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Strengthening Family, Faith, Freedom and Sovereignty in an ideologically hostile world

“Gender Identity Laws and Basic Freedoms”

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Abstract

Many Australian laws are designed to protect freedoms recognised as part of our common law and Western heritage- freedom from physical attack, freedom of movement, freedom of speech, freedom of association and freedom of religion. In recent years our society has also recognised the need to provide freedom against unjust discrimination. While there is widespread support for such laws aimed at decisions made on irrelevant grounds based on race, sex, age and disability, there is more controversy over laws which forbid discrimination, and “vilification”, based on gender identity: a person’s internal conviction that they do not in reality belong to the sex in which they were born. This paper addresses the nature of such laws and the complexities that arise when these laws may clash with the legal protection of other freedoms.

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Introduction

I am grateful as a lawyer and a believer to say that our legal system in Australia is a good gift from our loving and good God. We see throughout the Bible, starting at the beginning in Genesis 1, that God is a God of order who sets out boundaries, and creates appropriate divisions between things that are not the same.² He does so in the created order, and he does this by laying down laws and rules for his people to observe, which separate them from other peoples around them. But Romans 13:1-5 tells us that the provision of a legal system to enable the chaos of human sin to be restrained is a gift which is part of God’s providential order for all humanity, not just believers:

Let everyone be subject to the governing authorities, for **there is no authority except that which God has established**. The authorities that exist have been **established by God**.² Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. ³For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. ⁴For the one in authority is **God’s servant for your good**. But if you do wrong, be afraid, for rulers do not bear the

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² In the context of congregational life this is also true: see 1 Cor 14:33, “For God is not a God of disorder but of peace” (NIV).

sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. 5 Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience.

Hence all of us, as human beings made in the image of God, enjoy the protection of this legal order, and we may say, in referring to those protections, that we enjoy "legal rights". These rights, or freedoms, ought to be respected by other people in the community. Let me describe some of these freedoms, and how our Australia legal system protects them.

Basic Freedoms and their Legal Source

One of the most obvious freedoms is freedom from physical harm. In general, I have a right that others in the community do not do me harm by committing physical violence against me. This is also a fundamental Biblical value, based on the inestimable value of human persons made in the image of God, which was first spelled out in Genesis 9:5-6

5 And for your lifeblood I will surely demand an accounting. I will demand an accounting from every animal. And from each human being, too, I will demand an accounting for the life of another human being.

6 Whoever sheds human blood, by humans shall their blood be shed; for in the image of God has God made mankind.

The legal system protects our freedom from physical bodily harm in two main ways: through the criminal law, which forbids crimes such as "assault" (and which is enforced by the police, and prosecuted in the criminal courts), and through the civil law, which provides, among other things, a tort action for "battery" (which action is taken in a civil court and can result in an award of damages.)

The common law of crime and torts can to some extent be characterised as "common law human rights". Under the law of torts, for example, which I teach, the common law protects:

- A right not to have one's body interfered with (actions for battery, assault)
- A right of free movement (through the action for "false imprisonment")
- A right of enjoyment of personal property (actions for "conversion" and "detinue" and "trespass to goods")
- A right of enjoyment of real estate (actions for "trespass to land" and "nuisance")
- A right not to have one's reputation falsely degraded (the action for defamation).

These rights are further protected, and other rights granted, by Acts of Parliament and regulations. In addition, in recent years we have seen that international treaties on human rights have clarified that protection from harm in these areas should be provided by national governments. Both at common law and under international treaties we have also seen recognition of "freedom of speech" and "freedom of religion". We may note as significant examples articles 18 and 19 of the *International Covenant on Civil and Political Rights* (ICCPR):

Article 18

1. Everyone shall have the right to **freedom of thought, conscience and religion**. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to **hold opinions without interference**.

2. Everyone shall have the **right to freedom of expression**; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

These instruments, as well as the common law and statutes, recognise of course that there is no such thing as an “absolute right”. All rights and freedoms have to be balanced on some occasions. My right to “free movement”, for example, is constrained if you are standing in the doorway in front of me, and I cannot bowl you over without interfering with your right to freedom from bodily injury. So all legal systems have to have rules that allow exceptions to rights in certain circumstances- for example, where a police officer is enforcing the law he or she may interfere with my right to free movement or bodily integrity by arresting me, so long as they use no more force than is reasonably necessary.

Freedom from Unjust Discrimination

A particular type of freedom that has been recognised in recent years is a right to be free from “unjust discrimination”. Now you will notice that I have added the word “unjust” there, because we need to be precise when defining what sorts of discrimination are wrongful.

Let me briefly comment on something I sometimes hear more conservative people (like myself) say. It is sometimes correctly said that discrimination is not always wrong. All of us “discriminate” in the sense of choosing one thing rather than another. It used to be a compliment to pay someone to say that they had a “discriminating” taste in wine or books or paintings- they knew how to choose and what to choose.

But let me say, as gently as I can, that this is not an argument that is helpful to use any more in today's world. I agree with the logic, but the harsh reality is that the word “discrimination” is hardly ever used in a positive sense these days. You can keep on trying to change the usage if you like, but if you want to communicate with people you need to recognise that 95% or more of your neighbours think that all “discrimination” is bad, and so you need to speak carefully in this area. To say that we have a “right to discriminate” will be heard, to be blunt, as racist or hateful.

Laws prohibiting unjust discrimination were first introduced in a broad way from the 1960's and were, at first, mainly responding to the reality of racial discrimination. People were being denied jobs, and places in public transport, and seats in café's, and rooms in hotels, on the basis of the colour of their skin. These were terrible injustices, and of course this sort of behaviour is forbidden by the Bible, which tells us that all human beings are made in God's image (Gen 1:27) and we are all of the one human family (as Paul puts it in Acts 17:26). So, these laws forbidding racial discrimination were introduced to penalise those who unjustly discriminated by denying services or jobs to people on the basis of race.

Subsequently we had laws aimed at preventing unjust sex discrimination. In due course other grounds of discrimination were added. Not all of them were social problems of the

magnitude of race and sex discrimination, but the model has been rolled out to other human characteristics. In Federal law at the moment, we have separate legislation forbidding discrimination on the grounds of race, sex, disability and age. Within those sometimes a number of connected but not identical grounds are included- the sex discrimination legislation today encompasses unjust decisions made not just on the basis of biological sex, but also on the basis of “relationship status” (whether or not someone is legally married), pregnancy, sexual orientation, and gender identity, to which we will turn in more detail shortly. (There are also a large number of other “prohibited grounds” of discrimination under State laws, but time prevents us from exploring this more closely.)

All these discrimination laws, at least initially, were based on the premise that we should not allow *irrelevant* criteria to be invoked in certain decisions such as employment or provision of services. The fact is that they all recognise that in some cases these criteria are actually *relevant* for decision-making and should not be unlawful. There are few examples in the race area, but the most obvious one is that under NSW law someone casting a play or film is entitled to employ someone of a particular race if that is important to convey the story. The life of Martin Luther King Jr can be portrayed by an African-American actor.³ Similarly, the *Sex Discrimination Act 1984* (Cth) (“SDA”) contains provisions spelling out that it will not amount to sex discrimination in circumstances where the sex of a person being offered a job is relevant to the duties of the job. This would include where the job involved fitting clothes for one sex or being in a bathroom designated for persons of one sex.⁴

The questions arising then in any discrimination claim will be first, was a decision made on the basis of a “prohibited ground” (such as race, sex, or some other recognised category), and then if so, was that ground “relevant” to decision-making.

The Special Case: Gender Identity Discrimination

We come then to the prohibition on “gender identity” discrimination (“GID” for short.) This is implemented in the Commonwealth SDA as follows: under s 5B discrimination on the grounds of gender identity is defined.

SEX DISCRIMINATION ACT 1984 - SECT 5B

Discrimination on the ground of gender identity

(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.

(3) This section has effect subject to sections 7B and 7D.

³ See s 14(a) of the *Anti-Discrimination Act 1977* (NSW). Somewhat oddly the Commonwealth *Racial Discrimination Act 1975* does not contain such an exemption, though I am not aware of any claims that have been made in this sort of area.

⁴ See s 30 of the *Sex Discrimination Act 1984* (Cth), for these and other examples.

What does “gender identity” mean? Under s 4(1) of the SDA it is defined as follows:

“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.

Interestingly, these provisions of the Commonwealth SDA are relatively recent, having been added to the Act only in 2013. (Legislation enacted in 2012 added “sexual orientation”, “gender identity”, and “intersex status” to the prohibited grounds under the SDA). But something similar was already in place in State law.

Under NSW law, the *Anti-Discrimination Act 1977* (“ADA”) there is a prohibition which seems to operate in the same area, but which is described as discrimination on “transgender grounds”. It is sufficiently different to set out in full (I have highlighted some of the main words to help us follow it):

38B WHAT CONSTITUTES DISCRIMINATION ON TRANSGENDER GROUNDS

(1) **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 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.

(2) For the purposes of subsection (1) (a), something is done on the ground of a person being transgender if it is done on the ground of the person being transgender, a characteristic that appertains generally to transgender persons or a characteristic that is generally imputed to transgender persons.

The legislation, in s 38A, provides a definition of what it is to be “transgender”.

A reference in this Part to a person being transgender or a transgender person is a reference to a person, whether or not the person is a [recognised transgender person--](#)

(a) who identifies as a member of the opposite 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

There is also definition in s 4(1) ADA of the term “recognised transgender person” (“RTP”):

"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.

It is worth noticing that under the ADA someone who has actually had the sex of their birth certificate altered (after a medical procedure of some sort) has greater rights than someone who doesn't. For such a person, an RTP, it will be an act of discrimination simply to "treat the aggrieved person.. as being of the person's former sex", under s 38B(1)(c). But for someone who has not had a formal "sex change", but simply "identifies" as a member of the opposite sex, treating them as belonging to their biological sex will not automatically be discriminatory.⁵

What is the effect of these provisions?

Official guidance

We may be tempted to seek guidance from public service summaries of the law. But the gap between "guidance" provided by the public service, and what the law actually says, in this area, has recently been highlighted in the United Kingdom. There a recording of "training" given by a transgender lobby group to school teachers, revealed assertions about the law which [just could not be supported](#) by what the law actually says.

What is the situation in Australia? The current guidance given to schools by the NSW Education Department, for example, urges schools generally to accept the "gender of choice" indicated by a student, but does not in terms assert that a school would be breaking the law if it does not do this. The web-page (updated as at 26 March 2019) is headed "[Legal Issues Bulletin 55 – Transgender students in schools](#)", but carefully leaves assertions about the law to simply repeating in an appendix the broad terms of the relevant anti-discrimination legislation. Against this uncertainty, it is important to be as clear as possible on what the law *actually* says.

What do these provisions I have set above mean? While it is sometimes assumed that they require treatment of "pre-operative" transgender persons (that is, those who have not yet been through surgical procedures) as if they were for all purposes members of their preferred sex, this is by no means obvious, and in fact seems wrong.

It is arguable, rather, that a prohibition on discrimination against transgender persons simply means that they must not be denied services others would be provided in "neutral" areas such as service in a café or employment in a job, where their status would be irrelevant. But it seems that the law does **not** currently require a biological male (who has not undergone medical and surgical reconstruction) to be allowed to wear a girls' school uniform, or to be allowed access to female bathrooms, or to be called by a female pronoun, or to compete in a women's sporting event, or to be housed in a women's prison.

In other words, as we have seen, while the law forbids detrimental treatment of persons in a protected category on "irrelevant" grounds, it seems likely that it does not prevent the application of criteria in decision-making which are *relevant* to the decision. It is *relevant* to ask, when considering when someone should be allowed to use a women's bathroom or change-room, whether that person is a biological female. For all the recent history of bathroom construction, they have been constructed on assumptions about the biology of the users.

It is *relevant* to ask, when making decisions about the use of masculine pronouns, whether the person being referred to is a biological male. That is simply the way that the English language operates. For a speaker to use a masculine pronoun is generally for the speaker to assert that the person being referred to is a biological male.

⁵ There are some helpful comments in *Lawarik v Chief Executive Officer, Corrections Health Service* [2003] NSWADT 16, one of the few decided cases on the provision, on what it means to "identify" as a person of the opposite sex, at paras [41]-[54]. The Tribunal says that it requires some sort of ongoing commitment to the new identity, rather than just occasional "cross-dressing".

Such questions are also *relevant* in determining who should be allowed to compete in a women's sporting event. For example, even the SDA contains a clear exclusion of the "gender identity" discrimination provisions (as well as the normal "sex" provisions) from decisions in relation to participants in over-12 sporting competitions "in which the strength, stamina or physique of competitors is relevant".

Sport

SDA 42 (1) Nothing in Division 1 or 2 renders it unlawful to discriminate on the ground of sex, [gender identity](#) or [intersex status](#) by excluding persons from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

As noted already, the NSW ADA sets out separate grounds of discrimination which are applicable to 'recognised transgender persons', in s 38B(1)(c), and are not the same as the grounds which are expressed to apply in relation to a person who is simply described as 'transgender'. The difference between these categories of persons is that a 'recognised' transgender person will be one who has undergone a medical 'sex affirmation procedure'. It is *only* such persons for whom, under s 38B(1)(c), it is explicitly said to be discriminatory to treat them "as being of the person's former sex".

Given this, it seems fairly clear that by implication, under NSW law, treating a 'transgender' person who has **not** had the formal medical procedure, as if they belong to their biological sex, does **not** amount to unlawful (or "less favourable") treatment *per se*.⁶ A similar result seems to follow under the Commonwealth SDA.

This view of the operation of the legislation is, in my view, confirmed by what seems to be so far the only detailed consideration under discrimination law in Australia of a claim based on a "wrong pronoun", and the placement of a transgender female in a male prison, in *Tafao v State of Queensland* [2018] QCAT 409 (16 Nov 2018).

This decision, by a Member of the Queensland Civil and Administrative Tribunal, is not of precedential status,⁷ but provides an important example of the reasoning that might be applied in similar cases. The prisoner, Leilani Tafao, was a biological male person who had had some medical treatment to transition to female but was still able to function as a male (see para [7]). The prisoner's relevant identity documents noted them as male. An internal "Custodial Operation Practice Directive" ("COPD") noted as follows:

Staff will address transgender prisoners:

- With the same respect given to all other prisoners.
- By either the name that they are currently registered as having (refer *Births, Deaths and Marriages Registration Act* 2003) or the name on a Warrant committing the prisoner to a Corrective Services facility or requiring a prisoner to be produced to the General Manager of a Corrective Services facility.

All records must reflect the prisoner's registered name and gender to ensure the accuracy and consistency of the prisoner's identification.

While in the prison the prisoner was referred to by male pronouns, and at one stage was directed in relation to their behaviour towards other prisoners, not to behave in an "overtly

⁶ For further discussion of these issues, see a report prepared for the Sydney Diocese of the Anglican church, [Gender Identity](#) (a report from the Social Issues Committee, revised 21 November 2017), at pp 27-32.

⁷ Decisions of Tribunals, as opposed to decisions of "superior courts", are not regarded as formally establishing a binding precedent for future decision-makers, although of course in practice an earlier decision may be influential on a later one.

sexualised” way. They complained of “gender identity” discrimination under the Queensland *Anti-Discrimination Act 1991*.

The decision is lengthy, and not all details can be provided here, but in brief the result of the proceedings was as follows. On the complaint that the wrong pronoun was used, Member Fitzpatrick ruled that a “desire to be addressed by reference to the gender with which one identifies” was indeed a characteristic associated with the prohibited attribute of “gender identity” under s 7(m) of the Act- see [68]. Hence the prisoner had experienced “less favourable treatment” by being addressed by male pronouns, as a “cisgender” male prisoners would have been addressed by his preferred pronouns- see [83].

But the next question was whether this “less favourable treatment” was “on the basis of” the prohibited attribute of gender identity. Here the Member ruled that the real reason for the practice of using male pronouns was the COPD, the administrative guideline laid down by the Government, and hence she ruled that there had been no discrimination on “gender identity” grounds as such- see [86].

With respect, there was in my opinion another avenue to this same outcome, which may be relevant in other cases when no administrative guidelines are laid down. When asking the question, “was the male pronoun used *on the basis of* the attribute of gender identity?”, another answer was possible. In the Dictionary to the Queensland 1991 Act, in the Schedule, “gender identity” is defined as follows:

“**gender identity**”, in relation to a person, means that the person—
 (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or
 (b) is of indeterminate sex and seeks to live as a member of a particular sex.

But none of those matters were what led to the prisoner’s being addressed by male pronouns. It was not as if the form of address was some sort of arbitrary “punishment” for the prisoner’s “identification” with the opposite sex. No; the authorities were entitled to say, we simply used male pronouns because the prisoner was a biological male.

In any event, the direct discrimination claim based on pronoun use failed. So also did the direct discrimination claim based on a directive not to engage in overtly sexualised behaviour, which the Member found had been reasonably imposed in the interests of the safety of the prisoner and the good order of the prison, and would have also been imposed on a “cisgender” male prisoner who behaved similarly- see [162].

There were also “indirect discrimination” claims based on the alleged imposition of conditions on the prisoner. One such alleged condition was that the prisoner “be a male”. The Member rejected this claim at [175]:

[I]t is a nonsense to construe a requirement in the given scenarios that the applicant be a man, when the applicant is a man. The submissions of the applicant make the claim that because the applicant identifies as female and seeks to live as a female, she is therefore a female. I reject that submission. **I do not think an injunction against discrimination on the basis of the attribute of gender identity is a requirement to adopt the applicant’s perception of reality for all purposes.** The applicant has the male gender because of her biological sex. (emphasis added)

Other “indirect discrimination” claims were also rejected. Later the Member commented, at [193]:

I accept that the use of male personal pronouns caused the applicant distress. However, in weighing that against what I find to be the genuinely held reasons for doing so, and the broader

⁸ A person who identifies themselves in a way which is consistent with their biological sex.

implications for the safe operation of the prison, I find that it was reasonable to address the applicant by reference to her gender, not gender identity.⁹

While, as suggested above, it seems likely that the prohibition on “transgender discrimination” in most of Australia does not demand the use of a person’s preferred pronouns in the absence of surgical treatment, there is a law which *may* go so far. This is the Tasmanian *Anti-Discrimination Act 1998* which (since amendments to the Act which came into force on 8 May 2019) now includes definitions as follows in s 3:

gender expression means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity;

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including **gender expression** (whether by way of medical intervention or not), with or without regard to the individual’s designated sex at birth, and may include being transgender or transsexual;

Discrimination is prohibited in s 16(ea) on “gender identity” grounds. Unlike other discrimination laws around Australia on this topic, the Tasmanian Act contains no general defence for religious groups, or for religious schools.

Let’s briefly consider the situation in Tasmania should, say, a theological college run by a church with a strong belief that biological sex defines a person’s “gender identity”, be approached by a transgender person who was born female but now identifies as male (but has not had any medical treatment to achieve that outcome). The college decides that it will not make male bathrooms available, nor address the student by a male pronoun.

Under ADA 1998 (Tas) s 14(2) we read:

(2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.

On the pronoun issue, the question is: has the college treated the student “less favourably”? If the logic of the *Tafao* case noted above were followed, a tribunal might find, yes, other students are referred to by their “preferred” pronouns, but this student is not. However, the same issue then arises: is this treatment “on the basis of any prescribed attribute”? Perhaps not. The choice of pronoun has arguably not been made on the basis of the person’s “gender identity” in the sense defined by the Act. It has been made on the basis of the facts of biology and the college’s commitment to a religious world-view. In the college’s eyes, these are *relevant* factors for this decision.

It has to be conceded that the convoluted form of the definitions in the Tasmanian Act makes the outcome unclear. What is the import of the “with or without” phrase that is used? (A similar phrase is used in the Commonwealth SDA, where it is equally enigmatic.) Does it mean that the decision-maker can choose whether they do, or do not, take into account the biological sex at birth? Reading the definition into s 14 ADA 1998 (Tas), to replace the phrase “gender identity” with these words (and then adding the extra words from the phrase “gender expression”) seems almost impossible.

Similar difficulties will surround a decision about bathrooms, but again, the college may argue that male bathrooms have always been reserved for biological males, and this is a highly relevant and rational criterion to use.

⁹ Note that contrary to some other popular usage, the Member here was using “gender” to refer to “biological sex”- she explains the reasons for this usage in this case at para [73].

It seems that the meaning of the “ordinary” form of transgender discrimination law is not to automatically require, to quote the decision in *Tafao* noted above, the adoption of the “applicant’s perception of reality for all purposes”. The law requires that transgender persons not be treated detrimentally on irrelevant grounds, but there are a number of situations where biological sex is relevant.

As I will comment on below, even if this decision might be argued to be unlawful in Tasmania, it is more than likely that the Tasmanian law is inoperative when it clashes with protections provided by Commonwealth law.

GID Laws and Clashes with Other Freedoms

Let me sum up some of the problems in this area. It is worth noting first, why these problems arise in the area of “gender identity” discrimination and not in some of the other areas. In brief, the earlier forms of discrimination law were broadly consistent with Biblical values. As we have seen, the Bible does not support treating people badly on the grounds of race. In most areas of life, it is also a Biblical value that men and women receive equal treatment. Where there is a Biblical case for differential treatment, it is in the area of church leadership (where a number of Christians would see women not being encouraged to lead as priests or pastors) and family leadership. The latter is not an area (yet!) where discrimination law usually operates, and the former (insofar as it sees, for example, the Roman Catholic church not appoint women priests) has usually been seen to be a matter for the religions concerned, with people free to leave a religious group if they disagree with its stance on women’s leadership.

Similarly, most believers have no problems with saying that there should be no irrelevant differential treatment of disabled people or the young or the elderly. But when we come to the more recent grounds, there is a serious clash with traditional religious values.

I will simply offer examples from the Christian perspective. There is no really polite way to say this. A ban on “sexual orientation” discrimination focusses on persons who regularly engage in homosexual activity. Yet such activity is said to be contrary to God’s will as revealed in the Bible.¹⁰ It is a “sin”- a word which does not mean “the worst of all possible behaviour”, but simply means for a Christian “rebellion against God”. Lists of sins in the Bible also include envy, murder, strife, deceit, malice, gossiping, slander, insolence, arrogance, boastfulness, and disobeying one’s parents.¹¹ Any one of these activities is a sin and, unforgiven, will incur God’s judgment. Homosexual activity is one example of rebellion against God.

No consistent Christian will want to treat people badly because of this sin alone (as all will acknowledge that we are *all* sinners). But that the activity is contrary to God’s will means that Christians cannot offer affirmation and support of a decision to engage in this activity and will want to retain the right to explain what the Bible says on the matter. Similarly, the best view of the Bible’s teaching on human nature seems to lead to the conclusion that there are (absent some medical problem experienced in a fallen world) only two sexes, male and female, and that a person’s sex cannot be changed.¹² This view is at odds with the view that “gender” or “sex” can be altered, the assumption behind much discourse around “transgender” matters. Again, this does not require that someone who wants to, or has, “transitioned” should be treated badly where it is not relevant. But it will mean that some Christians will not be able to affirm the reality of a transition, and even in what seems like the trivial issue of a pronoun, may not wish to be forced to affirm what they see to be a lie.

¹⁰ To focus simply on the New Testament, see Romans 1:26-27; 1 Corinthians 6:9-10; 1 Timothy 1:10.

¹¹ Romans 1:29-30.

¹² See Genesis 1:27, “male and female”.

(a) Clash with Freedom of Speech

So, we see that there can be a clash between the right to freedom of speech, and the claim that to articulate God's judgment on sin in these areas amounts to doing harm to same-sex attracted or transgender persons. Here one of the key issues is whether the law should forbid harm, not in the sense of bodily injury or theft of chattels or trespass to land, but in the sense of causing "offence" or "humiliation". Do I have a right not to be told that someone else disapproves of my sexual preference or gender transition? Is a sense of being denigrated a sufficient "harm" for the law to protect me against it, even at the expense of someone else's free speech?

The issue has come to the fore in recent days with two cases that have arisen in the UK, which many of you will be familiar with. One is the case of Dr David Mackereth, a Christian doctor who was denied a contract with a Government health service because he said that he could not, in all conscience, use a client's "preferred pronoun" if that did not represent biological reality.¹³ The Department's response alleged that allowing Dr Mackereth to work in these circumstances would have been to potentially "cause offence" to clients who were transgender (even those who had not undergone all the medical procedures necessary for issue of a "gender recognition certificate" under UK law.)

Dr Mackereth sued on the basis of religious discrimination, but the Tribunal astonishingly found that his religious belief ("that every person is created by God as either male or female. A person cannot change their sex/gender at will") was one which was "incompatible with human dignity and [in] conflict with the fundamental rights of others, specifically here, transgender individuals." As a result, he could not maintain his claim of discrimination.

A similar, more recent, case involved a person who was not religious at all, Ms Maya Forstater, who held on general grounds of science the view that "sex is biological and immutable" and claimed that she had been denied a job she expected to get because of this view.¹⁴ Her claim was again rejected on the basis that this view was "incompatible with human dignity and [the] fundamental rights of others", and hence not a protected "belief" for the purposes of a claim of "belief"-based discrimination under the UK *Equality Act 2010*.

Each of these cases was a decision of a low-level Tribunal in the UK and may be overturned on appeal. But that they have reached the stage they have illustrates that we may be facing increasing challenges in articulating the Bible's view of sexual morality in a society which is starting to deem any expressed opposition to homosexuality or "gender transition" as the equivalent of "hate speech".

In Australia so far, we have not seen any similar decisions. The case of *Tafao* discussed above demonstrates that mere use of a "biological pronoun" will usually not amount to unlawful speech, at least outside Tasmania. But it is important to continue to resist the pressure that will be mounting for the law to change to recognise such a prohibition.

(b) Clash with Freedom of Religion

Just as there can be a clash between "gender identity" rights and freedom of speech, there can be a possible clash with religious freedom. A church wants to employ a youth worker

¹³ For more details see my blog post "Fired for using the wrong pronouns" (Oct 6, 2019) <https://lawandreligionaustralia.blog/2019/10/06/fired-for-using-the-wrong-pronouns/>.

¹⁴ See the summary of the case in my blog post, "Losing a job for believing that biological sex is immutable" (Dec 20, 2019) <https://lawandreligionaustralia.blog/2019/12/20/losing-a-job-for-believing-that-biological-sex-is-immutable/>.

who is a young woman, to provide a model of godly behaviour for the girls in their youth group. Someone applies for the job who was in fact born a male, though they have undergone medical transition procedures. Can the church choose not to employ this person on the grounds of their “gender identity”?

Under most Australian laws at the moment, they can lawfully decline to employ the person, so long as they can show that this decision is in accordance with their religious beliefs. Under the Commonwealth SDA, while s 37 prohibits gender identity being used as a ground to decline employment generally, s 37 allows religious bodies to act in accordance with their religious beliefs.

Religious bodies

SDA s 37 (1) Nothing in Division 1 or 2 affects:

(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

It seems likely that either under para (1)(c) (viewing youth groups as a “religious... practice”) or generally under para (1)(d), a church could make the case that it views sex as immutable and hence that appointment of a transgender youth worker would be contrary to their “doctrines, tenets or belief” or would cause “injury to the religious susceptibilities” of their members.

Most other Australian discrimination laws contain similar “exemptions” or “balancing clauses” to allow an appropriate balancing of different rights and interests here, at least for churches and other groups.¹⁵ One exception is Tasmania, which does not have a general provision protecting religious bodies. In a paper on the issues I have argued that in these circumstances the Tasmanian law which might result in a church being sued for not employing a youth worker for religious reasons, would be contrary to the protection provided by the Commonwealth law noted above, and hence by virtue of s 109 of the Constitution would be rendered inoperative to the extent of the clash.¹⁶

It is worth noting that this issue, of balancing religious freedom with “gender identity” rights, is one of those which will be considered in an important inquiry being undertaken this year by the Australian Law Reform Commission.¹⁷ This inquiry is due to report on 12 Dec 2020. It has not gone very far, because just as it was getting close to releasing its “Discussion Paper” in August 2019, the Government changed its terms of reference to say that it should not inquire into matters covered by the Religious Discrimination Bill. I understand that the ALRC has put this “on hold” until the final form of that legislation is established. It will, however, be issuing a formal Discussion Paper which it would be good for people interested in this area to respond to. In the meantime, there was an interesting paper presented by the President of the

¹⁵ For my comments on why “balancing clauses” is a better description than “exemptions”, see Neil J Foster, “Freedom of Religion and Balancing Clauses in Discrimination Legislation” *Oxford Journal of Law and Religion* Vol. 5 (2016) p. 385 – 430. For a more detailed list of religious balancing clauses see Neil J Foster, “Protecting Religious Freedom in Australia Through Legislative Balancing Clauses” *Occasional papers on Law and Religion* (2017) at: http://works.bepress.com/neil_foster/111/.

¹⁶ See Foster (2017), above n 15 at pp 23-26. In that paper I refer to the fact that the 2nd edition of a major textbook on discrimination law seems to support my view. Note now that the 3rd edition maintains their support for this view of the law- see Rees, Rice and Allen *Australian Anti-Discrimination Law* (3rd ed; Federation, 2018) at para [2.14.24].

¹⁷ See the home page for the inquiry, “Review into the Framework of Religious Exemptions in Anti-discrimination Legislation” at <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

ALRC, Justice Sarah Derrington, at the Freedom for Faith conference in 2019,¹⁸ which will give some preliminary ideas about how the Commission will approach the matter.¹⁹

Conclusion

Our legal system is a good gift from God. But there are some situations where the law may require us to behave in a way which God has said is wrong, or to not to do something which God says we should do. Until recently those situations have not been very common in Western democracies, which have had a moral framework substantially derived from a Christian world-view. But the more our society moves away from that shared moral framework, the more we will see such issues arise.

When confronted with a demand from the civic (and religious) leaders of the day to stop preaching the gospel of Jesus the Messiah, Peter and John responded:

“Which is right in God’s eyes: to listen to you, or to him? You be the judges! As for us, we cannot help speaking about what we have seen and heard.” (Acts 4:19-20)

Followers of Jesus in modern Australia may sometimes be confronted with this issue. I have not even covered all the possible challenges in this area, but one that I should briefly mention is that sometimes proposed legislation banning so-called “gay conversion therapy” has been drafted so widely that it would possibly make it unlawful for a Christian counsellor to explain the Bible’s teaching on gender identity to a confused young person who had some seeking guidance.²⁰

Whether it is a law saying that the Bible cannot be taught on these issues, or a law requiring someone to use a pronoun which they conscientiously believe would be conveying a falsehood, believers may need courage and grace to serve Jesus in the modern world. Of course in a democracy Christians and others are entitled to argue that such laws should not be enacted, or should be clarified so as not to impair religious freedom. Making submissions to government can sometimes make a difference! Prayer to our heavenly Father on these issues is also important. Paul in 1 Timothy 2 urges Christians to pray “for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness”- which I take it includes prayer that legal restrictions on religious freedom will not be enacted.

But in the final analysis we have a God who is sovereign over all, and we follow a Saviour who promised that he would always be “with us” (Matt 28:20). Ultimately we won’t go wrong by doing what is right and entrusting ourselves to his care.

¹⁸ Full disclosure: I am a board member of Freedom for Faith, which is a not-for-profit “thinktank” on religious freedom issues supported by most of the major Christian denominations.

¹⁹ For the paper and linked video, see <https://www.alrc.gov.au/news/of-shields-and-swords/>.

²⁰ For more details see my comment in *Eternity* magazine, “The prayer puzzle: will 'conversion therapy' laws ban Christian teaching?” (Jan 29, 2020) <https://www.eternitynews.com.au/opinion/the-prayer-puzzle-will-conversion-therapy-laws-ban-christian-teaching/>.