Submission to the Attorney General, The Hon Christian Porter regarding the Exposure Draft Religious Discrimination Bill and associated legislation

From

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The Australian Family Association and the National Civic Council welcome the opportunity to make a submission to the government’s consultation on its package of draft bills on religious freedom directed to implementing the recommendations of the Expert Panel on Religious Freedom (the Ruddock Review).

THE AUSTRALIAN FAMILY ASSOCIATION (the AFA) is a not-for-profit, voluntary, non-party political organisation concerned with strengthening and support of the natural family. Among its objectives are “to analyse laws and policies for their effect on the family ...”

In pursuing these objectives, the AFA makes submissions to government inquiries on matters that have an impact on the family.

THE NATIONAL CIVIC COUNCIL (the NCC) is a not-for-profit, non-party political organisation which seeks to shape public policy on cultural, family, social, political, economic and international issues of concern to Australia.

The AFA and NCC together represent 40,000 supporters across Australia.

In pursuance of their aims and objectives the AFA and the NCC have an interest in the matters raised by the consultation and make the following joint Submission.

The NCC and AFA recently completed several years of research on the legal consequences of gender identity laws and their impact on wide areas of the culture. This research was compiled in the recent book Transgender: One Shade of Grey – the legal consequences for man & woman, school, sports, politics, democracy, by Patrick J Byrne, Professor John Whitehall and Lane Anderson (a pseudonym), Wilkinson Publishing, 2018, 365 pages.
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td><strong>PART ONE: Draft Religious Discrimination Bill 2019</strong></td>
<td>6</td>
</tr>
<tr>
<td>1. Defining religious belief or activity</td>
<td>6</td>
</tr>
<tr>
<td>2. Freedom of speech</td>
<td>7</td>
</tr>
<tr>
<td>3. Employees expressing opinions outside the workplace</td>
<td>8</td>
</tr>
<tr>
<td>4. Discrimination in employment</td>
<td>9</td>
</tr>
<tr>
<td>5. Faith-based schools</td>
<td>10</td>
</tr>
<tr>
<td>6. Freedom of conscience</td>
<td>12</td>
</tr>
<tr>
<td>(a) Health professionals</td>
<td>12</td>
</tr>
<tr>
<td>(b) Principals, teachers, school counsellors</td>
<td>13</td>
</tr>
<tr>
<td>7. Refusal of goods and services</td>
<td>16</td>
</tr>
<tr>
<td>8. Religious charities</td>
<td>18</td>
</tr>
<tr>
<td>9. Religious bodies and organisations</td>
<td>18</td>
</tr>
<tr>
<td>10. Rights of parents</td>
<td>19</td>
</tr>
<tr>
<td><strong>PART TWO: The Religious Discrimination Bill will not resolve conflicts arising out of the legal recognition of gender identity</strong></td>
<td>20</td>
</tr>
<tr>
<td>11. The ambiguity of gender identity:</td>
<td>20</td>
</tr>
<tr>
<td>12. Gender identity creates legal uncertainty in the Sex Discrimination Act (SDA), Marriage Act and BDMRAs</td>
<td>22</td>
</tr>
<tr>
<td>13. Gender identity rights erase sex-based rights</td>
<td>24</td>
</tr>
<tr>
<td>(a) What are sex-based rights?</td>
<td>24</td>
</tr>
<tr>
<td>(b) What are gender identity-based rights, or transgender-based rights?</td>
<td>25</td>
</tr>
<tr>
<td>14. Real life conflicts</td>
<td>26</td>
</tr>
<tr>
<td>(c) Schools</td>
<td>26</td>
</tr>
<tr>
<td>(d) Erasing affirmative action programs</td>
<td>26</td>
</tr>
<tr>
<td>(e) The male-female pay gap</td>
<td>26</td>
</tr>
<tr>
<td>(f) Sport</td>
<td>26</td>
</tr>
<tr>
<td>(g) Liabilities of doctors and schools</td>
<td>28</td>
</tr>
<tr>
<td>(h) Accusing women of discrimination</td>
<td>29</td>
</tr>
<tr>
<td>(i) Police body searches</td>
<td>29</td>
</tr>
<tr>
<td>(j) Prison accommodation</td>
<td>30</td>
</tr>
<tr>
<td>(k) Women’s only (safe) spaces</td>
<td>30</td>
</tr>
<tr>
<td>(l) Services to women</td>
<td>30</td>
</tr>
<tr>
<td>(m) Imposing gender neutral language</td>
<td>31</td>
</tr>
<tr>
<td>(n) Recording crime</td>
<td>31</td>
</tr>
<tr>
<td>15. US Justice Department looks to restore sex-based rights while preserving transgender liberties.</td>
<td>32</td>
</tr>
<tr>
<td>16. Conclusion:</td>
<td>35</td>
</tr>
<tr>
<td>17. Recommendations</td>
<td>37</td>
</tr>
<tr>
<td>Appendix 1: Table of irresolvable conflicts between sex-based rights and gender identity rights</td>
<td>39</td>
</tr>
<tr>
<td>Appendix 2: “Transgender students in schools – legal rights and responsibilities”, Legal Issues Bulletin (NSW) (No 55, December 2014)</td>
<td>42</td>
</tr>
</tbody>
</table>
Introduction

In August 2019 Attorney General, Christian Porter released the government’s Exposure Draft Religious Discrimination Bill (the Bill). This is the main piece of legislation in a three-part package of bills intended to protect religious freedoms which have come out of the Ruddock Review into religious freedoms.

While the catalyst for the Ruddock Review was the failure to deal with conflicts arising out of the change of the new definition of marriage in 2017, in fact the issues at stake are far wider. Religious and secular freedoms are under threat from conflicts arising from:

1. The 2017 changes to the *Marriage Act 1961* recognising both same-sex marriage and transgender marriage, i.e. marriage of two people defined by their fluid gender identity;

2. Changes in 2013 to the federal *Sex Discrimination Act 1984*, and to various state/territory anti-discrimination acts, to make a person’s fluid gender identity and sexual orientation protected attributes in these laws;

3. Changes to some state and territory Births Deaths and Marriages Registration Acts to recognise a person by their gender identity, not their biological sex, and to allow people to periodically change the sex identifier on their birth certificate;

4. Corporations virtue signalling by requiring that, as a condition of employment, employees cannot express an opinion on human sexual identity (gender identity) or sexual behaviour in the workplace, or on their private social media, that is counter to the company’s Code of Conduct supporting sexual diversity.

These conflicts are in two areas.

First, there are conflicts over a person holding and manifesting a belief that marriage means the union of a man and a woman only. These conflicts affecting marriage celebrants, school curricula, parental rights in the education of their children and wedding services providers have received considerable public debate.

Second, there has been much less debate over the far wider conflicts created by legislative and corporate protection of a person’s fluid gender identity, particularly the 2013 changes to the federal *Sex Discrimination Act 1984* (SDA) that made gender identity a protected attribute. When laws and corporate codes protect a person by their gender identity, they force on all citizens a new, highly contested, socially constructed ideology, that says everyone is now recognised as having a legal, self-defined gender identity in place of their biological sex.

The *Australian Government Guidelines on the Recognition of Sex and Gender (2013)*\(^1\) say that as a consequence of the SDA protection for gender identity, the new sex identifier on all federal government forms, like passports and Medicare documents, must now recognise Male, Female, X (Indeterminate, Unspecified, Intersex). Here:

- Indeterminate means any non-binary gender identity;
- Unspecified means genderless or no sex/gender identification;
- Intersex is a disorder of sexual development; while

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\(^1\) *Australian Government Guidelines on the Recognition of Sex and Gender*, 2013 and updated 2015, Attorney General’s Department.  
Male and Female mean cismale or cisfemale, making “sex” a matter of personal choice and no longer meaning biologically immutable.

Gender identity laws:

- reflect the fluid gender/transgender world view, an ideology (a contested theory from the social sciences which has a legislative and political agenda) that erases the biological world view, the idea that humans are immutably biologically male and female;
- create irresolvable, and deep legal and cultural conflicts between the inherent sex-based rights of every citizen (e.g. their right to sex-specific sports, private spaces, change rooms, associations, schools, etc.) and transgender-based rights that say, for example, that a man can self-identify as a woman and claim the legal right to access female sports, private spaces, change rooms, associations, schools, etc.;
- redefine sex, thereby redefining human nature and human rights; and in doing so
- create far more legal and cultural conflicts for the vast majority of people, including secular people who hold that humans are binary male or female, than conflicts over same sex marriage and associated matters based on a person’s sexual orientation.

When federal state and territory governments impose gender identity laws, the state is acting outside its jurisdiction in attempting to determine the nature of the human person by adopting an ideology that is contrary to the lived experience of the vast majority of human beings from ancient times until now. The state should no more decide on the right or wrong of such a contested philosophical idea than it should adopt or reject a particular religion or faith.

This submission notes that the US Justice Department is currently investigating the deep and wide conflicts created by gender identity laws. It is understood that the Justice Department is considering resolving the problem by writing the definition of “sex” according to “natural biological functions” of males and females, into US law. It is understood that the US Supreme Court is considering this matter in several cases before the Court and the Justice Department is awaiting decisions on these cases.

With these matters in mind, this submission asks, how far will with the Federal government’s proposed freedom of religion legislation go in resolving conflicts over legal and corporate protections for both gender identity and sexual orientation?

**Recommendation 1:**

That just as the US Justice Department is investigating the conflicts created by gender identity laws, a parliamentary inquiry be established to review the legal recognition of “gender identity” in the *Sex Discrimination Act in 2013* and in state and territory anti-discrimination laws and Births Deaths and Marriages Registration Acts and the impact of these gender identity laws on inherent sex-based rights.

**Recommendation 2:**

That, because of the impact of the legal recognition of gender identity on religious freedom, the draft Religious Discrimination Bill 2019 not proceeded until the findings of that inquiry are published and responded to.
PART ONE: Draft Religious Discrimination Bill 2019

• Will the Bill protect freedom of speech so that a statement of religious belief would not be grounds for a complaint of vilification or result in an employee being sacked? Would the Bill protect Israel Folau if it was available to him?
• Will it protect the right of parents to “ensure the religious and moral education of their children in conformity with their own convictions”?
• Will it protect freedom of conscience?
• Will it protect the right of religious or faith-based schools and educational institutions to act in conformity with the tenets, doctrines or beliefs of the religion of the school or institution?
• Will it protect the charitable status of religious charities that hold the belief that human beings are binary, male and female?

1. Defining religious belief or activity

Should the definition of “religious belief or activity” in Clause 5 include “not holding a religious belief” and “not engaging in, or refusing to engage in, lawful religious activity”?

Why would a religious discrimination bill seek to protect a person on the grounds of their not having a religious belief? The ICCPR and the UDHRs includes this in dealing with religious freedom as people should be free to not have a religion, or not to have the religious beliefs, that are dominant in their society. It is not needed in a free society where there is no state imposed or dominant religion.

The reality of the current situation is that people, mainly of Christian and other religions, are being unfairly treated because of their religious beliefs. Particular religious beliefs should not be imposed on people, but people should be free to associate and join in activities or ventures with those who share their faith. It should not amount to discrimination if they require any person wanting to join in that venture to share their faith, or at least not to express their opposition to their beliefs while associating with them.

Religious organisations or bodies like faith-based schools do have an interest in whether a person has a religious belief or not. They should be able to protect their beliefs and ethos in their staffing and enrolment policies. Clause 5 could allow for mischievous applications by allowing hostile employees to openly oppose their religious employer’s beliefs and values in the workplace on the grounds of not holding those religious beliefs and values and then lodge discrimination charges if their employer takes action to preserve the ethos of the school.

How can a person who does not have a religious belief be discriminated against on the basis of his/her religious beliefs? This is an artificial construct that only arises because of the inclusion of “not holding a religious belief” in the definition of “religious belief”.

Recommendation 3:

Omit sub-clauses (c) and (d) of the definition of “religious belief or activity” in Clause 5.
2. Freedom of speech

Will the Bill protect freedom of speech so that a statement of religious belief would not be grounds for a complaint of discrimination?

In 2015, Hobart’s Catholic Archbishop, Julian Porteous, was taken to the Tasmanian Anti-Discrimination Commission under Section 17 of the Tasmanian Anti-Discrimination Act for circulating a statement of his church’s beliefs on marriage.2

Clause 41 (1) of the Bill does provide that statements of religious belief will not contravene Section 17 of the Tasmanian Anti-Discrimination Act. This is welcome as it would have avoided Archbishop Porteous being required to undertake mediation over his statement of his church’s teaching on marriage.

However, Clause 41 (2) (b) provides that any statement of belief that “is likely to” “vilify” another person, or group of persons, will not be protected by Clause 41 (1). What does “vilify” mean? Is a statement which someone feels insults or criticises (synonyms of vilify) them, enough to render a statement of belief discriminatory? This term has caused widespread criticism of Section 17 and of Section 18C of the federal Racial Discrimination Act for being a very low threshold for a claim of discrimination.

There is no definition of “vilify” or “harass” in the Bill.

In its normal dictionary meaning, “harass” is repeated acts or conduct that offends, humiliates or intimidates another person. The Bill should define “harass” to mean repeated statements of belief that have that effect on the other person.

The Victorian Racial and Religious Tolerance Act defines “vilification” as conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of another person. The Bill should include a definition of “vilify” that means to engage in behaviour that would have a similar serious impact on that other person.

Currently in Victoria, there is the Racial and Religious Tolerance Amendment Bill 20193, which would change the definition of vilification from “conduct that incites hatred against, serious contempt for, severe ridicule of” another person, to mean “conduct that is likely to incite hatred …”. This is a very low threshold on which to base a complaint. The amendments also add “sex”, “sexual orientation” and “gender identity” to the list of protected attributes, which opens up wider areas where a statement of religious beliefs (e.g. about marriage, family formation, the approach to gender dysphoria, use of pronouns), could be at risk of a complaint of vilification.

Recommendation 4:

Define the words “harass” to mean repeated statements of belief and “vilify” to require a statement of beliefs to have a serious impact for it to amount to vilification.

Recommendation 5:

Delete the words “or is likely to” from Clause 41 (2) (b).

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3. Employees expressing opinions outside the workplace

Does the Bill protect the right of employees to make statements of belief outside of work time, contrary to a corporate Code of Conduct?

Conflicts arose, particularly at the time of the marriage debate, about the freedom of people to make statements of their faith-based beliefs about marriage. It led to some people being sacked by their employers. In 2017, Madeline, an 18-year old nanny was sacked from the Canberra entertainment company Capital Kids Parties for expressing her opinion opposing same-sex marriage.4

Israel Folau was sacked for a statement of his religious beliefs. Would the Bill protect Israel Folau if it was available to him?

Israel Folau was dismissed by Rugby Australia (RA) for allegedly violating the RA Code of Conduct. It says that players, coaches, administrators, officers of a rugby body, match officials, spectators/parents, fans and all other participants must treat “everyone equally regardless of gender or gender identity, sexual orientation, ethnicity” etc., and must not bring the sport into “disrepute or discredit” on these matters on their “social media”.5

The Religious Discrimination Bill Clause 8 (3) provides that an employer’s code of conduct rule can restrict or prevent an employee from making a statement of their religious beliefs outside work time if it is to avoid “unjustifiable financial hardship” to the employer. In Israel Folau’s case the threat of withdrawal of sponsorship could amount to “unjustifiable financial hardship” for his employer, Rugby Australia. So this Clause, even if it was available to him, may not enable him to successfully claim religious discrimination.

“Unjustifiable financial hardship” is not defined so it is not clear what would be substantial enough to amount to “unjustifiable” financial hardship. Would the loss of a significant sport’s sponsor constitute “unjustifiable” financial hardship?

And employers who have revenue of less than $50 million do not have to show “unjustifiable financial hardship” to impose such a restriction on an employee, only that it was “reasonable” according to the tests laid down in Clause 8 (2).

There is a principal at stake here.

Is a person’s freedom to make a statement of his/her religious beliefs to depend on a monetary measure?

Should the freedom of Australians to make statements of their religious beliefs be able, by law, to be so restricted by their employer to avoid financial hardship?


5 Rugby Australia Code of Conduct, All Codes & Policies: A full list of Rugby Australia’s codes, policies and guidelines from A-Z https://australia.rugby/about/codes%20and%20policies/all%20codes%20and%20policies
Recommendation 6:
Reconsider Clause 8 (3).–
Should “unjustifiable financial hardship” allow employers to restrict an employee’s right to freedom of speech outside of work time?
Should the “unjustifiable financial hardship” condition be restricted to large employers with revenue of $50 million?
How is “unjustifiable financial hardship” to be defined?

4. Discrimination in employment

Situations where job applicants/employees, may not be protected against religious discrimination by the Bill.

Clause 13 (1) makes it unlawful for an employer to discriminate against a job applicant because of their religious beliefs or activity. When looking to hire a person, employers typically look at an applicant’s online comments. This Clause may be an effective protection if an employer makes it clear that the job was denied because of their religious belief or activity. However, the applicant may not have knowledge of the reason for not being offered the job and therefore not be able to show grounds for a discrimination complaint under Clause 13 (1).

Similarly, Clause 13 (2) (b) makes it unlawful to discriminate against an employee by denying them opportunities for promotion, training or benefits because of their religious beliefs or activity. For example, a person may be considered in breach of an employer’s expectations, policies, or code of conduct in opinions expressed online, or in conversation, or by not participating in purple days, not celebrating IDAHOT Day, not displaying rainbow diversity symbols, or not using gender neutral pronouns, or opposing gender neutral toilets. Again, this Clause may be an effective protection if an employer makes it clear that they were denied promotion, training or benefits because of their religious belief or activity. However, the applicant may not know the reason for not being promoted, or receiving training or benefits and therefore not be able to show grounds for a discrimination complaint under this Clause.

Some corporations and public sector departments are now virtue signalling the new morality of “inclusion” and “diversity”. In addition to the examples above, some institutions require acceptance of gender neutral toilets, as in the Department of Prime Minister and Cabinet and are being imposed in some state schools, while others firmly imply acceptance of men who identify as women in women’s sports, as in the Guidelines for the inclusion of transgender and gender diverse people in sport (2019) from the Australian Human Rights Commission and the

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Coalition of Major Professional and Participation Sports. This code is being imposed in all football competitions, cricket, netball and tennis, organisations covering 16,000 clubs with 9 million participants.\(^8\)

First, gender neutral toilets and sports is not “diversity” but “uniformity”, often the result of institutional codes of conduct, where everyone is treated same-same.

Second, refusal to accept these policies risks promotion and refusal of employment, which is a new form of coercive slavery, to be accepted by employees at the expense of “exclusion” from a job or promotion, which is the opposite of “inclusion”.

The Bill gives little protection against this power imbalance between employees and institutional and corporate employers on these new ideological requirements for employment and promotion.

In many of the examples above, the solution is to write into law the definition of sex, as defined by reproductive function (see Recommendations 13 and 20), to ensure that a person cannot be discriminated against for holding and manifesting their belief that human sex is binary and to legally recognise the inherent sex-based rights of men and women. Imposing gender ideology in the workplace treats employees who hold the biological world view as second class citizens. If they do not join in celebrations or do not embrace symbols of diversity such as rainbow flags or wearing purple clothing against their beliefs, then they are “outed” as homophobic or transphobic. There should be protection from pressure to actively join in. All views should be respected. Such requirements placed on people with religious beliefs about the nature of human sex should be treated as harassment and be prohibited.

**Recommendation 7:** The Bill should include a clause that prohibits harassment because of a person’s religious belief, similar to the harassment provisions in Section 28A in the *Sex Discrimination Act 1984.*

### 5. Faith-based schools

**Does the Bill protect the right of religious or faith-based schools and educational institutions to act in conformity with the tenets, doctrines or beliefs of the religion of the school or institution?**

First, the present exemptions for faith-based schools and educational institutions in the *Sex Discrimination Act 1984* (Sections 37 and 38)\(^9\) provide such protections in relation to beliefs about sex and gender identity. Those Sections provide that acts conforming to the doctrines, tenets or beliefs of the religion and/or are necessary to avoid injury to the religious susceptibilities of adherents of that religion do not amount to discrimination. The Australian Law Reform Commission (ALRC) has been asked for recommendations on how to limit or remove these exemptions, while protecting the right of faith-based schools to preserve their ethos and values. The ALRC has until December 2020 to report.

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Consideration of these exemptions are so fundamental to protections for religious freedom that should have formed part of the current package of religious freedoms bills. Therefore, the current bills should not be finalised until the recommendations of the ALRC are taken into consideration. Or, the Bill should provide for a review of its provisions when the ALRC review is completed.

Second, Clause 10 of the Bill does provide that “a religious body” (which would include a faith-based school) does not discriminate by “engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets ... of the religion in relation to which ... it is conducted.”

However, this leaves a secular court or tribunal is to decide what may “reasonably be regarded” as being “in accordance with the doctrines, tenets, beliefs or teachings” of a religion. What expertise do the courts have to arbitrate on matters of religious doctrine and theology, matters of personal and institutional belief? Instead, shouldn’t the test for reasonable conduct be what a reasonable person who is an adherent of the religion regards as reasonable conduct? Such a person should be suitably qualified to give expert advice on the matter.

Would an employer who refused to employ a person, or dismissed an employee, who actively opposed the doctrines, tenets or beliefs of the school, or who refused to participate in the religious activities, be “reasonably regarded” as acting in accordance with the doctrines, tenets or beliefs of the religion? Would refusing employment, or dismissing such a person, be required by the tenets, doctrines of beliefs of a religion?

The Bill fails to provide clear protections for such actions by a faith-based employer, whereas under current protections in Sections 37 and 38 of the Sex Discrimination Act refusing to employ or dismissing such a person would be very likely to be regarded as “necessary to avoid injury to the religious sensibilities of the adherents of the religion of the school”.

**RECOMMENDATION 8:**

That Clause 10 (1) be amended by adding the words “or that is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”

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**A case has arisen in Victoria which will test the Victorian exemptions for faith-based schools.**

A former teacher at Ballarat Christian College, is suing the school for discrimination.

The school’s Enterprise Agreement requires all staff “to possess and maintain a firm personal belief consistent with the Statement of Faith of the college”. When marriage was redefined in December 2017, that Statement of Faith was updated to specify that marriage is between a man and a woman and that it is from this foundation that children should be conceived.

The teacher wrote to the school, formally objecting to the revised Statement of Faith as she supports same-sex marriage. According to the media reports, “the college indicated she was free to hold her views personally, but was required to support and teach in accordance with the beliefs of the school.”

The issue had not been resolved when the teacher resigned. Subsequently, the school received notice of a complaint under the Victorian Equal Opportunity Act alleging discrimination on the basis of her “political” and “religious beliefs”.

There are two prongs to this complaint.
First, the Victorian Equal Opportunity Act provides exemptions for faith based schools to discrimination complaints on the basis of marital or relationship status, sexual orientation, gender identity and similar attributes. But the complainant is not alleging discrimination on these grounds, but rather on her political and religious beliefs about these matters. There is no exemption in Victorian law (or in the proposed federal Religious Discrimination Bill) that allows a religious school to discriminate on the basis of political beliefs, i.e. to preserve their religious ethos against hostile “political” beliefs.

Second, the complainant is alleging discrimination on the grounds of her religious beliefs. She says that she is a “committed Christian” and that she believes that God is really about “loving others” and so believes in same-sex marriage. The school’s position is that the Christian belief is that marriage is the union of a man and a woman. If the case proceeds, it will be for VCAT or another secular court to decide which religious belief about marriage is in accordance with the doctrines, beliefs or principles of Christianity.

Consequently, the case is a direct challenge to the provisions of the proposed Religious Discrimination Bill which say that it is not discrimination for a religious school to engage in conduct “that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion” of the school.

Recommendation 9:
That the Draft Religious Discrimination Bill (and related Bills) not be finalised or introduced into parliament until the ALRC recommendations on Sections 37 and 38 of the SDA are published and thoroughly considered.

Recommendation 10:
As the Religious Discrimination Bill puts far too much power into the hands of courts, in Clause 10 (1) substitute the words “is regarded by a person who is an adherent of the religion and is qualified to give expert opinion as being” for the words “may reasonably be regarded” where occurring.

Recommendation 11:
That the exemptions in Sections 37 and 38 of the Sex Discrimination Act should be retained in order to protect the right of religious schools and educational institutions to religious freedom in preserving the beliefs and ethos of the school/institution.

6. Freedom of conscience
Does the Bill protect freedom of conscience?
(a) Health professionals: The UDHR and the ICCPR also expressly include “conscience” under freedom of religion. Freedom to act on conscience is being increasingly undermined in relation to abortion, euthanasia, artificial reproductive services, adoptions, sex change surgery, surrogacy,
explicit sex education in schools, fluid gender theory sex education, pharmacists and medical practitioners having to prescribe and dispense gender transitioning hormones.

Clause 8 (5) says that discrimination occurs if a health practitioners’ code of conduct denies a health practitioner freedom of conscience when state or territory laws permit a health practitioner to conscientiously object to providing a health service.

However, state and territory laws with so called “conscientious objection” provisions are seriously flawed. They require that a medical practitioner with a conscientious objection to a medical procedure (e.g. abortion) must provide a referral to another medical practitioner who will provide the service (i.e. who will perform an abortion). Therefore, to the contrary, such state or territory laws, force a health professional to violate their conscience, or risk professional discipline and loss of professional registration or employment.

Further Clause 8 (6) provides that in the absence of a state conscientious objection law, a health professions’ code of conduct rule can require a medical practitioner to provide a health service against their conscience, if it is necessary to avoid an “unjustifiable adverse impact” on the ability of the practitioner’s employer (e.g. a hospital) to provide the health service required or on the health of the person requesting the service. So, arriving at work in a hospital, a nurse who finds he/she is rostered on for a procedure to which they have a conscientious objection, and who refuses to participate in the procedure, would require rescheduling of the procedure by the hospital. Would this be considered as having an “unjustifiable adverse impact” on the employer?

In two ways, the Bill is toothless for protecting for the conscience of health professionals.

**Recommendation 12:**

The Bill should provide that it is not illegal for a person to refuse to either refer for a medical procedure or participate in a medical procedure to which they have a conscientious objection.

(b) **Principals, teachers, school counsellors:** Clause 31 (2) (b) provides that it is not unlawful to discriminate against an employee because of their religious beliefs or activity if those religious beliefs mean the employee is unable to “carry out the inherent requirements of the employment...”. This provision does not protect teachers, principals, school counsellors or welfare officers, with religious (or secular) beliefs about the nature of sex, who are employed in government schools when they are directed by state education department policies to support students gender transitioning with puberty blockers and cross-sex hormones and to teach explicit and/or gender fluid sex education against their beliefs.

These education department policies have become inherent requirements for employment in state schools. In turn, these policies are being imposed by education departments as a requirement of the federal *Sex Discrimination Act 1984* (SDA). This has meant the SDA is imposing gender identity ideology on everyone, including teachers and students who don’t believe that sex/gender is fluid, whether for religious or reasons of biological science.
Following the 2013 amendments to the SDA, at least four state education departments (NSW\textsuperscript{10}, Victoria\textsuperscript{11}, Queensland\textsuperscript{12} and South Australia\textsuperscript{13}) have issued policies requiring state school authorities to negotiate with transgender students as to which toilets, other facilities, and services they can access at school, because, they argue, this is a consequential requirement of the protection of “gender identity” in the Act.

The threshold for recognition of a change of sex is low, requiring only a statement from a registered medical practitioner or psychologist, a passport or Australian government travel document, an amended birth certificate, or a state or territory Gender Recognition Certificate or Recognised Details Certificate.\textsubscript{14} These are very easy to obtain.

The NSW policy was outlined in the Education Department’s \textit{Legal Issues Bulletin No 55, December 2014} (see full document in Appendix 2). It assessed the risks in nine out of 11 policy areas as “high risk” and two as “medium risk”. It is baffling that an organisation charged with having a duty of care for children would issue a legal document that admitted that policies being imposed are “medium risk” or “high risk”.

For example, risk for use of toilet and change rooms was rated as “high”, suggesting that other students face not just “discomfort”, but potentially more serious issues. The \textit{Bulletin} says risk management involves:

Doors provided to change room cubicles of their identified gender. Student must change in cubicle. Staff to monitor length of time in change room. Staff and student to report any incidents in the change room to Principal ... Zero tolerance to ‘skylarking’ in change rooms ...

The South Australian policy warns principals and teachers that

[f]ailure to provide transgender students with access to appropriate toilet and change facilities may breach anti-discrimination legislation.\textsubscript{16}

This leaves teachers and principals in state schools caught between conflicted legal obligations. On the one hand, refusal to comply with these policies can result in discrimination charges, loss of professional accreditation and employment. On the other hand, implementing these policies could lead to charges for the failure of duty of care if a girl is sexually abused in these facilities by a natal male.

\textsuperscript{16} ‘Transgender and intersex student support’ (SA), Op. cit.
Again, what happens to the reputation and standing of a male teacher who enters a girls’ toilet or change room to remove a disruptive natal male identifying as female, particularly following the Royal Commission into Institutional Sex Abuse? These requirements come at a time when there is serious community concern over child-on-child sexual abuse in schools.

The inherent sex-based right of girls to protection in their private spaces has been replaced by the legally created rights of males who identify as females.

Further, the right of parents, as per Article 26 (c) of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights Article 18 (4), to determine the moral education of their children is violated if a request for their child to opt out of gender fluid sex education is refused or considered discriminatory, as recently happened in California.17

Of concern, the Australian Law Reform Commission has been asked to review certain religious exemptions in the SDA by seeking to “limit and if possible remove” the exemptions for faith based schools. This proposal could put faith-based schools at high risk of having the same polices imposed on them as are being imposed on state schools, as described above.

A solution: If the biological world view, that human beings are binary, male and female, was also recognised in laws, so that a diversity of views about the nature of human sexuality is allowed, then it could not be argued that the protection of gender identity rights in the SDA must be prioritised over the protection of sex-based rights i.e. those rights that flow from one’s biological sex as male or female as they would also be protected. (See Recommendation 13 and 20)

That would give protection to people who hold the biological world view and not require teachers, principals, counsellors and parents to affirm or support the gender fluid world view. As an aside: it should be noted that this would protect not only the rights of people who hold a religious belief that humans are immutably male or female, but also secular people who hold the biological world view because they believe that sex is defined by biological science, or just that it is self-evident.

By defining sex as male and female according to reproductive function in law, the conflict between inherent sex-based rights and created gender fluid rights evaporate for the vast majority of people who hold to the biological world view.

“Sex” was defined by Lawrence Mayer and Paul McHugh (2016) in their landmark study, Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences.18 They said that sex is defined by reproductive function only.

The only variable that serves as the fundamental and reliable basis for biologists to distinguish the sexes of animals is their role in reproduction, not some other behavioral or biological trait.19

... the female gestates offspring and the male impregnates the female.20


19 Ibid., pg. 90.

20 Ibid., pg. 89.
The extent of biological differentiation between the sexes is profound. Researchers at the Weizman Institute (2017)\textsuperscript{21}, one of the world's leading multidisciplinary basic research institutions in the natural and exact sciences, found that of 20,000 protein-coding human genes, 6,500 were biased toward one sex or the other in at least one tissue”. For example, “Gene expression for muscle building was higher in men; that for fat storage was higher in women.”\textsuperscript{22}

These findings confirm the 2001 statement “Exploring the Biological Contributions to Human Health: Does Sex Matter?” by the US National Academy of Medicine’s Committee on Understanding the Biology of Sex and Gender Differences. It emphasised the importance of medical research and trials being carried out separately on men and women, which had led to the creation of a new branch of science “known as sex-based biology”\textsuperscript{23}.

[Note: it has been argued that intersex people are evidence that humans can be other than male or female. This is false. As The Intersex Society of North America insists, intersex is a disorder of sexual development and is not evidence of third sex or gender.\textsuperscript{24} As a disorder of sexual development, intersex is no more evidence that humans are other than male or female anymore than a person born without legs could be used to claim that humans can be other than bipedal, i.e. stand upright on two legs.\textsuperscript{25}]

**Recommendation 13:**

Add a new Clause to the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 to provide that the federal Sex Discrimination Act be amended by inserting a definition of “sex” as meaning “Male or Female according to reproductive function” and re-inserting the definitions of “man” as meaning “a member of the male sex regardless of age” and “woman” as meaning “a member of the female sex regardless of age.”

7. **Refusal of goods and services**

Does the Bill protect those providing or requesting goods and services from discrimination?

Clause 20 of the Bill does not allow people providing goods and services to refuse a customer on the grounds of that customer’s religious beliefs. During the 2017 marriage debate, this provision may have protected the man+woman marriage campaigners who were denied venues for meetings and forums because they opposed changing the definition of marriage to include the union of “two people” of any sex or gender identity.


\textsuperscript{24} “Does ISNA think children with intersex should be raised without a gender, or in a third gender?” Intersex Society of North America, http://www.isna.org/faq/third-gender

\textsuperscript{25} “Sex and Gender: a beginner’s guide”, Rebecca Reilly-Cooper, political philosopher, University of Warwick, https://sexandgenderintro.com/
This clause would have required that their opposition to same-sex and transgender marriage be on religious grounds, and the hirer would have to have declined the venue because of those religious beliefs about marriage. However, most of those instances were about venue hirers withdrawing their venue because of the security risks posed by pro-same-sex marriage protesters, not because of their religious beliefs of those being denied the venue.

Can a person decline to provide services for an event that is against the service provider’s religious beliefs? Around the world, bakers, florists, photographers, venue hirers have faced discrimination complaints for refusing to supply their services to same sex weddings because of their religious beliefs about the nature of marriage. These cases – where people are being coerced under threat of discrimination charges of acting against their religious beliefs – have been important to the framing of the government’s Bills.

Clause 11 may cover such situations but it should be made clear that declining to provide goods and services because of religious beliefs or conscience will not amount to discrimination.

Recommendation 14:
Add the following as Clause 11 (1) (c) (iii) “is intended to avoid going against the person’s religious beliefs or conscience.”

Faith-based aged care facilities and hospitals do not come within the definition of “religious body” in Clause 10 (2) (b) or (c) as they engage in commercial activities.

Would a faith-based hospital or aged care facility be discriminating if they declined to provide assisted suicide/euthanasia to residents as against the tenets, doctrines etc. of the religion?

Will a faith-based hospital face discrimination charges for not performing sex reassignment surgery in its facility? Currently in California, a California appeals court ruled that discrimination charges against Mercy San Juan Medical Centre, a Catholic hospital, can proceed over the cancellation of a hysterectomy on a transgender female-to-male, even after the hospital transferred the surgery to a non-Catholic facility.  

Recommendation 15:
Delete the words in brackets in Clause 10 (2) (b) and (c) so that faith-based aged care facilities and hospitals come within the definition of “religious body” and therefore are protected by Clause 10.

Recommendation 16:
Add to Clause 10 another sub-clause to provide that the religious protection extended to religious bodies only covers their commercial activities to the extent necessary to prevent their facilities being used for purposes inconsistent with the doctrines, tenets, beliefs or teaching of the religion of the facility or hospital.

8. Religious charities

Does the Bill adequately protect the charitable status of religious charities?

Clause 3 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 proposes to amend the Charities Act to provide that “... the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.” This means a religious charity that has a traditional view of marriage will not, for that reason alone, be denied charitable status.

But what about adoption agencies being required to place children with same-sex couples or lose their charitable status? Why is the view of religious adoption agencies that a child should be placed with a man and a woman not protected? In the UK, Catholic adoption agencies had to close down when the UK Charities Commission removed their charitable status because they would not place children with same sex couples.²⁷

And why is it restricted to a religious charity’s view on marriage?

What of a religious charity that provides counselling or other services for children and young people which holds a religious view about sex that does not support gender fluidity or gender transitioning?

Recommendation 17:

That the Human Rights Legislation Amendment (Freedom of Religion) Bill amend the Charities Act to allow religious charities to operate in accordance with the tenets, doctrines, beliefs or teachings of the religion of the charity without losing their charitable status.

9. Religious bodies and organisations

Does the Bill protect the right of religious bodies or organisations to act or refuse to act in accordance with its doctrines, tenets or beliefs and to promote the religious principles for which the body or organisation is established?

The right of churches and religious bodies to teach and state their doctrines, tenets and beliefs should be clearly stated.

Clause 10 does apply to a “religious body”, but it is not clear that it includes a church, mosque or synagogue or temple. “Religious body” includes a “body that is conducted in accordance with the doctrines, tenets … of a particular religion...” But are churches, synagogues, mosques and temples conducted in accordance with the tenets, doctrines” etc. of the religion? Rather, they are bodies that teach and promulgate the tenets, doctrines and beliefs of their respective faiths.

So, does the Bill protect such places of teaching and worship from claims of discrimination for teaching the tenets, doctrines of their faith, which is not shared by those with no beliefs or those with other beliefs? This needs to be clarified.

**Recommendation 18:**

That the definition of “religious body” include churches, synagogues, mosques, temples and other places of religious worship in order to make it clear that they are protected by the provisions of the Bill.

10. **Rights of parents**

Does the Bill protect the right of parents to “ensure the religious and moral education of their children in conformity with their own convictions” as is recognised in Article 18.4 of the ICCPR?

Clause 18 (2) (c) of the Bill arguably could protect those parents who oppose gender fluid sex education because of their religious beliefs. This should be made clear.

It won’t protect parents who oppose transgender sex education because it is unscientific and who believe the evidence of biological science.

Specific provision should be made that parents have the right to opt their children out of classes teaching gender fluid theory, or other models of marriage or family, or explicit sex education, which is against their religion or belief.

**Recommendation 19:**

Add as Clause 18 (3): “It is unlawful for an educational institution to discriminate against the parent(s) of a student or a student by refusing to allow parent(s) to opt their child, or a student to opt himself or herself, out of classes that teach or model forms of marriage, family formation or of sexual identity or relationships that conflict with their religious beliefs.”
PART TWO: The Religious Discrimination Act will not resolve conflicts arising out of the legal recognition of gender identity

11. The ambiguity of gender identity

Would the Bill resolve the conflicts between inherent sex-based rights of religious (and secular) people and legally created gender identity rights that derive from the legal recognition of gender identity in anti-discrimination laws, on birth certificates and in the Marriage Act?

The reality is that actual cases of conflict are overwhelmingly to do with beliefs about the nature of human sexual identity, whether held for religious reasons or secular reasons, or both.

A basic element of belief for all major religions is that human beings are male or female, a view that is held by the vast majority of secular people who regard sex as defined immutably by biological science, or simply as self-evident. There is an irresolvable divide between those who hold the “biological world view” that human sexual identity is binary, male and female, and those who believe the ideological, “transgender world view” that human sexual identity is fluid and changeable depending on how a person feels.

The Exposure Draft Religious Discrimination Bill will not resolve the conflicts created by anti-discrimination laws, the Marriage Act and Births Deaths and Marriage Registration Acts recognising one view of human nature, the “belief” that sex/gender is fluid.

The issue here is not “competing rights”, a term which suggests conflicts between equally valid rights, but fundamental conflicts between inherent rights and constructed rights based on a contested social theory.

Sex is defined in biological sciences as male (a person whose reproductive organs produces sperm) and female (a person whose reproductive organs produces an ovum, receives male sperm to induce pregnancy and carries a pregnancy to birth). Infertility does not invalidate the definition of sex.

In contrast, gender identity is said to be a new form of personal identity based on a person’s feelings, making it independent of a person’s biological sex, or replacing biological sex.

But is gender identity independent of sex?

Does it replace sex?

What are the consequences?

The term “gender” originally meant social and cultural characteristics that reflected a person being male or female. These characteristics vary from culture to culture, but still reflect maleness and femaleness in the context of a person’s culture. To “express” one’s “gender” in a particular cultural and social context meant becoming “more” of what one already is, to express more one’s own maleness or femaleness. It did not mean “becoming something else”, something other than one’s immutable, biological sex.

In contrast, the legal term “gender identity” is intended to mean a person changing their sex/gender. However, gender identity is defined in two problematic ways that are ambiguous. On the one hand, it is said to be wholly a social construct based on feelings; on the other hand, some claim that an intersex condition is evidence that some people are neither fully male or fully female, opening the possibility of a third sex/gender or many sexes/genders.
The first problem is that gender identity cannot be both a social construct and have a biological basis in intersex. Which is it? Furthermore (as explained on page 16), intersex is a disorder of sexual development and is no more grounds for claiming that humans can be other than dimorphic any more than a person born without legs can lead to a claim that humans are other than bipedal.

The second problem is definitional. Friedmann Pfäfflin, in The Legal Status of Transsexual and Transgender Persons (2015), cites sociologists Richard King and Dave King as describing various forms of fluid gender identity. The following summary of the various forms of gender identity include Pfäfflin’s categories:

- **Transsexual**: a biological male can self-identify and be a female, a female can identify as male, and some people alternate between being male and female.

- **Spectrum**: a person can identify at a point on a spectrum of between 100 per cent male and 100 per cent female, e.g. a person can be 81.1 per cent male and 18.9 per cent female;

- **Non-binary**: a person can identify as non-binary, that is, identify as any of the 58 Facebook genders – pangender, androgynous, bigender, gender questioning, gender queer, gender variant, other, two-spirit, etc.; or

- **Genderless**: a person can identify as ‘genderless’, or ‘unspecified sex’, that is, escape sex and gender categories.

These forms of gender identity are so broad that they make it possible for every person on earth to have their own self-defined, fluid gender identity, and hence their own unique set of rights according to their chosen gender identity.

Each of these definitions is a paradox, as each form of gender identity is defined against the reality of biological sex and cannot ignore or replace sex without destroying its own definitional meaning. All definitions are dependent on, not independent of, biological sex.

There cannot be a spectrum between 100% male to 100% female, where a person can choose a particular point to be part male and part female (e.g. 61.3% male and 38.7% female), unless there exists biological male and female in the first place. Biological male and biological female define the spectrum.

Non-binary (not two) is defined against biological binary (two), male and female. To say a person’s gender identity is “non-binary” is intended to mean that the person’s gender identity is not based on biological male or female, but the claim requires the reality of biological male and female to give meaning to the word “non-binary”. There can be no non-binary without binary.

Genderless depends on, and is defined against, the reality of gender, i.e. sex-based cultural characteristics associated with a person being either biological male or biological female. There can be no genderless without there first being sex-based characteristics of dimorphic human beings.

The case of transsexual has two conflicted aspects.

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On the one hand, the term transsexual recognises sex as binary, even when saying that a person can “change their sex” to the opposite of their birth sex. Trans is a Latin prefix meaning to fundamentally change. A person cannot fundamentally change their sex (i.e. transition) to become transsexual unless first they have a one of two sexes. In this sense, transsexuals still recognise sex as binary as they change from one sex to the opposite sex.

On the other hand, if transsexual means a man can actually “be” the woman, then gender identity laws erase the biological definition of a “woman” as being a person having the biological anatomy with the potential to naturally produce an ovum, become pregnant and gestate a child. Equally, gender identity erases the meaning of a “man”, because such a person can now be defined as a woman. Consequently, gender identity laws erase not only the meaning of biological sex, they also erase the meaning of transsexual, which depends on the biological definition of male and female sex for it’s meaning. In short, how can a person transition from one sex to the other sex if gender identity erases the definition of sex? In which case, the meaning of the term transsexual is so conflicted that the term erases itself.

Conclusion: Gender identity cannot replace sex without erasing the very thing that it depends on to define itself, namely, biological sex. Nor can biological sex be considered a form of gender identity because gender identity is wholly a social construct in place of immutable sex. Legal recognition of gender identity reduces Male and Female from meaning biologically, immutable sex to cisgender terms, a choice a person makes about their sexual identity.

Redefining sex redefines human nature, which redefines human rights and creates uncertainties in law that have led to many conflicts and injustices.

12. Gender identity creates legal uncertainty in the Sex Discrimination Act (SDA), Marriage Act and BDMRAs

In 2013, amendments to the SDA defined and gave protected attribute status to “gender identity” and “sexual orientation”. Further, the biological definition of “man” as “a member of the male sex regardless of age” and “woman” as “a member of the female sex regardless of age” were repealed.

The amendment defined gender identity as

the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.31,32

The SDA definition of gender identity is as conflicted as definitions in the social sciences, as discussed above.

- Sex is said to be “designated” at birth, just as parents designate, or “assign”, a child’s name as a matter of choice, when in reality, sex is “recognised” as self-evident, inherent.

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32 Note: The federal International Criminal Court Act 2011 (Schedule, Part 1, Crime Against Humanity, 3) defines “gender” very differently to the SDA. It says “‘gender’ refers to both sexes, male and female, within the context of society, and does not indicate any different meaning”, but only for the purpose of crimes against humanity.
• The definition says “gender identity” means the “gender-related identity” of a person, but this is a circular argument. It is like defining a table as an object that is table-like. The statement is meaningless.

• What does “gender-related appearance or mannerisms or other gender-related characteristics” mean? Should a woman who wears a suit be considered as having the gender identity of a man? Should a man who wears his hair in a “man bun” be considered as having the gender identity of a woman? Should a boy who plays with dolls instead of toy trucks be considered as having the gender identity of a girl rather than simply a boy who represents a variation in patterns of male behaviour? In effect, gender-related “characteristics”, “mannerisms” and “appearance” refer to typical sex characteristics, within a cultural and ethnic context.

• “[W]hether by way of medical intervention or not” refers to transsexuals, both those who undergo sex-reassignment surgery and take cross-sex hormones, and those who simply self-identify as opposite to their birth sex.

• “With … regard” to a person’s “designated sex at birth” can mean a person identifies as cisgender or on a spectrum of male to female. “Without regard to designated sex at birth” can mean non-binary gender identities or genderless. In both cases, these gender identities are dependent on, and defined against, immutable biological sex. Therefore, “Without regard to designated sex at birth” actually means “with … regard” to a person’s “designated sex at birth”!

The definition of gender identity suffers from a definitional fallacy (sex as only being “designated”, not recognised as inherent), failure to define the key terms “sex” and “gender”, having a definition of gender that is circular (“gender” means “gender”) and in all aspects is dependent on the reality of immutable, biological sex.

It erases the meaning of biological Male and Female, as required by the Australian Government Guidelines on the Recognition of Sex and Gender on official federal government forms, like passports and Medicare forms, where a person can “choose to self-identify” as Male, Female, X(Indeterminate, Unspecified, Intersex). Male and Female are reduced to self-chosen cisgender terms, yet all these sex identifier terms are defined against, and depend on, the prior existence of immutable, biological sex.

To confound the meaning and purpose of the SDA even further, the Act says sex and gender identity are both attributes, even though it does not define sex and has a completely ambiguous definition of gender identity.

Consequently, the definition of gender identity has two major legal problems for anti-discrimination law:

1. On the one hand, the definition refers to social characteristics that are personal and individual such that they should be considered emotional states, feelings or personality traits. But such personal issues are not a matter for legal definition and writing them into law creates uncertainty, leading to deep legal and cultural conflicts.

2. Then to the contrary, all aspects of this definition of gender identity are based on biological sex; so, does gender identity really mean immutable, biological sex?

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In short, gender identity is an utterly ambiguous concept that should not be recognised or made a protected attribute in law.

13. Gender identity rights erase sex-based rights

As gender identity cannot replace sex without destroying the meaning of gender identity and transgender (as shown in section 11 above), the best that could possibly be claimed conceptually is that gender identity may coexist alongside biological sex as in the SDA, which still refers to sex, alongside gender identity, as a protected attribute.

However, the gender identity of some who identify as transgender does not peacefully coexist with the vast majority of people who recognise their sex is biologically fixed, immutable. Rather, the SDA creates irresolvable, deep and wide legal and cultural conflicts between inherent sex-based rights and legally created gender identity-based rights.

(a) What are sex-based rights?

For millennia, humans have recognised that binary biological sex was a self-evident, inherent human characteristic. Equally self-evident were a person’s inherent rights, privileges, protections and access to services based on their biological sex. As laws and courts historically regarded biological sex as axiomatic, it was considered unnecessary to define sex (or man and woman) in law in order to recognise and establish a person’s sex-based rights.

At the same time, some laws that govern the recording of a person’s sex, have also provided the legal and cultural basis for recognising sex-based rights. Consider birth registration laws. A newborn’s birth certificate is a person’s first legal document from which a cascade of rights unfold over a lifetime:

- according to age, state funded education, family payments, unemployment benefits and old age pensions;
- custodial and inheritance rights;
- citizenship rights, voting rights and qualification for public office.

Further, from a person’s recorded birth sex flow an array of inherent sex-based rights, privileges, protections and access to services. Recognition of sex also is necessary for the social, political and economic organisation of important aspects of society that are tailored to the separate needs of men and women. Both these areas have been poorly studied and documented.34

A non-exhaustive list of sex-based rights, for both religious and secular people, define:

- access to sex-specific schools;
- participation in separate male and female sports;
- access to sex specific school dormitories and camps;
- access to sex specific facilities like toilets, showers and change rooms;

864 http://www.unswlawjournal.unsw.edu.au/sites/default/files/g2_bennett.pdf
• access to safe comfort zones for women for the prevention violence and rape;
• access to domestic violence shelters for women;
• eligibility for marriage, which affects the nature of marriage ceremonies and services to weddings;
• language use of sex-specific names and pronouns;
• provision of sex-specific counselling services;
• provision of sex-specific medical treatments;
• sex specific epidemiological medical research in the new field of medicine known as “sex based science”;
• eligibility for affirmative action employment programs for women;
• determining who conducts police body searches;
• accommodation of prisoners in sex-specific prisons, to avoid male-on-female violence, sexual assault and rape;
• access to women’s only organisations and men’s only organisations;
• access to lesbian only and gay only organisations and events;
• eligibility to serve in certain areas of military service.

Sex is also important for:
• identifying and publicly outing men who abuse women;
• human sexuality and relationships programs in schools;
• accurately recording crime;
• insurance;
• prevention of fraud;
• national security;
• counselling and provision of pharmaceuticals and surgery for sex-reassignments;
• government planning for the provision of some services; and
• accurate monitoring of different sexes’ participation in public activities.

(b) What are gender identity-based rights, or transgender-based rights?
As a person’s gender identity is not inherent but a social construct, so too gender identity/transgender rights are not inherent, but constructed or created rights based on a person’s self-identified gender identity. These created rights follow from legal recognition of, and protection for, a person’s self-defined gender identity in BDRMAs, anti-discrimination and marriage laws.

As a result, where a person claims to be transgender they allow a man to self-identify as a woman and claim all the rights, privileges, protections and access to services claimed by biological women. Such a person can claim the right to play in women’s sports and to use female facilities, even when the person is say a 30 year-old-biological male using public swimming pool change rooms with
female children and female teenagers. Also, they frustrate or put at risk important aspects of the social, political and economic organisation of society.

In all of the above areas of law and culture, gender identity laws bring gender identity/transgender-based rights into deep legal and cultural conflicts with sex-based rights that have not been generally defined in law, having been regarded as self-evident.

14. **Real life conflicts**

Overwhelmingly, conflicts are between opposing beliefs about the nature of human sexual identity, a belief that can be held for either religious or secular reasons or both.

The Bill will not resolve this sample of conflicts.

(a) **Schools:** It does not resolve the conflict of rights where a boy identifies as a girl and claims the right to access girls’ showers, toilets and change rooms. As a consequence of the SDA amendments in 2013, policies of state education departments require that a boy who self-identifies as a girl must be allowed into the girls’ showers, toilets, change rooms and dormitories or into facilities separate from those provided normally to boys and girls. This would allow 17-year old biological boys in the same toilets and change rooms as 13-year-old girls. (see section 6 above).

Will principals and teachers face discrimination changes, and possible loss of professional qualifications, as warned by the South Australian Education Department (see section 6 above), for exercising their duty of care for biological girls by refusing a biological boy who identifies as a girl access to girls’ toilets, showers, change rooms, sports, camps and dormitories?

Is the government’s intention to force these same requirements on faith-based schools by removing the exemptions for faith-based schools from the SDA?

(b) **Erasing affirmative action programs:** How can a law that is meant to protect biological women against discrimination in employment guarantee jobs reserved for biological women, when the law says a man only has to self-identify as a woman to change his sex on his birth certificate to female?

Does this mean a biological male who identifies as a female would be eligible to claim the right to jobs reserved for women under affirmative action programs, as originally allowed for by the SDA Section 7D Special measures intended to achieve equality? Now, Section 7D allows for affirmative action programs that would permit a biological male who identifies as female to apply for positions reserved for biological women.

(c) **The male-female pay gap:** Will a male who identifies as female, and working in a low paid job mostly occupied by biological women, be regarded as being on the male or female side of the gender pay gap?

(d) **Sport:** Is it fair to oblige biological females to accept males who identify as females in women’s sporting competitions? Will such acceptance lead to males who identify as females dominating in women’s sports?
Thaibault et al. (2010) in the *Journal of Sports Science & Medicine* analysed 82 quantifiable events since the beginning of the Olympic era. Their study observed a gap in world records “after 1983, at a mean difference of 10.0% ± 2.94 between men and women for all events” ranging from 5.5% (800-m freestyle, swimming) to 36.8% (weightlifting). These “[r]esults suggest that [biological] women will not run, jump, swim or ride as fast as [biological] men”, they concluded.

Chris Schwirian (2015), a Biological Sciences lecturer at Ohio University since 1966, points out that men have a larger portion of ... fast-twitch [muscle], which allows them to generate greater force, speed, and anaerobically produced energy. At all distances beyond 800 meters, the main reason for the gap is men’s higher aerobic capacity [VO$_{2}$max], on average, which is due to their typically having less body fat, more haemoglobin and muscle mass, and larger hearts and lungs than women ...

A 2018 report by the International Association of Athletics Federations pointed out that ...

men have significant advantages in size, strength and power over women, due in large part to men’s much higher levels of circulating testosterone from puberty onwards...

To the best of our knowledge, there is no other genetic or biological trait encountered in female athletics that confers such a huge performance advantage.

Currently in the US state of Connecticut, 16-year-old Connecticut track and field athlete Selina Soule and two other girls have filed a civil-rights complaint with the state education department to stop biological boys playing in the girls’ sports. This comes after two biological boys won 15 women's state championships — titles that were held by 10 different Connecticut girls the previous year. Soule has been harassed on social media for speaking out.

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36 Ibid.

37 Ibid.


39 Note: The discussion in this report was in the context of the International Association of Athletics Federations (IAAF) maximum 5 nmol/L testosterone rule for intersex women competing female competitions. The rule has been the basis of rules for the participation of male-to-female transgender athletes in women’s competitions. A new rule for transgender athletes, due to be announced in the near future, will clarify eligibility requirements for the 2020 Olympics.


41 Ibid, pg. 6.

In 2015, eight members of the Iranian women’s national football team were biological men awaiting sex-reassignment surgery.43

In 2015, eight members of the Iranian women’s national football team were biological men awaiting sex-reassignment surgery. (Pic Daily Telegraph, UK)

(e) Liabilities of doctors and schools: On the one hand, a California appeals court recently ruled that discrimination charges against Mercy San Juan Medical Center, a Catholic hospital, over the cancelation of a hysterectomy on a transgender female-to-male, can proceed, even after the hospital transferred the surgery to a non-Catholic facility.45 On the other hand, in 2009 three Australian transsexuals sued the Monash Gender Clinic, which settled out of court and was temporarily closed, for misdiagnosing gender dysphoria instead of other psychological illness.46

So, will doctors face discrimination charges for conscientiously objecting to medically and/or surgically transitioning a person even if they do refer to another doctor (as in the current California case), and then will they face claims for negligence and irreparable damage caused if they do medically and surgically transition patients who later regret their transitioning?

Similarly, will principals and teachers face discrimination charges for not supporting children to take puberty blockers and sex change hormones, as a consequential requirement of the federal SDA? And will schools also be liable for irreparable damage to a child if they regret their transitioning and accuse the school of a failure of their duty of care for the protection and safety of themselves when they were a child, a minor?

(f) **Accusing women of discrimination?** Will biological women be accused of discrimination against transsexual male-to-females if they ask to only have biological females carry out intimate examinations and treatments such as pap smears or refuse to do body waxing on a man who self-identifies as a woman, with or without sex change surgery?

(g) **Police body searches:** How are police to carry out a body search on a non-binary person who identifies as “agender”, “pangender” or “gender queer”? Will male or female police body search a transgender male-to-female?

In March 2019, Tasmania’s Attorney General, Elise Archer, informed all members of the state’s Legislative Council that there was “a risk of serious unintended legal consequences” from proposed legislation that would allow a person over 16 years to choose to be recognised on their birth certificate by their biological sex or self-defined gender identity. Advice provided to her from the state Solicitor General was that the changes would “affect the interpretation of all Tasmanian legislation that has, as a criterion for its application, the sex or gender of a person.” The Attorney General said that “without first reviewing all Tasmania’s statutes and regulations”, several cases stand out.

For example, “there are a range of statutes that provide that full searches must be carried out by a person of the same sex as the person being searched. This is likely to cause difficulties if the person to be searched is registered as non-binary, indeterminate, or by some other word or phrase used to indicate the person’s perception of self, neither entirely male, nor female. In those categories, the power of search is likely to be compromised or negated.”

So, will a biologically male policeman face discipline for searching a female-to-male person?

(h) **Prison accommodation:** Should a biological male who identifies as female be accommodated in prison according to their birth sex or according to the sex with which they identify? Consider these cases:

At Gol Gol, New South Wales, Maddison Hall (born Noel Crompton Hall in 1964) shot and killed hitchhiker Lyn Saunders. After being convicted in 1989, Hall began hormone treatment while in prison, and was transferred to the women’s Mulawa Correctional Centre in 1999, where it was alleged that Hall had sexual relations with several female prisoners. After three months, Hall was alleged to have raped a woman and was returned to a male prison. Hall was charged with rape, but a case did not proceed after the alleged victim was released, returned to New Zealand and refused to press charges. After being returned to a male prison, Hall sued the state of NSW claiming psychological trauma, and received an out-of-court settlement for $25,000, which was used to fund Hall’s sex-reassignment surgery in 2003.

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In the UK, Martin Ponting, who was sentenced to life in 1995 for the rape of two girls under the age of 16, was moved to the all-women prison of Bronzefield in Surrey in 2017 because he now identifies as a woman and goes by the name of Jessica Winfield.49 He received a £10,000 National Health Service sex change in prison. He started molesting inmates almost immediately after transferring to a women’s prison. He has since been segregated.50 One of the women he victimised stated, “To assume the identity of a woman after what he did is a kick in the teeth”51. Some pro-trans observers have criticised the media for “deadnaming” Ponting; that is, mentioning his old name, Martin Ponting, rather than solely using his new name, Jessica Winfield.52

A 2017 report by the UK campaign group Fair Play for Women suggests that placing trans male-to-females in women’s prisons may put other inmates at serious risk. The report was produced by Dr Nicola Williams, a research scientist specialising in human biology who has held a number of senior scientific positions within the pharmaceutical industry. Williams said that, despite the imprecision of prison figures, she found that 41 per cent of trans male-to-female prisoners in England and Wales are sex offenders, compared with a proportion of 17 per cent in the prison population as a whole.53

(i) Women’s only (safe) spaces: Will women’s only gyms and clubs, domestic violence shelters, lesbian organisations and other women’s safe spaces be obliged to give biological men who identify as women, with or without sex-change surgery, access to their facilities?

This question arises because, for example, the Anti-Discrimination Board of NSW lists 89 exemptions to the NSW Anti-Discrimination Act 1977. Approximately 80 are for women’s organisations, such as refuges, gyms, career education, medical services, disability services, leadership training, education scholarships and female swimming classes. Exemptions have also been granted to some men’s sporting and support organisations and for some gay clubs.54

Until recently, anti-discrimination laws have aimed to protect biological women against

54 "Half of all transgender prisoners are sex offenders or dangerous category A inmates", Dr Nicola Williams, Fair Play for Women, 9 November 2017. https://fairplayforwomen.com/transgender-prisoners/
discrimination, allowing for exemptions to provide safe spaces and specialist services to women. Gaze and Smith (2017) point out that, after the Sex Discrimination Act was passed in 1984, “some early complaints were from men who argued that specialist women’s health services, domestic violence support services, or women’s-only gyms or sessions in swimming pools were discriminatory.” These claims were rejected on the grounds that certain female spaces and services were necessary to provide substantive equality for women.

A leading case in the issue of women’s-only services concerned Fernwood Fitness Centres, a large provider of women’s gyms. In 1996, the Victorian Civil and Administrative Tribunal ruled that it could provide health and fitness gyms catering for women only and to permit those centres to be staffed by women only under Victoria’s Equal Opportunity Act. This was one of a number of exemptions granted periodically to Fernwood in different states.

So, what happens if a man identifying as a woman seeks to access a women’s safe space such as a homeless shelter or other women’s space? Does recognising this person as a woman undermine, if not erase, the exemptions granted to a variety of women’s and lesbian organisations in Australian jurisdictions by legally recognising a person by their gender identity?

As feminists Ruth Barrett et al. argue in the recent book, Female Erasure (2016), this is erasing women and girls from the public square.

(j) Services to women: Will female beauty parlour employees face discrimination charges for failing to provide intimate services such as body waxing to biological men who identify as women? This has already happened in Canada where a man who identifies as a woman is taking a number of female beauticians to court for refusing to wax his/her male genitalia.

(k) Imposing gender neutral language: Will the use of a person’s nominated pronouns be forced on everyone? Will not using the required pronouns mean a person will be treated disadvantageously, for example, by being sacked from a job?

Dr David MacKereth, a physician from Dudley in the UK, took a complaint against the Department for Work and Pensions saying they discriminated against his religion by suspending him from his position as an assessor for the NHS after he said he would not use gender pronouns for what he called someone’s “chosen” sex. The case has yet to be decided.

UK journalist Caroline Farrow, 44, a mother of five children, was subjected to an investigation by Surrey Police over tweets in which it was alleged she “misgendered” a young male-to-female

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56 Stevens v Fernwood Fitness Centres Pty Ltd (1996), EOC 92-782.
57 Ruth Barrett (Editor), Female Erasure: What you need to know about gender politics’ war on women, the female sex and human rights, foreword by Germaine Greer, Tidal Tide Publishing, LLC, Pacific Palisades, CA, USA, 2016.
transsexual. The complaint was eventually withdrawn but it caused significant anxiety and resulted in death threats to the journalist and her family.\footnote{Surrey Police investigation over ‘misgendering’ tweets”, BBC News, 20 March, 2019. https://www.bbc.com/news/uk-england-surrey-47638527}

In Canada, a judge has made a protection order against a father banning him from “misgendering” or “deadnaming” his child who is transitioning from female to male. The judge said the father was “harming his child” and that rejecting his child’s gender identity constituted family violence.\footnote{“Trans Teen Gets Court Order Against ‘Misgendering’ Dad: Words Are Violence”, Pluralist, 25 April, 2019. https://pluralist.com/canada-court-dad-misgendering-transgender-teen-violence/}

Imposing gender neutral language is a logical consequence of gender identity laws. So, will International Women’s Day become International Person’s Day and women’s hospitals renamed persons’ hospitals? Will pregnant women have to be referred to as pregnant persons? Will breast feeding women be referred to as chest feeding persons?

(I) Recording crime: Where a biological woman is assaulted by a husband/ partner who was born male but identifies as female, is this to be recorded as a case of male-on-female or female-on-female domestic violence?

These are just a sample of the real-life conflicts that are being driven by recognition of “gender identity” in anti-discrimination laws, the \textit{Marriage Act} and amendments to Births, Deaths and Marriages Registration Acts.

There is need for a public debate about how the law should recognise sex and how these conflicts between biological sex and socially constructed gender identity can be resolved. A good place to start would be to amend the SDA by re-inserting definitions of “man” and “woman” (which were removed in 2013) and by defining “sex” as “male or female according to reproductive function”, as proposed in Recommendations 13 and 20.

15. \textbf{US Justice Department looks to restore sex-based rights while preserving transgender liberties.}

In Australia, there have been no restrictions on medical and surgical transitioning of transsexuals. There has been the \textit{liberty} to adopt any gender identity they choose. Liberty means “the state of being free within society from oppressive restrictions imposed by authority on one’s way of life, behavior, or political views”\footnote{“liberty”, Oxford Living Dictionaries. https://en.oxforddictionaries.com/definition/liberty =}

This liberty was preserved in all Australian states and territories after 2000, when all these jurisdictions provided for female-to-male sex-reassignment surgery to be an exemption in amendments to their respective criminal codes that made it illegal to perform a female genital mutilation operation on a girl or woman.\footnote{NSW Crimes Act 1900, Section 45. Victorian Crimes Act 1958, Section 32-34. Queensland Criminal Code 1899, Section 323A. South Australian Criminal Law Consolidated Act 1935, Section 33, 33A, 30B. Western Australian Criminal Code Act Compliance 1933, Section 306. Tasmanian Criminal Code Act 1924, Section 178. ACT Crimes Act 1900, Sections 73-77. Northern Territory of Australia Criminal Code, Sections 186A-D.} Without this exemption, female-to-male sex reassignment surgery would be illegal.
A person’s *liberty* to be transgender in any form does not impose legal obligations on others. In contrast, legally defined *rights* do impose legal obligations on others.

Gender identity laws create new legal rights for a person who identifies as transgender with accompanying legal obligations on others, leading to wide cultural conflicts, as described above. Consequently, when people attempt to claim their inherent sex-based rights over transgender rights, they are risking discrimination charges and penalties under these gender identity laws.

Recognising that sex-based rights are being erased by gender identity laws, the US Department of Health and Human Services and the US Justice Department are looking to establish a legal definition of sex. According to a 2018 Health and Human Services memo, the object is to have a uniform definition of gender as determined “on a biological basis that is clear, grounded in science, objective and administrable.” The Definition is to be along the lines of “sex” meaning “a person’s status as male or female based on immutable biological traits identifiable by or before birth,” where “[t]he sex listed on a person’s birth certificate, as originally issued, shall constitute definitive proof of a person’s sex unless rebutted by reliable genetic evidence.”

It is understood that a final decision by these departments is pending after consideration by the US Supreme Court of the definition of “sex” in an appeal to the Court of the decision in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (6th Circuit Court, Michigan 2016). The original case was awarded in favour of transsexual Aimee Stephens (formerly known as Anthony Stephens) who claimed discrimination on the basis of “sex” when dismissed from employment at Harris Funeral Homes. The Supreme Court is expected to hear the case in 2019.

A recent amicus brief to the Supreme Court regarding this case sets out detailed reasons why biological sex should be the basis of law, not gender identity. The amici curiae consisted of 50 scholars of philosophy, theology, law, politics, history, literature and the sciences. They warn that gender identity laws are erasing the inherent sex-based rights of the vast majority of people.

In part, the scholars argued that:

> When courts hold that “sex” in antidiscrimination legislation includes or means “gender identity,” they also implicitly accept this latter category as real, which, in the present context, means that they agree that the relationship between the sexually dimorphic body and identity are in principle related accidentally, even arbitrarily. This means that the relationship is established according to one’s feelings or choice, rather than organically or naturally.

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Consequently, they said, what is at stake...

concerns truths about the very nature of things that precede human construction and transcend contingent historical circumstances.

What purports to be a decision about rights is, more fundamentally, a metaphysical decision about the very nature of things. After all, [Aimee, formerly Anthony] Stephens’s claim is not that he has the right to dress as he pleases, but rather that he in fact is a woman and, on that basis, has a right to be treated as such. [This] implies acceptance of the idea that “fathers” might give birth or breastfeed, or, for that matter, that mothers might impregnate fathers.

The effect of the law enforcing transgender rights over sex-base rights is...

an archetypal redefinition of man and woman, indeed the abolition of man and woman as we have heretofore known them...

Such questions should in fact be fought out in the academy and in the development of culture and society...

[Otherwise], by confirming the gender construct, the law would foist a “trans-world” on everyone, forcing them to deny their most basic apprehension of reality and the speech that signifies it, the very conditions for a shared life...

Harmful practical consequences follow as a matter of logical necessity. Imposing new “natural norms” and a correlative set of rights would accelerate social division by triggering a tidal wave of litigation – in schools, workplaces, even in churches and families – wherever someone does not adhere to the new thought and speech norms.

The scholars conclude that laws should recognise natural, biological, immutable sex and that sex should not be interpreted as meaning a self-chosen gender identity based on changeable feelings.

Would laws defining “sex” as immutably fixed according to a person’s biology have the effect of erasing the “transgender experience? Would such laws define transgender “out of existence” and negate the humanity of transgender people, as argued in the New York Times?

The answer is “no”. There are no laws inhibiting the “liberty” of transgenders to self-identify as they choose according to their feelings.

Whereas laws defining sex as immutably biological respect the sex-based rights of the vast majority of people, gender identity laws erase the sex-based rights of the vast majority.

Finally, this points to one last serious matter of concern arising from gender identity laws. As stated in the scholars’ amicus brief, gender identity “foists a ‘trans-world’” on everyone, denying our shared reality of biological sex, i.e. denying that we have a shared human nature.

Indeed, queer/transgender theorists assert that their theory is based on the claim by French philosopher, Michel Foucault, that there is no common human nature.

They cite Foucault saying that there is

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nothing in man – not even his body – [that] is sufficiently stable to serve as the basis for self-recognition or for understanding other men.  

In which case, if there is no shared common human nature, no shared biological reality of male and female sex, then there are no universal human rights.

Therefore, it’s not the recognition of biological “sex” in law that would “erase” transgenders and their humanity. Rather, it is recognition of the transgender world view through gender identity laws that erases our shared humanity as dimorphic beings and, in the process, erases the inherent sex-based rights of the vast majority of human beings who regard their own biological sex, and that of all people, as part of the essence of their shared humanity.

Recommendation 20:
Amend the Sex Discrimination Act by inserting definitions of “sex”, “man” and “woman” into that Act. (See Recommendation 13 above).

Recommendation 21:
That a parliamentary inquiry be set up into the legal recognition of “gender identity” in the Sex Discrimination Act in 2013 and in state and territory anti-discrimination acts and BDMRAs and the impact of these gender identity laws on inherent sex-based rights. (see Recommendation 1)

Recommendation 22:
That the draft Religious Discrimination Bill 2019 not be proceeded with until the findings of that inquiry are published and responded to. (see Recommendations 2)

16. Conclusion
The Bill is a religious discrimination Bill.

Freedom of Religion as recognized and protected in the UDHR and the ICCPR includes “conscience”. Conscience may or not be based on any specific religious set of beliefs. But it is in the area of conscience and beliefs about human sexual identity that most of the present discrimination conflicts are arising.

There needs to be recognition and protection of belief in the biological view of sex as binary male and female and binary in law. This lies most appropriately within the SDA. The biological world view should be recognized and protected from discrimination in the SDA just as the fluid gender identity world view is. This can be achieved by defining sex and man and woman in the SDA.

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17. Recommendations

RECOMMENDATION 1: That just as the US Justice Department is investigating the conflicts created by gender identity laws, a parliamentary inquiry be established to review the legal recognition of “gender identity” in the Sex Discrimination Act in 2013 and in state and territory anti-discrimination laws and Births Deaths and Marriages Registration Acts and the impact of these gender identity laws on inherent sex-based rights.

RECOMMENDATION 2: That, because of the impact of the legal recognition of gender identity on religious freedom, the draft Religious Discrimination Bill 2019 not proceeded until the findings of that inquiry are published.

RECOMMENDATION 3: Omit sub-clauses (c) and (d) of the definition of “religious belief or activity” in Clause 5.

RECOMMENDATION 4: Define the words “harass” to mean repeated statements of belief and “vilify” to require a statement of beliefs to have a serious impact for it to amount to vilification.

RECOMMENDATION 5: Delete the words “or is likely to” from Clause 41 (2) (b).

RECOMMENDATION 6: Reconsider Clause 8 (3) –
Should “unjustifiable financial hardship” allow employers to restrict an employee’s right to freedom of speech outside of work time?
Should the “unjustifiable financial hardship: condition be restricted to large employers with revenue of $50 million?
How “unjustifiable financial hardship” is to be defined?

RECOMMENDATION 7: The Bill should include a clause that prohibits harassment because of a person’s religious belief, similar to the harassment provisions in Section 28A in the Sex Discrimination Act 1984.

RECOMMENDATION 8: Clause 10 (1) be amended by adding the words “or that is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.”

RECOMMENDATION 9: That the Draft Religious Discrimination Bill (and related Bills) not be finalised or introduced into parliament until the ALRC recommendations on the religious exemptions in Sections 37 and 38 of the SDA are published and thoroughly considered.

RECOMMENDATION 10: As the Religious Discrimination Bill puts far too much power into the hands of courts, in Clause 10 (1) substitute the words “is regarded by a person who is an adherent of the religion and is qualified to give expert opinion as being” for the words “may reasonably be regarded” where occurring.

RECOMMENDATION 11: That the exemptions in Sections 37 and 38 of the Sex Discrimination Act should be retained in order to protect the right of religious schools and educational institutions to religious freedom in preserving the beliefs and ethos of the school/institution.
RECOMMENDATION 12: The Bill should provide that it is not illegal for a person to refuse to either refer for a medical procedure or participate in a medical procedure to which they have a conscientious objection.

RECOMMENDATION 13: Add a new Clause to the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 to provide that the federal Sex Discrimination Act be amended by inserting a definition of “sex” as meaning “male or female according to reproductive function” and re-inserting the definitions of “man” as meaning “a member of the male sex regardless of age” and “woman” as meaning “a member of the female sex regardless of age.”

RECOMMENDATION 14: Add the following as Clause 11 (1) (c) (iii) — “is intended to avoid going against the person’s religious beliefs or conscience.”

RECOMMENDATION 15: Delete the words in brackets in Clause 10 (2) (b) and (c) so that faith-based aged care facilities and hospitals come within the definition of “religious body” and therefore are protected by Clause 10.

RECOMMENDATION 16: Add to Clause 10 another sub-clause to provide that the religious protection extended to religious bodies only covers their commercial activities to the extent necessary to prevent their facilities being used for purposes inconsistent with the doctrines, tenets, beliefs or teaching of the religion of the facility or hospital.

RECOMMENDATION 17: That the Human Rights Legislation Amendment (Freedom of Religion) Bill amend the Charities Act to allow religious charities to operate in accordance with the tenets, doctrines, beliefs or teachings of the religion of the charity without losing their charitable status.

RECOMMENDATION 18: Specifically include in the definition of “religious body” churches, synagogues, mosques, temples to make clear they are protected by the provisions of the Bill.

RECOMMENDATION 19: Add to Clause 18 (3): “It is unlawful for an educational institution to discriminate against the parent(s) of a student or a student by refusing to allow parent(s) to opt their child, or a student to opt himself or herself, out of classes that teach or model forms of marriage, family formation or of sexual identity or relationships that conflict with their religious beliefs.”

RECOMMENDATION 20: Amend the Sex Discrimination Act by inserting definitions of ‘sex”, “man” and “woman” into that Act. (See Recommendation 13 above).

RECOMMENDATION 21: That a parliamentary inquiry be set up into the legal recognition of “gender identity” in the Sex Discrimination Act in 2013 and in state and territory anti-discrimination acts and BDMRAs and the impact of these gender identity laws on inherent sex-based rights. (see Recommendation 1).

RECOMMENDATION 22: That the draft Religious Discrimination Bill 2019 not be proceeded with until the findings of that inquiry are published and responded to. (see Recommendations 1 and 2 above).
Appendix 1

Conflicts between sex-based rights and gender identity/transgender rights.

These legal and cultural conflicts result from the *Sex Discrimination Act* (and other anti-discrimination laws), BDRMAs and the *Marriage Act* giving legal status and protections to a person’s gender identity.

<table>
<thead>
<tr>
<th>Access to services and spaces, employment and identity documents.</th>
<th>Inherent sex-based rights.</th>
<th>Legally created gender identity based rights, or transgender rights.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sex identifier on:</td>
<td>Male, Female.</td>
</tr>
<tr>
<td>2</td>
<td>• birth certificates; or</td>
<td>• Male, Female, X (Indeterminate, Unspecified, Intersex); or</td>
</tr>
<tr>
<td></td>
<td>• official documents according to comply with anti-discrimination. BDMRA and marriage laws.</td>
<td>• Male, Female, Other; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Record no sex/gender.</td>
</tr>
</tbody>
</table>

When laws give legal recognition to a person by their gender identity, as in 1 and 2, then the following irresolvable conflicts are created.

<table>
<thead>
<tr>
<th>Access to toilets, showers, change rooms.</th>
<th>Separate female and male facilities.</th>
<th>Gender neutral (unisex) facilities.</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td></td>
<td>• Trans male-to-females have the right to access women’s facilities.</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>• Trans female-to-males have the right to access men’s facilities.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Access to sex-specific schools.</th>
<th>Boys attend boys’ schools.</th>
<th>Biological boys who identify as girls can attend girls’ schools.</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Girls attend girls’ schools.</td>
<td>Biological girls who identify as boys can attend boys’ schools.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>School sex education in schools.</th>
<th>Sex is taught as binary male and female according to reproductive function.</th>
<th>Gender identity replaces sex and is regarded as fluid and changeable.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>School dormitories and camps.</th>
<th>Boys accommodated in boy’s dormitories.</th>
<th>Biological boys who identify as girls accommodated in girls’ dormitories.</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Girls accommodated in girls’ dormitories.</td>
<td>Biological girls who identify as boys accommodated in boys’ dormitories.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Marriage application forms.</th>
<th>Bride, Groom.</th>
<th>Bride, Groom, Partner, Sex identifier: Male, Female, X (Indeterminate, Unspecified, Intersex), as per post-2017 federal Notice of Intended Marriage forms.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Services to weddings.</th>
<th>Marriage celebrants and wedding service providers (reception places, food suppliers, photographers, etc.) provide services to heterosexual marriages only, according to their conscience, thought, belief or religion.</th>
<th>Civil marriage celebrants and wedding service providers are required, on threat of discrimination charges, to service transgender (gender-fluid) weddings.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Page</td>
<td>Section</td>
<td>Text</td>
</tr>
<tr>
<td>------</td>
<td>---------</td>
<td>------</td>
</tr>
<tr>
<td>9</td>
<td>Psychological counselling.</td>
<td>Counsel a person with body dissociation disorders – anorexia, body identity disorder, body dysmorphic disorder and gender dysphoria – to push back against the psychological disorder, i.e. to love the body they are in. So called “anti-conversion therapy” laws are required to support a person socially, medically and surgically transitioning and to prosecute those counselling a person to “love the body they are in”.</td>
</tr>
<tr>
<td>10</td>
<td>Language.</td>
<td>Pronouns (e.g. him, her) and names (Christopher, Christine) according a person’s sex. Gender neutral pronouns (e.g. he/she becomes “zie” and his/her becomes “hir”) and names are changed according to a person’s new gender identity (e.g. Noel Compton Hall transitions to Maddison Hall). Sanctions to be imposed on those who do not address a person with pronouns and names according to their self-defined gender identity.</td>
</tr>
<tr>
<td>11</td>
<td>Access to sex-specific sports, women-only clubs and organisations.</td>
<td>Women have women’s sports, clubs, organisations. Men have men’s sports, clubs, associations. Biological men who identity as women can play in women’s sports and join women’s clubs and organisations. Biological women who identity as men can play in women’s sports and join men’s clubs and organisations.</td>
</tr>
<tr>
<td>12</td>
<td>Provisions of health services such as female pap smear test.</td>
<td>Women have right to request female doctors/nurses carry out intimate tests and examinations. Doctors/nurses who are biological men who identify as women have the right to conduct intimate tests and examinations on biological women.</td>
</tr>
<tr>
<td>13</td>
<td>Medical treatments, referrals, provision of pharmaceuticals.</td>
<td>The whole new field of medicine called “sex-based biology” requires that men and women are diagnosed and treated according to many sex-specific symptoms, predispositions, conditions and diseases. Doctors and hospitals not required to perform or refer for sex reassignment surgery and hormone treatment. Do transsexuals and transgenders want to be treated according to their immutable biological sex or according to their self-defined gender identity? Is there a different form of treatment expected for a pangender who is pregnant from a biological woman who is pregnant? On threat of discrimination charges, doctors and hospitals are required to perform or refer for sex reassignment surgery and hormone treatment.</td>
</tr>
<tr>
<td>14</td>
<td>Medical research.</td>
<td>The US National Academy of Medicine’s Committee on Understanding the Biology of Sex and Gender Differences emphasises the importance of medical research and trials being carried out separately on men and women, because biological men and women have many different sex-specific symptoms, predispositions, conditions and diseases. Will medical research be frustrated when medial trials are carried out according to a person’s self-defined gender identity, not their biological sex? Will medical researchers face discrimination charges for requiring transgenders to be identified according to their biological sex in the course of medical research and trials?</td>
</tr>
<tr>
<td>15</td>
<td>Psychological counselling of, doctors’ referrals for, pharmacies’ provision of pharmaceuticals for, people (including children) to transition to the opposite of their birth sex.</td>
<td>Counselling and medical treatment of associated psychological disorders (depression, anxiety, dysfunctional family relationships, etc.) are prioritised over social and medical, and surgical transitioning. Demands are made via so called “anti-conversion therapy” laws to force psychological counselling and medical support for a person transitioning.</td>
</tr>
<tr>
<td>16</td>
<td>Female beauty salon services, like waxing.</td>
<td>• Biological women have the right to biologically female service providers.&lt;br&gt;• Biologically female service providers are not required to provide services to men who identify as women.</td>
</tr>
<tr>
<td>17</td>
<td>Access to female-only safe spaces; for example, female gyms, domestic violence shelters.</td>
<td>Biological women have their own safe spaces.</td>
</tr>
<tr>
<td>18</td>
<td>Police body searches, around which there are strict laws, regulations or codes.</td>
<td>Biological men are searched by biological male police.&lt;br&gt;Biological women are searched by female police.</td>
</tr>
<tr>
<td>19</td>
<td>Affirmative action, e.g. women’s scholarships, jobs, preselection for parliament.</td>
<td>Affirmative action programs provide scholarships for biological women, and quotas for biological women in employment, preselection for parliament.</td>
</tr>
<tr>
<td>20</td>
<td>Accommodation in prison.</td>
<td>• Biological women prisoners housed in women’s only prisons.&lt;br&gt;• Biological men housed in men’s only prisons.</td>
</tr>
<tr>
<td>21</td>
<td>Access to lesbian-only organisations, spaces, events.</td>
<td>Biological women who are same-sex attracted have their own lesbian-only organisations, spaces, events.</td>
</tr>
<tr>
<td>22</td>
<td>Employment.</td>
<td>Under various anti-discrimination and equal opportunity laws, employers can face charges of discrimination against transgenders, on the basis of their fluid gender identity, and employees and professionals can face workplace discipline, or loss of professional accreditation. These could apply in the areas above: 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.</td>
</tr>
</tbody>
</table>
Appendix 2

See attached document.
Transgender students in schools – legal rights and responsibilities

The Department of Education and Communities is committed to providing safe and supportive learning environments that respect and value diversity and are free from violence, discrimination, harassment and vilification. Research shows the supportive environment schools provide can have a lasting impact on both the educational and lifelong outcomes for students.

Most people express the gender that corresponds with their biological sex. There are some people whose gender identity or expression is different from that traditionally associated with an assigned sex at birth. This is known as being transgender. This can occur at any age.

All students, including those who identify as transgender have a right to be treated equitably and with dignity. The Department has a number of resources that support these rights including the Student Welfare Policy and the Bullying: Preventing and Responding to Student Bullying in Schools Policy. These resources promote a proactive approach to the development of positive school environments in which every student is respected and valued. Additionally schools have a legal duty to protect students from foreseeable risk of harm and to do what is reasonably practicable to ensure their safety.

The following information is general in nature. It is important, to structure any support specifically to the individual needs of the student within a particular school. Not all students who identify as transgender will require a plan to support them but it is necessary to assess the likelihood of any risk to each transgender student and where required plan for their support.

What legal rights or protections exist for a student who has identified as transgender?

A student who has identified as transgender enjoys the same legal rights or protections afforded to all students under the duty of care, education and work health and safety laws. Additional protections apply to such students under discrimination law. For example in NSW the Department of Education and Communities is prohibited from unlawfully discriminating against a student on transgender grounds:

(a) by refusing or failing to accept the person’s application for admission as a student, or
(b) in the terms on which it is prepared to admit the person as a student.

The Department is also prohibited from unlawfully discriminating against a student on transgender grounds:

(a) by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority, or
(b) by expelling the student or subjecting the student to any other detriment.

It does not follow that an application for enrolment from a transgender student can never be declined or that a transgender student can never be expelled. Rather, the law requires the student is not subjected to unlawful discrimination when such decisions are made. Further information about discrimination on transgender or gender identity grounds is found at Attachment A.
What rights or protections does the student have under privacy legislation?

Most, if not all, of the information collected about a transgender student will be personal or health information. This information is protected by privacy legislation.

While privacy legislation will not necessarily prevent school or other departmental staff from using or disclosing information for a lawful purpose (for example in the discharge of the duty of care or for child protection purposes), it is important wherever practicable to discuss how it is intended information will be used or disclosed with the student. This issue should also be discussed with the student’s parent(s) or carer unless the principal believes on reasonable grounds that it is not in the student’s best interests to do this (for example a court order has removed a parent’s parental responsibility for that student).

School and other departmental staff should seek legal advice in circumstances where parents or carers and/or the student object to the proposed use or disclosure of a student’s personal and/or health information.

What name and gender should be used and recorded for the student at school?

Generally students are enrolled at school under the name and gender on their birth certificate. There are exceptions to this position, however, including where a student is transgender and seeks to change the way their first name is used and recorded by the school. Principals may wish to review Legal Issues Bulletin 20 for advice about the process to follow when this issue arises.

Students should then be referred to by the name they are enrolled under. The pronoun used to describe the student (he/she, him/her) should be consistent with the gender now recorded by the school. The Department’s Code of Conduct and the individual school’s discipline and welfare policy should be utilised where staff or students deliberately or repeatedly use names or pronouns other than the one identified by the student concerned.

What uniform should the student wear at school?

The Department’s School Uniform Policy encourages schools to consider individual student circumstances when considering the school’s uniform. Many schools have developed unisex uniforms that are not gender specific. Students who identify as transgender should be allowed to choose from the uniform options available at the school.

All students are required to wear items identified as necessary for particular activities, e.g. closed in shoes for practical food technology classes. A school uniform should meet requirements of work health and safety and anti-discrimination legislation.

What should schools consider when planning to support a student who has identified as transgender?

Support needs will vary from student to student. It is important to consult with the student and their parents or carers where practicable when planning for the student’s support unless the principal believes on reasonable grounds that it is not in the student’s best interests to do this (for example a court order has removed a parent’s parental responsibility for that student).

Where reasonably practicable, the student should be treated on the same basis as other students of the same identified gender.

Consideration should be given to each activity the student is involved in at school. It is important to consider and as necessary plan ahead for any key transition points in the student’s schooling.

Risks arising from these activities should be identified and assessed and strategies to eliminate or minimise the identified risks should be implemented so far as is reasonably practicable. Staff must be consulted where they are also potentially at risk. Activities to be considered may include:

- Use of toilet and change room facilities;
- Excursions including overnight excursions;
- School sport;
- Curriculum;
- Health care planning; and
- Gender transitioning while at school.

A sample plan for a high school student who has identified as transgender is found at Attachment B. This is a sample only – the strategies it contains will not apply in all circumstances. The actual strategies required to support a student will vary according to their individual circumstances and the school they attend.
Use of toilets and change room facilities
Toilets, showers and change rooms are specific to each school. An assessment of the risk posed to the student by using the toilets of their identified gender must be undertaken. If an identified risk to the student cannot be satisfactorily eliminated or minimised then other arrangements should be made. The need for the student to be safe is a paramount concern in these circumstances.

Students should not be required to use the toilets and change rooms used by persons of the sex they were assigned at birth if they identify as a different gender. Alternative arrangements may include using staff toilets or unisex toilets where possible. The exclusion of students who identify as transgender from the toilet or change rooms of their identified gender must be regularly reviewed to determine its continuing necessity.

If other students indicate discomfort with sharing single-sex facilities (toilets or change rooms for example) with a student who identifies as transgender, this should be addressed through the school learning and support team.

Excursion including overnight excursions
An assessment of risk is normal procedure for all excursions. Ordinarily a student who identifies as transgender should use the facilities of their identified gender or unisex facilities when available. In some circumstances it may be appropriate to arrange private sleeping quarters.

School Sport
A student who identifies as transgender should be permitted to participate in most school based sports as their identified gender. Where the sport is competitive and the student is under 12 they should compete as their identified gender. Most students will be able to continue to participate in competitive sport in their identified gender after they have turned 12.

It may be lawful to exclude students aged 12 and over from competing in certain sports at the elite level in certain circumstances. Confidential case-by-case evaluation should occur. More information is available at: http://www.ausport.gov.au/supporting/integrity_in_sport/resources/national_member_protection_policy_template

Curriculum
All teachers should be respectful and inclusive of all students’ individual learning identity. Gender identity may be discussed in many curriculum areas including Personal Development, Health and Physical Education (PDHPE) classes following syllabus guidelines. Teachers should treat the topic in a manner that is respectful, inclusive and positive. Information for PDHPE teachers can be found at the Department’s Curriculum Support Site.

Health care planning
Students undergoing a gender transitioning process will do so over time and in consultation with health care professionals. The process may or may not include medical treatment. The Student Health in NSW Public Schools policy should be applied by schools in relation to medication or any other health care needs the student may have.

Gender transitioning while at school
When a student advises of their intention to gender transition, schools need to provide a safe and supportive environment. It is often useful to set a date of gender transition for the student (in consultation with the student and their parent/carer) at the point of return from holidays. This allows an immediate visible change even though the personal process of change will occur over a longer period of time.

The school counsellor is likely to have an important role to play in supporting the student and their family. This could include liaising with the school and health professionals, especially in cases where the student may be experiencing difficulties in their personal relationships with family and friends. Staff may need additional professional development to enable them to successfully support the student.

The welfare and educational needs of the student are of primary importance and should be the focus of all actions taken by the school.

What communication strategies may need to be implemented to support the student?
Communication strategies should potentially be developed and implemented for:

- the school and the student and his or her parents or carers;
- the student and his or her friendship group;
- other students and school staff;
- the broader school community; and (potentially) the media.
The student and his or her parents or carers
Ongoing, open and transparent communication between the school, and the student and their parents or carers is an essential part of providing the student with a safe and successful education unless the principal believes on reasonable grounds that it is not in the student's best interest to involve the parents or carers (for example a court order has removed a parent’s parental responsibility for that student). A point of contact should be established within the school and the parents/carers and student encouraged to provide the school with relevant information. Parents and the student should be encouraged to promptly advise the school of any new of changed information, issues or incidents that occur at the school.

It is also important to encourage parents and the student to advise the school of any relevant incidents that occur outside of school. For example it is important for the school to be advised if there has been an incident involving the student and other students on the weekend or a public holiday in order to review any plans for supporting the student at school.

The student and his or her friendship group
A student who identifies as transgender may need to discuss issues with the school counsellor (or staff member nominated by that student) such as informing friendship groups and other peers if they choose to do so. Depending on the circumstances it may also be necessary to provide support to students in the friendship group.

Other students
Students may be curious, or confused if one of their peers discloses that they identify as transgender. They should be reassured that the student deserves the same respect and courtesy that they would extend to any other person.

Other students may have questions about the student who has identified as transgender, particularly when the student has transitioned while they are at the same school. Staff should be provided with a suggested response to these questions. This response should promote acceptance but will vary according to the student’s individual circumstances. The school counsellor and/or District Guidance Officer can assist in developing this response. The Legal Services Directorate may be of assistance if legal issues arise.

Consideration should be given to how gender diversity is currently dealt with in the school and whether further action is necessary to reinforce the need for tolerance and respect for diversity.

Staff
It is important to identify the staff who need to have more detailed knowledge about the student in order to provide them a safe and supportive learning environment. This is likely to include the principal, school counsellor and year advisor (where the student is in high school). Depending on the circumstances it may also include classroom teachers and other staff that need the information in order to safely provide the student with learning and support.

It is important to remind staff that a student who identifies as transgender has the same rights to learning in a safe and supportive environment as all other students and that additional support for the student may be necessary. It is also important to remind staff of their professional obligations in their dealings with all students and particularly with students who may be more vulnerable.

Staff may need additional professional development to support the student. Consideration should be given to what professional development staff may need while planning for the student’s enrolment and/or transition. Assistance can be obtained from the Student Engagement and Interagency Partnership Directorate in identifying possible sources of professional development.

The broader school community
On occasions it is helpful if school staff are provided with a school-developed response to enquiries from the broader school community. The school should consult with the student who identifies as transgender and their parents to develop this response.

Media
The school should respond to any external enquiries about students who identify as transgender with respect for the student’s privacy, as with enquiries about all students. Any media enquiries should be referred to the Media Unit on (02) 9561 8501.

What support should be offered to any siblings, or the extended family of the student who has identified as transgendered?
Siblings and the student’s extended family may find the student’s transition challenging and be adversely affected by the impact of the student’s transition on their family. Siblings and other family members can also experience bullying behaviour from peers and others as a consequence of the student’s transition. Strategies to address this should be implemented across the schools in which the student who has identified as transgender or their affected family members are known to have enrolled.
When a sibling, or a member of the student’s extended family, attends a non-government school it may be helpful to work with that school to coordinate support for the student and their family. Consent should ordinarily be sought from the student’s parents or carers or to allow this information exchange and coordination to occur.

Where this consent is not able to be obtained and information related to the safety, welfare or wellbeing of the student or his/her siblings or extended family is needed to help with decision making, planning, assessment or service provision then the Children and Young Persons (Care and Protection) Act 1998 can be used to seek and/or provide information and also to coordinate services. The school counsellor may be able to assist in this regard. See Legal Issues Bulletin 50 for more information about this process.

**What reporting requirements may apply to this situation?**

On rare occasions a parent’s or carer’s response to a student identifying as being transgender could give rise to a reasonable suspicion that the student is at suspected risk of harm. This could relate to the parent’s stated response to their child identifying as transgender but other risk factors may be present. School staff should inform their principal of any concerns about a student who may be at suspected risk of harm.

Principals need to consider whether a report to Community Services or contact with the Department’s Child Wellbeing Unit or some other action is required. The Mandatory Reporter Guide can help with this decision. If in doubt or if assistance is required contact can be made with the Department’s Child Wellbeing Unit. The Department’s Protecting and Supporting Children and Young People Policy and Procedures also provides guidance about responding to child protection issues.

**What if I am the principal of a single sex school?**

If the student is seeking enrolment at a single sex school, a decision about their eligibility to enrol should be made on the basis of his or her identified gender. If the student is already attending school advice should be sought from the Legal Services Directorate.

**What record keeping requirements apply to this situation?**

It is critically important to maintain appropriate official records when supporting a student who has identified as being transgender. These include records of:

- information provided by health care professionals or other professionals involved in providing support to the student;
- meetings of the school learning and support team, copies of programs and where applicable units of work from year advisors or other staff used to raise awareness amongst students;
- staff training and orientation (including briefing of casual staff);
- consultation with parents or carers, students, staff and others as appropriate during the development of learning and support plans for the student; and
- the development and implementation of plans to provide the student with learning and support (including any health care planning) and their later review. It is also important to keep a record of who has been provided with the current version of the plan.

Schools must observe any requirements imposed by privacy legislation with most records other than risk assessment and management strategies being kept secure and accessible only to those staff that need to see them. Staff should contact the Records Management Centre of Expertise (CoE) (Intranet only) if they have specific records-related queries.

**What assistance is available to schools within the Department to support them through this process?**

The Principal Education Officer, Learning and Engagement Coordinator can be contacted to provide advice. Legal Services can also be contacted for legal advice.

**What resources are available to support schools through this process?**

- A Department Student Engagement and Interagency Partnerships guide, Bias based bullying
Attachment A

How is the issue of discrimination on the basis of gender identity dealt with in Commonwealth and State legislation?

Commonwealth Sex Discrimination Act 1984

The Commonwealth Sex Discrimination Act 1984 (the Commonwealth Act) defines gender identity as meaning the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person’s designated sex at birth. It provides that a person is unlawfully discriminated against on the ground of their gender identity if by reason of:

(a) their gender identity; or

(b) a characteristic that appertains generally to persons who have the same gender identity; or

(c) a characteristic that is generally imputed to persons who have the same gender identity;

the transgender person is treated less favourably than, in circumstances that are the same or are not materially different, a person who has a different gender identity would be treated.

A person may also be unlawfully discriminated against if a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person is imposed (or proposed to be imposed) on that person unless the condition, requirement or practice is reasonable in the circumstances. The matters that are taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

NSW Anti-Discrimination Act 1977

The NSW Anti-Discrimination Act (the NSW Act) defines a transgender person as including persons who identify as a member of the opposite sex by living or seeking to live as a member of the opposite sex or who being of indeterminate sex identify as a member of a particular sex by living as a member of that sex.

The NSW Act provides that a person is unlawfully discriminated against on transgender grounds if, on the grounds that they are transgender:

- they are treated less favourably than in the same circumstances (or circumstances which are not materially different) than a person who is not transgender;

- they are required to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons comply or are able to comply being a condition that is not reasonable having regard to the circumstances of the case and with which the transgender person does not or is not able to comply.
## Attachment B – Sample Support and Risk Management Plan

<table>
<thead>
<tr>
<th>Activity/Issue</th>
<th>Hazard Identification &amp; Associated Risk</th>
<th>Assessment Risk Use Matrix</th>
<th>Elimination or Control Measures</th>
<th>Who</th>
<th>When</th>
</tr>
</thead>
<tbody>
<tr>
<td>Record Keeping</td>
<td>Potential for identification of sex at birth</td>
<td>High</td>
<td>Amend all school information (including ERN and other electronic record systems maintained by the school) to reflect student’s preferred name and identified gender once approved.</td>
<td>P</td>
<td>Now</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Any card identifying the student (e.g. the school library card) should be reissued.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Bus and train passes adjusted to reflect preferred name and identified gender.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Need for current information</td>
<td>School unaware of changes in the student’s situation that place him or her at risk</td>
<td>High</td>
<td>One point of family contact to be established within school (Mr/Ms X). If Mr/Ms X is unavailable and matter is urgent contact to be made with the Principal.</td>
<td>HT(W)</td>
<td>Now</td>
</tr>
<tr>
<td></td>
<td>School unaware of issues that may affect the wellbeing of sibling currently in Year X</td>
<td></td>
<td>Parents to keep school informed of any relevant developments and/or issues.</td>
<td>YA</td>
<td>Ongoing</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Parents to contact school with concerns they may have regarding student or sibling.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>School to have access to relevant medical information including contact with health care professionals to support for student.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Regular scheduled meetings to review plan and student issues with parent and student.</td>
<td></td>
<td>Monthly or as needed</td>
</tr>
<tr>
<td>Curriculum</td>
<td>Potential for student intolerance through a lack of understanding</td>
<td>Medium</td>
<td>Review PDHPE curriculum Stage 4/5 to ensure that issues related to difference; gender; prejudice and discrimination are highlighted and addressed.</td>
<td>DP(C)</td>
<td>Now and ongoing</td>
</tr>
</tbody>
</table>

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1 This is a sample plan for a high school student. It should be modified to suit the needs of the individual student at the particular school.
<table>
<thead>
<tr>
<th>Activity/Issue</th>
<th>Hazard Identified &amp; Associated Risk Type/Cause</th>
<th>Assess Risk</th>
<th>Elimination or Control Measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Playground</td>
<td>Bullying of student and/or friendship group</td>
<td>High</td>
<td><strong>Staff to monitor playground.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Student given a safe place to go.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Assistant provide strategies to deal with comments from other students.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Sibling given a safe place to go.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Counselor can help them.</strong></td>
</tr>
<tr>
<td>Use of toilet and change rooms</td>
<td>Potential for identification of biological sex</td>
<td>High</td>
<td><strong>Student to use male change room facilities.</strong></td>
</tr>
<tr>
<td></td>
<td>Potential for other students to be embarrassed or angered</td>
<td>High</td>
<td><strong>Doors provided to change room cubicles of their identified gender.</strong></td>
</tr>
<tr>
<td>Puberty</td>
<td>Potential for identification of biological sex</td>
<td>High</td>
<td><strong>Student must change in cubicle.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Staff to monitor length of time in change room.</strong></td>
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<td></td>
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<td></td>
<td><strong>Staff and student to report any incidents in the change room to HT(W) as above.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Zero tolerance to “skylarking” in change rooms. Teachers to report to DP in the first instance.</strong></td>
</tr>
<tr>
<td>Sport</td>
<td>Potential for identification of biological sex</td>
<td>High</td>
<td><strong>Discussion with student and family as appropriate about strategies to ensure confidentiality and safety when participating in sports such as swimming.</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Subsequent plan and strategies to be communicated to relevant school personnel.</strong></td>
</tr>
<tr>
<td>Overnight Excursions</td>
<td>Potential for identification of biological sex</td>
<td>High</td>
<td><strong>Student to be given the opportunity to participate in overnight excursions for supporting and maintaining confidentiality, including strategic discussions with his family prior to the excursion and consideration to any health care needs.</strong></td>
</tr>
</tbody>
</table>

**Assessment of Risk**

- **Low**
- **Medium**
- **High**

**Control Measures**

- **Elimination or Control Measures**
- **Who**
- **When**
- **Risk Use Matrix**

- **P**: Principal
- **S**: Staff
- **C**: Counselor
- **P**: Parent
<table>
<thead>
<tr>
<th>Group</th>
<th>Description</th>
<th>Level</th>
<th>Control Objectives</th>
<th>Responsible Person(s)</th>
<th>Target Date</th>
</tr>
</thead>
</table>
| Peer group  | Alienation from peer group where the group becomes aware of biological sex; dealing with sense of betrayal from those who did not know the student’s birth gender. | High  | Student to be involved with peers of his identified sex in any activities that may be segregated by sex such as sport and health education. Staff to be reminded of the school anti-bullying and anti-discrimination policies.  
Assist student in developing communication strategy with friendship group.  
New or revised risk management plan to be devised in response to situational changes or developments.  
Group discussions of differences and tolerance; prejudice and discrimination if awareness of birth gender becomes an issue.  
Involve of school counsellors in developing a process should the need arise. | DP(C)  
P  
P & Counsellor  
YA | Now & review T1 2009  
As needed  
As needed  
As needed  
As needed |
| Staff       | Inappropriate talk amongst students and/or staff  
Inadvertent discrimination | Medium| All staff briefed and made aware of the privacy legislation and the confidentiality of the information disclosed to them. Staff should also be reminded of their obligations under the Code of Conduct.  
Staff briefed on group discussions and strategies in place should birth gender of student become common knowledge among students  
Script developed (in consultation with Educational Services staff, Student Engagement and Interagency Partnership, and Legal Services) for staff in responding to questions from other students.  
Statement of school values made available to all staff including casual staff. | P  
P  
P/ Counsellor | Now, & beg. each semester  
As needed  
As needed  
Now |
| Community   | Disclosure of student’s situation to students and community                  | High  | Developed media strategy in consultation with DEC Media Unit | P | Now |

Monitor and Review - Monitor the effectiveness of controls and change if necessary. Review the risk assessment if an incident or a significant change occurs.
About Legal Services Directorate

Legal Services Directorate provides legal support and advice to staff in schools, colleges, state office directorates, senior staff and specialist boards and authorities. It arranges for the Department and TAFE NSW to be represented before a range of courts and tribunals and assists with the preparation of legal documents. It is also available to provide legal advice in respect of any departmental policies or procedures that may have a legal complexion.

The Legal Services Directorate can provide legal advice to departmental staff only. It is not able to provide legal advice or assistance to parents, students or members of the public.

The Legal Services Directorate posts a large amount of information on the Department's intranet. This includes:

- all current Legal Issues Bulletins
- questions the Legal Services Directorate most frequently encounters
- announcements about what’s new
- guidelines about family law and the school
- information about the Government Information (Public Access) Act
- information concerning the operation of NSW Privacy legislation, including Privacy Bulletins
- information about copyright
- links to other related legal web-sites
- other information for the use of schools and TAFE

The Legal Services Directorate continues to offer its telephone advice service to DoE and TAFE NSW personnel.

The service is available between **9.00am to 5.00pm** weekdays.