

# **Minding Our GLBs & TIQs**

**A SUBMISSION TO THE INQUIRY BY THE SENATE LEGAL  
AND CONSTITUTIONAL AFFAIRS COMMITTEE  
ON THE EXPOSURE DRAFT OF THE  
HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012**

Submission by Dr Tiffany Jones  
Lecturer & Researcher in Contextual Studies in Education  
School of Education  
University of New England, Australia

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I make this submission with thanks to the GLBTIQ students and education informants involved in my PhD, the GLBTIQ education staff contributing to our new Out/in Front study, and to my inspiring co-researchers past and present.

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## Glossary and Abbreviations<sup>1</sup>

**Androgynous:** Can mean having both masculine and feminine characteristics, or having neither specifically masculine nor feminine characteristics. Some people who are androgynous may identify as genderqueer, trans or androgynous.

**Bisexual or Bi:** Refers to people whose sexual and romantic feelings are for both men and women, and who identify with these feelings. Many people may engage in bisexual behaviours but not identify as bisexual. See also: pansexual or omnisexual.

**Cisgendered:** Refers to people whose sense of gender and/or sex matches the sex they were assigned at birth. Cisgender is the antonym of transgender and is used to label those whose gender is not trans.

**Gay:** People whose sexual and romantic feelings are primarily for the same sex and who identify primarily with those feelings. In Australia, both men and women identify as gay, however it often refers mainly to homosexual men.

**Gender expression:** How a person, thinks, acts, dresses and speaks which distinguishes them as masculine or feminine. The sociological construction of one's masculinity or femininity. One's gender can be masculine, feminine and/or androgynous.

**Gender Identity:** the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not, socialisation or alternative expression), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.

**GenderQueer:** Can be used as an umbrella term similar to Transgender but commonly refers to people who are not transsexual, but do not comply with their traditional gender expectations through their dress, hair, mannerisms, appearance and values.

**Homophobia:** An individual's or society's misunderstanding, fear, ignorance of, or prejudice against gay, lesbian and/or bisexual people. In this document, 'Homophobia' is also used as an umbrella term to include transphobia, biphobia and heterosexism.

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<sup>1</sup> Most definitions included here are repeated from my report *Discrimination and Bullying on the Grounds of Sexual Orientation and Gender Identity in Western Australian Education* (Jones, 2012a). The definition of intersex status is derived from consultation with Oii – Intersex International Australia.

**Homosexual:** People whose sexual and romantic feelings are primarily for the same sex and who identify primarily with those feelings. People who feel this way often identify as gay or lesbian.

**Intersex status:** The status of having physical, hormonal or genetic features that are

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- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male.

**Lesbian:** Women whose sexual and romantic feelings are primarily for other women and who identify with those feelings.

**Pansexual or Omnisexual:** Refers to people whose sexual and romantic feelings are for all genders; this rejects the gender binary of male/female and asserts that there are more than two genders or gender identities. These are inclusive terms that consider the gender diverse community.

**Queer:** Queer is an umbrella term used to refer to the LGBT community. Some people in the GLBTIQ community prefer not to use this term as the history of the word has negative connotations. These days, the term has been embraced and is more about Pride and inclusivity.

**Sex:** is the physiological make-up of a person. It is commonly expressed as a binary and used to divide people into males and females. However, in reality, sex is a “complex relationship of genetic, hormonal, morphological, biochemical, and anatomical differences that impact the physiology of the body and the sexual differentiation of the brain. Although everyone is assigned a sex at birth, approximately 2 percent of the population are intersexed and do not fit easily into a dimorphic division of two sexes that are ‘opposite’”.

**Sexual Orientation:** The direction of one’s sexual and romantic attractions and interests toward members of the same, opposite or both sexes, or all genders. Similar to ‘Sexual Preference’.

**Trans, Transexual or Transgender:** A person who identifies as the sex opposite to the one assigned at birth and who may choose to undergo sex affirmation/ reassignment surgery. Describes a broad range of non-conforming gender identities and/or behaviours.

## **About the Author**

Dr Tiffany Jones is a lecturer and researcher at the University of New England, NSW. She contributed to the '*Writing Themselves In 3*' project during her time at La Trobe in Victoria, where she completed her PhD on the impacts of education policy and provisions for gay, lesbian, bisexual, transgender, intersex and otherwise questioning students. A published author, Tiffany has liaised on policy and GLBTIQ issues with several Australian state government and non-government organisations, and international organisations such as UNESCO. She received the Griffith University Medal for her research and an Association for Women Educators' Award for her teaching.

## **Foreword**

I thank and congratulate the Australian Government and the Senate Legal and Constitutional Affairs Committee for affording the public, including individuals and organisations, the opportunity to provide feedback on the Draft of the Human Rights and Anti-Discrimination Bill 2012. I commend the presentation of a much-improved position in this draft in comparison to previous disparate Bills.

I encourage the Committee to consider the linguistic feedback I offer carefully. Minor wording choices in this Bill will have major implications for many Australians. My research has uncovered significant differences in social and related impacts for policies that do explicitly enumerate particular identity attributes, as opposed to those that overlook a particular attribute (or are more general). Your work is extremely important and historic, albeit difficult; involving, as it does, the weighing of what can appear as 'competing interests'. My aim is to assist you in making this Bill as fair and useful to Australians as possible, and more consistent with international human rights provisions.

I make this submission to you in my role as an academic expert in GLBTIQ issues at the University of New England (UNE), with particular reference to my Australian studies in the field and my knowledge of human rights texts. However, this submission does not necessarily represent the views of UNE as an organisation or other UNE employees.

Dr Tiffany Jones

**School of Education  
University of New England  
Armidale NSW 2351**

## **Executive Summary**

### **Introduction – Obligations for Legislation**

The United Nations have placed pressure on Australia and other countries to support greater recognition of discrimination on the basis of sexual orientation, gender identity and intersex status in direct federal legislative provisions. UN directives exist on legislation in this area that should be more directly referenced and reflected in the Australian Bill. I advise the Senate Legal and Constitutional Affairs Committee to mind their language use – their ‘GLBs’ and ‘TIQs’, so to speak – so that the achievements thus far in the Bill are furthered to be as effective as possible in protecting gay, lesbian, bisexual, transgender, intersex and otherwise queer/ questioning people’s rights in congruence with our obligations under specific aspects of UN agreements. I recommend the Committee directly references specific human rights instruments currently missing from the Bill’s “Division 2— Objects of this Act”.

### **Inclusion of Protections for People with Intersex Attributes/ Status**

The UN outlined the need for legislative protections around intersex attributes in direct federal legislative provisions, and Organisation Intersex International (Oii) Australia has previously submitted advice to the Committee around how best to word such protections informed by their significant knowledge of these issues. The Draft Bill did not adequately reflect such requirements and guidance. I recommend the Committee specifically enumerates the protections against discrimination on the basis of intersex attributes/ status currently missing from the Bill’s “Division 2— Interpretation” (in section 6 The Dictionary, section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person).

### **Inclusion of Protections for all People on the Basis of Gender Expression**

The Australian Government is congratulated and thanked for including recognition of discrimination on the basis of gender identity in the Draft Bill. The Draft Bill

defines gender identity in a manner which makes it correspond most precisely with transgender issues. However, there should also be protection for non-traditional expressions of gender which are not necessarily related to a so-called “opposite sex” (or transgender) gender identity. I recommend the Committee specifically enumerates additional and separately named protections against discrimination on the basis of gender expression currently missing from the Bill’s “Division 2— Interpretation” (in section 6 The Dictionary, section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person).

### **Exemptions – Default Vs. Opt-in Models**

The UN and UNESCO clarified that the right to freedom of religious expression ends where it impinges upon GLBTIQ people’s rights to protection from discrimination on the basis of sexual orientation, gender identity and intersex attributes. Recent research has shown that Australian GLBTIQ youth forced to attend religious schools by their parents/ guardians and state-specific age-requirement schooling legislations suffer significantly increased discrimination, verbal abuse, violence and associated self-harm and suicide risk. The Draft Bill affords religious educational institutions a *default model* of exemption around discrimination on the basis of sexual orientation and gender identity which hands them a legally-sanctioned right to discriminate against one of the most vulnerable youth groups in Australian schools today. This right is unnecessary and should not be made automatic. I recommend its withdrawal or replacement with an *opt-in model* of exemption within the Bill’s “Division 4—Exceptions to unlawful discrimination” (in section 33 Exceptions for religious bodies and educational institutions).

### **Recommendations – Changing the Human Rights and Anti-Discrimination Bill**

The report concludes with a series of numbered recommendations reiterating the recommended changes to the Human Rights and Anti-Discrimination Bill arising out of research, consultations, and consideration of international human rights polity.

## 1. Introduction – Obligations for Legislation

*The legal obligations of States to **safeguard the human rights of LGBT and intersex people**<sup>2</sup> are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly (United Nations, 2012, p. 10).*

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. The United Nations has placed pressure on Australia and other countries to support greater recognition of discrimination on the basis of sexual orientation, gender identity, gender expression and intersex status in direct legislative provisions (UN Human Rights Council, 2011a; United Nations, 2012; United Nations High Commissioner for Human Rights, 2011). In attempting to formulate legislative provisions that could ideally ensure the valuing of such human rights in Australia, the Australian Government is to be congratulated and encouraged. However, I advise that they mind their language use – their ‘GLBs’ and ‘TIQs’, so to speak – so that this worthy venture (which has such important implications for the everyday lives of many Australians) is supported to be as effective as possible in protecting gay, lesbian, bisexual, transgender, intersex and otherwise queer/ questioning people’s rights. The title of the submission emphasises my position that we must make careful language choices in translating GLBTIQ rights in legislation. It also links to my key argument around schools; that the rights to freedom of religious expression of those minding GLBTIQ youth in education systems *do not outweigh* the rights of our Australian GLBTIQ youth in their care.

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<sup>2</sup> My emphasis.

## **1.1 Safeguarding Sexual Orientation and Gender Identity (SOGI)**

The Australian Government is to be congratulated and encouraged for including protections against discrimination on the basis of “sexual orientation” and “gender identity” in the Draft of the Human Rights and Anti-Discrimination Bill 2012. I further encourage the Senate Legal and Constitutional Affairs Committee to hold firm in safeguarding these protections against any ill-informed critique they may engender. These protections are in line – at least in part – with United Nations human rights instruments as they currently stand and are to be interpreted. There will be critics who argue against these protections as if they represent “new” or “special” rights. But I remind the Committee that it is the UN’s position that protecting people on the basis of sexual orientation and gender identity does not constitute “the creation of new rights or special rights” for GLBTIQ people, but simply requires enforcement of the “universally applicable guarantee of non-discrimination in the enjoyment of all rights” (United Nations, 2012, p. 10). Where there are limitations in the Draft Bill’s protections for GLBTIQ and other people, I encourage the addition of further protections, rather than losing these key “SOGI” terms which are linked historically and currently to UN-based conceptualisations.

## **1.2 Acknowledging Existing UN-issued SOGI Human Rights Provisions**

UN directives exist on legislation in this area that should be more directly referenced and reflected in the Australian Bill. These directives provide clarification around how different UN treaties are to be interpreted in relation to SOGI issues, and how terms like “other status” should be interpreted. I recommend that the Committee directly references specific human rights instruments currently missing from the Bill’s “Division 2—Objects of this Act” to more firmly anchor the SOGI provisions (and other provisions I will discuss in this document) to their

development within international human rights frameworks being taken up around the world. Specifically, the United Nations has published detailed guidelines on SOGI issues within the document *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (United Nations, 2012). UN provisions around five core legal obligations of member states with respect to protecting the human rights of GLBTIQ people are outlined in the document: protecting individuals from violence; preventing torture and degradation; decriminalisation; prohibiting discrimination and respecting freedom of expression, association and peaceful assembly. I recommend referencing/ hyperlinking this document in the Bill, and the provisions listed within it, so the clarification of international treaties around SOGI issues will be accessible and clear to all who access the Bill. It may also be useful to reference *Discrimination Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity* (United Nations High Commissioner for Human Rights, 2011) to further historicise the inclusion of SOGI protections in the Bill.

### **1.3 Overview of Submission**

This general introduction (Section One) located the submission within the global push for human rights and anti-discrimination legislation around discrimination and bullying on the basis of actual or perceived sexual orientation, gender identity, gender expression and intersex attributes. It pointed out key international provisions overlooked in the Draft of the Human Rights and Anti-Discrimination Bill 2012. The rest of the submission deals with specific aspects of the Draft more directly. Section Two argues for the inclusion of protections for people with intersex attributes. Section Three argues for the inclusion of protections for all people on the basis of gender expression. Section Four argues for the withdrawal of default exemptions for religious educational institutions around discrimination on the basis of sexual orientation and gender identity, and suggests (if an alternative is required

by the Committee) an opt-in model of exemptions. Section Five supplies a numbered list of recommendations for changes to the Human Rights and Anti-Discrimination Bill.

## **2. Inclusion of Protections for People with Intersex Attributes/ Status**

*I was laughed at by staff at a health insurer for the nature of necessary medical examination. The staff member refused to reimburse the cost, as they didn't cover the examination in men. In a busy public office, this made me blush intensely, but I really needed that money back. Everyone there had overheard and I had nothing left to lose. After a stand up row, her supervisor used her discretionary authority to reimburse an equivalent amount (One of many personal accounts of discrimination experienced by people with intersex attributes recounted by OII Australia, 2012, p. 8).*

The UN has repeatedly outlined the need for legislative protections around intersex attributes in direct federal legislative provisions (United Nations, 2012, p. 10 and others). It directs countries to provide education and training to prevent discrimination and stigmatisation of intersex people, and to safeguard freedom of expression, association and peaceful assembly for intersex people (United Nations, 2012, p. 13). For people with intersex attributes it is also important to specify, as the United Nations does, that the right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, and "be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation" (United Nations, 2012, p.47). Yet children born with atypical sex characteristics are often subjected to discrimination on the basis of their intersex attributes/ status, in that they can be subjected to "medically unnecessary surgery, performed without their informed consent, or that of their parents", in an attempt to fix their intersex attributes (United Nations, 2012, p.51). Similarly, Organisation Intersex International (Oii) Australia has previously submitted advice to the Committee around how adults have experienced discrimination in the workplace on the basis of their intersex attributes, or been harassed into undergoing unnecessary treatments or (as the above quote showed) denied remuneration for necessary treatments (OII Australia, 2012). Such

discrimination based on physical intersex attributes can be practically different to discrimination on the basis of sex (being male/ female) or gender identity, which the Draft of the Human Rights and Anti-Discrimination Bill 2012 provides for. In Short, the Bill does not adequately reflect the UN's requirements or Oii's recommendations to specifically include protections for people with intersex attributes/ status.

## **2.1 Providing for Intersex Attributes/ Status Directly**

The Draft Bill does not mention "intersex" even once. It appeared to confuse provisions around gender identity, or sex, or some combination of gender identity and sex, as provisions for people with intersex attributes. Yet Oii Australia has previously submitted advice to the Committee that intersex attributes do not officially constitute a "third sex" in Australia, and do not officially constitute a "gender identity" (although some intersex people may have a male or female gender identity for example, and the Bill does cover their right to do so, some do not). Oii's position is that intersex is a "biological state, one that in many cases can be determined prenatally, via amniocentesis" (Oii Australia, 2012).

Gay, lesbian or bisexual people will be seen as "obviously" covered in provisions around sexual orientation in the Bill, and transgender people will be seen as covered in provisions around gender identity. Intersex attributes are not going to be seen by the general population as "obviously" included under either sex or gender identity, nor by the academic community, nor (most importantly) by Oii Australia. In never using the term "intersex", nor enumerating protections for people with intersex attributes (other than the right for people of indeterminate sex to identify as being of a particular sex, p.15), the Draft Bill appears to suggest that protection against discrimination on the basis of having intersex attributes/ an intersex status – including being fired for that reason, being unable to book a flight for that reason, being subjected to discriminatory comments for that reason, or being subjected to

unwanted medical intervention or denied medical intervention for that reason – are not covered.

## **2.2 Applying the Tasmanian Model**

Rather than introduce any new frames here, I intend simply to draw the Committee’s attention back to Oii Australia’s submission and *Briefing Paper* (Oii Australia, 2012), which should be seen as the key document giving advice on intersex inclusion in the Bill, being informed by the authoring representative’s significant knowledge of and experience with intersex issues in polity. Oii Australia recommended the Committee applied the Tasmanian Model of protections around intersex issues that has been through Tasmanian Parliament with bipartisan support within the *Anti-Discrimination Amendment Act 2012* (TAS Parliamentary Counsel, 2012).

I recommend the Committee specifically enumerates these protections against discrimination on the basis of intersex attributes/ status which are currently missing from the Bill’s “Division 2—Interpretation”. I support Oii’s recommendation that the Tasmanian legislation’s definition of intersex is used in section 6 The Dictionary, as a separate definition to gender identity. This definition is as follows:

Intersex means the status of having physical, hormonal or genetic features that are –

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male; (TAS Parliamentary Counsel, 2012, p. 7).

I recommend that the provision for “intersex” attributes/ status is also directly reinforced through inclusion by direct enumeration in section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person.

### **3. Inclusion of Protections for all People on the Basis of Gender Expression**

*Security is called 95% of the times I use public toilets - elderly ladies telling me im in the wrong toilet, assumptions based on the fact that I have short hair and wear jeans. (I) ignored comments from bullies and random people, just went about my business... Even had to go as far as to lift up my shirt to women and security guards in public toilets just to prove I was female (Female student who describes herself as tomboyish discussing various types of discrimination based on her gender expression in a survey collected for Writing Themselves In study Hillier et al., 2010; Jones & Hillier, 2012).*

The Australian Government have done well to include protections against discrimination on the basis of “gender identity” in the Draft of the Human Rights and Anti-Discrimination Bill 2012, which are worded in a manner that will protect people who are transgender. This inclusion is to be applauded. However, the Committee is advised that the current wording around gender identity will not offer all (non-transgender) people protection on the basis of their gender expression. For example, a transgender male (who was female-born), would be protected under the Draft Bill from being discriminated against on the basis of their masculine presentation/ clothes/ mannerisms at work or school. But a cisgendered female (who sees her identity as female and was female born) would not necessarily be protected under the Draft Bill from being discriminated against on the basis of their masculine or non-traditional presentation/ clothes/ mannerisms at work or school.

#### **3.1 Providing for Gender Expression Directly**

There is a certain kind of discrimination which is not quite based in “gender identity” (as defined in the Draft Bill), nor exactly covered by “sex” (as defined in the Draft Bill). This kind of discrimination is on the basis of a person’s gender expression, and although this kind of discrimination is commonly discussed in the GLBTIQ

community, it can impact anyone of any sex, sexual orientation or so forth including people who see themselves as heterosexual males and females. There should be protection for non-traditional expressions of gender which are not necessarily related to a so-called “opposite sex” (or transgender) gender identity. I recommend the Committee specifically enumerates additional and separately named protections against discrimination on the basis of gender expression currently missing from the Bill’s “Division 2—Interpretation” (in section 6 The Dictionary, section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person).

#### 4. Exemptions – Default vs. Opt-in Models

*(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. The balance between tradition and culture, on the one hand, and universal human rights, on the other, must be struck in favour of rights (Pillay, 2012).*

Leadership from the United Nations have clarified that the right to freedom of religious expression should not impinge upon the right to protection from discrimination and violence on the basis of sexual orientation, gender identity and intersex attributes in schools or beyond them (Pillay, 2012; UN Human Rights Council, 2011b; UNESCO, 2009, 2011, 2012; United Nations, 2012). On December 8<sup>th</sup> in 2011, over 200 UN Member States attended the New York convention ‘Stop Bullying – Ending Violence and Discrimination Based on Sexual Orientation and Gender Identity’. UN Secretary-General Ban Ki Moon contended:

*Bullying of this kind is not restricted to a few countries but goes on in schools (...) in all parts of the world. This is a moral outrage, a grave violation to human rights and a public health crisis (UN Secretary-General, 2011).*

That month, UNESCO held the ‘First International Consultation on Homophobic Bullying’ in Rio, Brazil. International leadership, research experts and education activists formulated education policy guidance. The UNESCO Rio Statement on Homophobic Bullying and Education for All (2011) was issued to call upon all governments to ‘live up to their responsibility’ to eliminate barriers to education created by homophobia and transphobia, including the ‘unacceptable and devastating prevalence’ of anti-GLBTIQ bias and violence in schools. The last decade has seen more education policies developed at national, state, sector and school levels covering gay, lesbian, bisexual, transgender, intersex and queer (GLBTIQ) issues in Australia (Boston, 1997; MCEETYA, 2008; VIC Government, 2007, 2008, 2009, 2010). The Melbourne Declaration on Educational Goals for Young Australians (MCEETYA, 2008) particularly outlines a commitment from all governments and education sectors to ensure an education service free from discrimination based on

grounds including ‘gender’ and ‘sexual orientation’ (p.7). This reflects the increased recognition of problems around school provisions for GLBTIQ students. Yet this recognition, in combination with the UN’s clear distinction between where religious freedom ends and discrimination against GLBTIQ people begins, is not adequately reflected in the Draft Bill. This is due to the overly broad automatic exemptions the Bill currently offers religious schools around discrimination on the basis of sexual orientation and gender identity. Religious schools are being set up to simply “get away” with not addressing problems for Australian GLBTIQ youth in religious schools.

#### **4.1 Specific Problems for Australian GLBTIQ Youth in Religious Schools**

Recent research has shown that contrary to what some education leaders may claim, Australian GLBTIQ youth are in every education system in Australia, including religious educational systems (Hillier, et al., 2010; Jones, 2012b)<sup>3</sup>. Also contrary to popular understanding, the situation in schools generally has worsened for GLBTIQ students since a decade ago: 61% of Australian GLBTIQ students reported having experienced verbal homophobic abuse, 18% had experienced physical homophobic abuse (23% of boys, 14% of girls, and 31% of gender questioning youth)<sup>4</sup> and 26% reported other forms of homophobia including rumours, graffiti and cyber-bullying<sup>5</sup>. Of these abuse experiences, 80% of occurred at school.

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<sup>3</sup> In a national online survey of over 3,000 Australian GLBTIQ students aged 14-21 from all Australian states and territories, 65% attended government schools, 18% attended Catholic schools and 12% attended ‘other Christian’ schools – figures consistent with broader demographics (Australian Bureau of Statistics, 2010). Others attended Jewish schools, Islamic schools, Scientology schools and other kinds of religious schools. Of the participants 57% were female, 40% were male and 3% were ‘genderqueer’, ‘transgender F-M’, ‘transgender M-F’, ‘intersex’ and so on. By orientation, 56% identified as gay/ lesbian/ homosexual, 28% as bisexual, 5% positioned as questioning, 4% as queer and 1% as heterosexual (yet somewhat same-sex attracted).

<sup>4</sup> The physical abuse ranged from having clothes ruined to severe bashings and rapes resulting in hospitalisation.

<sup>5</sup> These percentages have increased in comparison to versions of the national Australian study conducted in previous years.

GLBTIQ students suffered significantly increased discrimination, verbal abuse and violence in religious educational institutions overall (Hillier, et al., 2010; Jones, 2012b; Jones & Hillier, 2012). Students described having their abuse complaints ignored by staff, being punished for reporting abuse or being asked to leave their schools as the problem was ‘too difficult’. The majority of GLBTIQ students who attended religious schools rated them as homophobic spaces and many students in religious schools suffered attempts to be “converted to heterosexuality” (Jones, 2012b)<sup>6</sup>, despite the fact that conversion attempts are widely and strongly denounced in by leading psychology organisations (APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, 2009). There were significantly fewer policy-based protections for GLBTIQ students against bullying in religious schools, which is highly problematic as policy protections are associated with decreased risks of experiencing homophobic violence and decreased risks of self-harm and suicide rates for GLBTIQ students (Jones & Hillier, 2012)<sup>7</sup>. Whilst there are some religious schools that actively seek to provide policy protection and specific structural and social supports for their GLBTIQ students, it is unfortunately the case that Australian GLBTIQ youth generally face significantly increased dangers in religious educational institutions. Yet ***educational leaders can make a potentially dramatic difference to self-harm and suicide rates*** for one of the most vulnerable youth groups in Australian society today through their policy approaches which support the human rights of these students and protect them from discrimination and bullying.

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<sup>6</sup> Some systems were particularly notorious in this area. Over 30% of GLBTIQ students in NSW Christian schools (other than Catholic) were taught gays should convert to heterosexuality, for example, which was a significant increase in comparison to NSW Government schools.

<sup>7</sup> GLBTIQ students who knew their school had protective policies in place were more likely to feel safe (75% v. 45% at schools without policies) and more likely to report a support feature at their school (84 % v. 41%). They were less likely to self-harm (26% v. 39%) and less likely to attempt suicide (12% v. 22%). However, the risk as indicated here is only very conservatively represented; no surveys could be collected for students whose suicide attempts did end their lives.

## 4.2 Outcry over Controversies in Australian Religious Schools

The Australian media has not been silent on these problems, nor have some of the students themselves. Same-sex partner bans at religious school formals have caused outrage and heated human rights campaigns online and in the newspapers (Cook, 2010; Ironside, 2008; Ryan, 2010), as have cases in which gay students have faced expulsion (Marr, 2011) and anti-gay/ conversion-themed teachings (AFP, 2011). There have similarly been community concerns and public protests over the ways in which religious schools can discriminate against (for example) lesbian and single mothers, GLBTIQ teachers and a host of other community members (Fyfe, 2011). Many in the community are uncomfortable with how religious schools accept the government's – and thereby, the public's – funding and yet are not being held to the same standards as the rest of the community at least in terms of respect for the most basic of human rights. There has also been much outcry by international, national and local organisations over the problem of bullying. Even Prime Minister Julia Gillard recently stated:

The evil of bullying is it targets each person individually, perhaps aiming at their ethnicity, or their sexuality (...) the very things that make us who we are, and that we have no need to apologise for” (Gillard, 2012).

There is no sector or school type that can legitimately claim that their particular GLBTIQ students do not deserve to be safe. The increased risks these students face around violence, educational disruption and suicide are so significant that educational leadership of all beliefs should be united by a legal responsibility to protect them, if not an ethical one.

## 4.3 Default vs. Opt-in Exemptions

The Australian Human Rights and Anti-discrimination Draft Bill as it currently stands affords religious educational institutions a ***default model*** of exemption around discrimination on the basis of sexual orientation and gender identity

(broader than many models currently used in several Australian states). This model hands religious educational institutions a ***legally-sanctioned right to discriminate against one of the most vulnerable youth groups – GLBTIQ youth – in Australian schools today***. This right is ***not necessary*** and ***should not be automatic***. Religious educational institutions minding our Australian GLBTIQ youth, and the parents/guardians who choose to send them to such institutions, can express their religious beliefs and hold their particular spiritual opinions without forgoing a ***legal and professional responsibility*** to protect the GLBTIQ youth in their care from discrimination and violence. We must remember that GLBTIQ youth are legally ***forced*** to attend religious school by the combined force of their parents' choice and the state-specific age-related schooling attendance legislations; these youth do not simply have the option of leaving the spaces in which they can be subjected to such dangers to their wellbeing ...nor should they have to forgo their access to education. No school should be handed the right to support active discrimination, verbal or physical abuse of the GLBTIQ students forced to attend it, or contexts which contribute to GLBTIQ self-harm and suicide. Institutional/ adult rights to religious expression do not trump the rights of GLBTIQ youth and are not more important than their wellbeing.

I recommend the Committee makes protection against discrimination on the basis of sexual orientation, gender identity, gender expression and intersex status ***the standard for Australian religious schools*** in this legislation, not the exception. I recommend recalling the Bill's integrity as ***a tool for preventing discrimination rather than actively encouraging and sanctioning it***. I recommend withdrawal of the default model of exemptions for religious schools. If the Committee feels it must provide religious schools with exemptions on this issue, I recommend it affords religious educational institutions an ***opt-in model*** of exemption. An opt-in model would not make exemptions automatic. Instead, this model would place the onus on the religious school to apply for an exemption in the first instance. It should then require a process in which the religious school would need to make a public and

explicit policy-based justification of any “need” to discriminate against GLBTIQ students in a particular manner (for example). The model should require an assessment process for the validity of the individual religious school’s arguments behind both the need and the manner for such discrimination, which would ensure transparency to the community it serves and is funded by. It should also require a process by which successful exemptions are held for a set period of time, but then audited in a cycle of periodic review or re-applied for (to allow a socially responsive flexibility as educational contexts shift and change). I recommend that this opt-in model be integrated into discussion of the exemptions within the Bill’s “Division 4— Exceptions to unlawful discrimination”, in section 33 Exceptions for religious bodies and educational institutions.

## **5. Recommendations – Changing the Human Rights and Anti-Discrimination Bill**

Safeguarding human rights and preventing discrimination requires leadership at the federal legislative level. Our national Australian provisions should not in any way lag behind those of Australia’s states and territories, but should match or better these provisions so there is a higher level of recourse for rights breaches in any part of Australia. Recommendations for Australia’s federal provisions are drawn from research, consultations and interpretation of international human rights provisions.

### **5.1 Numbered Recommendations List**

1. Protect and retain the enumerated protections against discrimination on the basis of sexual orientation and gender identity currently in the Bill’s “Division 2—Interpretation”, in order to honour obligations under international human rights treaties.
2. Directly reference specific human rights instruments currently missing from the Draft Bill’s “Division 2—Objects of this Act”. These include: *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (United Nations, 2012) and the documents it lists, and *Discrimination Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity* (United Nations High Commissioner for Human Rights, 2011).

3. Specifically enumerate the protections against discrimination on the basis of intersex attributes/ status currently missing from the Bill's "Division 2— Interpretation" (in section 6 The Dictionary, section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person). Draw on the wording of the *Tasmanian Model* of protections around intersex attributes.
4. Specifically enumerate additional and separately named protections against discrimination on the basis of *gender expression* currently missing from the Bill's "Division 2—Interpretation" (in section 6 The Dictionary, section 17 The Protected Attributes, and section 49 When a Person Sexually Harasses Another Person).
5. Withdraw the *default model* of exemption around discrimination on the basis of sexual orientation and gender identity for religious educational institutions.
6. If the Committee insists on some form of replacement exemption for the *default model* of exemption around discrimination on the basis of sexual orientation and gender identity for religious educational institutions, offer an *opt-in model* of exemption within the Bill's "Division 4—Exceptions to unlawful discrimination" (in section 33 Exceptions for religious bodies and educational institutions). Require religious educational institutions to publicly and explicitly make their case for exemptions through a monitored application process which details their claimed need for an exemption to be able to discriminate in a very particular area (only), and their claimed process or manner of discrimination for which they will be exempt (only).

## **5.2 Conclusion**

While discrimination and bullying on the basis of sexual orientation, gender identity, intersex attributes and gender expression are rife in Australia and particularly in religious schools, this submission was able to highlight pathways in which federation legislation could contribute to positive outcomes for GLBTIQ students. It argued particular words in protective legislation could have positive impacts for many Australians generally. The Senate Legal and Constitutional Affairs Committee are in a powerful position to refine the Draft of the Human Rights and Anti-Discrimination Bill 2012 so that it better responds to and reflects research, consultation processes and international human rights provisions.

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