

Submission to the Report on Right to Education and Sexual Orientation and Gender Identity

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

1. Introduction

The Justice and Equity Centre (JEC) welcomes the opportunity to provide this short submission in response to the call for input, issued by the United Nations Independent Expert on Sexual Orientation and Gender Identity, on the important topic of the human right to education and the protection against violence and discrimination based on sexual orientation and gender identity (SOGI).

We do so as an Australian non-government organisation with a long history of advocating for the human rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people, especially in relation to the right to be legally protected against discrimination.

This includes consistently calling for the ability of lesbian, gay, bisexual, transgender and queer (LGBTQ) students¹ in religious schools to be able to learn and grow free from lawful mistreatment on the basis of who they are, something that, as we shall discuss below, is not currently reflected in the anti-discrimination laws of several Australian jurisdictions.

In particular, since 2018 we have made a number of policy submissions to domestic consultation processes, especially at Commonwealth level,² urging reform of the *Sex Discrimination Act 1984* (Cth), and where relevant to state and territory anti-discrimination laws, to remove exceptions that permit religious schools to discriminate against LGBTQ students.

Our Director of Policy and Advocacy, also recently had published an article detailing the history of this topic, including surrounding law reform debates, in the *Australian Journal of Human Rights*.³

This submission draws on this expertise, and will specifically focus on the following suggested questions in the call for input:

Question 1. Does your country have any laws, policies, or practices (at the central or local levels) that, explicitly or implicitly, affect SOGI-diverse students' right to be free from discrimination?

¹ We also advocate for the rights of LGBTQ teachers in religious schools to be protected against discrimination, although that is not the primary subject of the current consultation process.

² Including (but not limited to):
Submission to the Religious Freedom Review, 14 February 2018, available at: <https://jec.org.au/resources/submission-to-the-religious-freedom-review/>
Submission to Senate Legal and Constitutional Affairs References Committee Inquiry into Anti-Discrimination Exceptions for Religious Schools, 26 November 2018, available at: <https://jec.org.au/resources/submission-to-senate-legal-and-constitutional-affairs-references-committee-inquiry-into-anti-discrimination-exceptions-for-religious-schools/>
Submission to the Senate Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, 21 January 2019, available at: <https://jec.org.au/resources/submission-to-the-senate-inquiry-into-the-sex-discrimination-amendment-removing-discrimination-against-students-bill-2018/>
Submission to Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws, 10 March 2023, available at: <https://jec.org.au/resources/submission-to-alrc-inquiry-into-religious-educational-institutions-and-anti-discrimination-laws/>

³ Alastair Lawrie, 'Déjà vu for LGBTQ students in religious schools', *Australian Journal of Human Rights*, 3 April 2025, available at: <https://www.tandfonline.com/doi/full/10.1080/1323238X.2025.2483847>

And especially sub-questions: 2 ‘Are there any laws or policies that impact SOGI-diverse students’ ability to access equal educational opportunities?’ and 3 ‘Have there been recent attempts to introduce, amend, or repeal such laws or policies?’

Question 6. Do any laws, policies, or practices in your country shape SOGI-diverse students’ ability to fully realise their right to identity?

And especially sub-questions 3 ‘Do any obstacles or penalties exist for students to freely express their sexual orientation or gender identity?’ and 4 ‘Have there been efforts to reform or introduce such laws or policies, either locally or nationally?’

2. Jurisdictional Approaches

This section outlines the different approaches to the protection, or otherwise, of LGBTQ students in religious schools against discrimination across the nine Australian jurisdictions, including discussion of recent attempts to introduce protections where they are currently lacking.

2.1 Commonwealth

LGBTQ students in religious schools are not protected against discrimination under Commonwealth law. This is because of both a specific exception for religious schools,⁴ and a general exception for religious organisations,⁵ allowing mistreatment on the basis of sexual orientation and gender identity that would otherwise be prohibited under the *Sex Discrimination Act 1984* (Cth).

There have been numerous political promises to remove the ability of religious schools to discriminate against LGBTQ students in recent years, starting with a bipartisan commitment, from both the then-Coalition Government, and then-Labor Opposition, in October 2018. The Opposition introduced legislation to implement this,⁶ but was not supported by the Government.

The Coalition Government was re-elected in May 2019, and continued to fail to act on their promise on this issue. They even chose to withdraw their Religious Discrimination Bill package from Senate consideration in February 2022 because it had been amended in the House of Representatives by Labor, other non-Government MPs and five Government backbenchers to protect LGBTQ students in religious schools against discrimination.

The Labor Party was elected to Government in May 2022 with a promise to protect LGBTQ students but, like their predecessors, have failed to deliver on this commitment. They did ask the Australian Law Reform Commission (ALRC) to review this issue and provide advice on how the laws should be amended in this area. Their report⁷ – delivered in December 2023 and published in March 2024 – included a recommendation⁸ to repeal the specific exception for religious schools, and to clarify that the general religious exception does not apply to them either. Despite

⁴ S38(3) *Sex Discrimination Act 1984* (Cth).

⁵ S37(1)(d) *Sex Discrimination Act 1984* (Cth).

⁶ Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth).

⁷ Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142, 2023).

⁸ Recommendation 1, *ibid*.

this, the Labor Government refused to introduce legislation to implement the ALRC's recommendations.

A Commonwealth election is scheduled for 3 May 2025. Unfortunately, at the time of submitting neither Labor nor the Coalition have provided clear commitments to progress legislation to remove the *Sex Discrimination Act* amendments which allow religious schools to discriminate against LGBTQ students if they are elected.

2.2 New South Wales

LGBTQ students in religious schools are not protected against discrimination under NSW law. Like the Commonwealth, this is because of specific exceptions for educational institutions,⁹ as well as a general exception for religious organisations,¹⁰ in the *Anti-Discrimination Act 1977* (NSW).

However, the specific exceptions for schools are actually much broader than those in the *Sex Discrimination Act*, or indeed in any other Australian jurisdiction, in two key ways. First, they allow discrimination by all 'private educational institutions', irrespective of whether they are religious or not. Second, there is no test which must be satisfied before a school is permitted to mistreat LGBTQ students¹¹ – the exceptions are absolute.

The current NSW Labor Government, elected in 2023, have made no promises to protect LGBTQ students in religious schools against discrimination, and also ensured amendments that would have done so were removed from Independent Member for Sydney Alex Greenwich MP's Equality Bill prior to its passage in October 2024.

However, the Government did refer the *Anti-Discrimination Act* to the NSW Law Reform Commission for comprehensive review in mid-2023. This review is ongoing, with an expectation it will ultimately recommend removal of the legal ability of religious schools to mistreat LGBTQ students. Whether such a recommendation is implemented will be up to the Government, and Parliament.

2.3 Victoria

LGBTQ students in religious schools are protected against discrimination under Victorian law. Exceptions allowing religious schools to discriminate on the basis of sexual orientation and gender identity were removed following the December 2021 passage of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

⁹ S38K(3), S49ZO(3) *Anti-Discrimination Act 1977* (NSW).

¹⁰ S56(d) *Anti-Discrimination Act 1977* (NSW).

¹¹ Unlike s38(3) of the *Sex Discrimination Act*, where the institution must be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed [and the discrimination is undertaken] in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'

2.4 Queensland

LGBTQ students in religious schools are also protected against discrimination under Queensland law. In fact, they have enjoyed this protection for more than two decades, following passage of the *Discrimination Law Amendment Act 2002* (Qld).

The effectiveness of these protections were highlighted by the successful settlement of a discrimination complaint by parents against an anti-LGBTQ enrolment contract that was issued by Citipointe Christian College in January 2022. In June 2024, the College published an 'expression of regret' for its actions, acknowledging the distress and concern their attempted discrimination had caused.¹²

2.5 Western Australia

LGBTQ students in religious schools are not protected against discrimination under Western Australian law. Like the Commonwealth and NSW, this is because of both a specific exception for religious schools,¹³ and a general exception for religious organisations,¹⁴ allowing this mistreatment in the *Equal Opportunity Act 1984* (WA).

This legislation was recently reviewed by the WA Law Reform Commission, who issued their final report in 2022, including a recommendation that religious schools not be permitted to discriminate on the basis of sexual orientation or gender identity.¹⁵

While the then-Labor Government initially said it would implement the Commission's recommendations during that term of Parliament, they later reneged on that commitment, instead stating they would only take action to reform the *Equal Opportunity Act* if they were re-elected at the March 2025 State election. The Labor Government were in fact re-elected earlier this year and, with a sympathetic Legislative Council, are now under pressure to follow through on the introduction of this much-needed legislation.

2.6 South Australia

It is unclear whether LGBTQ students in religious schools are protected against discrimination under South Australian law. While there is no specific exception for religious schools with respect to students in the *Equal Opportunity Act 1984* (SA) (unlike for teachers, who may be discriminated against provided a school publishes its discriminatory policies beforehand),¹⁶ it is possible the general exception for religious organisations¹⁷ nevertheless permits such mistreatment.

¹² ABC News, *Citipointe Christian College issues statement of regret two years after controversial student contract*, 9 June 2024.

¹³ S73(3) *Equal Opportunity Act 1984* (WA).

¹⁴ S72(d) *Equal Opportunity Act 1984* (WA).

¹⁵ Recommendation 81, The Law Reform Commission of Western Australia, *Review of the Equality Opportunity Act 1984* (WA) (Project 111 Final Report, 2022).

¹⁶ S34(3) *Equal Opportunity Act 1984* (SA).

¹⁷ S50(1)(c) *Equal Opportunity Act 1984* (SA).

In 2016, the South Australian Law Reform Institute recommended this ambiguity be resolved by clarifying that LGBTQ students in religious schools may not be legally discriminated against.¹⁸ However, both Labor and Liberal Governments have subsequently ignored these recommendations, and we are not aware of any current plans to ensure LGBTQ students are clearly protected.

2.7 Tasmania

LGBTQ students in religious schools are protected against discrimination under Tasmanian law. Indeed, religious schools have not enjoyed exceptions allowing them to mistreat students on the basis of their sexual orientation or gender identity since the inception of the *Anti-Discrimination Act 1998* (Tas).

2.8 Australian Capital Territory

LGBTQ students in religious schools are protected against discrimination under ACT law. This was achieved via amendments passed in 2018,¹⁹ removing the exceptions in the *Discrimination Act 1991* (ACT) that existed before that point.

2.9 Northern Territory

LGBTQ students in religious schools are protected against discrimination under NT law. Indeed, they have been protected from mistreatment on the basis of who they are following amendments²⁰ to the *Anti-Discrimination Act 1992* (NT) passed more than two decades ago.

3. Discussion

Australia has a complementary framework of anti-discrimination laws, with state and territory regimes operating alongside the Commonwealth's. It is broadly agreed that, as long as either the relevant state or territory law, or the Commonwealth *Sex Discrimination Act*, provides protection for LGBTQ students in religious schools against discrimination, that is sufficient.

Given the above description of the law as it currently stands across the nine jurisdictions, this means LGBTQ students are currently vulnerable to legal mistreatment in NSW and Western Australia, and potentially in South Australia too.

Obviously, the most straight-forward way to ensure all students are protected against discrimination in all schools would be for the Commonwealth Government to amend the *Sex Discrimination Act* to repeal s38(3) and clarify that s37(1)(d) does not apply.

¹⁸ SA Law Reform Institute, "'Lawful Discrimination': Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status', June 2016.

¹⁹ *Discrimination Amendment Act 2018* (ACT).

²⁰ *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT).

However, in the absence of clear commitments from either the Labor Government or Coalition Opposition in the lead-up to the May 2025 election, the State Governments of NSW, WA and SA can and should also take action to repeal the exceptions which exist in those places.

This action is both necessary, and urgent, because, while most religious schools do not discriminate against LGBTQ students, some do, even in 2025.

Contrary to repeated assertions by religious opponents of reforms, that discrimination does not occur in practice, the Australian Law Reform Commission confirmed it indeed continues: ‘The ALRC heard that exclusion and discrimination do sometimes occur and can cause serious harm, in part because of the nature of community ties within institutions.’²¹ This was reinforced by numerous case studies included in a report by domestic LGBTIQ+ advocacy organisation Equality Australia.²²

If all SOGI-diverse students in Australia are to enjoy their human right to be free from discrimination, irrespective of their place of education, as well as to be able to fully realise their right to identity, law reform in this area remains essential.

²¹ Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (ALRC Report 142, 2023), 13.

²² Equality Australia, *Dismissed, Denied and Demeaned: A National Report on LGBTIQ+ Discrimination in Faith-Based Schools and Organisations*, March 2024.