

Submission to the ALRC Consultation regarding ‘Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023)’

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Expertise

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Dr Naomi Barnes is Senior Lecturer in education politics and policy at QUT and an expert on how lobby groups affect change in education policy using moral statements. Drawing together communications, politics and policy, Dr Barnes is a member of the Centre for Justice and Digital Media Research Centre. She recently published School choice to religiously discriminate: religiopolitical activism and secularism in public schooling in the *Journal of Education Administration and History*. For a full list of Dr Barnes’ publications, please see https://eprints.qut.edu.au/view/person/Barnes,_Naomi.html

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We draw on our combined expertise in this submission. The submission is made in a personal capacity and we do not claim to speak for any organisation.

Executive Summary

1. Generally, the proposed changes in the *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* ('the Consultation Paper') are welcome but in our view do not go far enough to protect the rights of students and staff who identify as sexuality or gender diverse as compared with the religious educational institutions that teach or employ them.
2. In our view, the rights of the child are not adequately centralised within the review. As such, the proposed changes will limit a religious school's ability to discriminate but the power imbalance and regulatory environment will not be sufficient to prevent harm and discrimination. Australia has an opportunity to be a leading nation in the protection of the rights of the child in educational settings. We have the capacity to prioritise child rights above religious rights to ensure fairness and equity for those who are less powerful in our society.
3. We are deeply concerned that the regulatory environment, even with the proposed changes, would continue to place the burden of proof when it comes to discrimination on the most vulnerable person in the equation – the child, rather than introducing proactive responsibilities on all schools to provide an inclusive education. Children do not get a choice in schooling and can be enrolled in a discriminatory institution by their families despite their sex, sexuality or gender identity. Even with the proposed changes, there is still an unjustifiable risk of harm and discrimination.
4. Greater protection for children and teachers concerning sex, sexuality and gender identity is necessary to address established hostility and harm to LGBTIQ+ people in schooling contexts and to meet our international human rights obligations.
5. The Commission should closely consider the complexities of those teachers and students of faith who also identify as gender or sexuality diverse and take note of submissions to the review from the many religious bodies that have reconciled these traditionally 'opposing' dispositions (such as the Uniting Church) over religious institutions that continue to support discrimination.
6. We propose that the government provide incentives to schools that actively introduce inclusive policies and reverse funding to the religious education sector in its current form. Taxpayer funding of discrimination must cease.

Our general response to the Consultation Paper is below, followed by specific responses to each proposition and related technical proposals.

General Response to the Consultation Paper

- 1. In our view, the rights of the child are not centralised within the review.** The Consultation Paper formally acknowledges that children are at the centre of this consultation (Principle 5) and that exemptions for religious educational institutions to discriminate on the grounds of sex, sexuality and gender identity can impact their rights. The acknowledgement of the fundamental rights of the teacher, whose rights impact on the child who has the same protected characteristics, are embedded within the propositions contained within the review. However, we argue that the rights of the child are not centralised within the review, despite the formal acknowledgement of such in the Consultation Paper. As such, the proposed changes will limit a religious school's ability to discriminate, in theory, but the power imbalance and regulatory environment will not be sufficient to stop the discrimination.
- 2. We are deeply concerned that the regulatory environment, even with the proposed changes, continues to place the burden of proof when it comes to discrimination on the most vulnerable person in the equation – the child, rather than introducing proactive responsibilities on all schools to provide an inclusive education.** Religious schools come from a position of power in that they are already established schools, with very few obligations for transparency in terms of student support and delivery of policy including curriculum. The child will need to prove discrimination within the religious school, against the collective. This is particularly problematic when the child's identity is at odds with not just their school's 'ethos', but potentially also their family and immediate community. Even more pertinent is that the bullying, often projected by peers and allowed,¹ may be coming from the teachers as well,² who question their very right to exist in accordance with many religious doctrines and who are responsible for religious educational institutions in Australia.
- 3. Children are a significantly greater risk of discrimination than religious educational institutions and require protection from stronger legal and policy mechanisms.** As children who identify with diverse genders and sexualities are a particularly vulnerable group, we urge the Commission to consider that the rights of individual vulnerable children must outweigh the 'rights' of religious educational institutions, as children do not possess the collective power that religious institutions do. Young Australians that identify as gender or sexuality diverse are at significant risk of adverse mental health outcomes, including suicide attempts, as well as being bullied or discriminated against in school.³ The Consultation Paper

¹ Jacqueline Ullman, *Free2Be... Yet?: The Second National Study of Australian High School Students Who Identify as Gender and Sexuality Diverse* (Centre for Educational Research, School of Education, Western Sydney University, 2021) <<https://doi.org/10.26183/3pxm-2t07>>.

² Tiffany Jones, 'Religious Freedom and LGBTIQA + Students' [2023] *Sexuality Research and Social Policy* <<https://doi.org/10.1007/s13178-022-00785-w>>; Nomisha Kurian, 'Rights-Protectors or Rights-Violators? Deconstructing Teacher Discrimination against LGBT Students in England and the UN Convention on the Rights of the Child as an Advocacy Tool' (2020) 24(8) *The International Journal of Human Rights* 1080.

³ Penelope Strauss et al, 'Associations between Negative Life Experiences and the Mental Health of Trans and Gender Diverse Young People in Australia: Findings from Trans Pathways' (2019) 50(5) *Psychological Medicine* 1.

implicitly suggests that powerful religious organisations are at just as great a risk of discrimination for religious beliefs as the children attending them who are gender and sexuality diverse. This is simply not true, nor representative of the process of determining discrimination.

Religious educational institutions will still be able to discriminate against students through other policy mechanisms such as 'school choice'.⁴ However, there must be legal oversight to protect children and teachers from discrimination before they are exposed in the press. A religious school should not have to get to the point of an expose on Four Corners or in the press before their community finds out how children are treated within the system.⁵ There is a long history of religious schools breaching human rights that extends back to the 1980s, where the right to discriminate was central to the development of independent Christian schools. It is well documented that they took on the Independent Education Union for the right to continue to discriminate within their systems and employ teachers without qualifications, only church oversight.⁶ The government must not placate the religious sector by suggesting they are at risk of discrimination to the same level as the children the policy is directed at.

We urge the Commission not to take on board the argument from extremely powerful and influential religious institutions that argue they are under threat from discrimination on religious grounds in crafting law in this area. Further, we argue that it is possible for religious educational institutions to adhere to and uphold their religious 'ethos' without the risk and harm that young people and teachers, who identify with diverse sex characteristics or as gender diverse or sexuality diverse, experience in schools if adequate incentive is provided through legal and policy mechanisms. In our view, the proposed changes in the Consultation Paper would not achieve this end.

- 4. While outside the remit of the Consultation, we propose that the government remove funding from the religious education sector in its current form and instead provide incentives to schools that actively introduce inclusive policies and practices.** Schooling that allows for and promotes discrimination should not be funded by public money. The increasing taxpayer contributions, introduced by the Morrison government, to religious schools that have exemptions under the *Sex Discrimination Act 1984* (Cth), means that taxpayer money is being used to fund discrimination. Independent school funding increases implemented by the Morrison government means that the independent schooling sector is significantly overfunded; with the Catholic system alone accounting for nearly three-quarters of the total over-funding of Independent schools.⁷ As such, to continue to allow discrimination

⁴ 'School choice' is not limited to parental decisions in enrolment, see Naomi Barnes, Melanie Myers and Elizabeth Knight, 'School Choice to Religiously Discriminate: Religiopolitical Activism and Secularism in Public Schooling' [2022] *Journal of Educational Administration and History* 1.

⁵ 'Purity', *4 Corners* (ABC, 30 January 2023) <<https://iview.abc.net.au/video/NC2303H001S00>>.

⁶ See Barnes, Myers and Knight (n 4).

⁷ Trevor Cobbold, 'Wealthy Qld Private Schools Massively Over-Funded by the Morrison Government – SOS Australia', *SOS Australia: Fighting for Equity in Education* (19 April 2022) <<https://saveourschools.com.au/funding/wealthy-qld-private-schools-massively-over-funded-by-the-morrison-government/>>.

of students and staff within this sector, taxpayers are being asked to contribute more than the necessary funding to a sector that is allowed, and continues, to discriminate against children. Further, this means that taxpayer money is being used to support practices that negatively impact on the mental health and wellbeing of gender and sexuality diverse young people.

Specific Responses

Proposition A

Discrimination against students on the grounds of sexual orientation, gender identity, marital or relationships status, or pregnancy

Response

- **Proposition A(1):** We agree with proposition A(1). However, the addition of 'sex' would further protect students who are intersex, trans or gender non-binary and work towards removing stigma and unnecessary segregation of students based on sex.
- **Proposition A(2):** We disagree with proposition A(2) to the extent that children could be required to participate in religious observances and practices.

The ability of religious educational institutions to 'regulate participation in religious observances or practices' should be significantly fettered as children do not have choice in the school they attend. Many argue that school choice exists to enable parents to withdraw their children from a school discriminating against their child. This is an unrealistic view of many parents whose children have diverse sex, sexuality and/or gender identity characteristics, and children who wish to 'exit' a school cannot do so without parental permission. If within a religious practice, children are consequently exposed to conversion therapy messages (as one example), those children are not protected. Recent research evidences that students in Australian schools are exposed to extremely harmful conversion ideology.⁸

A study of 3134 Australian LGBTIQ+ youth found that 7% were exposed to the conversion ideology messaging 'gay people should become straight' in schools (Jones, 2015; Jones & Hillier, 2012)—more in Catholic (15.4%) and Other Christian (16.4%) schools than government schools (3.6%). Students at schools with anti-homophobia policies had reduced exposure (3.9% vs. 14.3% without policies). Another study showed that 4.9% of 2500 mostly heterosexual cisgender Australian students were exposed to this conversion ideology school-based messaging: over a tenth in ideologically conservative schools (those schools inculcating students with the status quo's traditionalist values within a top-down power structure, Jones, 2020). These students reported greater harms to concentration, grades and attendance due to abuse at school than those not exposed to

⁸ Tiffany Jones et al, 'Religious Conversion Practices and LGBTQ+ Youth' (2022) 19(3) *Sexuality Research and Social Policy* 1155; Tiffany Jones et al, 'Mis-Education of Australian Youth: Exposure to LGBTQ+ Conversion Ideology and Practises' (2022) 22(5) *Sex Education* 595.

conversion ideology. They were significantly more likely to consider self-harm (81.8%); engage in self-harming behaviours (61.8%); consider suicide (83.6%); and attempt suicide (29.1%). Conversion ideology is clearly in operation across multiple contexts internationally including schools, and harmful.⁹

- **Proposition A(3):** We reject Proposition A(3) because it will potentially excuse both direct and indirect discrimination under the guise of schools' 'duty of care' and 'requirements of the curriculum'.

While this Proposition notes the importance of teaching religious doctrines in ways that accord with a school's 'duty of care to students', we have concerns that there is a doorway in this proposition for discrimination against children who identify with diverse genders and sexualities. That is, an opening for children to continue to be exposed to transphobic and homophobic teachings that are detrimental to their health and wellbeing. For example, suppression or conversion practices may be framed in such a way that they are considered to be relevant to upholding a schools' duty of care to the student, and for their benefit as per religious doctrine, even though conversion therapy is widely condemned in Australian society and known to be very harmful to children and young people.¹⁰ Recent research shows that religious schools are associated with greater anti-LGBTIQA+ practices and messages, as well as increased attempts to change young people's gender and sexuality identities and/or expression, with negative impacts on their wellbeing.¹¹

While suppression and conversion practices are increasingly criminalised under Australian state and territory legislation, this approach would seem to open the door to justify such practices in jurisdictions lacking these protections. Further, as the Australian curriculum is only a guideline for schools, there is no mandatory curriculum in Australia. As such, 'requirements of the curriculum' shows a misunderstanding of how curriculum is considered, adopted and taught in schools. Additionally, research demonstrates that curriculum is not the only 'requirement' that influences teachers' practices relating to genders and sexualities and that a range of institutional documents influence and perpetuate hetero-cis-norms.¹² Limiting schools' ability to discriminate to the 'requirements of the curriculum' achieves nothing.

- **Adequacy of Proposition A**

The Consultation Paper rightfully says the Commission places students at the 'centre' of the inquiry and asserts that 'the design of policy that impacts students must place at its heart the

⁹ Jones et al, 'Religious Conversion Practices and LGBTQA + Youth' (n 8).

¹⁰ Jack L Turban et al, 'Association between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts among Transgender Adults' (2020) 77(1) *JAMA Psychiatry* 68.

¹¹ Jones (n 2).

¹² Lisa van Leent and Nerida Spina, 'Teachers' Representations of Genders and Sexualities in Primary School: The Power of Curriculum and an Institutional Ideological Code' [2022] *The Australian Educational Researcher* <<https://doi.org/10.1007/s13384-022-00515-6>> ('Teachers' Representations of Genders and Sexualities in Primary School').

best interests of those students'.¹³ However, The Consultation Paper highlights that Proposition A is generally consistent with existing law in Australian states and territories,¹⁴ and we would argue that this is not enough to actually protect students with diverse sexualities and genders and ensure their rights are met. Greater protections are required for students attending religious educational institutions than is provided for in proposals associated with Proposition A.

In part, this is warranted as the population of Australian young people who are identifying as gender and sexuality diverse is much larger than previously identified. In Australia, approximately 11% of students – three in any classroom - identify as gender and/or sexuality diverse in schools and they continue to experience inequity and discrimination.¹⁵ In a more recent study in Australia, of over 3000 youth ages 14-25, 7% of youth identified as gender diverse and 52% identified outside of heterosexual.¹⁶ The same study notes that the population of youth who belonged to a religion in Australia was 34%.¹⁷ A significant number of individuals, children, are students in religious schools subject to potential discrimination based on sex, gender and sexual orientation.

Young people who are sexuality or gender diverse need greater protection from harm and discrimination by religious educational institutions as they are a particularly vulnerable group at significant risk of self-harm and suicide:¹⁸

- 11% of LGBTQA+ young people aged 16 to 17 had attempted suicide in the past 12 months
- 25.6% of LGBTQA+ young people aged 16 to 17 had attempted suicide in their lifetime
- 16% of LGBTI young people aged 16 to 27 reported that they had attempted suicide
- 27.8% of bisexual people aged 18 and over reported that they had attempted suicide
- 48.1% of trans and gender diverse young people aged 14 to 25 reported having attempted suicide
- 35% of transgender people aged 18 and over reported having attempted suicide
- 5.2% of LGBTI people aged 18 and over reported having attempted suicide in the past 12 months (13.7% of trans men, 10.9% of trans women, 6.8% of non-binary participants, 4.2% of cisgender women and 3.3% of cisgender men), and 30.3% of LGBTI people aged 18 and over reported having attempted suicide at some point during their lives
- 19% of people with an intersex variation aged 16 and over reported that they had attempted suicide on the basis of issues related to their intersex status

¹³ Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper (2023)* (2023) 9 <<https://www.alrc.gov.au/wp-content/uploads/2023/01/ALRC-Anti-discrimination-Laws-CP-2023.pdf>> ('*Consultation Paper*').

¹⁴ Australian Law Reform Commission (n 13) [47].

¹⁵ Australian Human Rights Commission, 'Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People', *Australian Human Rights Commission* (2014) <<https://humanrights.gov.au/our-work/education/face-facts-lesbian-gay-bisexual-trans-and-intersex-people>>.

¹⁶ Angela Higginson and Matthew Morgan, *Australian Youth Safety Survey: 2020 Technical Report* (QUT Centre for Justice, 2020).

¹⁷ *Ibid.*

¹⁸ LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTIQ+ People* (October 2021). Please note that the statistics presented have been produced by LGBTIQ+ Health Australia in which they have referenced numerous research studies therefore the acronyms used refer to different cohorts reflected in those studies.

These horrific experiences of young people are linked to bullying and sexuality-based harassment,¹⁹ and we know that up to 80% of this harassment and bullying occurs in schools. This has a profoundly negative impact on students' wellbeing, learning outcomes, and retention rates.²⁰ The impacts of such discrimination on school children who exist in every classroom is far greater than the discrimination that could possibly be inflicted on religious educational institutions.

We raise concerns about comments within the Consultation Paper that similar reforms in states such as Queensland have been 'experienced positively' and that 'staff and administrators...have expressed support' for such legislation. Such statements ignore that children and staff continue to experience discrimination in these jurisdictions²¹ and suggest a bias toward the perceptions of religious educational institutions. In other words, they reflect the views of an institution that will benefit from such changes and failure to engage with the reported stories and experiences of bullying and harassment of students with diverse sexualities or gender – the most recent public examples being associated with Citipointe College and the Opus Dei schools in Sydney.²² These proposals therefore will not provide children with an educational environment which upholds their rights to the full extent,²³ especially given their potential vulnerabilities, in addition to their schooling and the institutional power that they have to navigate. The expressions of support also ignore that LGBTIQ+ teachers are still fearful about many aspects of working within a religious education institution, such as being themselves at work, supporting children who want to discuss LGBTIQ+ topics, respectfully presenting alternate perspectives on religious ethos and so on.²⁴

To the extent that the Proposition A merely aligns the Commonwealth laws with existing laws in Australian states and territories, it will do little to effect adequate protection for students with diverse genders and sexualities. For example, under current laws in Queensland, students have publicly reported overt and covert discrimination.²⁵ This demonstrates that current Queensland legislation does not adequately protect students from discrimination and, as

¹⁹ Strauss et al (n 3); Kerry H Robinson et al, *Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse* (University of Western Sydney, 2014).

²⁰ Australian Human Rights Commission (n 15).

²¹ Tonya D Callaghan and Lisa van Leent, 'Homophobia in Catholic Schools: An Exploration of Teachers' Rights and Experiences in Canada and Australia' (2019) 22(3) *Journal of Catholic Education* 36; Lisa J van Leent, 'Primary School Teachers' Conceptions of Pedagogical Responses to Concepts of Diverse Sexualities' (PhD thesis, Queensland University of Technology, 2014) <<https://eprints.qut.edu.au/78396/>>.

²² Naomi Barnes, Elizabeth Knight and Melanie Myers, 'The Surprising History of Sexual Obsession in Our Schools', *EduResearch Matters* (31 January 2023) <<https://www.aare.edu.au/blog/?p=15854>>.

²³ Jenna Gillett-Swan and Lisa van Leent, 'Exploring the Intersections of the Convention on the Rights of the Child General Principles and Diverse Sexes, Genders and Sexualities in Education' (2019) 8(9) *Social Sciences* 260.

²⁴ Callaghan and van Leent (n 21).

²⁵ Susan Chenery and Kirstin Murray, 'How Citipointe Christian College's "sexuality Contract" Brought Queer Students out of the Shadows and onto the National Stage - ABC News', *ABC* (online, 31 October 2022) <<https://www.abc.net.au/news/2022-10-31/faith-versus-freedom-consequences-of-a-clash-of-values/101293004>>.

such, aligned Commonwealth laws would be similarly inadequate. It is plausible to expect that students will continue to be discriminated against unfairly in religious educational institutions even with the protections proposed in connection with Proposition A.

Australia has an opportunity to be a leading nation in the protection of the rights of the child in educational institutions. Whilst the review observes overseas laws, we have the capacity to prioritise child rights above religious rights to ensure fairness and equity for those who are less powerful in our society. This is an important aspiration when considered alongside the statistics, such as those related to suicide, mentioned above. We understand that individual cases and experiences highlight religious educational institutions can and do act to support and ensure the rights of others are respected, but it is dependent on too many variables and the rights of children should be prioritised more under Australian law.

Existing Australian law, and the changes proposed by the Commission, continue to place greater emphasis on the rights of educational institutions over the students that attend them. Rather than engaging in a 'balancing' exercise between the rights of the child and the 'rights' of religious institutions, in the context of an extraordinary imbalance of power and a legal and political framework that inevitably favours the religious institution, it is our view that the rights of the child to an inclusive and safe learning environment cannot be accomplished within religious educational settings with the current lack of incentive for them to do so.

Related Technical Proposals

We agree with many of the technical proposals associated with Proposition A but disagree that they achieve a proportionate balance between the 'rights' of religious educational institutions and the rights of students that attend them. In our view, these proposals are still too heavily weighted towards religious rights at the detriment of students that identify as sexuality or gender diverse.

- **Proposal 1** – We greatly support the removal of the exception in relation to students under subsection 38(1) *Sex Discrimination Act 1984* (Cth) but argue that it does not go far enough. Children/students would still not be protected from the discrimination inherent within many religious teachings in religious educational institutions.

We also hold serious reservations that this measure will effectively prevent issues being raised in relation to a religious school's ability to impose policies on uniform and behaviour, and therefore students will continue to be discriminated against. Students who do not have choice in schooling and do not have supportive parents will continue to be silenced, oppressed and discriminated against. For example, a student who is forced to wear a uniform that does not align to their gender identity and or expression. In cases such as this, students will remain invisible until they are an adult and can choose to leave or, as statistics show, they may take other measures such as suicide.

- **Proposal 3** – We support this proposal.

- **Proposal 4** – We support this proposal.
- **Proposal 6** – We support this proposal.
- **Proposal 7** – This proposal should be rejected. We have serious concerns around the proposal to exempt the curriculum from the purview of the *Sex Discrimination Act 1984* (Cth). The rights of staff and students in religious schools should not be siloed such that the content of what is taught is considered separate from other experiences in schools. Such framing betrays the reality of the classroom environment and permits religious educational institutions to cause harm to children by teaching religious doctrine or beliefs on sex or sexuality, and similarly to staff who are required to do such teaching.

For example, schools may not be able to use enrolment contracts that prevent students of diverse sex, sexuality and gender from enrolling in the school, but they are still able to teach that these protected identities are ‘unnatural’.²⁶ This is a discriminatory use of curriculum. Children often do not have a choice in their schooling, due to parental decision making, but they do have rights not to be subjected to schooling that is discriminatory in any way.²⁷ There is evidence that teachings within religious doctrines can impact on LGBTQ+ youths’ mental health and wellbeing.²⁸

For example, a student in a Catholic school who identifies as lesbian attends English classes in which only literature that has heterosexual relationships is only ever presented under the premise of holding religious family values to the fore. This student will experience covert or indirect discrimination based on their sexuality. We know that LGBTIQ+ students who do not see themselves represented in their learning at school experience academic disadvantage, in addition to poorer mental health and life outcomes.²⁹ Further, students at religious schools are more likely to be required to wear a uniform that aligns with their sex described at birth and be exposed to messaging that gender and sexuality diversity is sinful and against the ‘natural order’, should not be acted upon, and can be ‘fixed’.³⁰ This is unacceptable.

Children raise topics, issues, and questions in everyday schooling contexts about, for example, same-sex families, trans and gender non-binary children, relationships and sexuality education curriculum, children discuss ‘same-sex love’, and political and cultural ‘queer

²⁶ See, for eg, *ibid*.

²⁷ Katharine O’Donnell, ‘Children’s Rights to Safety and to a Holistic Education’, *Australian Human Rights Commission* (Children’s Rights Speeches) <<https://humanrights.gov.au/about/news/speeches/childrens-rights-safety-and-holistic-education>>.

²⁸ Edward McCann, Gráinne Donohue and Fiona Timmins, ‘An Exploration of the Relationship Between Spirituality, Religion and Mental Health Among Youth Who Identify as LGBT+: A Systematic Literature Review’ (2020) 59(2) *Journal of Religion and Health* 828.

²⁹ Tania Ferfolja and Jacqueline Ullman, ‘Inclusive Pedagogies for Transgender and Gender Diverse Children: Parents’ Perspectives on the Limits of Discourses of Bullying and Risk in Schools’ (2021) 29(5) *Pedagogy, Culture & Society* 793; Tiffany Jones et al, ‘School Experiences of Transgender and Gender Diverse Students in Australia’ (2016) 16(2) *Sex Education* 156.

³⁰ Jones (n 2).

knowledge', to which teachers must respond.³¹ Children also use homophobic and transphobic expressions in schools.³² Children raise these topics as a result of intrinsic curiosity and their own life experiences with family, friends, television, the internet and so on.³³ Having teaching staff able to competently answer those questions with medical, scientific and social evidence, rather than religious 'ethos', is essential for developing active and informed citizens, free from bigotry, equipped to navigate an increasingly complex and diverse world.

Teachers' pedagogical responses impact outcomes for children, and teachers should be able to make confident, well informed pedagogical decisions that promote socially just education for the benefit of all children, not religiously informed anti-LGBTIQ pedagogies that perpetuate harmful ideas to children. By supporting schools and teachers to engage with students' on such topics without fear for themselves, teachers are able to provide supportive and inclusive learning environments as determined in the Australian Institute for Teaching and School Leaders in their *Australian Professional Standards for Teachers*.³⁴

Proposition B

Discrimination against staff on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy

Response

- **Proposition B(1):** We agree with Proposition B(1) for the same reasons as we agree with Proposition A(1).
- **Proposition B(2):** We agree with Proposition B(2). However, we have concerns about the extent to which requirements regarding religious observances and practices, unfettered by sex discrimination laws, may cause harm or discrimination towards LGBTIQA+ staff.
- **Proposition B(3):** As noted above in our response to Proposition A(3), permitting religious educational institutions to teach religious doctrine or belief on sex or sexuality provided it meets the 'requirements of the curriculum' provides no protection for staff or students as there is no mandatory curriculum in Australia.

Additionally, teachers and staff who 'choose' to be employed in such institutions may not 'choose' to endorse such teachings and may be 'forced' to do so. This does not account for the complexity of teachers who are both religious and who identify with diverse genders and

³¹ Lisa van Leent, 'Supporting School Teachers: Primary Teachers' Conceptions of Their Responses to Diverse Sexualities' (2017) 17(4) *Sex Education* 440.

³² Ibid.

³³ Kerry H Robinson, "'Difficult Citizenship': The Precarious Relationships between Childhood, Sexuality and Access to Knowledge' (2012) 15(3–4) *Sexualities* 257.

³⁴ Australian Institute for Teachers and School Leadership (AITSL), *The Australian Professional Standards for Teachers* (2022) <<https://www.aitsl.edu.au/docs/default-source/national-policy-framework/australian-professional-standards-for-teachers.pdf>>.

sexualities or who may have experiences with pregnancy and relationships that are outside of the religious institution's ethos. The 'examples' note that staff can 'provide objective information about alternative viewpoints' if they wish however, the point is that the discriminatory teachings are still required to happen in the first place. In practice this might mean a teacher has to teach 'if you are gay, you go to hell', but not all religion practising teachers believe this. It is important that the review take into consideration the views of religious educational organisations that are making advances in how to balance being a person who practises religion and identifies as having diverse sex, sexuality and/or gender characteristics. Australia, as a pluralistic and multicultural society, has the opportunity to be a world leader in demonstrating how it is possible to be both spiritual and identify with the LGBTIQA+ community.

- **Adequacy of Proposition B:** The proposed implementation of Proposition B with regards to staff is, like Proposition A, insufficient to achieve its aims. Proposition B(1) states that 'religious educational institutions should not be allowed to discriminate against staff on the grounds of sex, sexual orientation, gender identity, marital or relationships status, or pregnancy' but that, in Proposition B(3), those institutions 'should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.' In our view, these sub-propositions are unable to be reconciled without significant detriment to staff and students.
- Teachers and other staff have choice. Although as recognised in the 'Consultation Paper', not all teachers and staff have choice depending on location, other circumstances such as employment opportunities, and changes in expectations of the institution over time. Thus, the statement that 'a religious educational institution could not impose policies or practices that had the effect of disadvantaging...staff' does not account for the power relations between policy, practices, and employment. The onus on individuals to prove that discrimination has occurred on these grounds is extremely difficult, expensive, time consuming and emotionally damaging.
- The consistency of laws across Australia and overseas is positive, but teachers still experience discrimination under those laws.³⁵ Australia has an opportunity to be a global leader in policy and law reform on this issue. We argue that the proposed changes are insufficient given the known harmful practices of religious educational institutions and the clear and ongoing disadvantage these practices have on children and young people. Again, it needs to be noted that the laws in Queensland and Tasmania may have afforded some 'positive experiences', but the laws have not prevented discrimination against staff and students and the reforms are not proportionate and continue to privilege the religious education institutions' 'rights' to discriminate against others.

³⁵ Callaghan and van Leent (n 21).

Related Technical Proposals

- **Proposal 2** – We greatly support the removal of the exceptions in relation to staff under subsections 38(1) and (2) of the *Sex Discrimination Act 1984* (Cth) but argue that it does not go far enough. Staff would still not be protected from the discrimination inherent within many religious teachings in religious educational institutions.
- **Proposal 3** – We support this proposal.
- **Proposal 4** – We support this proposal.
- **Proposal 5** – We support this proposal.
- **Proposal 7** – We have serious concerns around the proposal to exempt the curriculum from the purview of the *Sex Discrimination Act 1984* (Cth), as explained above in relation to implementing Proposition A.

Proposition C

Preferencing staff involved in the teaching, observance, or practice of religion on religious grounds

Response

- **Propositions C(1) and C(2):** In relation to Propositions C(1)-(2) we suggest it is likely that religious educational institutions will interpret everyday teaching practices as inherently religiously informed, ‘a genuine requirement of the role’ and thus preference staff with religious belief. This will not only be at the expense of the rights of staff, but of the quality and adequacy of student educational experiences.

By implementing Proposition C, educators supportive of students with diverse sexualities and gender are unsupported and harm and discrimination is likely to occur across policy, curriculum and everyday teacher practices outside situations that could legally constitute discrimination towards an individual. For example, when a classroom discussion on the condemnation of same-sex marriage occurs, significant harm is done even though the conversation is not directed at a person with the relevant attribute for grounds of discrimination or religion.

This kind of damage is occurring in practice, as evidenced by this excerpt from a news article reporting on the experiences of Felicity Myers, a student who attended Citipointe College in Brisbane, Queensland:

In class debates and Christian studies classes, Felicity would be sitting in a room with students, discussing issues like homosexuality, abortion, marriage and gender identity. Many of her classmates didn't seem to realise there were LGBTIQ+ students in the room, or that the conversations were "actually damaging some of us sitting [there]". "It was really challenging to be in that space when people are discussing your worthiness to just exist as a part of society," she says. "It definitely did have an impact on my mental health, self-confidence and self-worth."³⁶

Related Technical Proposals

- **Proposal 8** – We do not support this proposal in terms of how it may permit a religious educational institution to justify discriminating against staff that do not observe or practice religion, as everyday teaching practices could be considered to require such observance or practice and we are concerned this aspect could potentially be used to discriminate against LGBTIQA+ teachers.
- **Proposal 10** – We do not support this proposal because 'actively undermining the ethos of the institution' is not sufficiently defined; and 'ethos' itself is a nebulous concept. Sexual health education, for example, can be detrimental to the health of students if taught according to religious belief rather than medically supported education. For example, 'abstinence' is not medically, scientifically, or socially supported as effective and evidenced as harmful, despite being taught by religious educational institutions.³⁷

Proposition D

Ongoing requirements on all staff to respect the religious ethos of the educational institution

Response

We urge the Commission to abandon this proposition insofar as there is sufficient justification to make changes to the legal framework to accommodate such requirements. Religious educational institutions do not need special or different protections under the law and should not be permitted to harm staff who often do not face choice in employment.

The example regarding a university in which a lecturer could be terminated for denigrating the religion of the institution is extremely problematic. If there is scholarly research that critiques religious perspectives or history, and it is relevant and necessary to scholarly learning and future

³⁶ Chenery and Murray (n 25).

³⁷ UNESCO Global Education Monitoring Report, *Facing the Facts: The Case for Comprehensive Sexuality Education* (June 2019) <<https://unesdoc.unesco.org/ark:/48223/pf0000368231>>.

practice, then the lecturer should be able to present the research without fear that this is interpreted as 'denigrating'. In a pluralistic society, educators in any education sector should be free to consider the multiple definitions of terms and concepts, and perspectives in society, according to their professionalism and training.

Proposition D would have the effect of not supporting school or teacher knowledge in relation to inclusive and equitable practices. We would like to reiterate that gaps in schools' and teachers' knowledge to implement equitable practices will persist in the context of inequitable learning outcomes and educational experiences of those children who identify with gender and sexuality diversity.³⁸ A study by Kosciw et al revealed that educators supportive of LGBT youth have a significant impact on reduced harassment and bullying, greater well-being, higher grades, and greater school attendance for these children.³⁹ If 'religious belief can be manifested through teaching and practice'⁴⁰ then educators will be dissuaded from supportive practices and discrimination will continue through curriculum, pedagogy and school policies. If Proposition D is accepted, then significantly greater action will need to be taken with regard to the implementation of Proposition A to ensure the wellbeing of young people.

Related Technical Proposals

- **Proposal 9:** We do not support this proposal because 'damage caused to the ethos of the educational institution' is not sufficiently defined. In a democratic institution, a qualified teacher should have the freedom to question the religious ethos of their workplace. Religious tenants and doctrine should not be positioned as 'truth' or 'normal' without critical perspectives. This would include debate about whether to include LGBTIQA+ content within the curriculum. Teachers must be protected from raising these socio-political debates within their workplace as important content for being active and informed citizens.
- **Proposal 10:** We similarly do not support this proposal because 'actively undermining the ethos of the institution' is not sufficiently defined and could be interpreted in ways that are too broad and inappropriate. Thus, the 'ethos' of the institution guiding the teaching of harmful curricula (eg abstinence sexual health education) could effectively override a teacher's ability to question the provision of this kind of teaching and curricula as it might be interpreted as undermining the ethos of the institution. This is inappropriate from the perspective of ideological control over curricula which is ultimately to the detriment of staff and students.

³⁸ Kurian (n 2); Lynne Hillier et al, *Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (Australian Research Centre in Sex, Health and Society, Latrobe University, 2010); Australian Human Rights Commission (n 15).

³⁹ Joseph G Kosciw et al, 'The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports' (2013) 12(1) *Journal of School Violence* 45.

⁴⁰ Australian Law Reform Commission (n 13) 28.

Summary

In addition to the points made above, we urge the Commission to consider further writings about the 'best interest of the child as the primary consideration', as provided for under Article 3 of the *United Nations Convention on the Rights of Child*, which has been written about extensively in a paper by Gillette-Swan and van Leent entitled *'Exploring the Intersections of the Convention on the Rights of the Child General Principles and Diverse Sexes, Genders and Sexualities in Education.'*⁴¹ The remaining text is presented directly from that publication to highlight the importance of this work for the Commission:

...tensions arise when trying to define the best interests of the child, where different stakeholders may be advocating different and divergent perspectives such as education and religion. However, as noted by the United Nations, "[a]lthough preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests. Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention" (2013, paragraph 57, emphasis added). This assertion may, therefore, provide some level of clarity in considering whether the cultural and/or religious traditions are in apparent competition with some of children's other rights that may be in their 'best interests.'" (Gillette-Swan & van Leent, 2019, p. 6-7).

The 'best interests' justification is a common fallback position in avoiding sensitive or seemingly controversial topics in educational decisions. Paternalistic protectionism underpins the actions and decisions of often well-meaning and well-intentioned adults seeking to provide what they consider necessary additional safeguarding of children from exposure to certain information. This concern is indeed warranted, as evidenced through the recent Australian Royal Commission into Institutional Responses to Child Sexual abuse highlighting "almost one in three of all survivors [of child sexual abuse] . . . told us they were sexually abused in a school setting as a child" (Commonwealth of Australia 2017, p. 10). The Royal Commission findings highlight children's potential vulnerability in settings and contexts that are supposed to keep them safe. The Royal Commission also found "when children experienced forms of abuse and neglect in schools other than sexual abuse, their ability to disclose sexual abuse was reduced and sexual abuse could become normalised." (Commonwealth of Australia 2017, p. 11). Such normalising practices that may permeate the culture of a school are potentially counter to an environment seeking to assure that the best interests of the child are the primary consideration. Quality education involving comprehensive sexuality education, for example, to better ensure the protection of each child from abuse, and/or the identification of abuse should they or others be exposed to it, is what should be in focus for children's best interests in this example.

A case in point where the Royal Commission determined, "many survivors of school-based abuse said they did not disclose the sexual abuse because they did not know or were uncertain that what had happened to them was abusive...some children were not taught to identify sexual abuse because they lacked access to appropriately tailored sex education." (Commonwealth of Australia 2017, p. 15; emphasis added). Children may depend on adults to assure they are equipped with appropriate information and knowledge to reduce threats to their safety, as they may not know what

⁴¹ Gillett-Swan and van Leent (n 23).

they do not know. The United Nations further affirms children's relative vulnerability in assuring their best interests are a primary consideration as "[c]hildren have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked" (United Nations 2013, paragraph 37). Comprehensive sexuality education that focuses on the best interests of the child must acknowledge that learning about diverse genders and sexualities is not just about providing children with access to information, but also an understanding that comprehensive sexuality education in itself is fundamental to safeguarding children.

Recommendations stemming from the Royal Commission include "prevention education for children delivered through preschool, school and other institutional settings should aim to increase knowledge and build skills to help reduce the risks of sexual abuse. Education should be integrated into existing school curricula and should make links with related education areas such as respectful relationships and sexuality, and be mandatory for all preschools and schools" (Commonwealth of Australia 2017, p. 20.) Whilst these recommendations are welcomed, school culture and teachers' capacity and/or abilities to ensure comprehensive sexuality education is delivered is complicated and bound up in their personal views, school ethos and broader cultural practices (van Leent 2017). Cultural taboos, such as talking about or making visible 'sex', contribute to schooling cultures and teacher practices that perpetuate the silencing of topics such as child sexual abuse (Goldschmidt-Gjerløw 2019) as well as other topics such as diverse sexes, genders and sexualities. Consequently, such silences can further complicate the visibility of each child's best interests. The Royal Commission findings are not unique to Australia, with many similar issues being raised internationally, such as in Norway, relating to the educational implications of cultural taboos associated with child sexual abuse (Goldschmidt-Gjerløw 2019).

While there is complexity associated with best interest assessments when there are apparent tensions between rights that seem to contest with one another, the United Nations affirms the necessity for including the child's views and recognition of children's diverse identities in these determinations. The United Nations acknowledges that "[c]hildren are not a homogenous group and therefore diversity must be taken into account when assessing their best interests...includ[ing] [identity] characteristics such as sex, [and] sexual orientation..." (United Nations 2013, paragraph 55). To support and enable the realisation of the child's rights under a best interests mandate requires specific attention to ensuring the care, protection and safety of the child does not by default outweigh the child's right to have "access to adequate information that is essential for their health and development . . ." (United Nations 2013, paragraph 78) such as provided through comprehensive sexuality education. A key tension in the recommendations in relation to the discussion presented in this paper is that young children may not have yet developed their own understanding of themselves based on sex, gender and/or sexuality, but they may have family and friends who do. They may not be able to 'realise' their diversity or express their uniqueness. They may not want to disclose their intersex status, for example, or their sexual orientation even if it is established for them as a way of being or if it is safe and acceptable to do so. A child's capacity or choice to express a sex, gender or sexuality identity should be understood when considering the best interests of the child and implementing obligations afforded through the Convention. In doing so, respect for the child's views and enabling their views to be heard is paramount.

Thank you for your consideration of our submission,

Kind regards, Dr Lisa Van Leent, Dr Michelle Jeffries, Dr Naomi Barnes and Dr Steph Jowett

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