Feminist Legal Clinic Inc.
PO Box 273, Summer Hill NSW 2130
Mobile: 0402 467 476
www.feministlegal.org
ABN: 17 360 484 300

NSW Law Reform Commission

Email: nsw-lrc@justice.nsw.gov.au

5 October 2023

Preliminary Submission to Anti-Discrimination Review

Feminist Legal Clinic Inc. is a community legal service established to advance the human rights of women and girls. We welcome the opportunity to contribute to this review and thank you for the extension of time. Unfortunately due to time constraints our submission will be focused only on sex and transgender status.

1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

Care should be taken not to add further complexity to the legislation under the guise of modernising and simplifying it. For example, earlier amendments adding transgender status as a protected attribute have unnecessarily complicated the legislation by effectively undermining the recognition of sex as a protected attribute. Confusion has arisen because of increasing conflation of biological sex with socially constructed gender identities.

Sex discrimination provisions are adequate to protect transgender status and other gender identities without undermining recognition of sex as a physical reality. If an individual attracts less favourable treatment because they present or identify in a manner that does not conform with stereotypical expectations based on sex, this can ground a claim of sex discrimination. For example, if a man adopts a traditionally female name and wears a dress and make up to work and as a result loses his job, he has been treated less favourably than a woman in similar circumstances and could therefore bring a claim of sex discrimination. Similarly, if a woman is sacked for refusing to wear heels and cosmetics and preferring attire that is considered more traditionally masculine, she could also bring a claim for sex discrimination since a man in the same job would presumably not be sacked for failing to wear heels and make up. There is no need for 'transgender status' or 'gender identity' to be included as protected attributes to provide this protection.

There is no need to deny the reality of biological sex to protect the rights of individuals with a 'gender identity' that does not conform with traditional sex stereotypes. To do so creates an avalanche of unintended consequences, including creating grounds for vexatious claims such as the notorious ball waxing cases brought

by Jessica Yaniv in Canada. Gynaecologists should not be compelled to conduct pap smears on males, as also demanded by Yaniv in subsequent claims. Reason dictates that the reality of biological differences must be acknowledged, and is essential for special measures for the protection and advancement of women and girls to operate effectively.

2. whether the range of attributes protected against discrimination requires reform

As stated above, transgender status should be removed from the legislation and calls to add gender identity generally as a protected attribute should be strongly resisted as this will only further undermine recognition of sex as a biological reality needing protection.

Other Australian jurisdictions recognise political belief and activity as a protected attribute. However, in our experience human rights bodies in Australia are interpreting this attribute very narrowly, and in a manner that protects only political beliefs and activities which have their approval. For example, feminists with gender critical beliefs (the belief that sex is based in biology, is binary and cannot be changed) have not been successful in obtaining protection and as result are being sacked and refused service in many contexts.

Protecting beliefs and activities, whether political or religious, is problematic because they are often in themselves inherently offensive and discriminatory towards women and other groups. For example, some Christians argue male headship is a core belief and are also deeply opposed to fornication, homosexuality and abortion. Many of our health, education and welfare services are operated by Christian organisations and so the implications of protecting these beliefs are potentially far-reaching. Protecting religious beliefs, but not other belief systems, is in itself discriminatory. For example, a service that bases its beliefs in feminism and science is not protected, whereas a service that bases its beliefs in patriarchal religion may be protected.

3. whether the areas of public life in which discrimination is unlawful should be reformed

In view of the concerns outlined above, we do not support the expansion of discrimination law into any further areas of public life. Employment, accommodation and access to good and services are fundamental to existence and the current application of these laws is increasingly problematic. We oppose extending the reach of discrimination legislation into other areas where the legislation may operate to further constrain freedom of belief and expression, particularly the expression of opinions opposed to gender identity ideology and the harms of the sex-change industry.

4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

No, the application of the existing test in relation to transgender status is unclear. For example, if a male who identifies as a ‘trans woman’ is excluded from a facility intended only for women, is the comparator a woman who does not identify as transgender or is the comparator a man who does not identify as transgender? We suggest the comparator must be the latter, because the implication is otherwise that

service providers must disregard a person's biological sex and treat these individuals as if they are the sex with which they 'identify'. This reasoning results in many consequences that undermine the right of women to have any services, opportunities or facilities which exclude men. As a result, women's sport, and sex- segregated custodial facilities, domestic violence refuges, toilets and changerooms will be untenable.

5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

Currently women who defend women's sex-based rights and deny that sex can be changed can be ridiculed, abused and threatened - 'Kill TERFs' being a popular trans activist rally cry. If women defend their position they are met with claims of vilification and discrimination which are upheld by human rights bodies (see for example, the case of *Clinch v Rep (No. 2) (Discrimination)* [2020] ACAT 68).

In view of these considerations, we suggest the range of protected attributes should be restricted to those that can be more objectively ascertained (sex, age, race, disability) and are less fluid and reliant on subjective assessments. The current vilification laws are already a significant constraint on freedom of speech and there should be no expansion into the criminal law. The idea that people should be prosecuted for questioning the fraudulent sex-change industry and the 'gender affirmation' model of medical and surgical intervention for gender incongruent individuals, is frightening and must be strongly resisted.

6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

Sexual harassment is specific to sex and is distinct from other forms of harassment. We do not support the extension of these laws to other protected attributes in the current environment where people allege 'violence' when they claim to have been 'misgendered'.

7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

Voluntary schemes imposing positive obligations such as those imposed by ACON's Australian Workplace Equality Index (AWEI) have resulted in women's sex-based rights being steadily eroded in the workforce and beyond. For example, women have lost exclusive access to female toilets and changerooms in the workplace, and affirmative measures such as quotas have been recast to include anyone who 'identifies' as a woman. If women dare to complain about this change in conditions, their employment is threatened. In this context, we cannot support the imposition of any legislated positive obligations, as such provisions may be used to further coerce women into ceding their right to reasonable accommodations and special measures to advance equality with men. It is extraordinary that legislation originally intended to overcome inequality is now increasingly used as a weapon to reverse the gains made by decades of feminist activism.

8. exceptions, special measures and exemption processes

Unfortunately, existing exceptions, special measures and exemption processes are undermined by an apparent preference for meeting the demands of those claiming a transgender status. Despite the clear exception for sport, increasingly female sport is no longer fair or safe because of pressure to include males identifying as women. Special measures for the advancement of women's equality have also been subverted by extreme gender identity ideology, which opposes the restriction of quotas or opportunities on the ground of biological sex. Restricting spaces or services to females is no longer tenable when any man can gain entry by simply identifying as a woman, regardless of his presentation or motivations.

9. the adequacy and accessibility of complaints procedures and remedies

Complaints procedures are now routinely exploited by aggressive males wanting to assert their entitlement to access services, spaces and opportunities reserved for women. Sadly, this means the legislation is increasingly serving a purpose opposite from that intended. Bullies are using complaints procedures to victimise those who dare assert sex-based rights on behalf of women. In this context we do not support any expansion of the powers of the Anti-Discrimination Board and strongly oppose setting up anything resembling the Victorian 'star chamber' established by the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic). The remedies available to women who have been discriminated against have been inadequate to date. Now, these mechanisms are instead being turned on those needing the assistance of the law and their value is becoming increasingly questionable.

10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

It is difficult to avoid the impression that the Anti-Discrimination Board of NSW, in its embrace of gender identity ideology, may be doing women more harm than good. In these circumstances we cannot support an increase in its powers and functions until such time that clarity is restored to the definition of 'woman' and the importance of spaces, services and opportunities that cater exclusively to females.

11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

Similar problems are being experienced throughout Australia and globally, with Victoria arguably modelling what may be the most oppressive model in the country, if not the world. At least NSW has so far retained a definition of 'man' and 'woman' within the Act and health practitioners are not yet being coerced into fast-tracking young and vulnerable people onto hormonal and surgical interventions.

In Victoria, the *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) is drafted in a manner that breaches multiple human rights and civil liberties and also constitutional principles as set out by the High Court in *Burns v Corbett* [2018] HCA 15. Section 8 of the Act effectively purports to give the Commission and VCAT jurisdiction to determine matters between residents of different states (a jurisdiction specifically reserved under Article 75(iv) of the Australian Constitution).

The powers of compulsion given to the Human Rights Commission as part of its investigatory functions (section 36, 37, 38), the capacity to conduct proceedings in secret (section 41) and potentially in disregard of principles of natural justice (section 35) and its unfettered power to '*take any action it considers fit*' under section 42 would establish it as a menacing, largely unaccountable tribunal, with extraterritorial reach. Meanwhile, the Act makes provision for VCAT, and not a court, to review the Commission's decisions (section 45) and enforce its orders (section 46). Indeed, the secrecy provisions and the restrictions placed on disclosure of information to a court (section 51 and 52) would seem to hamper any recourse to the civil court system.

We urge the NSW Parliament not to follow the Victoria's lead, or introduce any other oppressive provisions designed to further advance dangerous gender identity ideology.

12. the interaction between the Act and Commonwealth anti-discrimination laws

Unfortunately, the federal *Sex Discrimination Act 1984* (Cth) has been similarly afflicted and in 2013 introduced 'gender identity' as a protected attribute. Provisions recognising and protecting gender identity or transgender status are currently the subject of at least one court challenge (see the matter of *Tickle v Giggle* presently before the Federal Court of Australia), with arguments being raised that such provisions are unconstitutional and in conflict with the Commonwealth Government's obligation to act in accordance with its ratification of the international human rights Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

13. any other matters the Commission considers relevant to these Terms of Reference.

We urge the NSW Government to shy away from further embedding a harmful ideology that is responsible for exposing many young and vulnerable people to unethical experimentation by the sex change industry, undermining women's sex-based rights, and constraining freedom of expression and belief. We would be happy to expand on any of these matters if required.

Conclusion

Anti-discrimination law in Australia is characterised by an incoherent and inconsistent mix of federal and state-based laws that have emerged on an ad hoc basis, with no clear focus. NSW has an opportunity to return to first principles and craft legislation that clearly enunciates the human rights of its citizens and offers appropriate protections against discrimination.

In particular, the protected attribute of 'sex' should unambiguously refer to 'biological sex, being either male or female'. Anti-discrimination laws in Australia now recognise 'gender identity', or some version of a gender-related attribute, as a protected characteristic. Unlike biological sex, 'gender' cannot be defined except by reference either to stereotypical notions of masculinity or femininity, or to infinitely variable individual conceptualisations of the term. Unlike biological sex, gender has no legal clarity.

The inclusion of 'gender', 'gender identity' and 'gender expression' in anti-discrimination laws has produced an intractable impasse between the human rights of those claiming a 'gender identity', and women's sex-based rights. Changes to state-based birth registration laws have compounded this dilemma by creating the fiction of the 'legal female', with only self-identified declaration being required in a majority of states.

Battle lines have been drawn and litigation is currently on foot to address this issue. The NSW Parliament can avoid such certain challenges to its anti-discrimination law by eschewing notions of 'gender' and instead ensuring women's sex-based rights are clearly protected in its legislation.

Yours faithfully

Anna Kerr
Principal Solicitor
Feminist Legal Clinic Inc.
Organization in Special Consultative Status with the Economic and Social Council (ECOSOC) since 2023.