 February 1998); *Aegean Macedonian Association of Australia v Karagiannakis* (10 December 1999) (digest at (2000) EOC 93); *Miller v Wertheim* [2002] FCAFC 156.

36. *John Fairfax Publications Pty Limited v Kazak* [2002] NSW AD TAP 35 at par 16; *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Final) [2004] VCAT 2510 n.31 at p.4.

hatred by the publication or conduct.<sup>37</sup> The test is problematic because, as is frequently acknowledged, the “reasonable person” varies depending on the views and beliefs of the adjudicator. Case law precedent indicates that courts and tribunals have a great deal of discretion in determining whether the conduct in question is covered by the legislation. A more appropriate test would be the subjective-objective test in harassment provisions, which would require that the publication or conduct in question was unwelcome and did *in fact* offend, humiliate or intimidate a person, in circumstances in which it was reasonable for the perpetrator to have anticipated that a person in the position of the complainant would feel that way.<sup>38</sup>

44. The broad definition of “public act” threatens the freedom of religious individuals and organisations to publicly manifest their beliefs and teachings, especially in cases where they are unable to endorse or accept particular lifestyles, or when they engage in public debate and criticism about values and ideas.<sup>39</sup> Christian teaching on sexual morality and marriage and family, for example, or on the fixed and complementary nature of maleness and femaleness, may not be accepted by everyone, even though as explained at paragraphs 20-26 they are reasonable teachings. Some may even receive these teachings as an insult or personal condemnation of their own situation or relationships, even though no comment on individual circumstances is intended.
45. This raises the very real danger that the public explanation and defence of Church teaching in these areas may become the subject of a claim that by word or action, an individual or a Church agency or body is guilty of a “public act” capable of inciting hatred of, or serious contempt for people, (for example) based on their sexual orientation. This would seriously constrain the right to freedom of thought, conscience and religion, and

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37. Kazak, *op.cit.* at p.52.

38. For example, the test for sexual harassment in section 28A of the *Sex Discrimination Act 1984 (Cth)* provides:

“(1) For the purposes of this Division, a person sexually harasses another person (the **person harassed**) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.”

39. *Deen v Lamb* [2001] QADT 20; *Islamic Council of Victoria, op.cit.* n.31 at pp. 5–6. Both cases concerned criticism made in a pamphlet and at a seminar respectively of the Qur’an and a comparison of the Qur’an and the Christian faith. In both cases, the allegations of religious vilification were substantiated, although the respondent in *Deen* was held to have the benefit of the Constitution’s protection of communications made during the course of a Federal Election.

would also have a powerfully chilling effect on public debate about ideas and values, which necessarily entails criticism or judgements that some people may not like. Anti-vilification legislation is intended to protect people from hateful speech, but from experience here and overseas it often ends up protecting *ideas* rather than people, being used to shield some ideas from criticism, while silencing the public expression of others as “hate-speech”. In this way, anti-vilification laws can become a sword wielded against freedom of religion and belief.

46. If the object is to protect vulnerable people from harassment, bullying and violence, attention should be focussed on the criminal law to protect these groups from actual harm and violent offences, and the model offered by existing harassment provisions in anti-discrimination legislation, with their subjective-objective test. Public education campaigns to encourage people to treat individuals in vulnerable groups with respect and friendship have a much better chance of reducing insulting or hateful speech than the blunt and sometimes counterproductive instrument of anti-vilification laws.

## Conclusion

47. The considerations set out in this submission make it essential that any anti-discrimination or anti-vilification legislation must expressly include ample protection for religious freedom for individuals and for religious organisations and agencies. These provisions might also take cognizance of the Resolution of the United Nations General Assembly On the Elimination of all forms of Religious Intolerance, which provides that laws guaranteeing religious freedom should also include “*effective remedies in cases where the right to freedom of religion or belief is violated*”.<sup>40</sup>
48. The Catholic Church supports all efforts to eliminate unjust discrimination and inequality before the law, which also recognise and fully protect the fundamental human right to freedom of thought, conscience and religion. Unjust discrimination on the grounds of sexual orientation or sex or gender identity is a violation of human rights. Unjustly compelling religious organisations and individuals to act in ways contrary to the fundamental beliefs and teachings of their faith is also a violation of human rights, even when it is intended to serve a just purpose, such as protecting vulnerable people from

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40. *Op. cit.* n.11.

discrimination. Great care must be taken to ensure that attempts to prevent discrimination against one group, do not impinge on freedom of religion or discriminate against citizens on the basis of religion, and this submission has highlighted a number of important considerations which will help to avoid this danger. The Catholic Church welcomes the opportunity to assist the Commission in its efforts to protect the rights of all Australians, and especially those who are marginalised in our society, including by being involved in the drafting of any proposed legislative changes.

**Catholic Diocese of Wagga Wagga**

**Catholic Education Commission New South Wales**

**Archbishop Mark Coleridge, Archbishop of Canberra-Goulburn**

**Bishop Max Davis, Catholic Bishop of the Australian Defence Force**

**Bishop Anthony Fisher OP, Catholic Diocese of Parramatta**

**Bishop Geoffrey Jarrett, Catholic Diocese of Lismore**

**Life, Marriage and Family Centre, Catholic Archdiocese of Sydney**

**Bishop Michael Malone, Catholic Diocese of Maitland-Newcastle**

**Bishop Luc Matthys, Catholic Diocese of Armidale**

**Cardinal George Pell, Catholic Archdiocese of Sydney**