Submission No 28

EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023

Organisation: Freedom for Faith

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NSW Parliamentary Committee on Community Services
By e-mail: communityservices@parliament.nsw.gov.au

Submission on the Equality Legislation Amendment (LGBTIQA+) Bill 2023

Who are we?

1. This submission is on behalf of, and co-signed by:

   (a) Australian Baptist Ministries
   (b) Australian Christian Churches
   (c) Anglican Church Diocese of Sydney
   (d) Fellowship of Independent Evangelical Churches
   (e) Seventh-day Adventist Church of Australia
   (f) NSW Council of Churches
   (g) Fellowship of Independent Evangelical Churches
   (h) Acts Global Churches
   (i) Syndey Chinese Christian Churches Association
   (j) Council of the Ministers of Korean Churches in Sydney, Australia
   (k) Sydney Holy City Movement
   (l) Australian Ahl Al Bait Islamic Centre
   (m) Islamic Schools Association of Australia

2. The submission was coordinated by ***Freedom for Faith,*** a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

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General Comments

4. This Bill seeks to embed controversial gender ideology throughout the New South Wales statute book that will only frustrate the proper operation of the law and significantly undermine human rights in NSW.

5. Most alarmingly, the Bill will expose children to controversial gender ideology, removing the caring influence of parents on the decisions of their children, and will destroy the religious character of faith-based institutions in NSW.

6. The oft-purported medical basis for gender ideology has been brought into serious question by the recently released final report of the Cass Review.[1] It would be the height of irresponsibility to increase the ease of access by children and young people to gender-affirming interventions at the very moment when the best available evidence suggests that such access should be curtailed.[2] The Bill should therefore be withdrawn in order to protect children and young persons from harmful practices that have no grounding in evidence.

A. The Bill undermines the ability of religious schools and other institutions to maintain their faith-based character (Schedule 1)

7. The Bill hollows out the general protections for religious bodies in section 56 of the *Anti-Discrimination Act 1977* (NSW),[3] by requiring religious institutions to satisfy a judge that ALL of their actions (outside of the appointment and training of leaders and those who engage in religious practices) are 'reasonable and proportionate'.

8. This confers unprecedented power over religious institutions upon judges whose personal convictions on what is 'reasonable and proportionate' in respect of religious matters may well significantly differ. Judges are not trained theologians. This creates inordinate uncertainty for religious institutions, their members, employees, and volunteers.

9. The Bill imports an inherent requirements test "by another name".[4] This is because it provides an exception in respect of employment only if its conduct falls within the following description: 'the selection or appointment of a person to exercise functions in relation to, or otherwise participate in, a religious observance or practice'. Thus, religious institutions would lose their ability to create a community that embodies their religious beliefs through their employment of administration, reception, support or shared services staff, IT, groundskeepers, or property maintenance persons. In some contexts, this could be the vast majority of persons employed by the religious institution, placing in real peril the authentic maintenance of its distinct ethos.

10. It also subordinates religious rights to sexuality and transgender rights in a new section 56(2),[5] which will require faith-based charities to supply fostering services and marriage counselling to same sex couples. Together with the corresponding removal of section 59A, the Bill will lead to the closure of religious adoption services who will be required to supply

[1] Cass, Hilary 'Independent Review of Gender Identity Services for Children and Young People: Final Report', April 2024. https://cass.independent-review.uk/?page_id=936. ('*Cass Report*').
[2] Ibid, pp. 22, 31, 33, 74, 179.
[3] Equality Legislation Amendment (LGBTIQ+) Bill 2023 ('the Bill'), sch1, cl40, p.16.
[4] Ibid.
[5] Ibid.

support to same sex couples against their convictions (an eventuality that has occurred in other jurisdictions).[6] This outcome would be inconsistent with international law[7] and with the judgement of the NSW Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*.[8] Similarly, health facilities would no longer be able to refuse to supply services to which they have a conscientious objection, where they supply the same service to a person not protected under the Act (for example relationship counsellors or IVF services).

11. Where the law prevents a faith-based charity from acting in accordance with the religious convictions of the movement it is associated with, this impacts the religious manifestation of those persons associated with the charity and stymies the philanthropic efforts of the members, employees and volunteers of faith-based charities who are not able to express their faith in that particular instantiation. In addition, beneficiaries who seek a faith-based supply will be detrimentally impacted by the withdrawal of the service. As a result, the community is denied an important service and the autonomous exercise of preference within the wider community is diminished. Anti-discrimination law that precludes the operations of faith-based providers amounts to a government intervention in the market of charitable services to exclude faith-based options. The Government should not stifle the philanthropy of persons of faith by limiting the operations of faith-based service providers through anti-discrimination law.

12. The Bill removes all balancing provisions in the *Anti-Discrimination Act 1977* for the religious freedom rights of religious schools, with regard to sexuality and transgender rights.[9] Again, this is inconsistent with the relevant international law, as outlined in a recent article published by Associate Professor Mark Fowler.[10] The removal of this exception will mean a faith-based school cannot refuse to employ, or continue to employ, a person that is transitioning to a sex that differs from their biological sex, or who has a non-binary or fluid understanding of their gender identity. There is no limitation, so this would apply to the Principal, to a religious instruction teacher, to a counsellor or chaplain, to a maths teacher or any other staff or volunteer (where, on the view of Anti-Discrimination NSW, the volunteer receives an honorarium beyond their expenses).[11] The proposed subsection 56(2)(a) (cited above) also removes "religious education institutions" from the scope of section 56(1)(d).

13. The Bill also proposes the total removal of all current exemptions for 'private educational authorities'. Together with the proposed amendments to section 56, this means that there are **no exemptions** for religious education institutions in employment or in the provision of education and religious schools will have to satisfy a judge that standards and conditions

[6] Ibid, sch1 cl41, p.16. See, for eg, https://www.independent.co.uk/news/uk/home-news/catholic-charity-says-it-could-close-adoption-service-if-it-cannot-refuse-gay-couples-8280149.html

[7] Fowler, Mark 'The Position of Religious Schools Under International Human Rights Law' (2023) 2 *The Australian Journal of Law and Religion* 36.

[8] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

[9] Examples include is the removal of section 49ZH(3)(c), see sch1, cl31, p.10; section 38C(3)(c), see sch1, cl10, p.3.

[10] Fowler (n 6).

[11] Anti-Discrimination New South Wales 'Volunteers and voluntary organisations' (web page, 28 July 2021), https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/organisations-and-community-groups/volunteers-and-voluntary-organisations.html.

they set in their communities are "reasonable" in each novel circumstance (the test for indirect discrimination, for example see section 49ZG(1)(b)). For example,

a. Religious schools will need to satisfy a judge that their refusal to continue the employment of a genderfluid teacher that varies in their day-to-day identification as a male or female, or of a teacher that moonlights as a sex worker, is 'reasonable'.

b. Religious schools will need to convince a judge that sex-based rules about uniforms, or their refusal to permit biological boys access to girls' toilets or change facilities are reasonable.

c. Single-sex schools and affiliated boarding houses would need to satisfy a judge that it is reasonable for them to only admit students and boarders on the basis of their biological sex.

d. Religious schools will need to convince a judge that the teaching of a traditional view of marriage, sexuality or gender is 'reasonable'.

e. The 'reasonableness test' would allow a judge to decide whether a religious school could decline a request to establish a transgender student advocacy group.

f. Religious schools will not be able to ensure that boys and girls below the age of thirteen play sport in their own teams and competitions.[12]

14. In these various ways, the Bill would transfer from the Parliament to the judiciary the determination of important policy issues. Such matters should be determined by the Parliament, according to its democratic mandate. Unelected and unaccountable judges should not be given the final say on such contentious policy questions through the unfettered 'reasonableness test'.

15. In addition to the uncertainties introduced by the 'reasonableness' test for indirect discrimination, the removal of the exceptions would cast religious schools, their staff and families on the perilous waters of the distinction between direct and indirect discrimination. All of the foregoing examples assume that the discrimination is not direct, but is asserted to be indirect discrimination. Indirect discrimination permits a defendant to argue that its actions are 'reasonable', whereas any act of direct discrimination can never be 'reasonable'; it is simply unlawful. Campbell and Smith acknowledge that 'there is considerable disagreement about how the distinction between these two forms of discrimination should be understood.'[13] To illustrate the application of this ambiguity to the Bill's proposal to remove the exceptions for religious schools, consider the rule that a teacher must teach and faithfully model the beliefs of a school. If a teacher teaches or acts in a manner that undermines the beliefs of the school and is disciplined, is that impermissible direct discrimination, or is it permissible 'reasonable' indirect discrimination? As noted, wherever an action is direct and not indirect discrimination, it will not be able to rely on a defence of reasonableness.

[12] *Equality Legislation Amendment (LGBTIQA+) Bill 2023*, sch1 cl12, pp.3-4.

[13] Campbell, Colin and Dale Smith, 'Distinguishing Between Direct and Indirect Discrimination' (2023) 86(2) *Modern Law Review* 307, 308 ('*Campbell and Smith*').

16. The Bill also removes the ability of a private educational authority to discriminate against a student on age grounds.[14] This could lead to absurd outcomes, casting into doubt the ability of private schools to set limits on the age at which students can be enrolled and study at a school. As the genuine occupational requirement exception (see s 49ZYJ) only applies to employment, private schools would need to establish that limitations imposed on the basis of age are not direct discrimination (see s 49ZYA(1)(a)) and are 'reasonable' (see s 49ZYA(1)(b)).

17. For the foregoing reasons we do not support the removal of the private educational authority exception, or the proposed reform to section 56. These provisions of the *Anti-Discrimination Act 1977* are currently subject to a referral to the New South Wales Law Reform Commission. The terms of reference include 'exceptions, special measures and exemption processes'. The passage of this Bill would effectively overrun the Government's referral, rendering consideration of those matters by the NSWLRC redundant.

B. The new definitions of transgender and sexuality are incoherent or illogical (Schedule 1)

18. Some of the proposed amendments are incoherent, inconsistent or illogical. For example, the proposed amendments to section 38A are shown in markup below.

> **38A Interpretation**
>
> A reference in this Part to a person being transgender or a transgender person is a reference to a person, ~~whether or not the person is a recognised transgender person~~
>
> (a) who identifies as a member of ~~the opposite~~ **another** sex by living, or seeking to live, as a member of ~~the opposite~~ **another** sex, or
>
> (b) who has identified as a member of ~~the opposite~~ **another** sex by living as a member of ~~the opposite~~ **another** sex, or
>
> (c) ~~who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,~~ **who identifies as a particular sex that is not exclusively male or female by living as a member of that sex**,
>
> and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

19. The phrase "another sex" is incoherent – "another" with reference to what? This definition is further problematised by the proposed self sex id legislation in Schedule 2. If a person legally changes their "sex descriptor" on their birth certificate, then arguably they no longer fall within section 38A, because it is not "another" sex anymore. It is also inconsistent with definitions elsewhere – see for example Schedule 5[2], which inserts a new section that provides that references to the 'same sex' and 'different sex' means a person of the same or different sex to the sex with which a transgender person identifies.

20. The new (c) is unclear: What exactly is a "a particular sex that is not exclusively male or female"? Furthermore, the new definition no longer applies to an intersex person (i.e., someone who is of indeterminate sex, but who chooses to live as (say) male) – presumably because the new Part 3B, which covers discrimination on ground of variations of sex

[14] *Equality Legislation Amendment (LGBTIQA+) Bill 2023*, sch1, cl38, p. 11.

characteristics. But instead of simply removing (c), it has been replaced for a protection for someone who is *not* intersex but who identifies as intersex and lives as intersex. Does this occur, and if so, with sufficient frequency to warrant legislative inclusion?

C. Transgender discrimination reforms

21. Schedule 1[12] removes existing sporting-related exemptions on transgender grounds. Discrimination on transgender grounds in sport would only be permitted if a person is over the age of 12, participating in a competition where the strength, stamina or physique of the person is relevant and the exclusion is reasonable and proportionate in the circumstances. Sporting teams for children under 12 could no longer be single-sex, and nor could non-competitive sporting teams. Competitive sports for those 12 years and older would need to prove multiple criteria in order to remain single sex. The proposed provision applies to the conduct of sports within schools. The Bill will mean that schools will be required to allow biological boys under the age of 13 that identify as female to compete in girls' sports (and vice versa). It applies to 'sporting activity … conducted as part of a competition' and so would conceivably apply to participation in sports activities in religious youth groups and camping grounds within NSW. It puts the onus on the school, religious body or sporting association that is subject to a complaint to prove that it is reasonable to exclude a biological boy from girls' sports, or that it is reasonable to exclude a biological girl from participation in boys' sports. This will be a costly impost for many of these associations. This uncertainty is only further enhanced by the additional requirement that refusal is 'reasonable and proportionate', for which we have noted our concerns above.

22. The tying of the exemption to sports in which strength, stamina, or physique are relevant effectively removes the ability of women who participate in less physically demanding sports to organise competitions exclusively for participants who are biologically female. Examples include:

    a) mind sports such as chess and bridge;
    b) cue sports such as snooker and pool;
    c) lawn bowls;
    d) target shooting;
    e) eSports; and
    f) darts.

23. Though strength, stamina, or physique are arguably less relevant in these sports than in other sports, all of the above sports have women's only competitions. The rationale for such competitions is often to increase participation by women in those sports, particularly where there have historically been systemic barriers to the full participation of women. The proposed amendments therefore restrict participants of these sports from offering women's only competitions aimed at increasing participation by women. Arguably, they represent an imposition on the right of women to full and equal participation in sports, a protected right under Article 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women*. rendering the proposed drafting inconsistent with Australia's obligations under international human rights law.

24. These amendments also remove the ability of a superannuation fund to treat a person according to their biological sex. It is unclear what implications this will have for insurance where the biological sex has a statistical impact on outcome, and therefore an impact on premiums (eg. life insurance, car insurance).

D. Privileging LGBTI people over other members of the community. (Schedule 1, Schedule 12, Schedule 13)

25. Schedule 1 proposes a new definition of "sexuality" that grants special privilege for certain sexualities, but not others. The current ADA protects against discrimination on the ground of homosexuality, but not bisexuality. To address this gap, the proposed amendments replace **Part 4C Discrimination on the ground of homosexuality,** with **Part 4C Discrimination on the ground of sexuality**, with the word "homosexuality" replaced with "sexuality" throughout the Part, and a new definition of sexuality.

> **49ZF Interpretation**
> (1) In this part, ***sexuality*** means—
> (a) homosexuality, or
> (b) bisexuality, or
> (c) asexuality.

26. However, this is a deficient definition of "sexuality", in that "heterosexuality" is missing from the definition. The exclusion of heterosexuality from a statutory definition of sexuality grants a special privilege to some sexualities but not others. If it were passed, the Bill would lawfully sanction discrimination against persons on the basis of their heterosexuality.

27. Schedule 12 amends the *Government Sector Employment Act 2013* to provide special privileges for LGBTIQA+ people in Government Sector employment. If the proposed categories are to be included, then other significant categories that represent the diversity of the people of NSW should be included, notably; religion, sex (as distinct from gender) and political opinion. The omission of religious diversity is particularly noteworthy. However, the multiplication of diversity attributes is likely to make this clause unworkable. We do not support the inclusion of a specific provision to provide additional leave for people to undergo sex reassignment surgery.

28. Schedule 13 amends the *Government Sector Employment (General) Rules 2014* to provide special privileges for LGBTIQA+ people in employment in Government Sector employment. The purpose of this rule is to provide help for classes of persons disadvantaged in employment. There is no evidence that intersex and transgender persons experience systemic disadvantage in Government sector employment.

E. Privileging prostitution - Sex-worker as an additional protected attribute and Concerns with 'Outing' (Schedule 1 [39], Schedule 6, Schedule 8)

29. Schedule 1 [39] adds a new protected attribute of "sex worker" in proposed Part 4H in the *Anti-Discrimination Act 1977*.[15] This is unlike all other protected attributes, which relate to aspects that go to a person's identity. The addition of 'sex work' seeks to elevate a person's "profession" to an unprecedented level of protection. No other form of occupation is protected in this way. We do not support this.

30. The addition of the definition of sex worker in conjunction with the proposed amendments to section 56 mean that a church could not ensure fidelity to its religious beliefs where an employee takes a second job as a sex worker. That is a consequence of the limitation of the employment exception to persons who 'exercise functions in relation to, or otherwise participate in, a religious observance or practice' at proposed section 56(1)(c).

31. Unlike Queensland (see section 106C *Anti-Discrimination Act 1991* (Qld)), the proposed exemption for accommodation providers in the *Anti-Discrimination Act 1977* only extends to small premises in which the provider or their relative resides (see proposed section 50AM(3)).[16] Hotels, motels, bed and breakfast providers or AirBNB providers will not be able to refuse accommodation applications from sex workers, even where the sex worker proposes to use the premises for their work.

32. The amendment to the *Crimes Act 1900* in Schedule 6, which extends the criminal vilification protections in s93Z to those who "are or have been sex workers" is consequent on including sex work as a protected attribute in the *Anti-Discrimination Act (1977)*. We do not support this.

33. The amendment to the *Crimes (Domestic and Personal Violence) Act* 2007 in Schedule 8, makes "outing" a person on the basis of information about a person's sexual orientation, gender history, intersex status, HIV status or sex worker status a form of domestic abuse, as an 'example of coercive behaviour', enabling the making of apprehend personal violence orders and apprehended violence orders. The 'outing' provisions are highly problematic. How would the inclusion of 'outing a person' or 'threatening to out a person' apply where, for example, a married, heterosexual person is discovered to be having sex with a person of the same sex? Because the focus is on any 'disclosure', it would apparently include, for example, disclosure to a counsellor or religious leader where the offended party wife or husband seeks advice or counsel. Apparently, that would be caught as an 'example of coercive behaviour' sufficient to ground an apprehended violence order. The Bill also expands the grounds on which harassment may occur to include harassment on the basis of a person's engagement in sex work, similarly privileging sex work as though it were a protected attribute. We do not support this.

[15] Ibid, sch1 cl39, pp.11-16.
[16] Ibid, sch1 cl39, pp.15

F. The Bill confuses and conflates sex and gender (Schedule 2)

34. Schedule 2 makes Amendments to the *Births, Deaths and Marriages Registration Act* 1995 to enable an individual to change the sex recorded on identity documents. Schedule 2[5] inserts a new Part 5A, containing sections 32A-32I.

35. Proposed section 32EA permits any person 16 or over to register a change in their sex by statutory declaration,[17] without imposing limitation on the number of times or frequency with which such a declaration may be made, regardless of their biology or whether they have undergone any form of medical or psychiatric treatment or assessment. They must nominate a "sex descriptor" of their choosing, such as male, female, agender, genderqueer, non-binary, and dozens and dozens of other options.[18] The only ***prohibited sex descriptors*** are those which are obscene or offensive, or which could not practicably be established by repute or usage (s32A).

36. The proposal that a gender identity could be legally recorded as a 'sex' conflates and confuses the two distinct concepts. The Australian Government Guidelines on the Recognition of Sex and Gender state that "sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex" whereas gender "refers to each person's deeply felt internal and individual identity and the way a person presents and is recognised within the community."[19] This understanding of sex as a biological concept was recently endorsed by the Western Australian Law Reform Commission's 2022 report.[20]

37. The conflation of sex and gender identity is also inconsistent with the new *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables 2020* released by the Australian Bureau of Statistics in January 2021, which distinguishes between sex and gender and requires both to be separately recorded on forms.[21]

38. It is also inconsistent with the definitions of sex and gender recently reaffirmed by the Royal Australian and New Zealand College of Psychiatrists (RANZCP):[22]

    (a) *Sex* refers to the biological characteristics that define humans as female or male. While these sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, they differentiate humans as males and females in the vast majority of people.

    (b) *Gender* refers to the state of being male, female, or other, and/or masculine, feminine and other, with regard to personal, social and cultural characteristics, rather than genetic, hormonal or anatomical characteristics.

39. Further, there is an inherent contradiction in the proposed amendments – *intersex person* is defined as "a person who has an innate variation of primary and secondary sex

[17] Ibid, sch2 cl5, pp.22-23.
[18] See, for example, https://helpfulprofessor.com/types-of-genders-list/
[19] https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-government-guidelines-recognition-sex-and-gender
[20] https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report_0.pdf at p113
[21] https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release
[22] https://www.ranzcp.org/clinical-guidelines-publications/clinical-guidelines-publications-library/role-of-psychiatrists-working-with-trans-gender-diverse-people

characteristics that differ from norms for female or male bodies." This depends on a biological understanding of sex. But, elsewhere, the changes are predicated on blurring or dissolving altogether the distinction between sex and gender. The view of Equality Australia (whom Mr Greenwich freely acknowledges as the source for his Bill) is that "NSW anti-discrimination laws should recognise one inclusive attribute of 'sex' or 'gender', but not both".[23]

40. Because proposed section 32EA allows anyone to change their legal sex, it will enable any man to self-identify as a woman and access female-only activities, spaces and services, including sports, schools, sex-specific places of worship, prisons, bathrooms, and refuges. The decision in Scotland in January 2023 to put transgender women in women's prisons was reversed in February 2023 because of the outrage when double rapist Isla Bryson was sent to Cornton Vale women's prison. The ability for a person to change their sex on records makes all remaining legislative exemptions for single-sex spaces (schools, gyms etc.) ineffectual, as the exemptions for sex will be based on a person's identity documents, rather than their biological sex. In Australia claims have been made that persons who wish to exclude biological males who identify as females from women's only spaces are acting illegally.[24] This reflects the current view of the Australian Human Rights Commission and the Tasmanian Civil and Administrative Tribunal.[25]

G. The Bill endangers the health and welfare of children in NSW and drives a wedge between children and their parents (Schedule 3 and schedule 2[5] section 32ECA)

41. The Bill makes amendments to the *Births, Deaths and Marriages Registration Act 1995* and the *Children and Young Persons (Care and Protection) Act 1998* that presume minors have the capacity to make life altering decisions for themselves without the guardian oversight of parents and family.

42. Not only do these changes allow children to make drastic medical decisions for themselves, but the changes also drive a wedge between children and their parents, privileging the influence of counsellors and doctors over parents and allowing children to conceal their potentially self-destructive decisions from their parents. Children will be able to make decisions about radical medical and legal gender identity changes that could result in permanent loss and severe physical damage to themselves.

43. The Bill's proposals would increase access to gender-affirming interventions at the very moment when the evidentiary basis for such 'treatments' has been brought into serious question by the Cass Report. Key findings of that report include:

    a) there is no clear evidence that social transition in childhood has positive or negative mental health outcomes;[26]

[23] https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD07.pdf, page 7
[24] *Tickle v Giggle For Girls Pty Ltd* [2023] FCA 553 (substantive matter currently being heard).
[25] Australian Human Rights Commission, *Sex Discrimination Act 1984* (Cth), section 44(1), Notice of Decision on Application for Temporary Exemption: Lesbian Action Group, 12 October 2023, C2023G01157; *Hoyle and LGB Alliance Australia (Review of Refusal of an Application for Exemption)* [2022] TASCAT 142.
[26] Cass Report, pp. 31, 164.

b) there is no evidence that puberty blockers improve body image or dysphoria;[27]

c) the Review found that 'evidence is weak' and clinicians report that 'they are unable to determine with any certainty which children and young people will go on to have an enduring trans identity';[28]

d) there is no evidence that access to hormone treatment reduces the risk of suicide;[29]

e) outcomes for children and adolescents who experience discomfort with their gender identity are best if 'they are in a supportive relationship with their family';[30]

f) in the interests of the child or young person, parents should be actively involved in decision making, unless 'there are strong grounds to believe that this may put the child or young person at risk'.[31]

The Bill therefore increases ease of access by children and young people to gender-affirming interventions at the very moment that the best available evidence suggests that such access should be curtailed. We submit that the Bill should be withdrawn.

44. Schedule 3[2] inserts a new section 174A into the *Children and Young Persons (Care and Protection) Act 1998:*

> **174A Administration of medical treatment to child or young person**
>
> (1) A young person may make a decision about the young person's own medical or dental treatment as validly and effectively as an adult.
>
> (2) A medical practitioner may administer medical or dental treatment to a child if—
>
> (a) a parent of the child consents, or
>
> (b) the child consents and, in the opinion of the medical practitioner or dentist who is to administer the treatment—
>
> (i) the child is capable of understanding the nature, consequences and risks of the treatment, and
>
> (ii) the treatment is in the best interests of the child's health and well-being.

45. Section 174A(1) deems capacity for a young person (i.e. aged 16 or over) to give informed consent for the impact of irreversible medical procedures that will render them sterile, at a time in life when they may not be able to comprehend the impact of loss of fertility. The Bill expressly clarifies that treatment 'reasonably likely to have the effect of rendering [a person] permanently infertile' can be administered to both a young person and a child.[32]

46. It would allow one parent to consent to medical treatment, even if the other parent strongly objects. This has the potential for the medical treatment of children being used as leverage in family disputes. The Bill also deems all young people 16 or over to be competent to make medical decisions for themselves (including life-altering procedures) as if they were an

[27] Ibid, p. 179.
[28] Ibid, p. 22.
[29] Ibid, p. 33.
[30] Ibid, p. 164.
[31] Ibid.
[32] Section 174A(1) in conjunction with existing section 175 of the *Children and Young Persons (Care and Protection) Act 1998*.

adult.

47. This would bypass the current requirement in NSW that medical practitioners must determine whether a young person is 'Gillick competent' (i.e., they have sufficient understanding and intelligence to understand fully what is proposed in the medical treatment) when they give consent to a gender affirming medical treatment.

48. Section 174A(2)(a) clarifies that a medical practitioner can administer treatments including puberty blockers or cross-sex hormones for children contrary to the objections of one parent, subject to the requirements of section 175 of that Act. Section 175 restricts a 'child' from receiving 'special medical treatment' (such as sex-reassignment surgery), but not a 'young person' (a person 16-17 years old). Section 175 permits NCAT to approve 'special medical treatment' for a 'child' (a person under 16 years old), including treatment 'reasonably likely, to have the effect of rendering permanently infertile' the child where such is 'in order to save the child's life or to prevent serious damage to the child's psychological or physical health.' NCAT is not a court. A medical practitioner can administer these treatments in the absence of NCAT approval and parental consent where 'the medical practitioner is of the opinion that it is necessary, as a matter of urgency, to carry out the treatment on the child in order to save the child's life or to prevent serious damage to the child's health'.

49. In so far as permission may be given by a medical practitioner in the absence of parental consent and the absence of a Court order, the regime contradicts the jurisprudence of the Family Courts. In *Re: Kelvin* [2017] FamCAFC 258, the Court stated in part:

> [O]ther circumstances may dictate the need for court intervention. For example ***disputes between parents*** or experimental or novel treatment or treatment for unusual or novel conditions can present difficulties; those circumstances may require a determination by a court of the best interests of the relevant child (para 124, emphasis added).

50. The decision of the Family Court in *Re: Matthew*[33] a decision concerning a sixteen-year-old child, states the current position of the Australian Family Court; that transgender young people diagnosed with gender dysphoria must apply to the Court for Stage 3 treatment (surgical intervention) where:

    a. the transgender teenager has been diagnosed with gender dysphoria;
    b. the transgender teenager's treating practitioners agree that the child is *Gillick* competent; and
    c. there is a controversy regarding the application (e.g., disagreement between the parents or doctors about the treatment).

51. The September 2020 decision of the Family Court in *Re: Imogen (No. 6)*[34] affirms the principle established in *Re: Kelvin* that court approval for stage two treatment is mandatory where a parent or doctor disputes the child's legal competency to consent; the diagnosis of gender dysphoria; or the proposed treatment. In *Re: Imogen* the mother of the sixteen-year-old child seeking stage two treatment refused her consent. These principles were

[33] [2018] FamCA 161 (16 March 2018).
[34] [2020] FamCA 761.

again affirmed in *Re Kelly*.[35]

52. Overriding the wishes of parents when it comes to their child's medical care is very rare. In cases where a child may require a blood transfusion and this conflicts with their own religious beliefs or the religious beliefs of their parents, a hospital must obtain a court order before they provide blood products to the child (see, for example, *The Sydney Children's Hospitals Network v AA*[36]). This is so even if the child's life will be at risk without the transfusion.

53. Section s174A(2)(b) is even more alarming, in that it allows a medical practitioner to administer puberty blockers or cross-sex hormones for children when neither parent consents, provided in the practitioner's opinion the child is 'Gillick competent' and gives consent, and an order of NCAT is obtained if required under section 175 of the Act. This is clearly contrary to the principles established by the Federal Court, as outlined above, undermines the parent-child relationship and puts a medical practitioner in the shoes of a primary decision-maker. An amendment to allow the supplanting of the decision of a parent in all medical decisions, including gender-affirming treatment, is a dramatic change that should not occur without parental consent.

54. The effect of the proposed S174A is to circumvent the specific consent requirements for gender affirming medical treatments (GAMT) established by NSW Health.[37] GAMT includes puberty suppression treatment (such as GnRH analogue therapy) and gender affirming (sex) hormone treatment. The Health Department's *Consent to Medical and Healthcare Treatment Manual* states:

> **Parental Consent is required for GAMT regardless of whether the child is Gillick competent.**
>
> - Written consent from the parents or legal guardian is required prior to the commencement of GAMT if the young person is under 18 years old.
> - Australian case law (see *Re Imogen (No. 6)* [2020] FamCA 761) has established that GAMT must not commence without first ascertaining whether or not the parents consent to the proposed treatment.
>
> **Young Person agreement or consent**
>
> - Where the young person is assessed to be *Gillick* competent they must also provide written consent.
> - See section 8.3 above for guidance on assessing *Gillick* competence – essentially, a young person is *Gillick* competent when they have sufficient maturity and intelligence to fully understand the nature, complexity, advantages, disadvantages, known short-term and long-term side-effects and sequelae of the specific proposed treatment and that there may be unknown sequelae

[35] [2022] FedCFamC1F 380.
[36] [2021] NSWSC 1123.
[37] https://www.health.nsw.gov.au/policies/manuals/Documents/consent-section-8.pdf, pages 48-49

[redacted]

56. Because of growing concerns about the long-term adverse impacts of puberty blockers or cross-sex hormones, regulators in England and Scandinavian countries are restricting their use. The Cass Report has revealed that there is no sound evidence that such 'treatments' confer any medical benefit.[38] The proposed 174A flies in the face of best practice elsewhere. There are a growing number of detransitioners who regret their prior reliance on medical advice that they should undergo a gender transition. In the United Kingdom Keira Bell, a biological female who had undergone gender transitioning to become a trans male under the advice of the Tavistock NHS GIDS Gender Clinic commenced litigation against the clinic. A woman who had her womb removed at the age of 22 is suing her former psychiatrist in the NSW Supreme Court.[39] Given that these treatments that have lifelong and very serious consequences, it is inappropriate to allow doctors to act without parental knowledge or consent. This is particularly the case given that the Cass Report has concluded that outcomes for children and adolescents who experience discomfort with their gender identity are best if 'they are in a supportive relationship with their family'.[40] It recommends that parents should be actively involved in decision making, unless 'there are strong grounds to believe that this may put the child or young person at risk'.[41]

57. As noted above, schedule 2[5] inserts a new Part 5A, for the alteration of a person's recorded sex. This includes a provision that would allow a child to change their recorded sex without parental knowledge or consent (s32ECA). Parents are only notified subsequent to the change (s32ED), and may never be notified if their child makes an application for this, on the basis that the child would be adversely affected by the parents being notified (s32ECA[3][b]).

58. Proposed section 32C provides an avenue by which a child under that age of 16 may apply to NCAT to have a record of their sex altered. One of the prerequisites for the making of an application is that the child has received counselling. This requirement is stated as follows:

> (i) the counselling was provided by a person, chosen by the applicant, who the applicant considers has suitable qualifications, training or experience to provide the counselling …

59. This drafting is fatally flawed, as it presumes that a child under the age of 16 is capable of assessing the suitability of the qualifications, training, and experience of a prospective

[38] Cass Report, pp. 31, 33, 163, 179.

[39] https://www.smh.com.au/national/absolutely-devastating-woman-sues-psychiatrist-over-gender-transition-20220823-p5bbyr.html

[40] Ibid, p. 164.

[41] Cass Report, p. 164.

counsellor (the same problem presents at proposed section 32ECA, relating to applications to NCAT where a child was born in another state). If adopted, this change would leave NSW children vulnerable to the influence of those who may be driven by ideological motivations rather than genuine concern for the best interests of the child.[42] Worse still, proposed section 32CA provides an avenue by which the alteration to the child's records may occur without notifying the parents, where NCAT determines that giving such notice could 'could reasonably be expected to adversely affect' the child.

60. This proposal arguably represents an encroachment by the State on the rights of parents and families under international human rights law. Article 3(2) of the *Convention on the Rights of the Child* states that where adopting members act to ensure care and protection for children, the 'rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her' must 'be taken into account' and 'all appropriate legislative and administrative measures' must be taken. Article 23(1) of the *International Covenant on Civil and Political Rights* guarantees the protection of the family unit by the State, stating: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Where State interference with parental rights is necessary for the wellbeing of the child, 'less restrictive and intrusive options' should be explored; failure to do so amounts to 'a failure to protect the family unit'.[43] Such a circumstance can also give rise to a violation of Article 24 with respect to the child's rights.[44] Article 24(1) provides:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

61. Taylor, quoting Nowak, writes:

> The guarantee within Article 23(1) functions to shield the family as the cornerstone of the entire social order from trends toward disintegration. It is directed against extremely collectivist social forms in which the traditional functions of the family, such as raising children, are shifted in whole, or to a large extent, to State institutions.[45]

62. Relevant to this is Article 6 of the *Declaration on the Rights of a Child*, which provides that the child 'shall, wherever possible, grow up in the care and under the responsibility of his parents, a child of tender years shall not, save in exceptional circumstances, be separated

[42] Ibid, pp. 13, 74. For eg, the Report says: 'It often takes many years before strongly positive research findings are incorporated into practice. There are many reasons for this. One is that doctors can be cautious in implementing new findings, particularly when their own clinical experience is telling them the current approach they have used over many years is the right one for their patients. Quite the reverse happened in the field of gender care for children. Based on a single Dutch study, which suggested that puberty blockers may improve psychological wellbeing for a narrowly defined group of children with gender incongruence, the practice spread at pace to other countries. This was closely followed by a greater readiness to start masculinising/feminising hormones in mid-teens, and the extension of this approach to a wider group of adolescents who would not have met the inclusion criteria for the original Dutch study. Some practitioners abandoned normal clinical approaches to holistic assessment, which has meant that this group of young people have been exceptionalised compared to other young people with similarly complex presentations. They deserve very much better.'

[43] *Tcholatch v. Canada*, Communication No. 1052/2002, U.N. Doc. CCPR/C/89/D/1052/2002 (2007) at [8.8].

[44] Ibid.

[45] Taylor, Paul, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 632.

from his mother.'

63. Consideration of the rights of parents and the protection of the family unit are conspicuously absent from the matters to which NCAT must have regard when making a determination about whether parental notification is required. There is no requirement to consider whether the interference with parental rights or the detriment to the family unit implicit in making a determination not to notify a child's parents is proportionate to the aim of avoiding adverse consequences to the child. It is arguable that the proposed drafting erodes the rights of parents and families under international law.

H. Intimate Body Searches etc (Schedules 5, 7, 9, 15 & 17)

64. Schedules 5, 7, 9, 15 & 17 make similar amendments, which add definitions of intersex person, private parts, private upper body parts and transgender person to use gender-neutral language to refer to a person's private parts, and to allow a transgender person to choose the sex of the person that conducts their intimate forensic procedure.

65. We recognise the importance of protecting the privacy of intersex and transgender persons in intimate body searches, but the proposed implementation is problematic for the following reasons:

    a) It creates a special privilege for transgender and intersex persons to choose the person to conduct a bodily search.

    b) It does not make allowance for the fact that a security officer of a different biological sex may not be willing to conduct a search (e.g. a female Muslim security officer being required to conduct an intimate body search for a trans-woman or a member of a faith community that is not permitted to touch a member of the opposite sex (see Schedules 5[4]; 7[4]; 9[10], [12]; 15[6],[7]&[10]; 17[3]).

    c) It embeds contested definitions of intersex and transgender that are not necessary to achieve the result.

    d) It will create requirements that are almost impossible to meet in the case of a person who has chosen a novel sex. For example, the amendment to s44 of the *Crimes (Forensic Procedures) Act 2000* reads "A forensic procedure … must not be carried out in the presence or view of a person who is of ~~the opposite~~ **a different sex** to the suspect". A plain reading of this provision means that a person who has changed their sex to "demiboy" can only have a forensic procedure carried out by another "demiboy".

    e) It permits persons to choose the particular security officer who will conduct the search, giving rise to the risk that prior collusion will comprise security arrangements (see Schedules 5[4]; 7[4]; 9[10], [12]; 15[6],[7]&[10]; 17[3]).

I. The Bill undermines the welfare of women in NSW. (Schedules 1, 18 & Schedule 19)

66. The Bill will remove Part 3 of the *Summary Offences Act 1988* which contains a variety of criminal offences related to prostitution in NSW.[46] This will liberalise the practice and solicitation of prostitution in NSW, undermining the health and wellbeing of vulnerable women in NSW.

67. It will no longer be an offence "by coercive conduct or undue influence, [to] cause or induce another person to commit an act of prostitution" (*SOA* 15A). It will no longer be an offence to solicit prostitution "near or within view from a dwelling, school, church or hospital" (*SOA* 19,19A). It will no longer be an offence to engage in public acts of prostitution (*SOA* 20).

68. This repeal would remove protections for vulnerable women – it will permit others to live on the earnings of the prostitution of another person ("pimping") and it will permit the inducement of another person to commit an act of prostitution, with the only limitations being against behaviour that otherwise falls within the scope of other criminal offences.[47] Current restrictions protect vulnerable young people from exposure to, and enticement by, prostitution. The suggested repeal will permit public acts of prostitution, permit solicitation in or near churches and schools, among other places, and permit the overt, public advertising of commercial sex services. It will also allow prostitution or solicitation in massage parlours, saunas and steam baths, gyms, photographic studios and the like.

69. The Bill liberalises commercial surrogacy by lifting the ban on commercial surrogacy arrangements outside NSW and through a consequential amendment that removes the requirement that any surrogacy arrangement must be altruistic as a mandatory condition.[48] This will harm vulnerable women in foreign jurisdictions. Commercial surrogacy is banned for important ethical reasons, including that it amounts to the sale of a child. It also banned for important human rights considerations. As the Australian Government clarifies:

> Some commercial arrangements can be classed as the sale of children. This breaches the *Convention on the Rights of the Child* (United Nations).
>
> Some surrogate mothers provide their services under bonded labor arrangements. This is a form of slavery, and against the law. It breaches the *Abolition of Forced Labour Convention (United Nations)*.[49]

70. Schedule 19[3] amends the *Surrogacy Act 2010* to override the mandatory preconditions created to protect vulnerable women from exploitation. These protections include the requirement that arrangements are altruistic only, pre-conception surrogacy arrangements, and that the birth mother must be 25 years or over. The proposal is to delete the following words from existing section 18(2)(b): 'the Court is satisfied that exceptional circumstances justify the making of the parentage order' transferring parentage. Instead, the Bill proposes that a parentage order may be made where, 'having regard to the

[46] Ibid, sch18, p.48.
[47] E.g. *Crimes Act 1900* (NSW) s 61, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.
[48] Ibid, sch19 cls 2, 4, pp.49.
[49] Australian Department of Foreign Affairs and Trade, 'Going overseas for international surrogacy' https://www.smartraveller.gov.au/before-you-go/activities/surrogacy#:~:text=Some%20commercial%20arrangements%20can%20be,slavery%2C%20and%20against%20the%20law.

circumstances of the birth parent or parents, it is in the best interests of the child'. However, the current section deploys the language of Article 6 of the *Declaration on the Rights of a Child*, which provides that the child 'shall, wherever possible, grow up in the care and under the responsibility of his parents, a child of tender years shall not, save in exceptional circumstances, be separated from his mother.' In its effort to liberalise access to overseas commercial surrogacy, the Bill would thus fail to acquit the protections afforded to vulnerable mothers and children under international law.

71. This would allow a person to breach the laws that are included to protect vulnerable surrogate mothers and the children born, but still obtain a parentage order by arguing that it is in the best interests of the child for the order to be made. If anything, these provisions would make subverting the law and engaging extremely vulnerable women in surrogacy arrangements more attractive, because the more vulnerable the surrogate mother, the less likely it is that a court will decide that staying with her is in the best interests of the child.

J. The Bill introduces self sex-id and other controversial gender ideology throughout the statute book (passim)

72. The Bill seeks to eradicate a large amount of sex-based language and distinctions in the NSW statute book. The effect is to impose a controversial gender ideology into the law of NSW. These changes are embedded through the Bill, and the instances are too numerous to list individually.

73. Some examples include:

    (a) The Bill removes the sex binary from many Acts, introducing the concept of "different sex", e.g., changes to section 3 of the *Amendment of Law Enforcement (Powers and Responsibilities Act) 2002*.[50]

    (b) The inclusion of a new Part 9C to the *Anti-Discrimination Act 1977* that requires government forms that collect information about a person's sex for that information to be described in a "non-binary way".[51]

    (c) The changes in Schedule 14 to amend the definition of gender in the *Interpretation Act* 1987 embeds the understanding of gender that is reflected in the Equality Bill as a whole, which is very different to what gender meant in 1987 when the *Interpretation Act* was first enacted. In 1987, "Gender" was being used synonymously with sex.

74. The Bill expands the scope for variations to administrative processes that seek to efface biological distinctions from the activities of the public service.[52] This will impact on those government employees with religious beliefs who are required to administer the provisions against the dictates of their conscience. For many, those procedures may be seen as requiring them to affirm views contrary to their deeply held beliefs. One leading example might be a public servant who objects to facilitating the registration of a child's change of

[50] Ibid, sch15, cl1, p.44.
[51] Ibid, sch1, cl43, p.17.
[52] See, for e.g., sch12, cl2, p.41.

sex in the absence of parental consent. In the United Kingdom, persons with such beliefs have been recognised as holding a protected philosophical belief, and are thus protected from discrimination under the *Equality Act 2010* (UK) (see, for eg, *Forstater v CGD Europe & Ors*).[53] However, in the absence of such clarification in NSW, because the Bill states that these various administrative provisions do not affect the operation of the *Anti-Discrimination Act 1977,* such persons will be driven from the public service. This is a profound irony, given the Bill's purported attempts to progress inclusion and diversity in the public service (see Schedule 12).

75. Moreover, within Schedule 12 itself, there is virtually no limitation on what obligations a 'diversity and inclusion standard' may impose upon a public servant contrary to their conscientious beliefs. As noted above, the omission of religious diversity within those proposed provisions is particularly noteworthy. We hold the concern that by failing to consider how to include persons of religious belief, such diversity and inclusion efforts will only increase the sense of exclusion and unwelcome felt by persons of religious belief.

Conclusion

76. The Bill increases ease of access by children and young people to gender-affirming interventions at the very moment that the best available evidence suggests that access to such 'treatments' should be curtailed.

77. The Bill's provisions are complicated and interlinked. Despite being broken into sections, the different issues raised above are interwoven, with consequential amendments to one section intermingled in others. There is no safe way of splitting this Bill, or passing parts of it, without risking significant unintended consequences.

78. Most of the issues addressed by the Bill were not telegraphed by Mr Greenwich or signalled for Parliamentary debate by Labor before the election. There is no mandate to make any of these controversial changes.

[53] [2021] UKEAT 0105_20_1006.

79. We thank the Committee for the opportunity to submit.

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