

PROTECTING DEMOCRATIC FREEDOMS AGAINST AUTHORITARIAN GENDER IDENTITY LAWS

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ABSTRACT

The political debate over same sex marriage legislation, and the Australian government's subsequent religious freedom bills, have focused on conflicts between the competing legal right of a same sex couple's right to marry and the counter right not to participate in same sex weddings of those who hold that marriage should be only between a man and a woman. Compromises and balances can often be found between these competing rights. However, these debates have masked the irresolvable conflicts arising from three forms gender identity laws introduced by federal, state and territory governments over the past two decades. This matrix of laws create gender identity rights that 'replace' inherent sex based rights. Gender identity rights are 'replacement' rights as opposed same sex marriage 'competing' rights. There have been no studies of the broad range of deep, irresolvable conflicts between what are two mutually exclusive world views: the biological world view that says human sexual identity is immutably fixed as male and female by human biological nature, and the transgender world view that says sex and gender are fluid based on mutable feelings, which creates the possibility that every person on earth could have their own unique gender identity. This paper examines how irresolvable conflicts are created by gender identity laws, meaning that cultural and legal 'balances' cannot be found between created gender identity rights and inherent sex based rights. As balances cannot be found, imposing gender identity laws on society in place of sex based rights risk turning a liberal democracy into an authoritarian state. This paper proposes a solution: write the definition of sex based on reproductive function into law to recognise the sex based rights of the vast majority of people who hold the biological world view of human sexual identity. At the same time, this would preserve the liberty (freedom without political or legal interference) of any person to self-identify as transgender.

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I. INTRODUCTION

A sustained campaign by the Australian Human Rights Commission has resulted in a matrix of gender identity laws being introduced by federal, state and territory governments. Together these laws create new rights for people who identify as transgender, as other than their birth sex.

Gender identity legislation differs from sexual orientation laws, like same sex marriage law where ‘competing’ rights can often be balanced, as when ministers of religion are exempted from conducting same sex marriages. In contrast, gender identity laws create ‘replacement’ rights’ that cannot be balanced with sex based rights. For example, there is no way to balance the new, created right of men who identity as women to play in women’s sports with the right of women to play in women’s only sports.

In erasing sex based rights, gender identity laws impose obligations on people and organisations, religious and secular, that threaten the freedom of religion, belief, conscience, thought and association of people who hold and express the belief that humans are immutably male or female. Such people can face discrimination charges, loss of professional accreditation and employment. Organisations like charities can face loss of charitable status, while schools could face loss of accreditation.

This paper suggests an important way to protect freedoms and employment.

II. SEX, BIRTH CERTIFICATES AND THE BIOLOGICAL WORLD VIEW

Where is ‘sex’ defined in legislation? Sex is not defined in federal, state or territory statutes.¹ Rather it is taken as self-evident from biological science, where, as Mayer and McHugh (2016) say, sex is defined only by reproductive function. They say:

¹ Note that ‘sex’ is defined in the federal *International Criminal Court Act 2011* (sch pt 1, Crime Against Humanity 3) which defines ‘gender’ as ‘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. ‘Man’ and ‘woman’ were defined in the *Sex Discrimination Act 1984* s4, until amendments to the Act removed these definitions in 2013.

[T]he female gestates offspring and the male impregnates the female.

[This] 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.²

The extent of biological differentiation is profound. The Weizmann Institute of Science (2017), one of the world's leading multidisciplinary basic research institutions in the natural and exact sciences,³ 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.'⁴

The US National Academy of Medicine's Committee on Understanding the Biology of Sex and Gender Differences says that, as the importance of medical research and trials being carried out separately on men and women has become recognised, a whole new branch of science 'known as sex-based biology' has been created.⁵

A person's first legal document is their birth certificate, from which a cascade of rights unfold over that person's lifetime.

According to a person's age calculated from birth, various age based rights and privileges are recognised, such as access to state funded education, family payments, unemployment benefits and old age pensions. From a person's recorded parents, custodial and inheritance rights flow. From a person's country of birth derive citizenship rights, voting rights and qualification (or disqualification) for public office.

A birth certificate also records a person's sex, from which flow an array of sex based rights, privileges, protections and access to services. A non-exhaustive list includes a range of identity documents that in turn determine a person's access to schools, school dormitories and camps, sports, toilets, showers, change rooms, domestic violence shelters, scholarships and jobs under

² Lawrence S Mayer, Paul R McHugh, 'Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences', (2016) 50 *The New Atlantis* 90, <http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf>

³ Moran Gershoni, Shmuel Pietrokovski, 'The landscape of sex-differential transcriptome and its consequent selection in human adults' (2017) 15 (7) *BMC Biology* <10.1186/s12915-017-0352-z>

⁴ Weizmann Institute of Science, '6,500 genes expressed differently in men and women', News & Media, 7 May 2017, <<https://weizmann.org.au/2017/05/6500-genes-expressed-differently-in-men-and-women/>>

⁵ Katherine A Liu, Natalie A Dipietro Mager, 'Women's involvement in clinical trials: historical perspective and future implications' (2016 Jan-Mar) 14(1) *Pharm Pract* (Granada) 708 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4800017/>>

affirmative action programs, sex specific clubs, a criminal's placement in prison, gay and lesbian organisations. Sex identification is also important in medical insurance and treatments, some forms of counselling, for national security, government planning and provision of services and police body searches.⁶

The biological world view is that humans are immutably male or female. It is a 'belief' held by the vast majority of people. It can be held either as a religious belief, eg the Bible says we are created male or female, or a secular belief from biological science, or both.

III. THE TRANSGENDER WORLD VIEW

Juxtaposed to the biological world view is the transgender world view, a 'belief' that comes not from biology but from the social sciences. It says that based on how a person feels about their sexual identity, they can have a self-defined, socially constructed, gender identity, separate from, or replacing their birth sex.

The *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) say that a person's gender identity is their cultural and 'social software', based on feelings about their identity, as manifest by their 'outward social markers, including their name, outward appearance, mannerism and dress'.⁷

A person's gender identity can be:

- transsexual, that is, a person identifying as opposite to their biological sex;
- identifying at a point on a spectrum of between 100 per cent male and 100 per cent female – eg a person may identify as 81 per cent male and 19 per cent female;
- non binary, that is, identifying as neither male nor female, for example pangender, androgynous, bigender, gender questioning, gender queer, gender variant, other, two-spirit, etc;⁸ or

⁶ Note: for a discussion on these matters, see Theodore Bennett, 'No Man's Land: non-binary sex identification in Australian Law and Policy' (2014) 37(3) *UNSW Law Journal* 864 <http://www.unswlawjournal.unsw.edu.au/sites/default/files/g2_bennett.pdf>

⁷ Attorney General's Department, 'Australian Government Guidelines on the Recognition of Sex and Gender', (Cth) (July 2013, Updated November 2015) 9 (Attorney General's Department, 'Australian Government Guidelines on the Recognition of Sex and Gender')

<<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>>

⁸ Russell Goldman, 'Here's a List of 58 Gender Options for Facebook Users', *American ABC News*, 13 February 2014, <<http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/>>

- ‘genderless’, or ‘unspecified sex’, that is, escaping sex and gender categories.^{9,10}

Such a broad understanding of gender identity gives each person on earth the potential to have a unique gender identity.

Transgender ideology (a philosophical theory with a political agenda) is riddled with contradictions. Its claims that gender identity is wholly a social construct independent of biology when all gender identity and transgender terms are defined using binary sexual terms. The term ‘gender identity’ first requires an understanding of the word ‘gender’ a male and female. As ‘trans’ is a Latin term meaning to fundamentally change, and as ‘gender’ means male or female, a person cannot be transgender unless they are first male or female. How can there be a spectrum of male-to-female if first there are not biological male and female to define the spectrum? How can a person be non binary (not one of two) unless there are first binary male and female? How can a person be genderless unless they first have a gender?

All attempts in sociology and law to redefine human sexual identity with a socially constructed gender fail. All gender identity and transgender are based on, and cannot escape, the reality of immutable, biological, sex.

A further contradiction of transgender ideology is its claim that a person’s gender identity is wholly a social construct while also claiming intersex people are biological evidence that a person can be other than male or female.

Intersex is a disorder of sexual development, involving various forms of sexual anomalies. For example, although over 99% of people are XX female or XY male, a rare anomaly can occur where for some XY people the Y chromosome is dysfunctional and the person develops in utero as female. Such females are often described as being more female in physical characteristics than XX females.

⁹ Attorney General’s Department, ‘Australian Government Guidelines on the Recognition of Sex and Gender’, July 2013,

<<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>>

¹⁰ See a similar range of gender identities described by Friedemann Pfäfflin, ‘Medical/Psychological Views’, in Jens M Sharpe (ed) *The Legal Status of Transsexual and Transgender Persons* (Intersentia Ltd, 2015) 19.

Most intersex people identify with their sex as recorded at birth, while a small number identify as the opposite of their birth sex.¹¹ The Intersex Society of North America insists that intersex disorders are not evidence of a third human sex or gender.¹²

IV. CHANGING HUMAN SEXUAL IDENTITY

The Australian Human Rights Commission (AHRC) has led the campaign to legally recognise people by their gender identity in place of their sex. Under its sex and diversity project, the AHRC has published at least a dozen papers on the issue: *Sex and gender diversity Issues paper* (2008), *The sex and gender diversity project: final report* (2009), *Sex Files: the legal recognition of sex in documents and government records: Concluding paper of the sex and gender diversity project* (2009), *Gender Equality Blueprint* (2010), *Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report* (2011), *Protection from discrimination on the basis of sexual orientation and sex and/or gender identity in Australia: Consultation Report* (2011), *Marriage equality in a changing world* (2012), *Sexual Orientation, Gender Identity & Intersex Rights Snapshot Report: Background Paper* (2014), *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015), *A road map for inclusion* (2015), *Rights and Responsibilities: Consultation Report* (2015), *Guidelines for the inclusion of transgender and gender diverse people in sport* (2019). The AHRC's latest 2019 project is a review of the exemptions for faith based institutions. Removal of such exemptions would force the transgender world view on faith based institutions, particularly religious schools.

These have formed and guided a concerted campaign to legally redefine the human person by their self-defined gender identity in laws governing birth certificates, marriage law and anti-discrimination law.

Several states and territories have changed their births, deaths and marriages registration acts, which determine a person's sex identifier on their birth certificate. For example, the ACT now records on a birth certificate, the child, parents and siblings with a sex identifier that allows for

¹¹ Intersex Society of North America, *Clinical Guidelines for the Management of Disorders of Sex Development in Childhood*, 2006, <<http://www.dsdguidelines.org/files/clinical.pdf>>

¹² Intersex Society of North America, 'Does ISNA think children with intersex should be raised without a gender, or in a third gender?' (Web Page) <<http://www.isna.org/faq/third-gender>>

a person to be male, female, indeterminate, unspecified or intersex.¹³ Indeterminate covers any non-binary gender identity; unspecified means no sex or gender; and intersex refers to a disorder of sexual development.

When the federal *Marriage Act 1961* was amended in 2017, after the Australian same-sex marriage survey, Commonwealth Notice of Intended Marriage forms were changed to recognise couples as Bride, Groom or Partner. The sex identifier allows each person to register as Male, Female or X, where X covers indeterminate, intersex, or unspecified.¹⁴

Most importantly, various federal, state and territory anti-discrimination laws have been amended to make a person's gender identity a protected attribute in place of their biological sex.

The AHRC has also called for corporations and professional organisations to incorporate recognition of gender identity in their codes of conduct and professional accreditation requirements.

V. TRANSGENDERING THE *SEX DISCRIMINATION ACT 1984 (CTH)*

Significant amendments to make gender identity a protected attribute were made to the *Sex Discrimination Act 1984* ('SDA') in 2013. To underscore the change, amendments repealed the biological definition of 'man' as member of the male sex and 'woman' as member of the female sex.

The SDA 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.¹⁵

As this definition of gender identity allows for a person to be legally recognised as non binary, or to be at a point on a spectrum of 100% male and 100% female, or as opposite to their birth

¹³ Australian Capital Territory, 'Birth Registration Statement', Births, Deaths and Marriages Forms and Fees' (Web Page), <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2214/~~/births%2C-deaths-and-marriages-forms-and-fees>

¹⁴ Commonwealth Attorney General's Department, 'Notice of Intended Marriage', *Marriage Stationary and Forms* (Web Page) <<https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/New-notice-of-intended-marriage.pdf>>

¹⁵ *Sex Discrimination Act 1984* (Cth) s 4

sex, it is subject to the same conceptual conundrums as found in the social sciences, as discussed above.

These conceptual conundrums lead to technical problems with the SDA definition.

It attempts to make gender identity separate from sex, yet ‘gender-related ... appearance or mannerisms or other gender-related characteristics’ are all sex based characteristics. These characteristics cannot be ‘without regard to a person’s sex at birth’ because to be transgender (to fundamentally change gender) a person first has to have a gender, male or female, from which to trans (change).

Further, the definition says ‘gender identity’ means the ‘gender-related identity’ of a person. This is a circular argument. It is like defining a table as an object that is table-like. Sex is said to be ‘designated’ at birth, just as parents designate, or ‘assign’, a child’s name as a matter of choice. In reality, sex identification is not designated as an option, but is ‘recognised’ as an inherent, biological human attribute.

Such definitional failures means there is no objective definition of gender identity, a self-defined term based on a person’s feelings. Lack of definitional clarity creates uncertainty in law.

The SDA specifies no minimum age for a person to adopt a gender identity different from their birth sex, and the threshold for legal recognition of a change of sex/gender is low. It only requires 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.¹⁶ These documents are easily obtainable.

Subsequently, the federal Attorney General’s Department issued the *Australian Government Guidelines on the Recognition of Sex and Gender* (2013). The *Guidelines* apply to all federal government departments and requires that ‘[w]here sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).’¹⁷

¹⁶ Attorney General’s Department, above n.9, 5

¹⁷ Ibid 4

As a result of these changes, a biological male can easily claim that their gender identity is female. This creates situations where the rights of biological women are now at risk from males who identify as women claiming the right to access female only schools, gyms, clubs, toilets, showers, change rooms, sports, scholarships, jobs for females under affirmative action programs, lesbian organisations and funding from charities to benefit biological women. Male prisoners who identify as women can claim the right to be accommodated in prisons for biological females. There are cases where such biological male prisoners have raped other female prisoners when housed in female prisons.

The conflicts created by gender identity laws go far wider than the conflicts created by same-sex marriage law. Gender identity rights don't 'compete' with sex based rights, they 'replace' sex based rights. This means that compromises cannot be found to 'balance' gender identity and sex based rights.

VI. THE SDA APPLIED TO SCHOOLS

The SDA covers state schools. Following amendments in 2013, at least four state education departments (NSW¹⁸, Victoria¹⁹, Queensland²⁰ and South Australia²¹) 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. Effectively, there is a low minimum threshold for a boy to self-identify as a girl and gain access to girls' toilets, showers, change rooms, sports, camps and dormitories.

The NSW policy was outlined in the Education and Communities *Legal Issues Bulletin No 55, December 2014*. It assessed the risks in eight out of 11 policy areas as 'high' and three as

¹⁸ Education and Communities, 'Transgender students in schools – legal rights and responsibilities', *Legal Issues Bulletin* (NSW) (No 55, December 2014) ('Transgender students in schools – legal rights and responsibilities', *Legal Issues Bulletin* (NSW))

<<https://education.nsw.gov.au/about-us/rights-and-accountability/media/documents/public-legal-issues-bulletins/LIB-55-Transgender-students-in-schools-legal-rights-and-responsibilities.pdf>>

¹⁹ Education and Training, 'Gender Identity', School Policy (Vic) (Web Page)

<<http://www.education.vic.gov.au/school/principals/spag/health/Pages/genderidentity.aspx>>

²⁰ Department of Education and Training, 'Diversity in Queensland Schools – information for principals' (Qld) (Web Page)

<http://education.qld.gov.au/schools/inclusive/docs/diversity-in-qld-schools-information-for-principals.pdf>
Accessed 28 August 2017.

²¹ Department for Education and Child Development, 'Transgender and intersex student support' (SA) (Web Page) (Transgender and intersex student support' (SA))

<<https://www.decd.sa.gov.au/sites/g/files/net691/f/transgender-and-intersex-support-procedure.pdf>>

‘medium’. It is baffling that an organisation charged with a duty of care for children would issue a legal document admitting 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 *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 ...’²²

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.’²³

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.

Further, there is the risk of medical and psychological damage claims for a minor who was supported to transition but who later regrets. In the first known damages case, Alan Finch alleged the Monash Gender Clinic had misdiagnosed him as transgender and caused irreversible damage from sex reassignment surgery.²⁴ The case was settled out of court in 2009.²⁵

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.

²² ‘Transgender Students in Schools – Legal Rights and Responsibilities’, *Legal Issues Bulletin*, New South Wales Government, No.55, December 2014 < <https://education.nsw.gov.au/about-us/rights-and-accountability/media/documents/public-legal-issues-bulletins/LIB-55-Transgender-students-in-schools-legal-rights-and-responsibilities.pdf>>

²³ ‘Transgender and Intersex Student Support’, South Australian Department of Education, January 2019 <<https://www.education.sa.gov.au/doc/gender-diverse-and-intersex-children-and-young-people-support-procedure>>

²⁴ *Finch v Southern Health & Ors* [2004] VCC 44 (12 November 2004)

²⁵ Jill Stark, ‘Sex change clinic “got it wrong”’, *The Age*, 31 May 2009, (online) <<https://www.theage.com.au/national/sexchange-clinic-got-it-wrong-20090530-br3u.html>>

The inherent sex-based right of girls to protection in their private spaces are ‘replaced’ by the 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.

Currently, the SDA provisions apply only to state schools. However, following the Ruddock Religious Freedom Review, Attorney General Christian Porter has asked the Australian Law Reform Commission to review and report by December 2020 on certain religious exemptions in the SDA by seeking to ‘limit and if possible remove’ the exemptions for faith based schools, while still protecting religious freedom. This proposal could put faith-based schools at risk of having the same polices placed on them as are being imposed on state schools, as a consequence of the SDA protections for a person’s gender identity.

VII. BROADER IMPACTS OF GENDER IDENTITY LAWS

Gender identity laws render some other laws inoperable.

When the Tasmanian upper house was in the process of amending the state law governing birth certificate in early 2019, Attorney General Elise Archer pointed out that strict rules require that police body searches be carried out by a person of the same sex as the person being searched. If a person’s birth certificate registers them 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, ‘the power of search is likely to be compromised or negated,’ the Attorney General warned.²⁶

Archer said that she could not assess how many Tasmanian laws would be affected ‘without first reviewing *all* Tasmania’s statutes and regulations ... that [have], as a criterion for [their] application, the sex or gender of a person.’

Gender identity laws open a way for criminals to adopt a non binary gender identity to avoid police searches.

²⁶ Letter to members of the Tasmanian Legislative Council regarding the *Justice and Related Legislation (Marriage Amendment) Bill 2018* (Cth), Hon Elise Archer MP, Tasmanian Attorney General and Minister for Justice, 20 March, 2019.

Gender identity laws affect the provision of particular medical services and can impact on health professionals' right of conscience.

Recently, the *New England Journal of Medicine* has reported the tragic case of a transgender female-to-male who presented at hospital with severe abdominal pains. A nurse didn't consider it an emergency, noting that the person was obese and had stopped taking blood pressure medicines. In fact, this person was pregnant, in labour, and the child was still born.²⁷

As doctors point out, when a person presents with abdominal pain, they need to know if the person is a female, possibly pregnant or with ovarian cancer, or a male who may have a bowel infection.

Doctors and hospitals face being caught between a rock and hard place. On the one hand, in 2019 a California appeals court ruled that discrimination charges against Mercy San Juan Medical Center, 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.²⁸ On the other hand, doctors and hospitals can face medical damages claims from transgenders who regret medical and/or surgical transitioning, as in the Finch case discussed above.

Further, should a doctor be required to provide prescriptions for puberty blockers and sex change hormones to transgender persons, particularly children? Should doctors and psychologists be required by professional codes of practice (or by law) to support a child or teenager suffering gender dysphoria to medically transition to the opposite of their birth sex?

VIII. CORPORATE CODES OF CONDUCT

In 2019, the AHRC produced the *Guidelines for the inclusion of transgender and gender diverse people in sport* in conjunction with the Coalition of Major Professional and Participation Sports. COMPPS is made up of Australian Football League, Cricket Australia,

²⁷ Marilyn Marchione, 'Nurse Mistakes Pregnant Transgender Man as Obese. Then, the Man Births a Stillborn Baby', *USA Today* 16 May 2019 (online), <<https://www.usatoday.com/story/news/health/2019/05/16/pregnant-transgender-man-births-stillborn-baby-hospital-missed-labor-signs/3692201002/>>

²⁸ 'Transgender California man can sue Catholic hospital over hysterectomy', *Mercy News*, September 18, 2019. (online) <<https://www.mercurynews.com/2019/09/18/transgender-man-can-sue-catholic-hospital-over-hysterectomy/>>

Football Federation Australia, National Rugby League, Netball Australia, Rugby Australia and Tennis Australia.

The *Guidelines* reiterate that under the federal SDA, sporting authorities can exclude a man who identifies as a woman from the women's competitions where 'strength, stamina or physique of competitors is relevant', but at the same time put strong pressure to allow trans male-to-females access not only to female competitions, but also their private spaces, like change rooms, toilets and showers.

The AHRC *Guidelines* support the existing Rugby Australia corporate *Code of Conduct*, under which Israel Folau was sacked from the sport. The Rugby *Code* says 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.'²⁹

Treating a person 'equally' by their gender identity effectively means, according to Rugby's *Gender Identity Dispensation Procedure*, that girls and women are obliged to allow any male who identifies as a girl/woman to play in the female competition.³⁰

The most serious breaches of the *Code* can lead to 'suspension for a specified number of matches or period of time', or 'withdrawal of ... membership', that is, expulsion from the game. Even parents and fans can face 'exclusion orders' from rugby playing grounds.

Israel Folau was sacked only for expressing a moral opinion about gays on his personal social media. He did not campaign for gays and lesbians to be excluded from playing the game.

However, should biological girls/women campaign against biological males playing in the female competition, they would be asking for these transgender male-to-females to be excluded from the female competition and, possibly from playing rugby. Arguably, this would be a more serious breach of Rugby's *Code* than Israel Folau tweeting his religious convictions, but like him female offenders could be expelled or suspended from the sport.

²⁹ Rugby Australia, 'Code of Conduct', Codes and Policies (Web Page)

<<https://australia.rugby/about/codes%20and%20policies/all%20codes%20and%20policies>>

³⁰ Rugby Australia, 'Gender Identity Dispensation Procedure', Codes and Policies (Web Page)

<<https://australia.rugby/about/codes%20and%20policies/all%20codes%20and%20policies>>

IX. REPLACEMENT RIGHTS – A TECTONIC SHIFT IN LAW

Gender identity legislation represents a tectonic shift in law, redefining human sexuality such that a man can claim the same sex based rights as a woman and a woman can claim the same sex based rights as a man. Legally created gender identity rights ‘replace’ inherent sex based rights. This has profound implications for human rights law.

At stake are employees who face restrictive corporate codes of conduct that have little to do with their work. At stake are individuals and organisations, like schools, that want to maintain their integrity as women’s only organisations. At stake are other laws that are rendered inoperable, as with laws governing police body searches. At stake is the right of health care professionals to exercise their conscience, when increasingly hostile states threaten to force them to provide services that conflict with good medical practice, and then face damages claims from regretting transgenders.

So, how far will the federal government’s proposed new religious freedom legislation protect the sex-based rights of women (and men)?

The federal government’s draft legislation may protect people like Israel Folau and it may also protect the right of girls to speak publicly against biological males in their sports, toilets, change rooms, and dormitories.

However, females are still left without measures to maintain girls’ only sports, so long as laws recognise a person by their gender identity, not their sex, and make gender identity a protected attribute. Corporations and professional organisations may still require that biological women accept biological males in their safe spaces, or to require a medical professional to support medical treatments that violate their conscience.

The biological and transgender world views are mutually exclusive. Hence, if the government is to begin protecting freedoms in all the cases described above, it first needs to define clearly in law the biological meaning of man as a member of the male sex, woman as a member of the female sex and sex as determined by a person’s male or female reproductive function. In doing so, the sex based rights are protected for the vast majority of people who regard sex as immutable. At the same time, the liberty is preserved for those who want to identify as other than their biological sex.

The Trump administration plans to address the conflicts between these two world views by clarifying the legal recognition of a person only by the biological sex. The US Department of Health and Human Services and US Justice Department are proposing to adopt an explicit and uniform definition of gender as determined ‘on a biological basis that is clear, grounded in science, objective and administrable.’³¹

A tolerant democracy maintains an open public square in which all beliefs, religious and secular, can be held and manifested. Or, if there is an established religion, the state does not discriminate against other religions or beliefs.

When the state makes gender identity a protected attribute in law, it effectively imposes a ‘belief’ on all citizens that redefines all citizens by their self-defined gender identity in place of their biological sex. It is analogous to the state making the Catholic belief a protected attribute in anti-discrimination law. This would mean that state schools would be forced to teach the Catholic faith, and atheist organisations would be forced to employ Catholics. Effectively, the government would impose Catholicism as a state religion intolerant of those who hold any different belief.

This marks a return to the sort of state imposed beliefs that resulted in horrendous wars of religion, the wars of all against all. It marks a shift from a tolerant, neutral democracy to an authoritarian state imposing one belief on all citizens.

Hence, incorporating the definitions of man, woman and sex in laws, and thereby protecting sex based rights, is an important component for protecting not only religious freedom for people and organisations, but freedom of belief, conscience, speech and association for secular and religious people and organisations.

New laws protecting sex based rights are necessary for preserving tolerant, liberal democracies.

³¹ Erica L Green et al, “‘Transgender’ Could Be Defined Out of Existence Under Trump Administration’, *New York Times* (online), 21 October 2018, <<https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>>