

**Catholic School Governance  
Archdiocese of Melbourne**

## **Threshold Issue 3: Incorporation**

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### **A. The Issue**

Incorporation, that is the establishment of a company to conduct the operation of Catholic Schools in the Archdiocese of Melbourne, follows through on the commitment given by the Australian Catholic Bishops Conference (ACBC) to implement the Royal Commission recommendation for parish priests to no longer to be the employers of principals and teachers in Catholic schools. The Royal Commission also encouraged Church organisations to adopt the procedures associated with the hallmarks of effective governance that come through incorporation: transparency, accountability, consultation and participation. As our schools receive funding for services to children they must meet the new requirements being implemented by the Victorian Government in response to Recommendation 26.1 of the *Betrayal of Trust Parliamentary Inquiry*, namely that funding recipients must be incorporated and adequately insured. Finally the sole person governance model has become increasingly unviable given the massive regulation that has been introduced in recent years. Our governance reform is being driven by factors such as these.

Our schools exist to be Catholic and issues associated with religious identity are therefore a critical consideration in the development of our governance structures. Threshold Issue Paper #1 considers these issues in greater detail. Governance is more than establishing a company and so once an incorporation model has been chosen a broader governance model involves establishing the 'framework of rules, relationships, systems and processes within and by which authority is exercised and controlled' within the corporation. Issues associated with the broader governance, leadership and management of schools are considered in greater detail in Threshold Issue Paper #2.

### **B. What is at stake?**

The governance, leadership and management structures all need to be aligned to the mission and purpose of our schools. A key driver in choosing a corporate structure is that it must be oriented towards preserving the Catholicity of the schools, even as we move into new arrangements. This will support the work of Catholic education in delivering outcomes in the protection of children, Catholic formation, pastoral care and educational excellence.

Furthermore when considering incorporation, it is imperative to ensure that the civil structure that is adopted is effective and safeguards the proper ecclesiastical role of those who have canonical oversight of Catholic schools. It is therefore essential that any civil law structure which is established for the purposes of pursuing the educational mission of the Church preserves a governance structure that is consistent with canon law.

### **C. Background and additional questions**

#### ***Background***

Across Australia a variety of civil and canonical structures have been established to govern and manage Catholic schools that are not governed by a diocese. This variety is evident in the proliferation of Congregational and Ministerial Public Juridic Person schools with a range of models with various combinations of Companies Limited by Guarantees, Trusts with multi-membership and ACNC approved reporting groups. In these cases the objects of the Company are aligned to the charism and tradition of the Congregation which established it.

Those dioceses who have progressed with incorporation models for their schools have established a not-for-profit company limited by guarantee,. Such a company has no shareholders, but members, and may not distribute its funds to the members. As a Not-for-Profit, any excess funds are referred to as 'surpluses of revenue' as distinct from profits. Recent incorporation examples include Catholic Education WA Limited, and the Dioceses of Sale, Sydney, Lismore and Ballarat.

The not-for-profit company limited by guarantee is an ideal civil vehicle for a Church ministry, as the Corporations Act 2001 (**Corporations Act**) requires the company to set forth in the constitution of the company its mission as the cause of its existence. Further, the company's directors, who have responsibilities in fiduciary oversight and strategic planning, must, as part of their directors duties, be guided by the purposes of the company.

Corporate governance structures are outlined in the company's constitution and revolve around the distinction between the three sections of a company structure and their respective roles:

- members (shareholders/owners)
- the board
- management

The roles played by Principals, Priests and and School Advisory Committees in the management of schools are considered in Threshold Issues Papers 1 and 2.

#### *Constitution*

A company's constitution is the contract between the **Member(s)**, between the company and each member, and the company and each director and secretary, with all involved agreeing to abide by the rules of the constitution. The constitution establishes the rights of the members and a **Board of Directors** as a governing body of the company to take responsibility for the fiduciary and strategic aspects of the whole company.

The constitution must be consistent with the Corporations Act 2001 which provides the governance and administration framework for companies. As such there are relevant checks and balances to ensure that effective governance principles of transparency, accountability, consultation and participation come into practice through incorporation. The Corporations Act, whilst prescriptive in many aspects of incorporation and administration of public companies limited by guarantee, provides much flexibility in the structuring of membership and the Board which makes it very suitable for establishing and operating Church ministry bodies consistent with canonical structures.

#### *Member(s)*

The Member "owns" the company. This does not entitle the Member(s) to any income or property of the company, such would be precluded in a not-for-profit company. The Member's role is to set the mission of the company by prescribing its objects and to determine the governance framework it desires for the company. All these matters are stated in the constitution on incorporation, which can only be changed by the Member.

Under the Corporations Act, the Board is the governing body of the company, it has responsibility for strategic direction and oversight of the management of the company's operations. The Member has no direct role, right or responsibility in these matters, other than to keep the board faithful to the mission, which is the purpose of the company. The Member's role typically, in the light of keeping the Board faithful to the mission, is limited to appointing and reviewing the Board and reserving decisions of the Board that impact on mission, for example the appointment of the CEO, opening and closure of schools, major expenditure items or any strategic directions which are inconsistent with the beliefs, teachings and practices of the Church. These reserved powers need to be set out in the constitution so they can be binding on Members and the Board.

Members in Church ministry companies are typically given such powers to reserve or approve certain decisions of the Board in order to ensure that the Board does not undertake anything contrary to the mission. The Constitution will prescribe the particular circumstances in which the Member will exercise the reserve powers, as they are intended to be used sparingly and carefully, and are not intended to hinder the Board's responsibility for strategic direction in pursuing the mission of the company.

### *The Board*

The first and primary duty of the Board is to ensure that company's fundamental principles are embodied in its core values, mission and vision. The Member appoints Board Directors to govern and set the strategic direction according to the objects of the company, as specified in the Constitution.

The Board is responsible for ensuring that company is compliant with its overarching legal obligations, in particular as it relates to corporations law, charity law and education law, as well as all other laws affecting the operation of schools. The Board's role is to govern the company and not to be involved in its day-to-day management. The Board is responsible for and should determine all matters relating to policy and practice and is responsible for the strategic aspects of the whole company.

Directors have fiduciary duties - they reflect the position of trust and confidence held by directors, which cannot be compromised. Fiduciary duties mean that the board must exercise independent judgement and act in the company's best interests and for a proper purpose. The directors must act honestly, in good faith, with a degree of care and diligence reasonably expected of a person in that role. The directors must not allow conflicting interests or personal advantage to override the interests of the company.

As the Board exercises its fiduciary responsibilities in oversight, risk management and strategic planning, it must be guided by the company's fundamental principles, as specified in the Constitution and as reflected in principles from Catholic Social Teaching: The Dignity of the Human Person, Solidarity, Subsidiarity, Care of the Common Good. The Board has overall responsibility to ensure that the company is well managed and that its operations are successful.

The incorporation structure should not be confused with wider concerns that relate to both mission and management. Issues associated with the Catholicity of schools are considered in Threshold Issue Paper #1 and issues associated with governance, leadership and management are considered in Threshold Issue Paper #2.

### **Questions**

1. What would be lost from Catholic education if we only had a sole member?

2. What reserved powers should be allocated to members in the Constitution to reflect their role as keepers of the mission of the company?
3. How can the composition of the Board meet the needs of both the **Corporations Act** and the mission – expertise-based rather than representative?

#### **D. A proposal for consideration**

That a suitably specialised legal firm is engaged by the Steering Committee to draft a Constitution for a not-for-profit company limited by guarantee. The Constitution will accord with the requirements of civil and canon law and will be framed within the mission of the Church. The Constitution will articulate roles and functions for the Member, Board and management that accurately reflects the purposes of Catholic education in the Archdiocese of Melbourne. The Steering Committee will ensure that the Constitution is informed by work being done in relation to Catholicity of schools in Threshold Issue Paper #1 and governance, leadership and management in Threshold Issue Paper #2. It will also ensure consultation with key stakeholders before being presented to the Archbishop for his consideration.

That the Board is comprised of diverse specialists who can act in the interests of the company, rather than representative interests.

That a canon lawyer is nominated to provide advice to the Steering Committee as it develops the model for approval.

Such a company will be governed by a Board of Directors and supported by a Chief Executive Officer and management structure that can adequately lead and supervise the operation of the large number of schools within the stringent school regulatory requirements. This structure will

- Fulfil the commitment given by the Australian Catholic Bishops Conference (ACBC) to implement the Royal Commission recommendation for parish priests to no longer to be the employers of principals and teachers in Catholic schools.
- Adopt the procedures of transparency, accountability, consultation and participation.
- Remove the burden of a sole person governance model given the massive regulation that has come in in recent years.
- Satisfy the incorporation requirements and thus, as provider of services to children, will be eligible to continue receiving the government funding entitlements for the schools which it will own and operate.

#### **E. Resources**

Incorporation arrangements in Archdioceses across Australia

**Key: Incorporated Body – Education Office – Commission.**

Sydney

**Sydney Catholic Schools Trust** was established to operate Catholic schools in the Archdiocese of Sydney. Its incorporated Trustee, **Sydney Catholic Schools Limited (SCS Ltd.)** under the authority of the SCS Ltd Board, is the employer of staff and operator of parish/diocesan schools/colleges for the Archdiocese of Sydney. The **Catholic Education Office Sydney** is the managerial body of the Sydney

Catholic Schools Trust in the Archdiocese of Sydney. The Parish is the beneficial owner of the land which is provided under licence to the incorporated Trustee. The canonical authority of the Archbishop is preserved via appropriate clauses in the Trust Deed of the Sydney Catholic Schools Trust and the Constitution of SCS Ltd.

#### Brisbane

**The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane** is the incorporated legal entity for the Archdiocese of Brisbane, incorporated by a Letters Patent on 25 July 1935 under *The Religious Educational and Charitable Institutions Act 1861*. This entity is the **Incorporated Trustee** that creates a civil corporation arrangement that enables the Archdiocese to own property, operate services, enter into contracts, employ staff, and register and engage with government regulators. The corporation is also the registered owner at civil law of all properties beneficially owned by parishes, including parish schools. These properties are held in trust under civil law for each parish.

The Incorporated Trustee is an employer of school staff which organisationally is effected through the **Brisbane Catholic Education (BCE)**, which is an operational unit under a separately registered business name. BCE is responsible for the administration and management of all Archdiocesan and parish schools in the Brisbane Archdiocese. The Parish is the beneficial owner of the land and the building improvements are accounted for within the accounts for the schools.

#### Perth

All Catholic schools in WA are to be conducted by the new **Catholic Education WA Limited (CEWA Ltd.)** The Bishops of WA are the members of the company, which will employ all staff in all dioceses. The Bishops of WA have established the Catholic Education Commission of Western Australia as the **Board of the Company**, essentially taking over and continuing the role of the Commission within an incorporated form.

**Catholic Education Office of Western Australia** is the managerial body of the company, supports the work of the Commission in all dioceses. The Parish will continue as the beneficial owner of the land on which the school operates.

#### Adelaide

All Catholic schools are operated and staff are employed by an incorporated association **Catholic Church Endowment Society Inc (CCES Ltd.)**. **Catholic Education South Australia (CESA)** supports the work of the commission in both dioceses. The Parish is the beneficial owner of the land and the building improvements are accounted for within the accounts for the school.

#### Sale, Sandhurst, Ballarat and Lismore

Diocesan constitutions are more relevant regarding the relationships between the significant bodies. Incorporation principles are the same as for diocesan bodies: The situation of the canonical responsibility of a single bishop. They have either gone for the Trust model or the Company Limited by Guarantee.

#### State Commissions:

These are the State bodies, not the diocesan incorporations. They complicate the scene and comparing them to a single diocese situation is like comparing apples and oranges. Nevertheless here for information.

Each state has a state wide Commission which under the *Australian Education Act 2013* (Cth) is responsible to the Australian and state governments for the distribution of funding to Catholic

diocesan schools in accordance with legislation. They have diverse structures as explained below. Each Commission derives its authority and mandate from the respective Bishops of each state through a Constitution and 'Canonical Mandates' from the Bishops that outline the functions and authority of the commission.

- **Catholic Schools NSW Limited [CSNSW]** is a company whose members are the eleven diocesan Bishops of NSW.
- The **South Australian Commission for Catholic Schools Inc (SACCS)** is a South Australian incorporated association, which canonically is a collegial public juridical person established by the Archbishop of Adelaide that acts as an authority for government funding purposes.
- The Catholic Education Commission of Western Australia (CECWA), which was an unincorporated body, has been replaced by the Board of Directors of **CEWA Ltd**. The directors of the state-wide company CEWA Ltd. will be known as Commissioners and the Board will be known as the Catholic Education Commission of Western Australia.
- The **Queensland Catholic Education Commission (QCEC)** is a 16 member body established by the Bishops of Queensland and operates as a not-for-profit body of the Corporation of the Roman Catholic Bishops of Queensland established under the *Roman Catholic Church (Incorporation of Church Entities) Act 1994* (Qld).