

# **Non-discrimination *is students' 'best interests'***

**A SUBMISSION TO THE INQUIRY BY THE SENATE  
LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE  
ON THE DISCRIMINATION AMENDMENT (REMOVING  
DISCRIMINATION AGAINST STUDENTS) BILL**

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January 2019

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## **Foreword**

I thank and congratulate the Australian Government and the Senate Legal and Constitutional Affairs References Committee for affording the public the opportunity to provide feedback on Senator Wong's proposed Sex Discrimination Amendments Bill. I commend the presentation of a Bill draft seeking to remove exemptions allowing discrimination. I encourage considering the following constitutional, legal and research-based feedback on the Bill. I further encourage taking this opportunity to get rid of the exemptions, wholly.

I make this submission to you in my role as an academic expert in LGBTIQ education policy issues at Macquarie University, with particular reference to my studies in the field and my knowledge of human rights texts. However, this submission does not necessarily represent the views of Macquarie University as an organisation or its staff and students.

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## 1. Introduction – Legislation Obligations & Limitations

*(People) are free to disapprove of same-sex relationships, for example. They have an absolute right to believe – and to follow in their own lives – whatever religious teachings they choose. **But that is as far as it goes***<sup>1</sup> (Pillay, 2012).

In June 2011, the United Nations Human Rights Council adopted resolution 17/19 – the first United Nations resolution on human rights, sexual orientation and gender identity. It received support from Council members from all key regions. All people have a basic human right to an education and employment equity free from discrimination regardless of gender identity and gender expression (UNESCO, 2016b, 2016c; United Nations, 1948). The rights of students to equal access in sexuality education specifically, regardless of sexual orientation, gender identity and expression have also been recognised repeatedly at the global level (UNESCO, 2009, 2011; United Nations, 2012). UNESCO’s education policy guidelines were developed by academics, governments and human rights representatives (UNESCO, 2011, 2012). A *Ministerial Call For Action* committing to LGBTI student protections in educational institutions was signed by over 50 countries (UNESCO, 2016a). Specific commitments included: national, subnational and school policies to address violence against LGBTIs; and inclusive and safe school environments (pp.3-4). The United Nations has placed pressure on Australia to support greater recognition of discrimination on the basis of sexual orientation, gender identity and gender expression in religious schools (UN Human Rights Council, 2011; UNESCO, 2015, 2016a, 2016b; United Nations, 2012; United Nations High Commissioner for Human Rights, 2011). This submission is based on the fact that freedom of religion (for individuals’ own free religious or atheist will) **does not include a right to enforce one’s own religious views on others or to discriminate against LGBTs’ fundamental human rights to non-discrimination, education and employment equity**. Human rights **do not allow discrimination** ‘for’:

- religious educational institutions’ ‘religious susceptibilities/ offence’ or ‘the doctrines, tenets, beliefs or teachings of a particular religion or creed the institution promotes;
- religious educational institutions’ public or hidden ‘policy of the educational institution’; or
- religious educational institutions’ beliefs about ‘the best interests of the child’.

The attempts to privilege old or new exemptions using addendums on these themes should be disregarded (Australian Government, 2018); there is no human or institutional right to enforce religious views on others.

### 1.2 Prioritising Constitutional and Legal Rule Over Religious Rule

Obviously, individuals and organisations believe their religion endorses practices that are ‘in the best interests’ of children. This variably can involve excluding from school or mistreating at school environments: LGBTs, unmarried sexually active or pregnant youth. Some religious individuals and organisations see ex-gay therapy as ‘the child’s best interests’ – regardless peak bodies in psychology separate themselves from religion and denounce these harmful practices (APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, 2009; Australian Psychological Society, 2007). The Committee and the Australian Government must similarly separate themselves from religious interests and understand: promoting specific religious doctrine is **completely inappropriate in anti-discrimination law**. Further, Section 116 of the Australian Constitution decrees a **separation of Church and State** (Commonwealth of Australia, 1900). It states:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall*

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<sup>1</sup> My emphasis.

*be required as a qualification for any office or public trust under the Commonwealth (Commonwealth of Australia, 1900)*<sup>2</sup>.

Australians are free to believe or not whatever they like when working or studying in any Australian school, and to adhere to the practice of any religion or none as individuals. However, it is *unconstitutional* for the Australian Commonwealth to make any law for imposing any religious observance – including allowance for the exclusion of or discrimination against students in religious schools as currently exists in the SDA... this enforces religious observances on students in these schools. It is also *unconstitutional* for the Australian Commonwealth to allow a religious test for qualifying for working in Australia's government-funded religious education sectors and schools; and *unconstitutional* (given our legal requirement that all young people whether religious or not be physically at school until of age) to enforce such religious compliance tests for students on any matter including their gender, sexuality or otherwise. It is *completely unacceptable* for an Australian to be discriminated against in schools on the basis of someone else's religion or an institution's desire to promote a creed. All humans have a right to non-discrimination on the basis of sexual orientation, gender identity and expression (including marital and relationship status) ***regardless of the existence of religious theories on their 'best interests' in these matters.*** The Committee and Australian Parliament are encouraged to simply focus on protecting humans from discrimination, not promoting religious doctrines, policies, tests or views of what is 'in the child's best interests' in discriminatory creeds.

### 1.3 Overview of Submission

The introduction (Section One) located the submission within the global push for human rights and anti-discrimination legislation protections on the basis of actual or perceived sexual orientation, gender identity and gender expression, marital and partnership status. It showed the irrelevance of debates over the specifics of religious stances on gender, sexuality, marital and relationship statuses to human rights protections; human rights do not afford discrimination for 'religious reasons'. Furthermore, in Australia the separation of church and state in anti-discrimination law is *constitutionally protected*: promotion of religious doctrine or policy, observances or tests cannot be written into this law (or and thereby, into the law requiring students to attend school). The rest of the submission argues for the withdrawal of exemptions for religious educational institutions, through showcasing some data on how (unchecked) schools do promote discrimination and this harms students' 'best interests' – their safety and wellbeing.

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<sup>2</sup> My emphasis.

## 2. Exempt Schools vs. Students' 'Best Interests'

*'Asked 'Is this a safe place for the LGBTQ+ community' they replied with 'No'' (Al, transgender FTM, 14yrs, on their Christian school)<sup>3</sup>.*

*My school was very homophobic. All the people I knew used to make jokes about gay people...sometimes even jokes about me being gay. I denied this for years (Lisa, lesbian female, 21yrs, on her Christian school) (Jones, 2015, p. 23).*

### 2.1 Impacts of Policy Protection for LGBTs' School Discrimination

Aggregated reviews of research from academics around the world have repeatedly shown LGBT students experience significantly disproportionate violence and discrimination in education contexts compared to other students (UNESCO, 2015, 2016b). The violence against LGBT students occurs in education-related environments such as classrooms, playgrounds, toilets, changing rooms, around schools, on the way to and from school, and online (UNESCO, 2016b). LGBT students who experience violence are more likely to:

- Feel unsafe at school;
- Achieve lower grades;
- Miss participation, classes or school days;
- Drop out of school;
- Have decreased employment and/ or housing prospects;
- Feel depressed;
- Adopt risky health behaviours; and
- Think about or attempt suicide.

Communicating local policy protections to students is helpful – when protective policies are known LGBTIQ students are significantly more likely to feel safe (75% v. 45%); and significantly less likely to experience physical abuse (23% v. 47%) or attempt suicide (13% v. 22%) (Jones, 2015). Australian transgender students are significantly more likely to drop out of school early, to feel their sexuality and puberty education provisions are inadequate and to suffer bullying in contexts where gender diversity is not supported by teaching staff (Jones, 2015, 2016; Jones et al., 2016; Smith et al., 2014). Using 'mostly appropriate' pronouns for transgender students makes it less likely they will drop marks (26% v. 54% when teachers use mostly inappropriate pronouns); and drop out (6% v. 22%) (Jones et al., 2016).

LGBTIQ teachers surveyed (42%) mostly do not know if their school had policy/ies protecting them against discrimination (showing how confused Australian schooling is when most contexts are indeed protected); 27% said their school did offer policy protection, 25% said it did not and 6% said they worked in schools which ***had a policy actively attempting to prevent people of diverse sexual orientation or gender diversity from working there*** (Jones, Gray, & Harris, 2014). Australian religious schools at their most extreme make teachers sign documents stating they will uphold the 'religious ethos' or face dismissal (Gray, Harris, & Jones, 2016) – firing LGBT teachers, heterosexuals in defacto relationships, divorcees without annulments and various everyday Australians. Such dismissals are *utterly unacceptable*; yet 'allowed'. Because of these confusingly inconsistent conditions most teachers (56%) did not work at schools supporting/allowing staff to be 'out'. Many said working in religious school environments made them feel shame, hide their identity at school and become more restrained in expressing their sexuality generally. One reflected, *'I worked in Catholic schools for many years and didn't realise how much it impacted on my own sexuality until I worked in a school that was much more accepting'*. Due to the homophobia and transphobia

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<sup>3</sup> Quotes in this section are from the 2018 *Voices of Experience* survey, pseudonyms are used for these participants.

in school environments, 27% stopped participating in aspects of work life or activities, 24% took extra sick days, 17% moved schools and several left education altogether. A further 17% engaged in activism; Australia needs to listen to them. Australian data on the value of policy protection is influential in global policy convenings, but unreflected in a portion of Australian religious schools: leadership is needed.

## **2.2 Discrimination on Gender & Sexuality is NOT in Students' 'Best Interests'**

Australians aged 14+yrs in the 2018 *Voices of Experience* survey (which had 2,500 participants who were overwhelmingly heterosexual cisgender teens) were asked about gender and sexuality education messages their school taught students. My 2018 submission to inquiry into the Sex Discrimination Act showed that there was a notable increase in messages about effective relationships and gender diversity, and decrease in censorship, since the 2013 amendment of the SDA and related efforts in government schools (Jones, 2018). The submission showed extensive data on how conservative schools taking a conservative approach on other issues (gender, social class, race, media, culture, technology) were *most likely* to either not provide sexuality education; or teach sex before marriage was wrong and that gay people should become straight. The schools teaching gay conversion to heterosexuality were overwhelmingly Catholic and Christian schools. A tenth of participants on the trans-spectrum were exposed to the conversion messaging at school; twice as many as other students, often as a response to their identity disclosures.

Messages taught in schools related to the Sex Discrimination Act's key interests had highly significant associations with participants' social wellbeing impacts (Jones, 2018). Sexuality education messages on rights (including women's rights but also broadly), pleasure, and diversity (gender and cultural) were associated with reduced impacts from abuse at school. Sexuality education messages endorsing pleasure and gender diversity were associated with ***reduced negative wellbeing impacts including suicidality***. Conversely, participants exposed to the message 'That gay people should become straight' were ***most likely to experience every type of negative impact from abuse at school*** (harms to concentration, grades, facility use and attendance) and least likely to say abuse did not affect them. Those exposed to conversion messages were ***considerably more likely*** to think about self-harm (81.8%); self-harm (61.8%); think about suicide (83.6%) and attempt suicide (29.1%). ***Only 14.5% of these participants – regardless of their sexual orientation – had not engaged in any of these behaviours.*** Participants denied their right to sex education also had increased suicide attempts (28.2%). It is also significant that participants exposed to conversion or censorship sexuality approaches were most likely to have responded to abuse with activism; some participants felt they had to fight back. There is evidence supporting that there is a portion of religious schools in Australia that are extremist, taking a harshly conservative approach to gender and sexuality in ways which negatively impact the wellbeing of not only LGBTs but most participants who attend and are exposed there to gay conversionist messaging. Anti-LGBT messaging is in short aligned with poor education, and poor wellbeing for those exposed to it – when 83.6% of people exposed to gay conversion messaging at school consider suicide, ***authorities cannot rely on these schools to determine students 'best interests' regarding gender and sexuality discrimination... anti-discrimination law MUST do it for them.***

### 2.3 Schools Need Clear Guidance on Students' 'Best Interests'

Participants in the 2018 *Voices of Experience* survey were targeted over body, gender differences and sexual orientation in bullying **more than any other issue** (Jones, 2018). Sex/ gender and sexuality were **the major language theme in Australian school bullying**: the most common insult used by students when bullying someone at school was 'Gay'; 'Faggot' also featured strongly, as did feminine gendered and sexual insults (Jones, 2018). Participants who were on the trans-spectrum (whether they were transgender, non-binary or had another gender identity) were around 10% more likely to report social abuse from teachers and other members of the school than cisgender people. They were half as likely to say abuse had not affected them at all (22.2% vs 41% of cisgender participants). Due to the abuse they experienced they were more likely to struggle to concentrate in class (54.5% vs. 41.5%), drop marks (40.4% vs. 26.7%) and miss class (29.3% vs. 18.2%) or days (41.4% vs. 26.3%). Due to the abuse they were also more likely to be unable to use bathrooms (19.2% vs. 5.5%) and change-rooms (22.2% vs. 7.1%); drop out of extra-curricular activities including sports (29.3% vs. 10.4%); move schools (18.2% vs. 9.5%) or drop out completely (9.1% vs. 2.4%). Trans-spectrum participants who had experienced abuse were twice as likely to get involved in activism (22.2% vs. 9.6% of cisgender participants). Further, a highly significant finding was that participants wanted sexuality better addressed at school **more than any other social issue**, followed by sex/ gender (Jones, 2018). In sum, students need the Sex Discrimination Act to enforce non-discrimination on the basis of body, gender differences and sexual orientation at schools for their wellbeing to be protected at school. Further, they need the Australian Government to issue related national education policy guidance on how to ensure this non-discrimination, highlighting the existing non-discrimination approach in the *Australian National Curricula* (Ezer, Jones, Fisher, & Power, 2018).



### 3. Conclusion – *Fully Remove the Exemptions; Add No Further Mediation*

*The reason why my previous independent Anglican school was more advanced than a government school was because the students had a bigger say in what should be considered normal in today's society. Therefore the school had to adapt their original traditional sex education towards a more twenty-first century approach (2018 Australian Voices of Experience survey participant).*

This submission adds to the author's and other academics' (including Professor Mary Lou Rasmussen and peers') past submissions on SDA Drafts citing evidence showing that many LGBT students in religious schools suffered discrimination; attempts to be 'converted to heterosexuality'; or being forced out of their schools (since 2012). It adds to the author's and various legal organisations/ representatives (including the Australian Lawyers' Alliance and peers') past submissions on the constitutional; and legal; problems in maintaining exemptions for religious schools in the SDA (since 2012). Anti-LGBT conversion approaches in schools *contribute to harm the wellbeing of not only LGBT students, but most people attending those schools* – who are *significantly* more likely to consider self-harm and suicide, and attempt self-harm and suicide. The religious schools *using exemptions to enforce anti-LGBT approaches or expel LGBTs and others, do not understand the best interests of their students* and are harming their wellbeing. They, and the current exemptions in Australian anti-discrimination law, promote religious institutions over students' human rights. Student wellbeing is served by non-discrimination: this must be enforced by Australian anti-discrimination law in full, and constitutionally the law cannot enforce religious observances or religions as it currently does. This submission recommends **complete** withdrawal of the anti-discrimination exemptions for Australian faith-based educational institutions. This includes:

1. Fully **repealing the section 38(3)** exemptions;
2. Inserting clarification that **the exception provided in section 37(1)(d) does not apply** to the treatment of students, teachers or staff by faith-based educational institutions; and
3. Fully **abandoning KQ147-151 amendments by the Government** to section 7B(2).

### References

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