



## **Submission: Religious Educational Institutions and Anti-Discrimination Laws**

**24 February 2023**

**Thorne Harbour Health** is one of Australia's largest community-controlled health services for people living with HIV, and lesbian, gay, bisexual, trans and gender diverse, intersex and queer (LGBTIQ+) communities. Thorne Harbour Health primarily services Victoria and South Australia, but also leads national projects. Thorne Harbour Health works to protect and promote the health and human rights of LGBTIQ+ people and all people living with, and affected by, HIV.

**Brave Network** and **SOGICE Survivors** are support and advocacy groups for survivors of conversion practices and LGBTIQ+ people from faith backgrounds. They work together to ensure ethical representation of conversion practices and survivors in media, facilitate participatory research, and develop policy recommendations. The [SOGICE Survivor Statement \(2020\)](#) has become a prominent advocacy tool for Australian survivors.

Of relevance to this submission, Thorne Harbour Health, Brave Network and SOGICE Survivors have engaged substantially in initiatives to support survivors of conversion practices and advocate for legislation ending the practices in all settings. Brave Network is a partner on the National Conversion Ideology and Practices Research Project led by La Trobe University, while Thorne Harbour Health hosted a range of forums and panels designed to facilitate awareness and debate in the lead up to the passing of the 'gold standard' Victorian *Change or Suppression (Conversion) Practices Prohibition Act 2021*.

Prepared by:

James Hamlet

- Senior Policy Analyst, Thorne Harbour Health - [policy@thorneharbour.org](mailto:policy@thorneharbour.org)

Nathan Despott

- Manager, Policy & Projects, Inclusion Melbourne – [nathan.despott@inclusion.melbourne](mailto:nathan.despott@inclusion.melbourne)
- Co-founder, Brave Network and SOGICE Survivors
- Research Fellow, National Conversion Ideology and Practices Research Project, La Trobe University

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## Executive Summary

Thorne Harbour Health, Brave Network and SOGICE Survivors welcome the opportunity to provide a submission to the Australian Law Reform Commission (ALRC) Inquiry into Religious Educational Institutions and Anti-Discrimination Laws.

Noting progressive advances in legislation in states and territories across Australia with regard to tightening of religious exemptions to anti-discrimination law, and banning of change or suppression (conversion) practices, it is concerning that certain Propositions and Proposals within the Consultation Paper may inadvertently permit the proliferation of conversion ideology, foster unsafe environments that harm student wellbeing and learning in educational institutions, and provide loopholes for ongoing discriminatory practices.

This submission primarily focuses on the problematic framing of 'religious ethos' in the Propositions and Proposals, and the correlate insidious nature of conversion ideology and conversion practices. The protections of the 'religious nature and ethos' of educational institutions – as they are currently framed – from certain elements of the *Sex Discrimination Act* and *Fair Work Act* will provide loopholes that continue to permit discrimination as well as harmful messaging on the basis of sexuality and gender identity under Propositions C and D.

The prioritisation of 'religious ethos' within educational institutions as an objective in and of itself wrongfully establishes a hierarchy of rights, rather than utilising a true proportionality test when managing tensions between conflicting rights. As such, 'religious ethos' - undefined in its scope, who decides it, how it is determined, or even if it aligns with community values, or the views of parents, students, staff or religious adherents - can justify prejudice toward gender and sexual minorities even where religious texts or doctrine have little or nothing to say on the matter.

## **Summary of Recommendations**

### **How protections for 'religious ethos' can lead to harm**

**Recommendation:** Clarify that student wellbeing and learning outcomes remain central and that any protections afforded to 'religious ethos' of an educational institution are limited where any harm to students or employees may result from prejudiced beliefs.

**Recommendation:** If making reference to 'religious ethos' in any Proposition and/or Proposal, define what is meant by 'religious ethos' of an institution, who and how it is determined.

### **Preferencing of staff based on religious belief or activity**

**Recommendation:** Reframe Proposition C.1 (second bullet point), Proposal 8 (second bullet point) and Proposal 10 (second bullet point) so that the requirement for proportionality is not directed to protecting the religious ethos of the institution, but is a genuine consideration of all circumstances of the case.

### **Termination based on 'actively undermining ethos'**

**Recommendation:** Reframe Proposition D.1 and D.2 and Proposal 9 into a positive right for an *employee* to self-expression of their beliefs, sexuality, gender, marital status, etc. in a manner that is reasonable and proportionate to the rights of others and the interests of the religious educational institution, having regard to the religion of the institution and the religious sensitivities of its religious adherents.

**Recommendation:** Delete Proposal 10 (second bullet point), so as to not disproportionately favour the religious ethos of the institution over the rights of employees.

**Recommendation:** Ensure the onus remains on the employer to justify the reasonableness and proportionality of any actions taken to infringe on the rights of an employee, including termination of employment.

### **Curriculum**

**Recommendation:** Delete Proposal 7, pertaining to Proposition A and Proposition B.

### **Protecting personal associates from discrimination**

**Recommendation:** Amend Proposal 6 pertaining to Proposition A, to ensure that anti-discrimination protections are extended to all personal associates of students and prospective students, and not just family members and guardians as specified in the Consultation Paper.

### **Protecting students and staff from discrimination**

**Recommendation:** We support Proposals 1, 2, 3, 4, 5 and 11, as they stand, which are intended to increase protections for students and employees at religious educational institutions.

**Recommendation:** Ensure guidelines developed by the AHRC and Attorney-General's Department address (and close) potential loopholes to discrimination.

## **Discussion**

### **How protections for ‘religious ethos’ can lead to harm**

#### **Broad and undefined**

The term ‘religious ethos’ is used in **Propositions C.1 and C.2, D.1, D.2, and D.3**, and **Proposals 8, 9 and 10** to broadly discuss the teaching, observance and practice of religion as a community of faith within educational institutions. The Consultation Paper fails to define what ‘religious ethos’ is, who determines it, whether it has the support of the school community, the broader faith community, or is even consistent with religious doctrine or common teachings.

#### **A means to justify prejudice**

Positioning ‘ethos’ as a core concept within ‘religious discrimination’ means that the notion of discrimination against adherents of a particular religion or faith tradition is expanded to include discrimination against the organisational position or stated vision of a particular religious institution or body, whether or not that position is actually integral to religious practice. When ‘ethos’ - and how it is determined - remains undefined, prejudiced and vilifying attitudes can be passed off as legitimate religious teachings integral to the community. This is akin to giving such institutions permission to carve out environments that actively harm young people, subvert basic educational outcomes, and severely impair their future ability to function as economic contributors and informed members of a pluralist society. Similarly, contravening said prejudice can be viewed as undermining religious ethos, and violating the right to manifest religion or belief.

This shift creates:

- Protections for the ideologies of niche or even fringe religious communities, inclusive of their ability to disseminate such ideologies internally and externally.
- The use of religious freedom protections to drive or preserve a particular model within particular institutions, while legitimising prejudice against LGBTQA+ member of religious school communities.
- The heightened subjectivity of ‘religious ethos’ means that many students and staff of such institutions would not be adherents of the specific ideological views of such institutions – either generally or during the tenure of a particular leader – despite perhaps being adherents of the broader religious traditions from which the institution may have originally derived. This therefore creates substantial insecurity and instability for all involved.
- The curation of communities of sustained ideological prejudice, incorporating fear of rejection and exclusion.
- Curriculum that may incorporate homophobic, biphobic or transphobic content under the guise of essential religious content.
- A lack of accountability and monitoring of contexts in which prejudiced content may be verbally communicated by teachers or other staff.
- Clear omission of reference to LGBTIQ+ concepts in a range of subjects or extra-curricular activities.

#### **Conversion ideology and conversion practices under the guise of “religious ethos”**

Brave Network, SOGICE Survivors, and Thorne Harbour Health are motivated to curate this submission by way of our experience working with survivors of conversion practices – which has a strong connection to institutional ethos.

The term ‘conversion practices’ refers to practices that aim to change or suppress the sexual orientation or gender identity of a person. The majority of conversion survivors report having been exposed to a range of messages before engaging with, or being subjected to, conversion practices. These messages are usually a blend of cultural or religious ideas, and pseudoscientific claims about the nature or origins of LGBTQA+ identity or innate experience, specifically that LGBTQA+ people are ‘broken’ or have a disorder and that they can be healed, treated or suppressed. Researchers and advocates often refer to this blend of ideas as ‘conversion ideology’.

In religious communities and institutions, most survivors indicate that they experienced an underlying culture that saw being LGBTQA+ identity or experience as broken or sinful, and requiring treatment, healing, or suppression<sup>1</sup>. Despite three state or territory governments having recognised these harms and taken formal steps to ban conversion practices<sup>2</sup>, most jurisdictions within Australia are yet to do so. In this regard, particularly in jurisdictions absent of such a ban, this legislation will ostensibly prioritise ‘religious ethos’ as a right above the rights of others, thus manifesting an environment where conversion ideology can flourish.

### **Undermining anti-discrimination protections**

Protecting prejudice dressed-up as faith, and prioritising religious ethos as an objective in and of itself, as it is framed in Propositions C and D, and Proposals 8, 9 and 10 (see below), risks undermining the spirit of Propositions A and B, even where discrimination (direct or indirect) does not strictly occur.

Propositions A and B are intended to protect students and teachers, respectively, from faith-based discrimination within religious educational settings. The promulgation of an institutional ethos that is prejudiced towards sexual and gender minorities, creates an environment that is harmful to students and employees alike.

### **Student wellbeing and educational outcomes must remain central**

The Consultation Paper rightly centres students as the direct beneficiaries of any reform relating to religious discrimination in educational institutions, (Principle 5):

#### ***Students are at the centre of this Inquiry.***

*Students are the direct beneficiaries of education and are owed a duty of care by all institutions that deliver that education. The design of policy that impacts students must place at its heart the best of interests of those students. Parents, carers, and religious educational institutions and their staff, including teachers, perform an important role in supporting the educational and spiritual*

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<sup>1</sup> Tiffany Jones, Timothy W. Jones, Jennifer Power, Maria Pallotta-Chiarolli & Nathan Despott (2022) Mis-education of Australian Youth: exposure to LGBTQA+ conversion ideology and practises, *Sex Education*, 22:5, 595-610, DOI: [10.1080/14681811.2021.1978964](https://doi.org/10.1080/14681811.2021.1978964)

<sup>2</sup> See, e.g., *Changes or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

*development, and wellbeing, of students. Staff also deserve safe workplaces and fair conditions of employment.*

The negative impacts associated with long term exposure to conversion ideology and insulation from healthy, positive representations of LGBTQA+ identity and community are extensive, potentially leading to poor mental and emotional wellbeing, self-harm, suicidal ideation and attempts, poor concentration and poor academic performance, and social withdrawal.

A number of Australian research projects have found exposure to conversion ideology was significantly higher in Catholic (15.44%) and Other Christian (16.35%) schools than in government/public (3.62%) schools<sup>3</sup>. The studies have also demonstrated a link between school safety, the presence of policies that protect against homophobia, and positive outcomes for LGBTQA+ students reduced self-harm and suicide rates, increased feelings of safety, and greater positivity about their sexuality.

Students encountering the message that “gay people should become straight” were considerably more likely to report:

- harm to concentration in class (58.2%);
- harm to marks (40.0%);
- reduced attendance including missed days (41.8%) and missed classes (25.5%);
- reduced facilities use including avoiding changing rooms (25.5%) and toilets (12.7%);
- hiding at lunch (49.1%);
- moving school (21.8%);
- leaving school altogether (7.3%);
- considering self-harming (81.8%);
- attempting self-harm (61.8%);
- considering suicide (83.6%); and
- attempting suicide (29.1%)<sup>4</sup>.

These findings highlight the potential for the ‘religious ethos’ of an educational institution to lead to the proliferation of harmful conversion ideology; and conversely, to prevent the protective effect that concrete anti-homophobia policies have for students.

For young people, exposure and progression are often more indirectly/incidentally motivated, only later becoming facilitated by other people, institutions and materials. At each stage, however, individuals are positioned to misconstrue LGBTQA+ conversion ideology and practices as positive by virtue of their prior exposure to everyday homophobic/transphobic discourses, and the absence of LGBTQA+ affirmative messaging at home and in school. Family and cultural loyalties were additional conversion motivations, or complicated ongoing processes of conversion rejection, for participants in multi-faith multi-cultural

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<sup>3</sup> Jones, T., Power, J., Hill, A.O., Despott, N., Carman, M., Jones, T.W., Anderson, J., and Bourne, A (2022). Religious Conversion Practices and LGBTQA + Youth. *Sex Res Soc Policy* 19, 1155–1164.

<sup>4</sup> Tiffany Jones, Timothy W. Jones, Jennifer Power, Maria Pallotta-Chiarolli & Nathan Despott (2022) Mis-education of Australian Youth: exposure to LGBTQA+ conversion ideology and practises, *Sex Education*, 22:5, 595-610, DOI: [10.1080/14681811.2021.1978964](https://doi.org/10.1080/14681811.2021.1978964)

communities<sup>5</sup>. While individuals in the studies progressed through the conversion experience in different ways, their experience was characterised by the absence of any form of affirming LGBTQA+ education – enabling conversion ideology itself to become their LGBTQA+ (mis)information source.

Analyses of phenomena experienced directly by young people in schools create an alarming picture of the potential for the creation of harmful environments, where the true long-term harm of exposure to this culture during youth is seen in research into adult survivors of conversion practices. A very large portion of survivors who participated in various Australian research projects indicated that much of their journey through conversion practices was self-directed following exposure to, and internalisation of, messaging and ideas communicated to them directly or indirectly during their childhood and youth.

**Recommendation:** Clarify that student wellbeing and learning outcomes remain central and that any protections afforded to “religious ethos” of an educational institution are limited where any harm to students or employees may result from prejudiced beliefs.

**Recommendation:** If making reference to ‘religious ethos’ in any Proposition and/or Proposal, define what is meant by ‘religious ethos’ of an institution, who and how it is determined.

## **Preferencing of staff based on religious belief or activity**

### ***Proposition C***

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

1. *In relation to selection, appointment, and promotion, religious education institutions should be able to preference staff based on the staff member’s religious belief or activity, where this is justified because:*
  - *Participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;*
  - *the differential treatment is proportionate to the objective of upholding the religious ethos of the institutions; and*
  - *the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.*

We agree with the ALRC’s contention that preferencing of staff for selection, appointment or promotion should be linked to genuine requirement of the role (first bullet point), should include a proportionality test (second bullet point), and should not amount to discrimination on any other ground (third bullet point).

However, a genuine occupational requirement test is insufficient. As employers determine the terms and conditions of employment, it is simple to incorporate religious requirements into any role, such as imposing that certain *beliefs* regarding sexuality or gender identity are a requirement. This alone creates a loophole to permit discrimination.

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<sup>5</sup> Jones, T., Power, J., Hill, A.O., Despott, N., Carman, M., Jones, T.W., Anderson, J., and Bourne, A (2022). Religious Conversion Practices and LGBTQA + Youth. *Sex Res Soc Policy* 19, 1155–1164.



## **Proportionality**

The requirement for proportionality, then, is essential to determine whether differential treatment is justified. However, this Proposition (C.1, second bullet point) supported by Proposal 8 (second bullet point) and Proposal 10 (second bullet point) is problematic. The requirement is framed as to whether it is 'proportionate' to the objective of upholding the religious ethos of the institution, thereby prioritising any religious ethos as an ultimate objective in and of itself, even if the 'ethos' violates the rights of others. What is more, the Consultation Paper takes at face value that:

- the stated ethos conforms with religious doctrine; and
- any failure to maintain that ethos would injure the religious susceptibilities of adherents of the religion.

However, some aspects of a religious ethos may not be worthy of ultimate protection when it conflicts with an employee's freedom of thought, conscience, religion, expression, right to marry and found a family, or right to work. Furthermore, communities of faith may disagree on what their ethos is or the importance of certain elements of it. The governing authorities of a school may also not represent the will of its school community regarding its ethos.

A true proportionality test recognises that employees have a freedom of thought, conscience and religion alongside the community of faith in which they may work or study, as well as other fundamental human rights that interact with article 18(2) and (3) of the International Covenant on Civil and Political Rights (ICCPR), alongside the community of faith in which they work or study. Proportionality should mean considering the impacts of the differential treatment on the staff member, students, others and the institution, in the least restrictive means necessary to achieve legitimate aims.

Proportionality should also consider potential harms resultant from a particular ethos, such as the promulgations of conversion ideology within the educational institution.

**Recommendation:** Reframe Proposition C.1 (second bullet point), Proposal 8 (second bullet point) and Proposal 10 (second bullet point) so that the requirement for proportionality is not directed to protecting the religious ethos of the institution, but is a genuine consideration of all circumstances of the case.

## **Termination based on 'actively undermining ethos'**

### ***Proposition D***

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

1. *Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.*
2. *Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.*

3. *Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.*

We strongly oppose the formulation of the right for employers (religious educational institutions) to terminate or take other action against employees based on 'actively undermining the ethos of the institution', (Proposition D.1, D.2, Proposals 9 and 10). These provisions are liable for misuse, gives inferior protections to employees than what they currently possess, and shifts the burden of proof away from the employer.

This right is liable for misuse because 'religious ethos', in this context, is often code for discriminatory beliefs regarding gender, sexuality and marriage. Allowing only discrimination based on religious beliefs is no answer, because that means *de facto* discrimination based on discriminatory beliefs regarding sexual orientation and gender identity regardless of a person's attributes.

These provisions create a positive right to terminate, rather than placing the onus on the employer to demonstrate proof of wrongdoing on the part of the employee. If an employee were to contest termination, they are faced with an open-ended debate that begins with the primacy of the institutional ethos, that is undefined in its scope, who determines it, and whether or not it has the support of the broader school or religious community. This provides educational institutions disproportionate latitude to dismiss staff that 'undermine' activities seen as originating from the institution's ethos, including activities that are significantly harmful such as the dissemination of conversion ideology.

The issue of proportionality, raised with respect to Proposition C, is again relevant here. Proposition D, supported by Proposals 9 and 10, reassert the primacy of institutional religious ethos above other concerns, such as the rights of employees and the wellbeing of staff and students.

**Recommendation:** Reframe Proposition D.1 and D.2 and Proposal 9 into a positive right for an *employee* to self-expression of their beliefs, sexuality, gender, marital status, etc. in a manner that is reasonable and proportionate to the rights of others and the interests of the religious educational institution, having regard to the religion of the institution and the religious sensitivities of its religious adherents.

**Recommendation:** Delete **Proposal 10** (second bullet point), so as to not disproportionately favour the religious ethos of the institution over the rights of employees.

**Recommendation:** Ensure the onus remains on the employer to justify the reasonableness and proportionality of any actions taken to infringe on the rights of an employee, including termination of employment.

## **Curriculum**

### ***Proposal 7***

*Amend the Sex Discrimination Act 1984 (Cth) to clarify that the content of the curriculum is not subject to the Act.*

Proposal 7 would exempt curriculum from the *Sex Discrimination Act* to allay concerns that Proposal 1 – which tightens protections for students under the Act – would prevent religious schools from teaching religious beliefs. Paragraph 91 of the Consultation Paper identifies that this has not been an issue in states and territories that have long-standing protection on Sex Discrimination Act grounds for students and staff – Proposal 7, therefore, addresses a non-existent problem.

**Recommendation:** Delete Proposal 7, pertaining to Proposition A and Proposition B.

## **Protecting personal associates from discrimination**

### ***Proposal 6***

*The Sex Discrimination Act 1984 (Cth) should be amended to extend anti-discrimination protections to prohibit discrimination against students and prospective students on the grounds that a family member or carer of the student has a protected attribute.*

We support Proposal 6 with further amendment. The intention of Proposal 6 is to improve the *Sex Discrimination Act* to protect a student in relation to discrimination on the basis of their family member's or carer's protected attributes. This should be extended to any personal associates of the student. There is no basis for a distinction or inconsistency.

**Recommendation:** Amend Proposal 6 pertaining to Proposition A, to ensure that anti-discrimination protections are extended to all personal associates of students and prospective students, and not just family members and guardians and specified in the Consultation Paper.

## **Protecting students and staff from discrimination**

We support Propositions A.1 and B.1, achieved through implementation of Proposals 1, 2, 3, 4 and 5, which are intended to increased protections for students and employees at religious educational institutions from discrimination on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy.

We support Proposal 11, which effectively allows the Australian Human Rights Commission to monitor these changes.

We support Proposals 12 and 13, provided they develop guidance which is faithful to new protections and do not attempt to allow religious educational institutions to search for new loopholes in this antidiscrimination law.

**Recommendation:** Proposals 1, 2, 3, 4, 5 and 11, which are intended to increased protections for students and employees at religious educational institutions.

**Recommendation:** Ensure guidelines developed by the AHRC and Attorney-General's Department address (and close) potential loopholes.