Submission to ALRC: Response to Consultation Paper

Executive Summary

Intolerable ethical, legal and psychological burdens on religious educational institutions and their communities would be imposed if the proposed law reforms as outlined in the consultation paper are adopted. Accordingly, this submission will respond to Proposition A, which concerns the proposed removal of the current exemption in the Sex Discrimination Act (SDA) for Australian religious educational institutions in relation to sexual orientation and gender identity as they pertain to students. The particular focus will be the effect of the removal of the religious exemptions in the SDA on Christian schools in Australia, especially (though not exclusively) Catholic, Anglican and various other Christian schools.

More specifically, this submission will argue that, under the proposed reforms, these school communities would need to be prepared to:

- act against their beliefs concerning safety by potentially being required to accommodate boys with girls in certain facilities and/or facilitate social gender transitions (affirm and act on a child's statement that they really are the opposite sex) on their school grounds;
- act against their beliefs concerning sexuality by potentially being required to hold on their school grounds groups whose message on sexual behaviour is contrary to that of the school; and
- not act in accordance with their beliefs by being prevented from teaching a biblical view of humanity, notwithstanding statements to the contrary in the consultation paper.

It is also argued that these burdens would not be outweighed by the stated benefits to school students who are same-sex-attracted or present with a gender identity different from their birth sex, due to documented risks associated with social and medical transitions, which disproportionately impact young people from both of these minority groups.

This submission will respond to each of the clauses presented in Proposition A. In so doing, it will highlight the incompatibility between biblical Christian beliefs and modern secular theories that underpin affirmative approaches to sexuality and gender transition, most notably as they pertain to children and young people.

Data demonstrating elevated levels of mental health issues for LGBT young people, including suicidality, will also be discussed. It is agreed that young people in these groups do indeed experience mental health issues at a higher rate than the majority of their peers, and it is important for Christian schools to address these issues within a Christian worldview without causing increased stigma for these young people.

It is also argued, however, that many of the survey statistics on suicide attempts for trans-identified and gender-dysphoric young people are misleading, because these are generally not random samples, the survey questions are often open to interpretation, and conclusions drawn from the data are often inconsistent with the design of those surveys. This submission contends that the statistics presented for suicide attempts for these young people greatly exceed the actual rates of serious suicide attempts for this group, which are more accurately obtained from hospital or other clinical records rather than exclusively from self-report data.

Another important issue is comorbidity. The data demonstrates that trans-identified youth, more than most other groups, suffer from a wide range of other mental conditions in addition to gender dysphoria, and that these issues are largely pre-existing rather than a result of social stigma

consequent to their trans identification. In addition, the evidence shows that a number of these mental health conditions individually have higher levels of suicidality than does gender dysphoria for young people. This is not to downplay the distress that gender-dysphoric students experience, which is very real. Rather, underlying mental health and other conditions should not be ignored in considering how best to conceive of, and respond to, a young person's transgender identification.

A section is also devoted to a critique of claims that a person's (opposite-sex) gender identity is innate and lifelong. The evidence for such claims is weak. Indeed, evidence is increasingly showing that social rather than innate factors are causing the sharp rise in recent years of young adolescents identifying as transgender or non-binary.

Importantly, a number of studies have demonstrated that, for most trans-identified young people, this identification does not persist. Moreover, long-term data has shown an increase in suicidality after transition compared to beforehand. Further, it is argued that an anti-discrimination policy based on gender identity could pave the way for potentially dangerous medical gender transition procedures for gender non-conforming students.

The conclusion of this submission is that LGBT (and other) students in Christian schools are better served by the schools having the autonomy to review their own policies to help them better protect LGBT youth, including monitoring any bullying or negative stereotypes perpetuated against these young people. This is considered to be a much more effective strategy than potentially finding themselves in legal battles as a result of anti-discrimination laws that are often inconsistent with the schools' missions. It is on this basis that recommendations are made at the end of the submission. Schools (and families) are responsible for the welfare of these children and young people, so they are the ones who should be working within their own policies to help these and other students achieve better mental health outcomes.

Proposition A: Review of the Sex Discrimination Act

I will start by responding to the statements made in sections A.30-A.38 in the ALRC consultation paper (pp. 45-47). I will discuss religious educational institutions and will focus primarily on Christian schools.

The theoretical background of the clashing worldviews is essential to this debate surrounding the implementation of these proposed law changes. Religious schools model their education on the religious texts on which their faiths are based. There are of course variations among the denominations within each faith, but in the case of Catholic schools and Christian community schools, for example, they are committed to educating students within a Christian worldview, meaning that they subscribe to the core tenets of Christianity, which include articles of Christian belief, mission and worship (AACS, 2020; CSA, 2023; NCEC, 2022). The foundational relational template assumed within a Christian worldview is one in which one man and one woman marry each other, mirroring the relationship between Christ and the church. It is not expected that all students or their parents will share this worldview, but it is expected that the school will be able to teach it with authenticity and in preference to other worldviews.

Response to Competing theories

Same-sex sexual orientation, and to a lesser extent opposite-sex gender identities, have been part of human existence in most societies since earliest historical records were available. What are new, however, are the affirmative approaches to sexual behaviour and a person's unique sense of their inner gender identity. These approaches are underpinned by queer theory (de Lauretis, 1991) and gender identity theory (Money, 1994) among others. In addition, there have been sustained campaigns in recent years to frame sexual orientation and gender identity as essential, permanent and innate aspects of a person's identity. This has served to extend the notion of, and associated human rights concerning, these aspects of one's identity not just to adults, but to adolescents and even children (Bradley, 2021). Responses to this latter claim will be provided in the section titled *Gender identity and biology.*

Queer theory, to which LGBT bodies generally subscribe, contends that, on the matter of sexual ethics, equal consent between partners is a necessary and sufficient basis upon which sexual activity between them is to be considered acceptable (de Lauretis, 1991). Traditional religious teachings, at least in Judaism, Christianity and Islam, state that sexual behaviour between people is ethical only in the context of marriage. More liberal or culturally progressive forms of Christianity and Judaism include same-sex marriage in their definition of marriage (Watkin, 2023; NSWJBD, 2023); however, like their more traditional counterparts, they also believe that consent is a necessary but not sufficient basis upon which sexual behaviour can be considered ethical. The vast majority of adherents to these religions do not, and I expect will not, agree that sexual consent is a sufficient condition for sexual contact to be considered ethical.

Gender identity theory proposes that everyone has a unique gender identity, meaning that only the individual can truly know which gender they are. The implications of this are that it is considered discriminatory and oppressive to divide up people on the basis of biological sex, which this theory considers not to be an accurate marker of one's true gender (Ainsworth, 2018). Proponents of gender identity theory therefore reject separate spaces for males and females in public toilets and changing rooms, dormitory accommodation, sporting teams, domestic violence shelters and prisons, and do not believe that schools should generally be permitted to divide students up on the basis of

sex. Again, the majority of people with traditional religious views do not accept this theory, including a majority of Christians in Australia and USA (Parker et al, 2022; Rodrigues, 2022).

The other current debate concerning gender identity is whether it is ethical to transition a minor (or unethical not to do so should the minor request it). As this is considered such a major issue by advocates and opponents of medical transition of minors in Australia, I will be including such discussions in my arguments concerning the proposed removal of the religious exemptions in the Sex Discrimination Act (SDA) that concern gender identity as it pertains to minors in primary and secondary religious schools. Just as most orthodox Christians do not believe that humans possess an innate gender identity that is independent of their biological sex, an even greater number believe that the practical application of that theory in relation to school students – medical gender transition for minors – is unethical (Regnerus & Vermurlen, 2022).

Therefore, I contend that removing the current religious exemptions in the Sex Discrimination Act (SDA) will seriously threaten the identity of religious schools, because the beliefs espoused by queer theory and gender identity theory are inconsistent with the religious beliefs held by many of these school communities. I will now proceed to address each of the points A.30-A.38 in turn.

<u>Response to Relevant rights at issue</u>

Point A.30 states:

> Proposition A may … [interfere with] … parents' liberties in relation to their children's religious and moral education, freedom of expression, and freedom of association.

I would contend that it may do more than that. If a state has enacted conversion therapy laws (as most have) that include a clause prohibiting parents or professionals from 'converting' or 'suppressing' a child's (opposite-sex) gender identity, and hence being required to 'affirm' a child's social or medical transition, Proposition A may also violate a parent's right to keep their gender-non-conforming or gender-distressed child what they consider safe from, and what many believe, to be an unproven and potentially dangerous medical intervention that is now often used in treating children and adolescents with gender dysphoria (Heneghan, 2019; Bewley et al, 2019). Many parents have sent their children to these types of religious schools because they want to be confident that the state will not interfere with the religious instruction that their child is receiving; this includes not introducing a definition of gender to their children that is against the parents' beliefs and may carry major medical implications.

As will be discussed in more detail in the response to point A.33, the data on suicidality of trans-identified young people is often misinterpreted and even misused. This is crucial in this discussion, because these statistics are often used to convince parents that what they consider unsafe – permitting medical transition of their child – is actually safer than not permitting it, because their child would then be at great risk of taking their own life if they are not permitted to undergo gender transition. The evidence for this latter assertion is very weak (SNBWF, 2020; GIDS, 2021). Competent and ethical suicide intervention involves accurate risk assessment and properly informed responses (Suicide Prevention Australia, 2015). It should not involve merely acting on the content of a demand (e.g. that the person will take their own life if not provided with what they want, such as medication).

Point A.31 then considers the implications of not implementing Proposition A, i.e. 'allowing discrimination' on the grounds of a student's sexual orientation or gender identity. One of the

negative implications listed is the breach of the young person's rights to privacy. Presumably this includes the right for one's biological sex not to be known by other people, but I submit that this right must also be balanced with the rights of others: for example, girls who want privacy from male bodies in female changing rooms. I will expand on this issue further in my comments at point A.34.

Response to Necessity of revocation of religious exemptions to the SDA

Points A.32 and A.33 (p. 45) refer to fundamental rights of students, which it is agreed should be upheld. The question is not whether trans-identifying children's rights should be respected, for example, but whether the method proposed for respecting them – a gender-affirmative model (Money, 1994) at odds with, and hostile to, orthodox religion (SDS, 2017) – should be the one that must be used by religious schools to protect these children and young people.

The second dot point at A.33 quotes Hill et al (2021) as stating 'one in four LGBTQ+ young people have attempted suicide and one in two trans young people'. In fact, the rate that they found for suicide attempts reported by trans young people was around 38% (p. 143). The figure for the Strauss et al (2017) study was close to half of the students surveyed, though, at 48%.

However, there is a question over the interpretation and generalisability of these figures. D'Angelo et al (2021) noted that a similar study (Grant et al, 2011), which found that 41% of surveyed trans youth stated that they had attempted suicide, was not representative of the population of trans-identified youth, as they targeted trans lobby groups, including a disproportionate number who had attended political rallies in support of trans causes. A relatively high number of respondents (at least 20%) had also attended one or more political rallies in the Hill et al (2021) study, while almost 42% of the young people in the Strauss et al (2017) study reported being involved in 'activism or volunteering' (p. 67).

This matters, because politically engaged young people are well aware of the potential implications of contributing to such alarming figures through their survey responses. There is also the question of how the respondents interpreted the question: for example, it is possible that many interpreted the question asking about attempting suicide as including non-suicidal self-harm or suicidal contemplation (Tanis, 2016; Zucker, 2019a). Michael Biggs (2022) analysed the results of self-report surveys administered to youth on this topic and compared these results to the clinical evidence on suicide attempts for this population. He noted in a study published through the Gender Identity Development Service (GIDS) that 44% of their young respondents (each of whom had been referred to the GIDS for gender-related distress) reported having attempted suicide, but the wording of that question was: "deliberately try *to hurt* or kill myself" (p. 686 – italics added). A more accurate means of assessing the annual rate of (serious) suicide attempts, according to Biggs (2022), is through hospital intake records, which for trans-identified young people tend to be close to 10% - still well above the population average (about 5.5 times the rate for this age group in the general population in the UK, adjusted for sex differences between the trans-identifying and general populations), but not close to the figures that are sometimes used to leverage governments to make radical changes to social policies. And even this figure of 10% is not based on a single issue, but masks the various other mental health issues that many of these young people are often experiencing (see the next section for a discussion of comorbidity of mental disorders for young people suffering from gender dysphoria).

Moreover, Biggs (2023) recently found that the suicidality of trans-identified young people taking puberty blockers increased over time. This has at least two implications: (i) the articles that quote suicidality in trans young people do not specify at what point they are at in their transition (the Biggs

(2023) review suggests that those who identify as trans may have a lower rate of suicidal ideation before starting on medication); (ii) the medical pathway, which has been found to present dangerous potential medical side-effects, may also have dangerous psychological side-effects. In addition, a large study on data covering more than 40 years found that completed suicides for transgender people are higher after 'gender confirmation surgery' than beforehand (Wiepjes et al, 2020).

The other study referred to at point A.33 (Ezzy et al, 2022) stated "This discourse of marginality is a common tactic utilised by conservative Christian lobby groups" (Ezzy et al, 2022, p. 4), and the expression used in several of their survey questions – 'Conservative Christians' (rather than using descriptors such as 'Orthodox' or 'Evangelical') is itself marginalising language, priming the respondent to want to distance themselves from such views. Also, while questions were asked about religious schools' freedom to select students based on their sexual orientation and gender identity, which could be considered discriminatory if these were the selection criteria, this does not go to the heart of the concern that many religious communities have about the proposed amendment to the SDA 38(3), which is whether the schools will be able to maintain the freedom to educate their students within their worldview, even if it does not align with the beliefs or practices of all students. This will be discussed in the response to points A.35-A.36 below.

Mental health issues that occur with gender dysphoria

A further matter for consideration is comorbidity. The prevalence of comorbid mental disorders among people suffering from gender dysphoria (formerly gender identity disorder; trans identification in young people is closely connected to the experience of these conditions) is particularly high (Anzani et al, 2020; Frew et al, 2021). This includes conditions that are unlikely to be, or in some cases clearly are not, a cause of social stigma resulting from a transgender identification, such as attachment-based disturbances (Giovanardi et al, 2018), autism (Anzani et al, 2020), personality disorders (Duisin et al, 2014; Perrotta, 2020), early-onset schizophrenia (Stusinski & Lew-Starowicz, 2018), and complex trauma (C-PTSD) arising from a history of sexual abuse (Bechard et al, 2017). The distress and suicidality of young people with gender dysphoria or a transgender (or non-binary) identification is therefore often exacerbated by pre-existing psychological factors. The mental health conditions included at A.33 in the Strauss et (2017) article cited in the consultation paper (anxiety, PTSD, depression, eating disorders, self-harm and suicidal behaviours: pp. 45-46) have not been shown to be *caused* by social exclusion of the young people in that study; only studies that involve appropriate control groups and include longitudinal data, where relevant, can establish causation (Toh & Hernan, 2008).

Suicide attempt rates for young people with these and other comorbid presentations that have been shown to accompany gender dysphoria have been found to be higher than for young people presenting with gender dysphoria alone (SNBWF, 2020). Therefore, policy recommendations made from suicide attempt figures for trans-identified young people cannot reasonably assume that the cause of the high suicide attempt rate is that these young people's distress is purely (or even mostly) associated with gender, or because they have not been permitted to transition socially or medically, which, I submit, forms part of the rationale for removing the religious exemptions in the SDA as discussed in this section.

The next statement at point A.33 is 'There is evidence that this vulnerability can be compounded for students who are themselves religious.' The study used to support this statement (Lytle et al, 2018)

consisted of the responses of tertiary students at a public university in USA, which found higher rates of suicidal ideation among those LGB (and questioning) students for whom their religious faith was important or very important. There were no transgender students in this study, and it did not involve youth under 18. The cause of the greater distress among religious students, as implied in the consultation paper, may have been about discrimination. But it could equally have been about these young adults' difficulty reconciling their faith and their sexual orientation, or it may have been about the anxiety of having a vastly reduced number of potential romantic interests (compared to other students) who shared their religious beliefs and sexual orientation. There is insufficient evidence within this study to draw a firm conclusion concerning which of these reasons was the most plausible.

A survey-based study by Redden et al (2021) produced a similar finding at a Christian university. However, Yarhouse et al (2021) noted that the Redden et al (2021) study participants had signed up to be members of the organisation responsible for producing the research, and the sponsor of the study had brought a lawsuit against a Christian organisation over LGBT issues but did not declare that conflict of interest. Moreover, some other studies have found religiosity to be a protective factor for the mental health of tertiary religious LGBT students (e.g. Ceatha et al, 2021; Oh et al, 2022) or neither a positive nor negative factor (Dyer & Goodman, 2022). Indeed, none of the studies quoted in the consultation paper compared the rates of mental health issues experienced by LGBT students in public schools with those of LGBT students in religious schools. Therefore, no conclusion can be drawn concerning the psychological impact on these students of being educated at the latter type of school – which has a religious exemption to the SDA concerning sexual orientation and gender identity – compared to the former.

Another study on this topic was conducted by Dean et al (2021), who found that there was an elevated level of distress reported by just under 10% of Christian LGBT students across several Christian tertiary campuses in the US, but there were a number of factors that were found to reduce that distress in the students, including intrinsic religiosity, social support from heterosexual friends, and having a positive sense of self-acceptance.

At point A.34, the subject of exclusion from religious schools is discussed. I have not found any evidence that Australian Christian schools, at least, have expelled students on the basis of their sexual orientation or gender identity. It is true, of course, that these schools have policies that reflect the values of their school communities. For example, sexual contact between students on school grounds is proscribed regardless of sexual orientation. In the case of gender identity, again the school should be permitted to maintain policies that reflect their ethos. This includes segregating students on the basis of sex in toilets, changing rooms, accommodation, and where appropriate, school sports. The negative impact on students who identify as the opposite sex has not been demonstrated to exceed that of students who wish to maintain privacy and safety.

At A.35, the consultation paper states (p. 46):

> While prohibiting discrimination may require inclusion and support of individuals with different beliefs or conduct that is not in compliance with religious beliefs, it does not significantly burden the ability to teach doctrine or to manifest religious belief through worship and practice in community.

I contend that this is very unlikely to be the case under the removal of the exemptions in section 38(3) of the SDA. Consider the following scenario: Suppose a teacher in a Christian school tells a class that human biology demonstrates that (apart from very rare anatomical abnormalities) all humans are clearly born as either male or female, which is consistent with the biblical view of humanity. A trans-identified student objects, stating that this statement is hurtful, and asks the teacher to retract

it. Alternatively, perhaps this student, or an advocate on the student's behalf, makes a complaint to their state anti-discrimination board. It would appear very improbable in such cases that this would not affect the future teaching of this topic in this school, and probably others. Further, given that many state schools are teaching the concept of gender fluidity (i.e. a child can change from being a girl to a boy or vice versa: Rodrigues, 2022), again, the logical next step would be that if a religious school persists in teaching the traditional view of biological sex and refuses to teach gender fluidity, they would likely be sued if they are required to abide by non-discrimination against students on the basis of gender identity.

Response to Proportionality

Point A.36 (point 1) argues that the effect of 'Interference with institutional autonomy' on educators, parents and students at an educational institution is less severe than the impact on the rights of the [LGBT] students who may be discriminated against. In relation to gender identity, one important aspect to consider in this argument is that of gender affirmation, the effects of which may be considerably more debilitating in the long term for the young person who has experienced it than not. While I acknowledge that there are significant differences of opinion on this matter, studies demonstrating harmful effects of gender identity conversion or suppression practices (e.g. Turban et al, 2019) have a significantly weaker evidence base and study design than those demonstrating the ill-effects of the medical transition itself (Cheng et al, 2019; Lee et al, 2020; D'Angelo et al, 2021). There has also been a recent exposé by a former staffer at a gender clinic in the US who wanted to alert the general public to the dangerous and unregulated practices in youth gender medicine that continue to cause harm (Reed, 2023). In fact, even social transition – the changing of names and pronouns, and the use of opposite-sex school toilets and changing rooms – has been described as a major clinical intervention, and not one that should be facilitated by schools without professional guidance and approval, as it is more likely to lead to medical transition than if the intervention is not used (Zucker, 2019b; Cass, 2022).

The second point under A.36 reiterates the previous position of the consultation paper that the teaching of religious doctrine will not be affected in its essence, but only its method. Again, I believe this is very unlikely, for the reasons described in my response to point A.34.

The third point at A.36 states:

> The proposed reforms would reflect the legal position that has existed in Queensland and Tasmania for a number of decades. This indicates that such reforms would not significantly undermine the ability of religious schools to maintain their religious ethos (p. 46).

In response to this statement, it should be noted that these states provide for some exceptions to discrimination on the basis of sex and gender. For example, the Queensland Anti-Discrimination Act (1991) states under Section 28:

> It is not unlawful to discriminate on the basis of lawful sexual activity or gender identity against a person with respect to a matter that is otherwise prohibited under subdivision 1 if— (a) the work involves the care or instruction of minors; and (b) the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case, including the person's actions.

Likewise, the Tasmanian act provides some religious exemptions (Equal Opportunity Tasmania, 2023). Thus, the proposed national law reforms would be a significantly greater intrusion into religious schools' instruction of children in relation to gender identity including, for example, division of children into groups according to birth sex (where appropriate) than such state laws.

The fourth point at A.36 refers to Australia's commitment to the principles outlined in the Mparntwe Declaration. That document refers to the rights of all children to be educated 'free from any form of discrimination' (p. 5). Sexual orientation and gender identity were not mentioned in that document, though it could be assumed that they would be included were it to be written today. However, inherent in any belief system are particular tenets that exclude other belief systems on various matters. For example, would a Hindu student be discriminated against by attending a Christian school? It would be expected on the one hand that the Hindu student should not be subjected to any kind of discrimination; however, this student's *beliefs* would be discriminated against (for example, the belief that there is not just one God) because their own beliefs would not be affirmed by the school. The manner in which this is done is of course very important, but either we say that the religious beliefs of the school are acceptable and should be protected, in which case belief discrimination against students is inevitable, or if not, then the beliefs of the school are unacceptable. Or if a lecturer at a public university, teaching from a secular postmodern framework, states that Christians hold undue power and outdated beliefs, they are potentially discriminating against the beliefs of Christian students, particularly if those students have found themselves disempowered by other individuals or institutions. But in a liberal democratic society, that lecturer presumably has the right to say what he or she did.

In the case of gender identity in school students, for various reasons articulated previously, while religious schools should refrain from discriminating against the student, they should not be expected to accommodate all of this student's beliefs and requests, any more than they would another student's beliefs or requests about any other issue, even if those beliefs are about the student's own identity. Specifically, if a student who is a natal male identifies as a female, in certain areas at least (those described in my response to point A.34 above), the school should have the right to (sensitively and compassionately) affirm their own beliefs, because: (i) those beliefs can be verified to be scientifically correct; (ii) those beliefs are consistent with their religious beliefs and values; (iii) the school is open about their beliefs concerning gender in their public documents; (iv) when weighing up the advantages and disadvantages of acting on those beliefs, the school can assess that the benefits outweigh the risks.

Consider a related example: If a student has schizophrenia and believes that they are someone other than who they are, does the school have the moral and legal obligation to affirm those beliefs? The argument that students with minority gender status have elevated suicide rates cannot and should not be argued to enforce a particular policy – especially one that potentially discriminates against other groups – if the same cannot be done with the student with schizophrenia, given that the suicide rates for people with schizophrenia (and other psychotic disorders) exceed those for gender dysphoria (or any other mental health condition: Song et al, 2020; Biggs, 2022).

The issue of discrimination at enrolment is discussed at point A.37. The consultation paper argues that discrimination according to different student characteristics should not be permitted at the enrolment stage. Private schools do discriminate at enrolment though, on the basis of previous academic performance, ability to pay fees, and/or agreement to adhere to the school's ethos, for example. Concerning a student's actions once they are enrolled at the school, If an attempt by the school to require behavioural expectations specific to their religion is blocked by the state, then the school will clearly cease to maintain its identity as a religious school. Suppose, for example, that a school considers membership of an LGBT organisation (or indeed an organisation associated with another religion) to be counter to its beliefs and principles (remembering that this is because the school does not affirm queer theory, even though it values (or should value) the student to the same extent as any other), should the school be allowed to advise the student that there is a conflict and that they could not support such groups on campus? Taking this argument a little further, if a student is a trans rights activist and campaigns to other students that the school is discriminatory on

this issue, should the school have the right to direct the student to refrain from this behaviour? Again, if the school is not permitted to defend itself from someone who acts against the school, this would clearly threaten its continued existence. While the consultation paper acknowledges that schools should not expect to be actively undermined, it is unclear what rights the school would have if its management believed it was being undermined by a student with one of the two characteristics addressed in the consultation paper if the religious exemptions to the SDA were to be removed.

Response to Consistency with overseas practice

At point A.38, the consultation paper states the 'reforms are consistent with practice in … England, and Ireland.' (p. 47). This is true concerning non-discrimination on the basis of certain protected characteristics in the UK. However, the UK Equality Act does not specifically prohibit discrimination on the basis of gender identity, which is "not a protected characteristic [in England]." (SMTT, 2022, p. 13). It is on this basis that the UK Government has been able to recently block a Scottish bill that would have permitted adult natal males with a female gender identity to be housed in women's prisons (Kottasova, 2023). On this point, note number 18 on page 10 of the consultation paper states that, according to UN treaty bodies, sex discrimination amounts to gender-based discrimination, but this again is not necessarily the case, at least in relation to the UK equality act (EHRC, 2022). The relevance of this to the present case is that a change in discrimination laws to allow expanded rights for trans-identified students could likewise create problems for female students – specifically, religious girls – and their parents, if the trans-identifying student is a natal male who is given the right to use the female changing room. This has already been the case in the US (Downey, 2022).

In weighing up the competing rights and needs of trans-identified and (biological) female students, the principal argument against schools being allowed to maintain the predominant religious view of biological sex and single-sex spaces would be that trans students are more oppressed than female students because (i) there are fewer of them; (ii) our society has disproportionately discriminated against and often held negative attitudes towards them; and (iii) the suicide rate is higher for transgender people than for women and girls. Each of these statements is true; however, they provide insufficient grounds for reforming the SDA exemption for religious educational institutions in relation to gender identity. This is because these reasons hide the important fact that (biological) males are in most cases larger and stronger than females of the same age. Therefore, a young natal male who identifies as a female may hold less social power than a natal female but is very likely to be more powerful physically (and sexually). And if suicide rates are to provide the key impetus for policy development, then men, who have consistently taken their own lives at a rate approximately three times that of women in Australia (AIHW, 2022), should be protected by anti-discrimination laws on the basis of being male. This does not and, one would expect, should not, happen.

Gender identity and biology

I would like to review the evidence for the biological basis of gender identity. This is important, because this construct, even for children and adolescents, appears to be assumed in the consultation paper to be a stable, innate characteristic of the young person. However, the evidence supporting this claim is weak. Even sexual orientation, which does appear to have a biological component (Burke et al, 2017), albeit with mixed evidence concerning its genetic basis (Bogaert & Skorska, 2020), may not be fully formed in adolescence (Ott et al, 2011; Stewart, 2019). But to describe a child as 'transgender' is to make a claim to stability of their gender identity that is very difficult to support.

Gender Health Query is a website run by secular LGBTQ professionals. They have conducted a thorough review of the evidence for claims that gender identity is lifelong, innate and immutable;

the many studies that they have reviewed do not support these claims (GHQ, 2020). Two of the reasons that people have come to believe that there is a biological basis for gender identity are (i) it is assumed, like same-sex attraction, to be a fairly stable aspect of one's identity, and (ii) some studies appear to have supported this claim.

Indeed, at first sight, the study by Burke et al (2017) seems to support a biological basis to gender identity. This study considered the cortical thickness of men's and women's brains. They found some differences not only between male and female brains (the cortex in men's brains is generally thinner than that in women's brains), but between homosexual and heterosexual men's brains (the cortical thickness of brains of same-sex attracted males more closely matched that of the women's brains in the study). This difference also appeared to exist between transgender and non-transgender (cisgender) adult brains, but once the sexual orientations (with respect to the participants' birth sex) were taken into account, those differences largely disappeared. That didn't mean that the transgender adults in the study did not have the sense that they were born in the wrong body, but no gender differences after sexual orientation was controlled for were found between their brains and those of the other participants. So from this and the many studies reviewed by GHQ (2020), there is little to no evidence that variations in gender identity result from having a male brain inside a female body or vice versa (Guillamon et al, 2016), nor are they related to hormones (Olson et al, 2015). A consistent finding in the literature is that the majority of trans-identified young people will grow up to be same-sex attracted if left to develop naturally and not encouraged to transition (GHQ, 2020). Indeed, a very large study conducted by the National Center for Transgender Equality (NCTE, 2015) found that of the 28,000 participants surveyed, approximately 66% of them described themselves as homosexual (in relation to their birth sex) or bisexual, which is well above the rate of non-heterosexual attraction in broader society.

The lack of a biological basis to gender identity is further underlined by desistance rates in adolescents (the proportion of young people initially declaring a transgender or non-binary identity but discontinuing that belief without transitioning). These rates have been found to vary from 60% to 98%, with most at around 80% (e.g. Korte et al, 2008; Singh et al, 2021; GHQ, 2020). This means that most young people who have believed at some point that they were transgender cease to believe this by puberty, again calling into question the biological nature of a trans identity, and hence also casting doubt on the wisdom of protecting the gender identity status *per se* of the young person, as distinct from protecting the whole person. Again, that does not in any sense mean that the distress of feeling like one is in the wrong body (gender dysphoria) is not real, but it does suggest that social policies – including anti-discrimination laws – should err on the side of caution, especially when they might set a young person on a (medically risky) path on which they would probably not normally continue. Specifically, medical transition for minors with a diagnosis of gender dysphoria often includes puberty blockers, whose side-effects include fertility problems, and their use invariably leads to the use of cross-sex hormones, which can lead to suppressed ovulation (transmen) or testicular atrophy (transwomen) (Cheng et al, 2019).

Furthermore, Australian Professor of Law, Patrick Parkinson (2023), contends that, unless there is a biological and hence medical basis for gender identity, people of faith cannot reasonably be expected to agree with someone else's belief that they really are the opposite sex (or another gender). Parkinson (2023) observes that the most current conception of gender identity is that it is considered a matter of human rights to identify as another gender, regardless of whether they share any of the genetic, anatomical or physiological aspects that are associated with being the opposite sex. He states that just as everyone deserves the human right of being respected and not ridiculed, it is equally an infringement of the human rights of a person of faith for the government to compel them to believe such a claim and act accordingly.

Further implications for faith-based schools

Given the ideological gulf between gender affirmation theories and orthodox religious beliefs, if the religious exemptions from the SDA are removed in relation to sexual orientation and gender identity, it is difficult to imagine a scenario other than a sharp increase in lawsuits related to these issues. Indeed, the response by a religious school to a student who declares an opposite-sex gender identity may not be considered acceptable by state authorities if it is one of mere tolerance; the bar is continually being set higher, as gender affirmation advocates insist that failure to fully affirm (accept and act on the beliefs of) a young person's self-identification as the opposite sex constitutes a form of neglect and should be reported to state authorities (Riggs, 2019). This is despite the evidence showing the potential for harm – especially for minors – when using puberty blockers or cross-sex hormones as discussed previously. Moreover, one implication rarely mentioned in discussions on policy concerning gender identity is that of disclosure. Consider, for example, a situation in which a male-to-female trans-identified student asks out a heterosexual male on a date. If the heterosexual male is unaware that the young person who asked him out is a natal male and finds this out on the date, this could become a very uncomfortable situation, and in some cases even a safety issue. Religious schools would not normally encourage such a lack of disclosure. This is such a fundamental issue for many religious young people, in particular, that it cannot simply be solved by 're-educating' students to be more open to the possibility of having intimate relationships with peers whose natal sex differs from the one to which they are attracted.

There is one final point to make here: trans identifications do not happen in a vacuum. They have been happening at much higher rates recently, and mainly within a specific age group and gender (young teenage girls have been significantly more likely in several countries in recent years to suddenly identify as transgender: Littman, 2018). There are a number of other predictors as to the likelihood of a trans identification (aside from gender non-conformity and body image discussed earlier). One of these is social media, wherein case studies have reported online influencers to 'diagnose' the gender-distressed young person as having gender dysphoria or suggest to the young person that they are likely to be trans (Littman, 2018). To this point, religious schools have provided a level of safeguarding from this online contagion effect by their teaching and policies on gender identity. Under an anti-discrimination law (and conversion therapy laws) that include gender identity – no matter how brief the identification or how the student was influenced – the school would be required to affirm the new gender identity of any student who declares it, and given that online influencers will not normally have to take any responsibility for the child's subsequent wellbeing , I submit that this would be a dangerous change in these schools' policies.

Religious schooling and equality

Religious discrimination survey

There has been a survey provided by Equality Australia that has asked respondents: 'Tell us what you think about religious discrimination, including your experiences in religious schools and organisations.' (Equality Australia, 2023). I have concerns about both the reliability and the validity of that survey. I took the survey myself once, and then I checked whether it was possible to take it a second time. Although it did not permit me to do so from the same computer, it did permit me to do so from another computer that I own, which stores the same email address (I did not submit my final responses, but I could have done so). Given that most people have access to more than one computer, this allows multiple responses from individuals. Secondly, that survey is on the same website that, until recently, specifically advocated against religious freedom (that was the case when I responded to the survey in December 2022), so the user was potentially influenced to report the harms that they had encountered from religious schools rather than report the benefits they

received from such schools. This affects the validity of that survey. I expect that the results of that survey will be used to advocate against religious schools' rights to maintain and teach their religious beliefs.

Mandated beliefs

A senior UN official has recently stated, "transwomen are women, and arbitrary obstacles to legal recognition of gender identity violate State human rights obligations" (OHCHR, 2022). This has profound implications, not only for the rights and freedoms of women, but for freedom of belief and speech of religious institutions and their adherents who do not subscribe to that view.

It also goes to the heart of the nature of equality. Specifically, which version of equality preserves the rights and freedoms of others: the right to identify as whichever gender one chooses (together with its implications), or the right to disagree with the claim above? If someone provides the answer to that question as: "only the first one, because the second 'right' causes violence", then I respectfully disagree. It is certainly possible to be respectful of transwomen without saying something that one does not believe to be true. Not all transwomen believe that statement, either (e.g., Catherine McGregor, Caitlyn Jenner, Debbie Hayton). State imposition of beliefs that people do not agree with but must accept has historically led to violence on a global scale. Forcing educational institutions to believe something and act on those externally imposed beliefs despite their religious convictions is the opposite of democracy.

<u>Concluding Points</u>

Proposition A in the consultation paper recommends the removal of the religious exemption to the SDA (section 38(3)). I support the principle to protect all children and young people in schools, which of course includes those who identify with diverse sexual orientations or gender identities. I do not, however, support this proposed change to the SDA because:

(i) Orthodox beliefs within the three monotheistic religions (those upon which many Australian religious schools were founded) are incompatible with queer theory and gender identity theory, and so enforcement of policies and practices informed by these philosophies on the schools would seriously undermine the capacity of these schools to continue to teach within their religious worldview;

(ii) The rejection of the above theories does not imply rejection of students with minority sexuality and gender status, as such rejection would also be contrary to Christian teaching;

(iii) In the cases of a large number of Christian schools (AACS, 2020; CSA, 2023; NCEC, 2022), the belief that someone's gender is known only to that person is inconsistent with their view of humanity and society;

(iv) It is agreed that children and young people with minority gender/sexuality status should be psychologically (in addition to physically) safe at school; what is at issue here are the definition and conditions for a child to be considered safe;

(v) For sexual orientation, if safety implies not being bullied or systematically disparaged, for example, religious schools can and must support that; if on the other hand safety here means not having anyone tell the students (even if through the teaching to all students) that being sexually active outside marriage is sin, then a religious school cannot support this;

(vi) For gender identity, if safety is again defined as not being bullied and having one's feelings validated (though not necessarily all their wishes fulfilled), I believe that religious schools can agree to that; if, instead, it means agreeing with the student that they really are the opposite sex or another gender (gender affirmation), then once again I do not believe that the religious school can support this;

(vii) Schools have an ethical and legal duty to do no harm, so if the school is required to support a student in an act which they believe is both contrary to their mission and may become harmful to that student (transitioning) and yet are required to facilitate it, the school may feel compelled to abandon their religious values and their duty to do no harm, which creates a conflict between two legal duties;

(viii) The schools and the parents are responsible for the wellbeing of the students under their care, rather than government or other external groups;

(ix) The government is responsible primarily to the principal stakeholders in this consultation, which includes the families who have chosen to send their children to religious schools;

(x) As gender identity is not classified as a medical condition but a subjective experience of one's 'true gender', a person of faith cannot reasonably be compelled to believe and act on the gender-related beliefs of a student who expresses a gender identity at variance with their natal sex (Parkinson, 2023); and

(xi) The high level of comorbidity between gender dysphoria and several other (mostly pre-existing) conditions that exacerbate it should be acknowledged, so that policies isolating gender identity do not inadvertently compromise other aspects of the young person's mental or physical health.

Therefore, I recommend the following:

<u>Recommendations</u>

(1) Due to the education of their students in the Christian understanding of humanity, as well as matters of safety, the current religious exemptions in the SDA should be retained;

(2) Religious schools must be permitted to continue to teach within their religious worldview, which includes (at least for many Christian, Islamic and Jewish schools) the teaching that God intended marriage to be between one woman and one man – as discussed above, the removal of the religious exemption to the SDA would compromise, if not ultimately prevent, this teaching;

(3) The rights of religious schools to continue to teach within their charter should be supported by governments in a free society; In the case of sexual orientation and gender identity that means accepting these schools' policies made in good faith to shape the character of all students, which includes helping all students to be safe and to flourish;

(4) Religious schools must be permitted to further develop their own policies to protect same-sex, gender-diverse and other minority group students in their schools (without government intervention) – this would permit them to balance the two crucial issues at hand, which are the rights of these students and the religious freedom of the members of the school community. These policies could include some or all of the following:

- Include statements on policy documents that are clear about the beliefs of the school concerning religious and social issues, but also affirm the value and equality of all students and avoid any statements that negatively target LGBT students (Smith, 2021);
- Emphasise the commonality among students regardless of identity based on religion, race, gender or sexual orientation, and formulate policies that promote self-acceptance in all students (Dean et al, 2021);
- Educate students to prevent bullying or stereotyping of other students based on gender non-conformity or same-sex attraction; Help students distinguish between normal sexual development and imposed gender stereotypes; As females are often

particularly subject to sexualised stereotypes, help girls (and boys) to challenge these expectations; Teach neuroscience to help all students understand how their brains (and bodies) develop; Encourage students to challenge unhelpful cultural messages, including online claims that gender non-conformity (or same-sex attraction) is a sign of potentially needing to change one's body to match a gender stereotype (Davies-Arai, 2018);

- Write policies concerning gender identity that do not exclude students either on entry or once already enrolled; Emphasise acceptance and kindness throughout the school community; Do not require 'affirmation' of a transgender identity per se, but affirmation of the individual student as a whole person; and Expect respectful language from all members of the school community that nonetheless does not compel the user to be dishonest or insincere. (Parkinson, 2023).

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