



# Lesbian, Gay, Bisexual, Transgender and Intersex Students

David Ford – November 2016



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## ABOUT THE AUTHOR

**David Ford** is the senior partner at Emil Ford Lawyers. He practises mainly in commercial and education law. He has advised educational institutions throughout Australia for over 30 years.

David is:

- Immediate Past President of the NSW Chapter of the Australia and New Zealand Education Law Association.
- A member of the English, American and South African Education Law Associations.
- A member of the Editorial Board of the *CCH School Principals Legal Guide*.
- The editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
- A reviewer for the *International Journal of Law and Education*.
- A former Chairman of the Council of MLC School, Sydney.
- A Fellow of The Taxation Institute.

David has presented at conferences in the United Kingdom, South Africa, Belgium, the Czech Republic, New Zealand and throughout Australia, and published numerous papers on topics as varied as enrolment procedures and conditions; student rights; teachers' liability; investigations; risk management; teachers, school counsellors and confidentiality; bullying (including cyber bullying); outdoor education; sport; multiculturalism in education; discrimination; discipline; and child protection.

David regularly presents in-school seminars for both teachers and administrators on education law matters. He also consults to schools and their boards on governance issues. David is often engaged by schools to investigate allegations against members of staff.

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# **Lesbian, Gay, Bisexual, Transgender and Intersex Students**

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## **What is this paper about?**

Schools and those who work in them have an overarching duty of care to students which spreads its tentacles into all areas of school life and which is often key to an understanding of how to respond to new challenges. Accordingly, as I consider how schools and teachers respond to the growing number of young people identifying as Lesbian, Gay, Bisexual, Transgender or Intersex, the first step is to see what reasonable steps should be taken to fulfil the duty of care to them. In particular, this means thinking about bullying and harassment.

The second step in relation to LGBTI students is to see how Australian and NSW legislation about unlawful discrimination affects a school's way of dealing with them.

Finally, I include a brief word about privacy.

## **Duty of Care**

Schools and teachers owe a duty of care to all their students. Put simply: "A school authority owes to its pupils a duty to ensure that reasonable care is taken of them whilst they are on school premises during hours when the school is open for attendance."<sup>1</sup>

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<sup>1</sup> *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J.

If there is a breach of the duty of care and damage is suffered as a result, the school and/or the teacher are liable to the injured student.<sup>2</sup>

To succeed, the student must prove that:

- (a) the school and its teachers have a duty of care to the student at the particular time the injury occurred;
- (b) the risk of injury was foreseeable;
- (c) the likelihood of what happened was more than insignificant;
- (d) there was a failure to observe a reasonable standard of care;
- (e) this failure was the cause of the injury; and
- (f) the injury was of a type for which damages are awarded.<sup>3</sup>

### ***A Non-delegable Duty***

The school's duty is to ensure that reasonable care is taken of students while they are in the school's care. The school cannot delegate this duty. In other words, the duty is not discharged simply by appointing competent teaching staff and leaving it to them to take appropriate steps for the care of the students. The school's duty requires it to ensure that reasonable care is taken, not to take reasonable care to ensure that reasonable care is taken.

### ***The Standard of Care***

The degree of risk has an impact on the standard of care required. In *Wyong Shire Council v Shirt*, Mason J spoke of determining "what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the

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<sup>2</sup> *Richards v State of Victoria* [1969] VR 136 at 138-9 per Winneke CJ; *Ramsay v Larsen* (1964) 111 CLR 16 at 28 per Kitto J

<sup>3</sup> Much more detail about the principles involved here may be found in *Tort Law Reform: Does it affect teachers and schools?* David Ford, ANZELA Annual Conference, Sydney 2003 available at [www.emilford.com.au/education-schools/free-education-law-papers-and-resources](http://www.emilford.com.au/education-schools/free-education-law-papers-and-resources)

expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.”<sup>4</sup>

When we consider the nature and extent of the duty of care to LGBTI students, we are moving to uncharted territory. What is a reasonable standard to expect of teachers when dealing with such students?

Although the territory is uncharted, schools have explored similar terrain. Many students are different from their peers in one way or another. Indeed, schools are often encouraging their students to dare to be different. At the same time, schools have long sought to encourage students to understand and tolerate difference, whether it be in looks, ability, race or social background. Since schools began, some students have not responded to this encouragement and instead have bullied and harassed those who do not fit their mould of normality.

This, in turn, has led to claims by bullied students. There is now substantial case law about the liability of schools and teachers for failing to care for students who have been bullied.<sup>5</sup>

### ***Foreseeability and Probability***

As noted above, the school need only take precautions against a risk of harm where the risk of injury is foreseeable and the likelihood of that risk materialising is more than insignificant. The High Court in *Commonwealth v Introvigne*<sup>6</sup> held that a risk of injury may be foreseeable even if one could say that it probably would not happen.

When LGBTI students are bullied, foreseeability and probability are not in question. That bullying occurs in schools is both foreseeable and probable

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<sup>4</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47

<sup>5</sup> *Haines v Warren* (1987) Aust Torts Reports 80-115; *Lisa Eskinazi v State of Victoria* County Court of Victoria, Melbourne No 06471/1999 (unreported); *Emonson v Trustees of the Christian Brothers* (2001) Ballarat County Court, Victoria (unreported); *Cox v State of New South Wales* [2007] NSWSC 471; *Gregory v State of New South Wales* [2009] NSWSC 559; *Oyston v St Patrick's College* [2011] NSWSC 269; *Oyston v St Patrick's College* [2013] NSWCA 135; *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310

<sup>6</sup> (1982) 150 CLR 258 at 267

as the court found in *Cox v State of NSW*.<sup>7</sup> Research in Australia<sup>8</sup> and in the US<sup>9</sup> has shown that LGBTI students experience high rates of harassment, physical assault and sexual violence.

### **Reasonable Steps**

As it is both foreseeable and probable that LGBTI students are going to be harassed, bullied and coerced at school with resultant serious consequences, schools do have a duty to take reasonable steps to minimise the risk of these things occurring.<sup>10</sup>

Some of the measures that the courts have felt that schools should have taken to minimise the risk of bullying are:

- (a) having a bullying policy and anti-bullying programs;
- (b) educating the school community about bullying and the policy;
- (c) implementing the policy;
- (d) responding to and investigating complaints of bullying in accordance with the policy;
- (e) being aware of vulnerable students;
- (f) ascertaining the identity of the perpetrators;
- (g) taking action to prevent repetition by the perpetrators.

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<sup>7</sup> [2007] NSWSC 471

<sup>8</sup> Research into young people's experiences of homophobia and transphobia shows that 61% of same sex attracted or gender diverse young people in Australia have experienced verbal abuse; 18% of same sex attracted or gender diverse young people in Australia have experienced physical abuse; and 80% of these homophobic and transphobic incidents take place in schools. Bully Zero Australia Foundation <http://bzaf.org.au/homophobic-bullying/>  
<sup>9</sup> "Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)" *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, Executive Summary* Grant, Jaime M, Lisa A Mottet, Justin Tanis, Jack Harrison, Jody L Herman, and Mara Keisling. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011

<sup>10</sup> This was the conclusion more than 10 years ago in a paper by Christopher Kendall & Naomi Sidebotham - *Homophobic Bullying In Schools: Is There A Duty Of Care?* [2004] ANZJILawEdu 5; (2004) 9(1) Australia & New Zealand Journal of Law & Education 71

## Discrimination and LGBTI Students

### **Legislation**

In Australia, there are both federal and state laws dealing with discrimination. For those in NSW, the relevant legislation is:

- (a) *Disability Discrimination Act 1992* (Cth)
- (b) *Sex Discrimination Act 1984* (Cth)
- (c) *Anti-Discrimination Act 1977* (NSW)

### **Definitions**

#### ***Sex Discrimination Act***

**Sex:** The *Sex Discrimination Act* does not define **sex** but does define several related terms. **Sex** therefore has its normal meaning which appears, in the context of the legislation, to be biological sex determined by the existence of sex chromosomes, gonads, internal reproductive organs and external genitalia.

**Sexual orientation** means a person's sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.<sup>11</sup>

Typically, we refer to a person whose sexual orientation is towards persons of the same sex as homosexual (lesbian or gay - the L and G of LGBTI); we refer to a person whose sexual orientation is towards persons of a different sex as heterosexual; and we refer to a person whose sexual orientation is towards persons of the same sex and persons of a different sex as bisexual (the B of LGBTI).

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<sup>11</sup> Section 4 of the *Sex Discrimination Act*

**Gender identity** means 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.<sup>12</sup> Although the Act does not refer to transgender people<sup>13</sup>, typically a person who identifies with a gender different to that normally associated with that person's sex at birth is trans<sup>14</sup> or transgender (the T of LGBTI).

**Intersex status** (the I of LGBTI) means the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male<sup>15</sup>; or
- (c) neither female nor male.<sup>16</sup>

### ***Anti-Discrimination Act***

**Homosexual** means male or female homosexual.<sup>17</sup> A reference to a person's **homosexuality** includes a reference to the person being thought to be a homosexual person, whether he or she is in fact a homosexual person or not.<sup>18</sup>

**Man** means a member of the male sex irrespective of his age.<sup>19</sup>

**Woman** means a member of the female sex irrespective of her age.<sup>20</sup>

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<sup>12</sup> Section 4 of the *Sex Discrimination Act*. The reference to a person's **designated** sex at birth is odd in that it suggests that someone decides after a baby is born what sex the child will be. A person's sex is a matter of biological fact, not designation.

<sup>13</sup> While the use of the term transgender is generally acceptable, not everyone whose appearance or behaviour does not conform to their gender identifies as a transgender person. The ways that transgender people are talked about in popular culture, academia and science are constantly changing, particularly as our awareness, knowledge and openness about transgender people and their experiences grow.

<sup>14</sup> Trans is sometimes used as shorthand for transgender.

<sup>15</sup> A hermaphrodite

<sup>16</sup> Section 4 of the *Sex Discrimination Act*

<sup>17</sup> Section 4 of the *Anti-Discrimination Act*

<sup>18</sup> Section 49ZF of the *Anti-Discrimination Act*

<sup>19</sup> Section 23 of the *Anti-Discrimination Act*

A reference 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<sup>21</sup>:

- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
- (c) who, being of indeterminate sex, identifies as a member of a particular sex 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.<sup>22</sup>

## **Sex discrimination**

### ***Sex Discrimination Act***

Section 5(1) and (2) of the *Sex Discrimination Act* state that:

*(1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:*

- (a) the sex of the aggrieved person;*
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or*
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;*

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<sup>20</sup> Section 23 of the *Anti-Discrimination Act*

<sup>21</sup> **Recognised transgender person** means a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provisions of a law of another Australian jurisdiction: section 4 *Anti-Discrimination Act*

<sup>22</sup> Section 38A of the *Anti-Discrimination Act*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.*

*(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.*

Subsection (2) must be read in conjunction with section 7B which states that:

*(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(2) if the condition, requirement or practice is reasonable in the circumstances.*

*(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:*

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*
- (b) the feasibility of overcoming or mitigating the disadvantage; and*
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.*

### ***Anti-Discrimination Act***

Section 24(1) of the *Anti-Discrimination Act* states that:

*A person (the **perpetrator**) discriminates against another person (the **aggrieved person**) on the ground of sex if the perpetrator:*

- (a) on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or*
- (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have a relative or associate of that*

*sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.*

## **Sexual orientation discrimination**

### ***Sex Discrimination Act***

Section 5A(1) and (2) of the *Sex Discrimination Act* state that:

*(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if, by reason of:*

- (a) the aggrieved person's sexual orientation; or*
- (b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or*
- (c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.*

*(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.<sup>23</sup>*

### ***Anti-Discrimination Act***

Section 49ZG(1) of the *Anti-Discrimination Act* states that:

*A person (the **perpetrator**) discriminates against another person (the **aggrieved person**) on the ground of homosexuality if the perpetrator:*

- (a) on the ground of the aggrieved person's homosexuality or the homosexuality of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially*

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<sup>23</sup> This subsection must be read in conjunction with section 7B set out on page 8.

*different, the perpetrator treats or would treat a person who he or she did not think was a homosexual person or who does not have such a relative or associate who he or she thinks was a homosexual person, or*

- (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not homosexual persons, or who do not have a relative or associate who is a homosexual person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.*

### **Gender identity discrimination (Transgender Discrimination)**

#### **Sex Discrimination Act**

Section 5B(1) and (2) of the *Sex Discrimination Act* states that:

*(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's gender identity if, by reason of:*

- (a) the aggrieved person's gender identity; or*
- (b) a characteristic that appertains generally to persons who have the same gender identity as the aggrieved person; or*
- (c) a characteristic that is generally imputed to persons who have the same gender identity as the aggrieved person;*

*the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different gender identity.*

*(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's gender identity if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the aggrieved person.<sup>24</sup>*

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<sup>24</sup> This subsection must be read in conjunction with section 7B set out on page 8.

The sections in the *Sex Discrimination Act* dealing with gender identity were introduced in 2013.<sup>25</sup> Before this, it may have been possible for transgender people to seek a remedy for alleged unlawful discrimination under the *Disability Discrimination Act 1992*. Indeed, such a remedy may still be available. The argument is that the definition of disability is so wide that it is possible for a transgender person to say that simply being trans amounts to a disability.<sup>26</sup> In the Act, disability means, among other things, a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that is imputed to a person.<sup>27</sup> Therefore, for example, a transgender person (whose sex at birth was male but who now identifies as female) could argue that the person treating her less favourably was doing so because that person believed that she suffered from a disorder that affected her perception of reality; namely, that she (the transgender person) thought that she was female. It does not matter whether or not the transgender person who is alleging an imputed disability actually had the disability.<sup>28</sup>

### ***Anti-Discrimination Act***

Section 38B(1) of the *Anti-Discrimination Act* states that:

*A person (the perpetrator) discriminates against another person (the aggrieved person) on transgender grounds if the perpetrator:*

- (a) on the ground of the aggrieved person being transgender or a relative or associate of the aggrieved person being transgender, treats the aggrieved person less favourably than in the same circumstances (or in circumstances which are not materially different) the perpetrator treats or would treat a person who he or*

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<sup>25</sup> Interestingly, DSM-5 was published by the American Psychiatric Association in 2013. DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The APA revised DSM-IV's criteria for gender identity disorder and replaced that description with gender dysphoria. Gender nonconformity is no longer seen as a mental disorder in itself. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition. For more information, see the APA Factsheet at <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

<sup>26</sup> I am not suggesting that a transgender person would want to argue this way.

<sup>27</sup> Section 4 of the *Disability Discrimination Act*

<sup>28</sup> *Gordon v Commonwealth of Australia* (2008) EOC ¶93-495

*she did not think was a transgender person or who does not have such a relative or associate who he or she did not think was a transgender person, or*

- (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply, or*
- (c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.*

### **Discrimination by educational authorities**

#### ***Sex Discrimination Act***

Section 21 of the *Sex Discrimination Act* states that:

*(1) It is unlawful for an educational authority<sup>29</sup> to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*

- (a) by refusing or failing to accept the person's application for admission as a student; or*
- (b) in the terms or conditions on which it is prepared to admit the person as a student.*

*(2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*

- (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;*

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<sup>29</sup> A school, college, university or other institution at which education or training is provided: section 4 of the *Sex Discrimination Act*

(b) by expelling the student; or

(c) by subjecting the student to any other detriment.

(3) Nothing in this section applies to or in respect of a refusal or failure to accept a person's application for admission as a student at an educational institution where:

(a) the educational institution is conducted solely for students of a different sex from the sex of the applicant; or

(b) except in the case of an institution of tertiary education, education or training at the level at which the applicant is seeking education or training is provided by the educational institution only or mainly for students of a different sex from the sex of the applicant.

(4) This section binds the Crown in right of a State.

The only exemption is found in section 38(3) of the *Sex Discrimination Act* which states that nothing in section 21 makes it unlawful for a school to discriminate against a child on the ground of the child's sexual orientation or gender identity in connection with the provision of education if the school is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the school so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Without going into the fine detail of this exemption<sup>30</sup>, it clearly does not apply to public schools in NSW and I am not aware of any independent schools which have tried to assert that providing an education to LGBTI students offends the religious susceptibilities of adherents of their religion. Nevertheless, I acknowledge that some followers of Judaism, Christianity and Islam believe that a person's gender should usually correspond with their biological sex, except where there is an intersex status.<sup>31</sup> Schools operated by such followers may seek to come within the section 38(3) exemption should they wish to discriminate against a transgender child in a way that would otherwise be unlawful under section 21.

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<sup>30</sup> For an examination of the equivalent exemption in the *Anti-Discrimination Act*, see *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155

<sup>31</sup> As defined on page 6

***Anti-Discrimination Act***

Section 31A of the *Anti-Discrimination Act* states that:

*(1) It is unlawful for an educational authority<sup>32</sup> to discriminate against a person on the ground of sex:*

*(a) by refusing or failing to accept the person's application for admission as a student, or*

*(b) in the terms on which it is prepared to admit the person as a student.*

*(2) It is unlawful for an educational authority to discriminate against a student on the ground of sex:*

*(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or*

*(b) by expelling the student or subjecting the student to any other detriment.*

*(3) Nothing in this section applies to or in respect of:*

*(a) a private educational authority<sup>33</sup>, or*

*(b) a refusal or failure to accept a person's application for admission as a student by an educational authority where the educational authority administers a school, college, university or other institution which is conducted solely for students of the opposite sex to the sex of the applicant.*

*(4) The admission into any such school, college, university or other institution of a transgender person as referred to in Part 3A who identifies with the sex of persons for whom the school, college, university or other institution is conducted does not, for the purposes of subsection (3)(b), affect its status as a school, college, university or other institution conducted solely for students of the same sex.*

Section 38K of the *Anti-Discrimination Act* states that:

*(1) It is unlawful for an educational authority to discriminate against a person on transgender grounds:*

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<sup>32</sup> **educational authority** means a person or body administering a school, college, university or other institution at which education or training is provided: section 4 *Anti-Discrimination Act*

<sup>33</sup> A **private educational authority** includes independent schools but not public schools: section 4 *Anti-Discrimination Act*

- (a) *by refusing or failing to accept the person's application for admission as a student, or*
  - (b) *in the terms on which it is prepared to admit the person as a student.*
- (2) *It is unlawful for an educational authority to discriminate against a student on transgender grounds:*
  - (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or*
  - (b) *by expelling the student or subjecting the student to any other detriment.*
- (3) *Nothing in this section applies to or in respect of a private educational authority.*

It is clear that, unless the section 38(3) exemption in the *Sex Discrimination Act* applies, schools in NSW must not refuse to enrol students and must not expel students because they are lesbian, gay, bisexual or transgender. This is so even though, under the *Anti-Discrimination Act*, this prohibition does not extend to independent schools.

### ***Discrimination by providers of services or facilities***

#### ***Sex Discrimination Act***

Section 22 of the *Sex Discrimination Act* states that:

- (1) *It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*
  - (a) *by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
  - (b) *in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
  - (c) *in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.*

(2) *This section binds the Crown in right of a State.*

### ***Anti-Discrimination Act***

Section 38M of the *Anti-Discrimination Act* states that:

*It is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against another person on transgender grounds:*

- (a) by refusing to provide the person with those goods or services, or*
- (b) in the terms on which the other person is provided with those goods or services.*

**Services** in the *Anti-Discrimination Act* includes services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not. I believe that a court is likely to hold that a school's facilities are used by a section of the public being the students attending the school.<sup>34</sup>

A school's facilities include its toilets and change rooms.

### ***Sexual Harassment and Transgender Vilification***

#### ***Sex Discrimination Act***

Under section 28A(1) of the *Sex Discrimination Act*:

*A person sexually harasses another person (the **person harassed**) if:*

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*

*in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.*

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<sup>34</sup> The Australian Taxation Office accepts, in determining what is a public library for purposes of gift deductibility under Division 30 of the *Income Tax Assessment Act 1997*, that students attending a public educational institution are a section of the public (TR 2000/10). See also *Wilde v University of Sydney* [2003] NSWADT 206.

The circumstances to be taken into account include the sexual orientation, gender identity and intersex status of the person harassed.<sup>35</sup>

It is unlawful for a member of the staff of a school or for a student aged 16 or above to sexually harass a student at the school or at another school.<sup>36</sup>

A school can be vicariously liable for sexual harassment by its employees.<sup>37</sup> To avoid liability, the school would have to show that it took all reasonable steps to prevent its employee from sexually harassing the student.

### ***Anti-Discrimination Act***

Division 5 of Part 3A of the *Anti-Discrimination Act* deals with transgender vilification, making it unlawful for a person, by a public act<sup>38</sup>, to incite hatred towards, serious contempt for, or severe ridicule of a person on the ground that the person is a transgender person.<sup>39</sup> Doing this by threatening physical harm towards or inciting others to threaten physical harm towards, or towards any property of, the person is an offence with significant penalties including imprisonment.<sup>40</sup>

## **Dealing with practical issues**

### ***Toilets and Change Rooms***

Some transgender students will happily use toilets and change rooms that are gender neutral. Others seek to insist that they be allowed to use the toilets and change rooms dedicated to the gender of their choice. It is far from clear how the latter would fare if they made a formal complaint under the *Anti-Discrimination Act* or the *Sex Discrimination Act*. This underlines the importance of schools thinking through issues like this before they

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<sup>35</sup> Section 28A (2) of the *Sex Discrimination Act*

<sup>36</sup> Section 28F of the *Sex Discrimination Act*

<sup>37</sup> Section 106 of the *Sex Discrimination Act*

<sup>38</sup> Defined in section 38R of the *Anti-Discrimination Act*

<sup>39</sup> Section 38S of the *Anti-Discrimination Act*

<sup>40</sup> Section 38T of the *Anti-Discrimination Act*

materialise. Schools ought to talk with transgender students and their families to find toilets and change rooms that fit the needs of these students. Ideally, such discussions will lead to solutions that will meet the needs of both these students and the whole school community. The alternative is litigation which, as the following analysis shows, is uncertain at best.

***Claim under the Anti-Discrimination Act***

A public school student whose biological sex is female, whose gender identity is now male and who is not allowed to use the boys' toilets at a co-ed school could argue under the *Anti-Discrimination Act* that the school is discriminating against him:

- (a) by treating him less favourably than the school treats or would treat a student whom it did not think was a transgender person (namely, by not allowing him to use the boys' toilets while allowing a biological male student who also identifies as male to use those toilets);<sup>41</sup> or
- (b) by requiring him to comply with a condition (namely, that students must use the toilets designated for their biological sex – those biologically male are to use the boys' toilets and those biologically female are to use the girls' toilets) being a condition with which a substantially higher proportion of persons who are not transgender persons are able to comply and being a condition which is not reasonable having regard to the circumstances of the case and with which the transgender student is not able to comply;<sup>42</sup> and
- (c) by limiting his access to a benefit provided by the school (namely, the provision of toilets used by those of the gender with which he identifies);<sup>43</sup> or

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<sup>41</sup> Section 38B(1)(a) of the *Anti-Discrimination Act*

<sup>42</sup> Section 38B(1)(b) of the *Anti-Discrimination Act*

<sup>43</sup> Section 38K(2)(a) of the *Anti-Discrimination Act*

- (d) by subjecting him to a detriment by requiring him to use the girls' toilets where he will feel out of place and possibly be subject to abuse and harassment.<sup>44</sup>

The school responding to such a claim could argue that:

- (a) the student is not being treated less favourably because:
- i. the boys' toilets and the girls' toilets are of equal standard;<sup>45</sup>
  - ii. if there is any disadvantage, it is not a matter of substance;
  - iii. the proper comparator is not a biological male student who also identifies as male but rather a non-transgender student (male or female) so the treatment is the same;
- (b) the condition that students must use the toilets designated for their biological sex:
- i. is reasonable and is accepted as such by society; and
  - ii. is one with which the student can comply;<sup>46</sup>
- (c) there is no denial or limiting of access to a benefit provided by the school as, assuming that the provision of toilets is a benefit, the student does have access to toilets;
- (d) the student has not been subjected to any detriment as the school has not refused to provide the student with the use of toilet facilities.

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<sup>44</sup> Section 38K(2)(b) of the *Anti-Discrimination Act*

<sup>45</sup> Compare *Haines v Leves (1987) 8 NSWLR 442* where it was held that a girl at an all girls' school was treated less favourably because she was not offered the same subjects as boys at a nearby all boys' school.

<sup>46</sup> In *Travers v New South Wales [2000] FCA 1565*, a student with a disability needed to be able to get to a toilet within 12 seconds to avoid accidents. The school did not allow her to use a disabled toilet that was that close to her classroom. Could she comply with the condition that she use a toilet further away? The Court held that one must adopt a reasonably liberal interpretation of the phrase "is not able to comply". While it was not literally impossible for the student to comply, she could only do so "with consequences which ... are seriously embarrassing and distressing."

***Claim under the Sex Discrimination Act***

A complaint by this student or a similar independent school student under the *Sex Discrimination Act* would have to be put a little differently because the comparator under the federal Act is *a person who has a different gender identity* as opposed to *a person who the perpetrator did not think was a transgender person* under the NSW *Anti-Discrimination Act*.

The student complaining under the *Sex Discrimination Act* could argue that the school is discriminating against him:

- (a) by treating him less favourably than, in circumstances that are the same or are not materially different, the school treats or would treat a student who has a different gender identity; namely, by not allowing him to use the toilets of his chosen gender – the boys’ toilets – while allowing a biological female student who also identifies as female to use the toilets of her chosen gender – the girls’ toilets;<sup>47</sup> or
- (b) by imposing on him a condition (namely, that students must use the toilets designated for their biological sex – those biologically male are to use the boys’ toilets and those biologically female are to use the girls’ toilets) that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as the student and that this condition is unreasonable;<sup>48</sup> and
- (c) by limiting his access to a benefit provided by the school (namely, the provision of toilets used by those of the gender with which he identifies);<sup>49</sup> or
- (d) by subjecting him to a detriment by requiring him to use the girls’ toilets where he will feel out of place and possibly be subject to abuse and harassment.<sup>50</sup>

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<sup>47</sup> Section 5B(1) of the *Sex Discrimination Act*

<sup>48</sup> Sections 5B(2) and 7B of the *Sex Discrimination Act*

<sup>49</sup> Section 21(2)(a) of the *Sex Discrimination Act*

The school responding to such a claim could argue that:

- (a) there is no less favourable treatment because:
  - i. the boys' toilets and the girls' toilets are of equal standard;<sup>51</sup>
  - ii. if there is any disadvantage, it is not a matter of substance;
  - iii. the proper comparator is not a biological female student who also identifies as female but rather a student who is biologically male but who identifies as female (that is, another transgender student) - it would then say that this student is not treated less favourably but the same because the rule for both is that they must use the toilets for their biological sex;
- (b) the condition that students must use the toilets designated for their biological sex is reasonable because:
  - i. there is no disadvantage to the student or, if there is, it is small;
  - ii. it is not feasible to overcome the disadvantage because the cost of altering all the boys' toilets to provide a sufficient degree of privacy would be prohibitive;
  - iii. the disadvantage to the student is small and proportionate compared to the result the school seeks; namely, respecting the privacy needs of its students and keeping them safe;<sup>52</sup>
- (c) there is no denial or limiting of access to a benefit provided by the school as, assuming that the provision of toilets is a benefit, the student does have access to toilets;

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<sup>50</sup> Section 21(2)(c) of the *Anti-Discrimination Act*

<sup>51</sup> See Footnote 45

<sup>52</sup> Note that section 30 of the *Sex Discrimination Act* recognises that there is a genuine difference between men and women and that difference manifests itself in a desire for modesty and not exposing one's body to members of the opposite sex.

- (d) the student has not been subjected to any detriment as the school has not refused to provide the student with the use of toilet facilities.

### **School Uniforms**

Under sex discrimination legislation<sup>53</sup>, students have made discrimination claims where there are different rules provided for boys and girls; for example: (a) when the girls are not allowed to wear trousers while the boys are; (b) when girls are allowed to wear some jewellery and boys are not; or (c) when boys are told to wear their hair short but girls are not. In *Cope's Case*, a 15 year old boy was suspended from school when he refused to comply with the school's uniform policy. It required the boys to have collar length hair. There was no such rule for the girls. The boy made a complaint under the now repealed *Equal Opportunity Act 1984 (Vic)*. Before his complaint was heard, he successfully sought an interim order allowing him to return to school and attend classes because the Victorian Equal Opportunity Board found that he had been singled out and therefore subjected to a detriment, that he had *prima facie* been treated less favourably than the school treated the girls and that this treatment was on the basis of his sex.<sup>54</sup>

Transgender students sometimes want to wear a uniform that is "genderless" and sometimes the uniform prescribed for the gender with which they now identify. Should a school wish to take issue with their request, a complaint might be made. The key factual issue in resolving the matter is likely to be whether or not the school rule (whatever it is) is such that the school is treating the student less favourably than, in circumstances that are the same or are not materially different, the school treats or would treat a person who has a different gender identity.

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<sup>53</sup> Section 5 of the *Sex Discrimination Act* and section 24(1) of the *Anti-Discrimination Act*

<sup>54</sup> *Cope v Girton Grammar School Ltd* (1995) EOC ¶92-68 (Equal Opportunity Board, Victoria); *Girton Grammar School Ltd v Cope* (1995) EOC ¶92-713 (Supreme Court of Victoria). The *Equal Opportunity Act 1994 (Vic)* now gives schools the power to breach age and sex discrimination laws in respect of school dress codes and school discipline policies.

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

In independent schools, parents agree that their enrolled children will wear the approved school uniform. For single sex schools, legally, there is no unlawful discrimination in requiring all students to wear the same uniform. If the single sex school have trans students – boys who identifies as girls at an all-girls school and girls who identifies as boys at an all-boys school - they will no doubt want to wear the uniform as that is consistent with them identifying as a girl or boy as the case may be. It may however be difficult particularly for swimming and other sport uniforms.

The practical solution is to work with the student and the student's parents to reach an agreement on how to handle the uniform issue (and no doubt many others). Although the transgender student may prefer a genderless uniform, the school may not want to move quickly to such a uniform. In this case, the transgender student can be required to conform to the school's uniform requirements for the gender with which the student identifies. Even then, special consideration may need to be given to what is acceptable wear for swimming and other sports. Pastoral concerns for the student may well trump the legal right to insist on the stipulated uniform.

### **Sport**

Under s 42 of the *Sex Discrimination Act*<sup>55</sup>, it is lawful to discriminate on the ground of sex, gender identity or intersex status by excluding persons from taking part in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. But this does not apply in relation to the exclusion of persons from participation in:

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<sup>55</sup> There are similar exemptions in the *Anti-Discrimination Act*; for example, section 38P in relation to transgender students.

- (a) the coaching of persons engaged in any sporting activity;
- (b) the umpiring or refereeing of any sporting activity;
- (c) the administration of any sporting activity;
- (d) any prescribed sporting activity; or
- (e) sporting activities by children who have not yet attained the age of 12 years.

### **LGBTI Clubs**

The Safe Schools Coalition has a resource which includes this:

*Student led action is a really effective way to create cultural change at school. If your school already has a 'Stand Out' group, 'Queer-Straight-Alliance' or other gender and sexual diversity club, actively support their efforts!*

NSW public and independent schools allow student led (and often teacher guided) clubs to meet in school hours using school facilities. Students wanting to start a club may lawfully be refused permission because:

- (a) there are already enough clubs - there is no time or space available for another club to meet; or
- (b) no teacher is prepared to take some responsibility for the club.

A refusal for other reasons such as the fact that the asking students are gay or lesbian or trans is more problematic. Issues to be considered are:

- (a) Is the refusal because of the sexuality or gender identity of the students or because of the activities they are proposing or the message they are spreading?<sup>56</sup>
- (b) Does the refusal amount to denying the students access or limiting their access to any benefit provided by the school?
- (c) Does the refusal amount to subjecting the students to any other detriment?

As in other areas, independent schools are not affected by the relevant provisions of the *Anti-Discrimination Act*.

### ***Other Issues***

Other issues are likely to arise for schools with lesbian, gay and transgender students; for example, who can be taken to the school formal and what can be worn there. Each of these needs to be analysed in the same way as above.

Debate about these issues can become highly emotional as events in the USA have shown; for example, the decision by the legislature in North Carolina to override a Charlotte City Council Ordinance which would have prevented public toilets being exclusively for one sex or gender identity. The state law applying to schools now states:

*Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.*

Biological sex is determined by a person's birth certificate. A transgender person who has had the relevant surgery can have their birth certificate amended.

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<sup>56</sup> If it is the latter, a school that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed may be able to rely on the exemption in section 38(3) of the *Sex Discrimination Act*.

In NSW, I encourage schools to try to work with the student and the student's parents to reach an agreement on how to deal with issues like what toilets and change rooms to use. **These are areas where the feelings of all students must be taken into account.** As mentioned at the beginning of this paper, schools have a duty of care to all students. There can be a tension between the duty of care and obligations under anti-discrimination legislation.<sup>57</sup>

Some would argue that allowing a person who is biologically male but who now identifies as female in the female toilets and change rooms puts the other girls using those facilities at risk. Others argue in response that providing transgender students with access to toilets and change rooms based on gender identity does not stop schools addressing and preventing inappropriate student behaviour. Further, it is said that, if a school has any doubts about the sincerity of a person asserting a transgender identity, the school should work with the student and the student's parents to remove those doubts.

If a student who is already enrolled seeks to transition from one gender to another, great care needs to be exercised in handling not only the timing of that transition but also the many practical challenges involved. Because there may be difficulty in having other students and staff readily accept the change, the transitioning transgender student may well prefer to start at a new school.

My plea to **all** is to consider not only your own interests but also the interests of others. The insistence on one's rights no matter the impact on others is inconsiderate and selfish.

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<sup>57</sup> *Purvis v New South Wales* [2003] 217 CLR 92 is a good example of this in the disability discrimination area.

## Privacy

### **Legislation**

The *Privacy Act 1988* (Cth) protects the personal information of students at independent schools, including personal information contained in the student's educational records. The *Privacy and Personal Information Protection Act 1998* (NSW) is the equivalent legislation for students in NSW public schools.

### **Access to information; right to amend**

Under the privacy legislation, current or former students may seek to access their school records and to ask that the information be amended if it is inaccurate, out-of-date, incomplete, irrelevant or misleading. Transgender students wishing to change their name and gender marker on their educational records can seek such an amendment under the privacy legislation.<sup>58</sup>

Parents may make decisions on behalf of their child if the child does not have sufficient understanding or maturity to make the decision. Neither the privacy legislation nor the common law specifies an age at which an individual obtains sufficient understanding and maturity.

A student may still request a change after leaving school. The rights and protections under the privacy legislation apply for so long as the school holds the personal information. Many transgender students wish to amend their secondary educational records after leaving to ensure that anyone who requests those records (for example, university admissions offices or potential employers) see only the correct name and gender marker on their transcript.

If a student changes his or her name or gender, it is inaccurate and/or misleading to refer to the student by his or her former name or gender. However, this is only the case from the time the student changes his or her name or gender. It is not misleading or inaccurate to maintain the former name and/or gender on historical records such as school reports which

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<sup>58</sup> *Privacy Act APP 13*; section 15 *Privacy and Personal Information Protection Act 1998*

accurately reflect the individual's name and gender at the time the document was created.

### **Disclosure**

A student's transgender status is personal information and may only be disclosed for the primary purpose of collecting the information or in other limited circumstances. If a student asks the school to correct his or her name and gender, the school must take reasonable precautions to ensure that the individual's transgender status is not disclosed unlawfully. This may include securing the information to prevent unauthorised access.<sup>59</sup>

Disclosure of the transgender student's personal information among staff should be on a "needs to know" basis consistent with ensuring the school's duty of care can be fulfilled.

### **Conclusion**

When dealing with LGBTI students, schools must primarily keep in mind the duty of care they owe to all their students. Without ever losing sight of that duty of care, schools must then consider how to comply with their obligations under anti-discrimination and privacy legislation. There can be a balancing act required but it is manageable if one focusses on doing what is in the best interests of the student cohort.

Schools can also mostly avoid the cost and angst that comes from getting involved in courts, tribunals or commissions by consulting with students and their parents. Combining such family consultation with open communication with and education of the school community about new issues such as the rights and responsibilities associated with LGBTI students is vital to ensuring that our schools can continue to do what they do best – making a lasting and positive difference in the lives of our young people.

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<sup>59</sup> For more information on privacy in schools, see Nathan Croot's papers "Practical Privacy Issues in Schools" and "Amendments to the Privacy Act" available at [www.emilford.com.au/education-schools/free-education-law-papers-and-resources](http://www.emilford.com.au/education-schools/free-education-law-papers-and-resources)