



Safety at School  
for the Transgender Student

David Ford – October 2017



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## ABOUT THE AUTHOR

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David is:

- Former 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; disability, sex, sexuality and gender identity 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. Schools often engage David to investigate allegations against members of staff.

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# **Safety at School for the Transgender Student**

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

Schools and those who work in them have an overarching duty of care to students in all areas of school life. This means that thinking about the duty of care is a good starting point when trying to understand how to respond to new challenges. Accordingly, as I consider how schools and teachers respond to the growing number of young people identifying as transgender, 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 is to see how anti-discrimination legislation affects a school's way of dealing with transgender students. In this paper, I will confine my analysis to Australian legislation although elsewhere I have considered the relevant anti-discrimination statutes in New South Wales<sup>1</sup> and Western Australia.<sup>2</sup>

To give some international context, I will briefly consider the situation in the United Kingdom, Canada, the United States of America, New Zealand and South Africa.

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<sup>1</sup> *Lesbian, Gay, Bisexual, Transgender and Intersex Students*, David Ford (November 2016) 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)

<sup>2</sup> *Lesbian, Gay, Bisexual, Transgender and Intersex Students*, David Ford (ASBA WA Professional Development Conference 24 March 2017) available by request from David Ford – [David.Ford@emilford.com.au](mailto:David.Ford@emilford.com.au)

## **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>3</sup>

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>4</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>5</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.

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<sup>3</sup> *The Commonwealth of Australia v Introvigne* (1981) 150 CLR 258 at 269 per Mason J.

<sup>4</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>5</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)

### **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 expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.”<sup>6</sup>

When we consider the nature and extent of the duty of care to transgender 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 idea 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>7</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

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<sup>6</sup> *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47

<sup>7</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

materialising is more than insignificant. The High Court in *Commonwealth v Introvigne*<sup>8</sup> held that a risk of injury may be foreseeable even if one could say that it probably would not happen.

When transgender students are bullied, foreseeability and probability are not in question. That bullying occurs in schools is both foreseeable and probable as the court found in *Cox v State of NSW*.<sup>9</sup> Research in Australia<sup>10</sup>, New Zealand<sup>11</sup> and in the US<sup>12</sup> has shown that transgender students, like lesbian and gay students, experience high rates of harassment, physical assault and sexual violence. The Australian Human Rights Commission's *Change the course: National report on sexual assault and sexual harassment at Australian universities* (August 2017) has similar findings in the university context.

### **Reasonable Steps**

As it is both foreseeable and probable that transgender 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>13</sup>

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<sup>8</sup> (1982) 150 CLR 258 at 267

<sup>9</sup> [2007] NSWSC 471

<sup>10</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>11</sup> Youth'12: Fact Sheet about Transgender Young People, from Clark, T. C., Lucassen, M. F. G., Bullen, P., Denny, S. J., Fleming, T. M., Robinson, E. M., & Rossen, F. V. (2014).

The health and well-being of transgender high school students: Results from the New Zealand Adolescent Health Survey (Youth'12). *Journal of Adolescent Health*, 55, 93–99

<sup>12</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>13</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

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 bullying 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.

However, reasonable steps to minimise the risk of harm to transgender students are very likely to go beyond the steps required to deal with bullying. For example, a transgender student or one transitioning from one gender to another could well be traumatised by:

- (a) personal information about them being disclosed unnecessarily to students or staff;
- (b) other students or staff deliberately refusing to use the transgender student's preferred name and pronoun;
- (c) the school using the student's former name on reports or other documents.

Accordingly, reasonable steps might involve:

- (a) ensuring that the school has appropriate privacy policies and practices in place;
- (b) briefing staff generally in relation to the arrangements that have been or are being put in place for the student;
- (c) explaining to staff and students about the need to use the student's preferred name and pronoun;

- (d) educating students, staff, board members and the school community about the needs of transgender students generally and, to the extent necessary, about particular students;
- (e) reviewing school policies to ensure that they cover relevant matters for transgender students.

## **Privacy**

Privacy issues can be particularly important for transgender students. A failure to maintain an appropriate level of privacy may amount to a breach not only of a school's duty of care but also of privacy legislation.<sup>14</sup>

## **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. There is equivalent legislation in the states and territories covering students in public schools.<sup>15</sup>

## **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>16</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.

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<sup>14</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)

<sup>15</sup> For example, *Privacy and Personal Information Protection Act 1998 (NSW)*

<sup>16</sup> *Privacy Act* APP 13

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 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.

An illustration of where this did not happen can be found in Canada. A female transgender student at a school in Edmonton, Alberta complained that teachers had both displayed and called out her legal name, which is a typically male name, thereby disclosing to fellow students that her gender identity was different to her sex at birth. The Office of the Information and Privacy Commissioner found that the School was in breach of the *Freedom of Information and Protection of Privacy Act, 2000*.<sup>17</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.

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<sup>17</sup> Office of the Information and Privacy Commissioner Order F2016-26 (re), 2016 CanLII 82100 (AB OIPC) (July 13, 2016) Edmonton Public School District No 7

## **Australian Discrimination Legislation**

In Australia, there are both federal and state laws dealing with discrimination. The relevant Commonwealth legislation is:

(a) *Disability Discrimination Act 1992* (Cth)

(b) *Sex Discrimination Act 1984* (Cth)

The focus in this paper will be the *Sex Discrimination Act*.

### **Definitions**

**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.

**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>18</sup> Although the Act does not refer to transgender people<sup>19</sup>, typically a person who identifies with a gender different to that normally associated with that person's sex at birth is trans<sup>20</sup> or transgender.

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

(a) neither wholly female nor wholly male; or

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<sup>18</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>19</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>20</sup> Trans is sometimes used as shorthand for transgender.

- (b) a combination of female and male<sup>21</sup>; or
- (c) neither female nor male.<sup>22</sup>

### **Sex discrimination**

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;*

*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:*

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<sup>21</sup> A hermaphrodite

<sup>22</sup> Section 4 of the *Sex Discrimination Act*

- (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.*

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

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>23</sup>

The sections in the *Sex Discrimination Act* dealing with gender identity were introduced in 2013.<sup>24</sup> Before this, it may have been possible for

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

<sup>24</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>.

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>25</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>26</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>27</sup>

### ***Discrimination by educational authorities***

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

*(1) It is unlawful for an educational authority<sup>28</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:*

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<sup>25</sup> I am not suggesting that a transgender person would want to argue this way.

<sup>26</sup> Section 4 of the *Disability Discrimination Act*

<sup>27</sup> *Gordon v Commonwealth of Australia* (2008) EOC ¶93-495

<sup>28</sup> A school, college, university or other institution at which education or training is provided: section 4 of the *Sex Discrimination Act*

- (a) *by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;*
  - (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>29</sup>, it clearly does not apply to Australian public schools and I am not aware of any independent schools which have tried to assert that providing an education to transgender 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>30</sup> Schools operated by such followers may seek to come within the section 38(3)

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<sup>29</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>30</sup> As defined on page 8

exemption should they wish to discriminate against a transgender child in a way that would otherwise be unlawful under section 21.

It is clear that, unless the section 21(3) exemption or the section 38(3) exemption in the *Sex Discrimination Act* applies, Australian schools must not refuse to enrol students and must not expel students because they are transgender.

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

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.*

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

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

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.*

The circumstances to be taken into account include the sexual orientation, gender identity and intersex status of the person harassed.<sup>31</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>32</sup>

A school can be vicariously liable for sexual harassment by its employees.<sup>33</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.

## **International Discrimination Legislation**

I will briefly consider the situation that exists in the United Kingdom, Canada, the USA, New Zealand and South Africa. The United Kingdom and Canada, like Australia, have sought to refer specifically to discrimination on the ground of gender identity. The USA, New Zealand and South Africa do not and have therefore had to try to cover such discrimination by including gender identity within “sex” or “sexual orientation”.

### ***United Kingdom***

In the United Kingdom, the *Equality Act 2010* makes it unlawful for a school to discriminate against a student or prospective student by treating the student less favourably than it treats others because of the protected characteristics which include sex, sexual orientation and gender reassignment. A person has the protected characteristic of gender reassignment if the person is a transsexual person or is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or

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<sup>31</sup> Section 28A (2) of the *Sex Discrimination Act*

<sup>32</sup> Section 28F of the *Sex Discrimination Act*

<sup>33</sup> Section 106 of the *Sex Discrimination Act*

other attributes of sex. Transsexual people, in the words of the House of Lords, “are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex”.<sup>34</sup>

Section 85 is the key provision:

*(1) The responsible body of a school to which this section applies must not discriminate against a person:*

*(a) in the arrangements it makes for deciding who is offered admission as a pupil;*

*(b) as to the terms on which it offers to admit the person as a pupil;*

*(c) by not admitting the person as a pupil.*

*(2) The responsible body of such a school must not discriminate against a pupil:*

*(a) in the way it provides education for the pupil;*

*(b) in the way it affords the pupil access to a benefit, facility or service;*

*(c) by not providing education for the pupil;*

*(d) by not affording the pupil access to a benefit, facility or service;*

*(e) by excluding the pupil from the school;*

*(f) by subjecting the pupil to any other detriment.*

*(3) The responsible body of such a school must not harass:*

*(a) a pupil;*

*(b) a person who has applied for admission as a pupil.*

*(4) The responsible body of such a school must not victimise a person:*

*(a) in the arrangements it makes for deciding who is offered admission as a pupil;*

*(b) as to the terms on which it offers to admit the person as a pupil;*

*(c) by not admitting the person as a pupil.*

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<sup>34</sup> *Bellinger v Bellinger* [2003] UKHL 21 at para 7

(5) *The responsible body of such a school must not victimise a pupil:*

*(a) in the way it provides education for the pupil;*

*(b) in the way it affords the pupil access to a benefit, facility or service;*

*(c) by not providing education for the pupil;*

*(d) by not affording the pupil access to a benefit, facility or service;*

*(e) by excluding the pupil from the school;*

*(f) by subjecting the pupil to any other detriment.*

(6) *A duty to make reasonable adjustments applies to the responsible body of such a school.*

In *Beis Aharon Trust v Secretary of State for Education*,<sup>35</sup> Judge Hugh Brayne, sitting in the First-tier Tribunal (Health Education and Social Care), heard an appeal against the Secretary of State's determination that an Orthodox Jewish school should cease to admit new pupils. The appeal was dismissed because of a number of defaults in respect of curriculum issues. Amongst these was the obligation to encourage respect for people of different sexual orientation or those undergoing gender reassignment. As to that, the Tribunal stated:

*The school agrees it does not acknowledge to pupils, or enable them to acquire any awareness, that some people are different because of gender reassignment. This prevents the school from encouraging respect for people who have such characteristics. People with those characteristics play a full and equal part in British society and pupils are not prepared for the experience of participating in a society, where, for example, families have same sex parents, same sex people can marry or form civil partnerships or have gender reassignment.*<sup>36</sup>

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<sup>35</sup> [2016] UKFTT 270 (HESC); [2015] 2531 INS

<sup>36</sup> [2016] UKFTT 270 (HESC); [2015] 2531 INS at page 22

## **Canada**

The *Canadian Human Rights Act* was amended in June 2017 to add gender identity and gender expression to the list of prohibited grounds of discrimination. Sex and sexual orientation were already prohibited grounds. Section 5 of the *Human Rights Act* states:

*It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public:*

- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or*
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.*

The provision of services includes the provision of educational services by schools and other educational institutions.

As in Australia, the various provinces in Canada also have legislation dealing with human rights and discrimination. For example, the *Education Act* in Ontario requires every school board:

- (a) to promote a positive school climate that is inclusive and accepting of all students, including among others students of any sex, sexual orientation, gender identity and gender expression;
- (b) to promote the prevention of bullying which is defined as aggressive and typically repeated behaviour by a student where the behaviour occurs in a context where there is a real or perceived power imbalance between the student and the individual based on factors such as sexual orientation, gender identity and gender expression.<sup>37</sup>

A school principal may suspend a student where the student has been involved in specified activities that were motivated by bias, prejudice or

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<sup>37</sup> Section 169.1(1) of the *Education Act (Ontario)*

hate based on various listed characteristics including sexual orientation, gender identity and gender expression.<sup>38</sup>

### ***United States of America***

The US, like Australia, is a federation of states. There is a US Constitution and federal laws. There are many state constitutions and state laws.

The Equal Protection Clause of the Fourteenth Amendment of the US Constitution, passed in 1868, declares that no state may “deny to any person within its jurisdiction the equal protection of the laws.” This was not initially considered to prevent sex discrimination. Over the past 50 years, a series of US Supreme Court decisions have meant that the Equal Protection Clause now protects women from sex discrimination particularly in situations where there is no rational basis for the discrimination. However, the Supreme Court has not as yet extended protection to transgender people.

An early case in which the Supreme Court was asked to do so was *Johnston v. Univ. of Pittsburgh*.<sup>39</sup> Although born female, Johnston had proclaimed himself a “boy” to his parents at an early age. He enrolled as a student at the University of Pittsburgh in 2009. At approximately the same time, he began the transition from female to male. Between 2010 and 2013, he acquired a legal name change and changed his driver’s licence, passport and Social Security record gender markers to male. He presented himself socially as male and operated at the University as a scholarship computer science major, without incident. In the spring 2011 semester, he enrolled in a men’s weight training class and used the men’s locker room. However, in the following semester, he was told that he could not use the men’s facilities. Johnston continued to use the men’s locker room and ultimately was charged with disorderly conduct by the campus police. A disciplinary hearing before a student panel found Johnston guilty of disorderly, lewd, or

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<sup>38</sup> Section 310(1) of the *Education Act (Ontario)*

<sup>39</sup> 97 F. Supp. 3d 657 (W.D. Pa. 2015)

indecent behaviour. Ultimately, his repeated failure to comply with University regulations resulted in his expulsion.

Johnston commenced court proceedings. First, he claimed violation of the Equal Protection Clause of the Fourteenth Amendment, claiming discrimination based on sex. After lengthy consideration, the court found that the Fourteenth Amendment does not recognise transgender as a suspect class, as the binary concept of sex applies to birth or biological sex, but not to transgender.

Second, Johnston claimed discrimination and retaliation in violation of Title IX. This is a reference to a provision in the *Education Amendments Act of 1972*, a federal US law that states:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*

The court did not recognise transgender discrimination (or gender identification) as a basis for a Title IX complaint.

The conclusions reached in Johnston have been challenged more recently in the litigation involving Gavin Grimm, a transgender male student at Gloucester High School. Gavin entered high school as female but, after beginning treatment for gender dysphoria, requested that his masculine name go on his school records, that he be addressed with masculine pronouns, and that he be allowed to use the male toilets. The school met all his requests, specifically by allowing Gavin to use the toilet in the nurse's office. He later asked to be allowed to use boys' toilets because the use of the nurse's toilet singled him out. Shortly after this arrangement was established, the school board held a public hearing on a proposed resolution requiring toilet use according to biological sex. The resolution passed. Gavin then went to the district court asking for an injunction that would

allow him to continue to use the boys' toilets until the conclusion of the litigation. He further claimed violation of Title IX protection against sex discrimination. The Department of Education supported Gavin's position that Title IX protects the right of transgender students to choose which toilets to use. The Department had earlier issued a letter to all schools directing them to act on the basis that Title IX protection against sex discrimination included gender identity discrimination. However, the court dismissed Gavin's Title IX claim which made the injunction request irrelevant.<sup>40</sup>

On appeal, the Fourth Circuit Court of Appeals reversed the decision of the district court concerning Title IX protection, stating that transgender students were protected from sex discrimination because of the provisions of the Department of Education's letter. That decision also allowed Gavin's injunction request to stand.<sup>41</sup>

The school board then petitioned the Supreme Court of the United States, which in August 2016 stayed the injunction. In early 2017, the Trump Administration withdrew the Department of Education's letter without replacing it. As a result, the injunction was dissolved in April 2017. In June 2017, the Supreme Court sent Gavin's case back to the Fourth Circuit Court of Appeals to be reconsidered in light of the Department of Justice and Education resending its Title IX guidance clarifying protections for transgender students. Accordingly, the issue as to whether Title IX sex discrimination includes gender identity discrimination remains open.<sup>42</sup>

As in Australia, US states also have anti-discrimination legislation which has led to litigation involving transgender students. For example, there was

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<sup>40</sup> *G.G. ex rel Grimm v Gloucester County Sch Bd*, 132 F. Supp. 3d 736 (E.D. Va. 2015)

<sup>41</sup> *G.G. ex rel Grimm v Gloucester County Sch Bd*, F. 3d (4th Cir. 2016)

<sup>42</sup> That is not to say that US courts have stopped having a say on the issue. For example, in May 2017, the Seventh Circuit Appeals Court upheld an injunction requiring a Wisconsin school district to allow a transgender high school student to use the boys' toilets, ruling that Title IX and the US Constitution's equal protection clause supported the student who was born female but now identified as male. *Whitaker v. Kenosha Unified School District No. 1*, No 16-3522

a case in Maine about Susan Doe, a transgender student.<sup>43</sup> Susan was born a male, but identified as a female by the age of two. Until fifth grade, her use of the girls' toilets went smoothly. However, at that point, a male student also went into the girls' toilets, claiming he was entitled to use them. The student's grandfather told the boy to do this because the grandfather was completely opposed to Susan using the girls' toilets. This was the first case in Maine regarding the state's rights toward transgender individuals in a public school. The court found that the school had violated the *Maine Human Rights Act* by discriminating against a transgender student based on sexual orientation.

### ***New Zealand***

New Zealand has a Bill of Rights<sup>44</sup> which, in section 19, enshrines the right to freedom from discrimination. The scope of section 19 is limited by its cross-reference to the prohibited grounds of discrimination in section 21 of the *Human Rights Act 1993*. These include sex and sexual orientation but not gender identity. Nevertheless, the Human Rights Commission interprets sex to include gender and gender identity.<sup>45</sup>

Under section 57 of the *Human Rights Act*, it is unlawful for a school (including those involved in management or teaching in the school):

- (a) to refuse or fail to admit a person as a pupil or student; or
- (b) to admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or
- (c) to deny or restrict access to any benefits or services provided by the establishment; or
- (d) to exclude a person as a pupil or a student or subject him or her to any other detriment,

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<sup>43</sup> *Doe v Reg'l Sch Unit 26*, 86 A.3d 600 (Me. 2014)

<sup>44</sup> *Bill of Rights Act 1990*

<sup>45</sup> The Commission relies upon an opinion from the New Zealand Solicitor-General to the effect that it was unnecessary to amend the *Human Rights Act* to include gender identity as a prohibited ground because the ground of sex covered transgender people:  
<https://www.beehive.govt.nz/sites/all/files/SG%20Opinion%202%20Aug%202006.pdf>

by reason of any of the prohibited grounds of discrimination.

## **South Africa**

The South Africa Constitution contains an equality clause:

### **9. Equality**

1. *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
3. *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
4. *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
5. *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

The Constitutional Court of South Africa has stated that:

*The concept “sexual orientation” as used in section 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.*<sup>46</sup>

The constitutional protection is fleshed out in the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (“the Equality Act”). Unfair discrimination is prohibited on many grounds including sex, gender and sexual orientation. Complaints under the Equality Act are heard by Equality

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<sup>46</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) at para [21]

Courts, which are mostly magistrates' courts in various South African districts.

In September 2012, the Equality Court at Roodepoort handed down judgment in a case where the complainant, Ambrose Lallu, was born a man but described herself as transsexual, by which she meant that she emotionally and psychologically identified as a woman rather than as a man. She brought a claim under the Equality Act alleging that her neighbour had harassed and uttered hate speech against her and her family.<sup>47</sup> Section 10 of the Equality Act prohibited the use of words based on sex, gender or sexual orientation that were intended to be hurtful or harmful or to incite harm or to promote or propagate hatred. Section 11 of the Equality Act prohibited harassment of a person related to their sex, gender or sexual orientation. The magistrate, no doubt relying upon the view of the Constitutional Court noted above, accepted that the use of harmful and hateful words directed at Ambrose and the harassment of her were done on the basis of her sexual orientation.<sup>48</sup> Accordingly, the neighbour was ordered to pay Ambrose the cost of attending psychological counselling, compensation to cover the entry into a new lease and truck hire to move to the new property, as well as general damages. Interestingly, despite the favourable outcome for Ambrose, the magistrate throughout the judgment referred to Ambrose using male pronouns.

In March 2017, the Equality Court at Seshego handed down judgment in a case where the complainant was a school student who was born a boy but who identified as a girl from an early age both at home and in her community including at school.<sup>49</sup> She dressed as a girl and used the girls' bathrooms. She alleged that she was the subject of verbal and physical abuse and humiliation from the school principal. Her treatment included being

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<sup>47</sup> *Lallu v Van Staden* Roodepoort Equality Court Case No 3/2011 (28 September 2012)

<sup>48</sup> In Australia, sexual orientation means a person's sexual orientation towards: (a) persons of the same sex; (b) persons of a different sex; or (c) persons of the same sex and persons of a different sex (section 4 of the *Sex Discrimination Act*).

<sup>49</sup> *Mphela v Manamela and Limpopo Provincial Department of Education* Seshego Equality Court (10 March 2017)

beaten with a stick, having her entry to the classroom blocked and being humiliated in class. The magistrate found that the allegations against the school principal fell within section 10 of the Equality Act. In this case, there was no discussion as to the relevant prohibited ground, which one must assume, again relying on the Constitutional Court in the *National Coalition for Gay and Lesbian Equality Case*, was the student's sexual orientation. The magistrate ordered the Limpopo Department of Education to pay R60,000 to the complainant in damages, R20,000 for her psychological expenses, and a further R20,000 for her to complete her education. The magistrate also ordered the principal to attend gender sensitivity training.

There is, therefore, a degree of protection under the law for transgender students in South Africa.

## **Dealing with practical issues**

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

Some transgender students will happily use toilets and change rooms that are gender neutral.<sup>50</sup> Others seek to insist that they be allowed to use the toilets and change rooms dedicated to the gender of their choice.<sup>51</sup> It is far from clear how the latter would fare if they made a formal complaint under the *Sex Discrimination Act*. This underlines the importance of schools thinking through issues like this before they materialise. This could involve an appropriate risk assessment and audit of the school's toilet and change room facilities. Having done that, a school should be able to identify, consider and make any necessary, reasonable adjustments. In addition, schools ought to talk with transgender students and their families to find

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<sup>50</sup> It may be best not to label such toilets as "accessible" or "disabled". This will help ensure schools respect the dignity and privacy of both transgender students and students with disabilities.

<sup>51</sup> For example, Stefani Muollo-Gray at Marlborough Girls' College in New Zealand <http://www.stuff.co.nz/national/81590796/marlborough-girls-college-transgender-student-stefani-muollogray-to-use-girls-bathroom>; Gavin Grimm in the USA <https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the->

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.

An Australian school student, whether at a public or independent school, 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 complain under the *Sex Discrimination Act* that the school is discriminating against him both directly and indirectly. I will call him Sam.

### ***Direct Discrimination***

Sam will argue that his school is directly discriminating against him because of his gender identity in that it is 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 boys' toilets.<sup>52</sup>

Following the reasoning of the majority in *Purvis (on behalf of Hoggan) v New South Wales (Department of Education & Training)*<sup>53</sup>, one must consider the actual circumstances in which Sam is treated less favourably by the school. These circumstances are all of the objective features which surround Sam's actual treatment by the school. They include circumstances connected with Sam's gender identity. Relevant circumstances might include Sam's sex at birth, his age and maturity, his previous behaviour at school, and the sex at birth, age and maturity of the other students who use the boys' toilets at the school.

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[bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa\\_story.html?utm\\_term=.5bb33294e327](https://www.abc.net.au/news/2016-08-30/transgender-student-sues-school/7811116) .

<sup>52</sup> Section 5B(1) of the *Sex Discrimination Act*

<sup>53</sup> [2003] 217 CLR 92; [2003] HCA 62, particularly the joint judgement of Gummow, Hayne and Heydon JJ with whom Callinan J agreed

While thinking about circumstances, it is also relevant to take into account the comments of Gleeson CJ in *Purvis* which, while he was referring to the *Disability Discrimination Act*, also apply to the *Sex Discrimination Act*:

*The Act is concerned with discrimination of a kind that the legislature regards as unjust, and makes unlawful. The question is whether the Act treats certain action taken in respect of conduct that affects, not only the person said to be the victim of the discrimination, but other persons whom the alleged discriminator is obliged by law to protect, as unjust and unlawful discrimination. The first respondent owed a duty of care towards its pupils and its staff. That is part of the legal background to the operation of the provisions of the Act dealing with education. In its application to educational authorities, the Act enters an area of relationships governed by legal obligations designed to protect the young and vulnerable. In the development of common law principle, it is appropriate, and sometimes necessary, for a court to take account of the need for coherence in the law. ...The obligations which arise from the Act have to be related to the functions, powers and responsibilities of the first respondent. Furthermore, the conduct of the first respondent can only be evaluated fairly in the light of an understanding of those functions, powers and responsibilities. The Act, in its application to educational authorities, and in its prohibition of discrimination against persons on the ground of a disability, requires a judgment both as to alleged differential treatment and as to the ground upon which action was taken. In both respects, it is impossible to ignore the context in which the first respondent, by its officers, was acting. It was charged with the care and protection of all the pupils in the school in question. The first respondent showed concern and sensitivity in its dealings with the pupil. It also recognised its legal responsibilities to the other pupils and to the school staff. If there is a reasonable construction of the Act which avoids a conflict between those responsibilities and the*

*obligations imposed by the Act, then that construction should be preferred. And in the practical application of the Act in an evaluation of the conduct of the first respondent, those responsibilities should be kept in mind.*<sup>54</sup>

This suggests that the particular circumstances of Sam and his school must be considered. The duty of care which the school owes to all its students has to be taken into account. Some would argue that allowing a person who is biologically male but who now identifies as female in the girls' 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.

Sam's next problem is deciding who might be the proper comparator. In other words, Sam has to point to a student who has a different gender identity to him; that is, a student whose gender identity is female. There are plenty of them. Therefore, there is no need to identify a notional person who has a different gender identity to Sam. However, there are two categories of students whose gender is female. The first comprises students whose biological sex is female and whose gender identity is also female. The second comprises students whose biological sex is male but whose gender identity is female. While there is no precedent to point to, I am inclined to think that the proper comparator is likely to be students in the latter category. I say this because that would ensure that at least some circumstances will be the same; namely, that both Sam and the comparator will be transgender students albeit that one is female to male and the other male to female.

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<sup>54</sup> [2003] 217 CLR 92; [2003] HCA 62, at para [7]

Finally, even if Sam can show that the school is treating him less favourably than it treats the appropriate comparator, he must also show that this was because of his gender identity. The school will no doubt argue that it required him to use the toilets designated for students who were biologically born female because he was biologically female. And the school will point to the fact that it required the comparator to use the toilets designated for her birth sex; namely, the boys' toilets. In other words, the treatment of both was because of their sex and not their gender identity.

The school would also argue that there was in fact no less favourable treatment of Sam because the boys' toilets and the girls' toilets are of equal standard.<sup>55</sup>

### ***Indirect Discrimination***

Sam will argue that his school is indirectly discriminating against him because of his gender identity by imposing on him a condition (namely, that students must use the toilets designated for their biological sex) that has, or is likely to have, the effect of disadvantaging persons who have the same gender identity as him and that this condition is unreasonable.<sup>56</sup>

In response, the school will argue that the condition that students must use the toilets designated for their biological sex is reasonable because:

- (a) there is no disadvantage to Sam or, if there is, it is small;
- (b) 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;

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<sup>55</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>56</sup> Sections 5B(2) and 7B of the *Sex Discrimination Act*

- (c) the disadvantage to Sam is small and proportionate compared to the result the school seeks; namely, respecting the privacy needs of its students and keeping them safe;<sup>57</sup>

***Discrimination in education***

Assuming that Sam can show some discrimination, he also needs to show that the discrimination occurred in the circumstances outlined in section 21 of the *Sex Discrimination Act*. In other words, to prove that the school has unlawfully discriminated against him on the ground of his gender identity, he has to show that he has been:

- (a) denied access, or given only limited access, to a benefit provided by the school;<sup>58</sup> or
- (b) subjected to any other detriment.<sup>59</sup>

Sam will argue that the school has limited his access to a benefit provided by the school by only allowing him to use toilets designated for students of his biological sex when he wants to use the toilets generally used by those of the gender with which he identifies; that is, the boys' toilets. The school will probably respond that 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, Sam does have access to toilets.

Sam will also argue that the school has subjected 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. The school will probably respond that Sam 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>57</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.

<sup>58</sup> Section 21(2)(a) of the *Sex Discrimination Act*

<sup>59</sup> Section 21(2)(c) of the *Sex Discrimination Act*

The only valid conclusion from the above analysis is that it is far from clear how Sam's complaints might be resolved if they ended up in court. Again I say that this underlines the importance of schools thinking through these issues now before they materialise. The ideal is to come up with solutions that, in consultation with the school's transgender students and their families, will meet the needs of these students and the whole school community – its other students, parents, former students and staff.

### ***School Uniforms***

Under sex discrimination legislation, 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*,<sup>60</sup> 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.

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<sup>60</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.

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.

The various Australian state and territory Departments of Education have school uniform policies which encourage 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 view of the Departments 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 has trans students – boys who identify as girls at an all-girls school and girls who identify 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*, 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. However, this does not apply in relation to the exclusion of persons from participation in:

- (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**

Victoria's Department of Education and Training has a 2016 publication that states:

*Student-led action is a very effective way to create cultural change at school. If your school already has a 'Stand Out' group, 'Queer-Straight- Alliance' or other groups which support gender and sexual diversity, further support this activity.*<sup>61</sup>

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 trans is more problematic. Issues to be considered are:

- (a) Is the refusal because of the gender identity of the students or because of the activities they are proposing or the message they are spreading?<sup>62</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?

### ***Other Issues***

Other issues are likely to arise for schools with transgender students and each of these needs to be analysed in the same way as above.

### **Conclusion**

I encourage schools to work with the transgender student and the student's parents to reach an agreement on how to deal with the hard 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. As we have seen, there can be a tension between the duty of care and obligations under anti-discrimination legislation.

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

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<sup>61</sup> *Guide to Making Your School Safe and Inclusive for LGBTI Students* at page 8

<sup>62</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*.

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.

When dealing with transgender 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 transgender 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.