

## MEMORANDUM 2024-16

### **Equal Rights Amendment: Draft Proposed Legislation**

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In 2022, the Legislature adopted a resolution assigning the Commission<sup>1</sup> to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]”<sup>2</sup> More specifically:

[The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission’s report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination....<sup>3</sup>

The Commission commenced work on this topic in 2022, considering a proposed approach for the study.<sup>4</sup> The proposed approach has two stages: first, the Commission will examine the possibility of enacting a provision in state law to achieve the effect of the Equal Rights Amendment (“ERA”) (such a provision is referred to hereafter as a “sex equality provision”); and second, the Commission will use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).<sup>5</sup>

This memorandum relates to the first stage of the study. Previously, the Commission considered a proposed reform approach to provide an interpretative rule expressly stating the broad scope of the terms “sex discrimination” and “discrimination on the basis of sex.”<sup>6</sup>

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<sup>1</sup> Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

<sup>2</sup> 2022 Cal. Stat. res. ch. 150 ([SCR 92](#) (Leyva)).

<sup>3</sup> *Id.*

<sup>4</sup> [Memorandum 2022-51](#); see also [Minutes \(Nov. 2022\)](#), pp. 3-4.

<sup>5</sup> See [Memorandum 2022-51](#), p. 2.

<sup>6</sup> See [Memorandum 2024-6](#).

This memorandum provides an initial draft of partial legislative language, consistent with the proposed reform approach.

## KEY FEATURES OF PROPOSED REFORM APPROACH

As described in [Memorandum 2024-6](#), the proposed reform approach would be crafted as a statutory rule that would:

- Describe the scope of “sex discrimination” or “discrimination on the basis of sex.”
- Be codified in all codes, likely within “General Provisions,” “Preliminary Provisions,” or similar.
- Be expressly nonexclusive.

## DETAILS OF DRAFT LEGISLATIVE PROPOSAL

The attached draft presents a sample statutory provision to describe the scope of sex discrimination and draft comment language.

For the most part, the draft legislative language reflects an approach previously presented in a memorandum or discussed by the Commission during a prior meeting. In some cases, the language incorporates some adjustments or additions proposed by the staff. Those items are discussed below and included in brackets in the attached draft.

### **Application of Rule**

#### *Entirety of Code*

As discussed in more detail later in this memorandum, this rule is proposed to be codified in all codes. In each case, the provision would specify that the rule applies broadly to the entire code (i.e., the provision specifies that the rule is “for the purposes of [the] code”).

The draft comment language notes that there are identical sections in all other codes to provide consistency across all California laws governing sex discrimination.

#### *Inclusion of Notwithstanding Clause*

The Commission may want to consider the inclusion of a clause that specifies that this rule applies “notwithstanding any provision to the contrary.” While the staff has not yet identified any provision that would appear to be in direct conflict with this rule, the inclusion of such a clause could help to ensure that this rule would override any contrary language. **Would the Commission like to include a clause specifying that this rule**

**applies notwithstanding any contrary law?**

## **Language of Discrimination Rule**

### *Expand to Include Gender Discrimination*

The proposed reform approach focused specifically on sex discrimination or discrimination on the basis of sex. The staff proposes to make the rule applicable to gender discrimination or discrimination on the basis of gender, as well.

This proposal is consistent with the treatment of sex and gender in California’s anti-discrimination laws. Those laws broadly extend protections for sex and gender but vary somewhat in their terminology.<sup>7</sup> In some cases, the California codes refer to gender discrimination (either in addition to or instead of sex discrimination).<sup>8</sup> However, these terminology differences do not appear to reflect any underlying substantive difference in the scope of the discrimination rule. Sex and gender are often defined to include one another.<sup>9</sup>

For these reasons, the staff proposes to make clear that this statutory rule applies to both sex discrimination and gender discrimination. **Does the Commission approve of including gender discrimination in this rule?**

For simplicity, this memorandum refers only to sex discrimination (as opposed to both sex and gender discrimination).

### *Items Within Scope of Sex Discrimination*

In the attached draft, paragraph (1) of subdivision (a) identifies characteristics encompassed within the scope of sex discrimination. In particular, the draft language provides that sex discrimination includes discrimination based on any of the following actual or perceived characteristics:<sup>10</sup>

- (A) Assigned sex or gender category, including female, male, or nonbinary.<sup>11</sup>
- (B) Degree of conformity to sex or gender stereotypes.
- (C) Gender, including gender identity and gender expression.
- (D) Pregnancy, childbirth, breastfeeding, or related medical conditions.

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<sup>7</sup> See generally [Memorandum 2023-21](#).

<sup>8</sup> E.g., Educ. Code § 220; see also *id.* § 210.7 (defining “gender” to “mean[] sex, and include[] a person’s gender identity and gender expression.”); see also generally [Memorandum 2023-21](#).

<sup>9</sup> E.g., Gov’t Code § 12926(r)(2) (“‘Sex’ also includes, but is not limited to, a person’s gender. ‘Gender’ means sex....”).

<sup>10</sup> See, e.g., Civ. Code § 51(e)(6); Gov’t Code § 12926(o). These provisions make clear that the discrimination prohibitions cover both actual and perceived characteristics.

<sup>11</sup> See generally 2017 Cal. Stat. ch. 853 ([SB 179](#) (Atkins)). This legislation, the Gender Recognition Act, provided a third gender option, nonbinary, for state-issued identified documents. See *id.* § 2.

- (E) Reproductive health decisionmaking, including, but not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.<sup>12</sup>
- (F) Sexual orientation.
- (G) Use of health care services for reproductive health, sexual health, or gender-affirming care.
- (H) Variations in sex characteristics, including intersex traits or differences in sex development.

In several cases, the language identifying a particular characteristic is described using very similar language to the definitions in California’s broad anti-discrimination laws.<sup>13</sup> In other cases, the language has been modeled on existing laws, which do not necessarily involve discrimination rules. In those cases, the proposed language may have been drawn from multiple sources and may also vary significantly from the existing source language (items A,<sup>14</sup> B,<sup>15</sup> G<sup>16</sup> and H<sup>17</sup> on the list above).

In this initial draft, the staff strove for concision in drafting the individual items on the list and avoided cross-references to other statutory provisions. The goal of this approach is to craft a rule that could be understood without requiring additional research into other laws. However, it may be that including additional detail or cross-references in the statutory language could be helpful to provide context and a more robust understanding of the rule’s

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<sup>12</sup> Government Code Section [12926\(y\)](#) provides, in part, that “[r]eproductive health decisionmaking’ includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.”

<sup>13</sup> See, e.g., Civ. Code § [51\(e\)\(5\)](#) (defining “gender” to include “a person’s gender identity and gender expression.”); Gov’t Code § [12926\(r\)](#) (specifying that “sex” includes pregnancy, childbirth, breastfeeding, or related medical conditions), (y) (providing the definition for the term “reproductive health decisionmaking”).

<sup>14</sup> See, e.g., *supra* note 11 (Vehicle Code § 12800, added in Section 16 of the bill, uses the term “gender category” for drivers’ licenses); Educ. Code § [210.7](#) (definition of “gender expression” includes reference to “assigned sex at birth”); Health & Safety Code § [1439.50\(b\)](#) (definition of “gender identity” refers to “sex assigned at birth”).

<sup>15</sup> See, e.g., Civ. Code § [51\(e\)\(5\)](#) (defining “gender expression” to mean “gender-related appearance and behavior where or not stereotypically associated with the person’s assigned sex at birth”); Health & Safety Code § [1439.50\(c\)](#) (definition of “gender-nonconforming” as “a person whose gender expression does not conform to stereotypical expectations of how a man or woman should appear or act.”).

<sup>16</sup> See, e.g., Civ. Code § [56.05\(q\)](#) (defining “reproductive or sexual health application information” to mean “information about a consumer’s reproductive health, menstrual cycle, fertility, pregnancy, pregnancy outcome, plans to conceive, or type of sexual activity collected by a reproductive or sexual health digital service, including, but not limited to, information from which one can infer someone’s pregnancy status, menstrual cycle, fertility, hormone levels, birth control use, sexual activity, or gender identity.”); Civ. Code § [1798.300\(d\)\(1\), \(e\)](#) (defining “reproductive health care services” to mean and include “all services, care, or products of a medical, surgical, psychiatric, therapeutic, diagnostic, mental health, behavioral health, preventative, rehabilitative, supportive, consultative, referral, prescribing, or dispensing nature relating to the human reproductive system ... which includes, but is not limited to, all services, care, and products relating to pregnancy, the termination of a pregnancy, assisted reproduction, or contraception.”); Welf. & Instit. Code § [16010.2\(b\)\(3\)](#) (defining “gender affirming health care” and “gender affirming mental health care”).

<sup>17</sup> See, e.g., Health & Safety Code § [150900\(f\)\(5\)](#) (defining “intersex” as “an umbrella term referring to people whose anatomy, hormones, or chromosomes fall outside the strict male and female binary.”).

contours.

In the attached draft, paragraph (2) of subdivision (a) provides that sex discrimination includes harassment based on any of the listed characteristics.<sup>18</sup>

The draft language does not expressly address the concept of sex-plus discrimination, where the discrimination is targeted at a subset of individuals who share a sex characteristic (e.g., women who are married or, as noted in the *Bostock* decision, women who are Yankees fans).<sup>19</sup> The Commission may recall (from earlier materials in this study) that this form of discrimination was recognized as sex discrimination in the case law under Title VII of the federal Civil Rights Act of 1964.<sup>20</sup> Given that, this rule may not need to expressly address sex-plus discrimination as a separate matter. The Commission should also be aware that there is currently a pending bill on a related, but distinct, issue, that legislation would expressly incorporate the concept of intersectionality in California’s civil rights laws.<sup>21</sup>

**The staff welcomes feedback on the language of attached draft. The staff would particularly welcome any suggestions for specific adjustments to the draft language or the characteristics included on this list.**

### **Nonexclusivity of Listed Characteristics**

Consistent with prior Commission discussions, this rule is not intended to exhaustively define the scope of sex discrimination. Rather, the rule is crafted to make clear that discrimination on certain grounds constitutes sex discrimination under the law, while not foreclosing the possibility that sex discrimination may also encompass characteristics that are not listed.

The draft language contains a clause preceding the listed characteristics, specifying that sex discrimination “includes, but is not limited to” discrimination focused on the listed characteristics. And, as discussed further below, the proposed language includes a rule of liberal construction.

The draft comment language also indicates that the rule confirms that laws prohibiting and protecting against sex discrimination address “at a minimum” discrimination based on any of the listed characteristics.

**In the Commission’s view, does the proposed draft language sufficiently address this issue?**

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<sup>18</sup> [Minutes \(Feb. 2023\)](#), p. 3; [Memorandum 2023-10](#), pp. 3, 20-21.

<sup>19</sup> [Memorandum 2023-10](#), pp. 14-16; see *id.* at fn. 55 (quoting *Bostock v. Clayton County*).

<sup>20</sup> [Memorandum 2023-10](#), pp. 14-16.

<sup>21</sup> [SB 1137](#) (Smallwood-Cuevas), as amended April 1, 2014.

## **Expressly Address Associational Discrimination**

Associational discrimination refers to a situation where an individual is discriminated against based on a relationship with someone who has a protected characteristic.<sup>22</sup> Key California anti-discrimination laws specifically prohibit discrimination based on the actual or perceived characteristic of the individual's associate.<sup>23</sup>

**Does the Commission want to expressly address associational discrimination in the proposed statutory rule?**

## **Relationship with Constitutional Protections**

[Memorandum 2024-6](#) noted the possibility of including language specifying that the rule should be understood as being declarative of existing law. At its February meeting, the Commission expressed reservations about whether language along these lines could be read to limit the rule's application. In light of these concerns, the staff, in the attached draft, proposes language that connects this rule with existing California Constitution protections related to sex equality.

The attached draft includes, in brackets, proposed language along these lines. Specifically, the draft provision indicates that the rule is intended to implement related protections of the California Constitution. The rule references sections of the California Constitution recognizing the individual rights to pursue and obtain safety, happiness, and privacy,<sup>24</sup> guaranteeing equal protection of the laws,<sup>25</sup> protecting against exclusion from a business or profession,<sup>26</sup> and protecting reproductive freedom.<sup>27</sup> This language indicates that the rule is derived from existing constitutional requirements, while avoiding incorporating any and all existing statutory and case law.

In addition, the proposed language specifies that the rule should be liberally construed to effectuate the purposes of these constitutional protections. This rule of liberal construction helps to emphasize that this list is not an exhaustive description of the scope of sex discrimination.

**Does the Commission approve including the proposed language, with or without amendments, in its proposed reform?**

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<sup>22</sup> See generally Daniel A. Klein, Annotation, *Associational Discrimination or Retaliation Under State Civil Rights Statutes*, 7 A.L.R. 7th Art. 7 (2022).

<sup>23</sup> See, e.g., Civ. Code § [51\(e\)\(6\)](#); Educ. Code § [210.2](#); Gov't Code § [12926\(o\)](#); .

<sup>24</sup> Cal Const., art I, § [1](#).

<sup>25</sup> Cal Const., art I, § [7](#).

<sup>26</sup> Cal Const., art I, § [8](#).

<sup>27</sup> Cal Const., art I, § [1.1](#).

## LOCATIONS FOR RULE CODIFICATION

### Codification in Each Code

As indicated above, the proposed approach would be to codify this rule in each of the California codes.

Based on initial research, the staff has identified provisions in roughly half of the codes that address sex discrimination specifically.<sup>28</sup> In addition, the staff identified some sections with rules addressing gender discrimination (without mention of sex)<sup>29</sup> and discrimination rules that incorporate characteristics (including sex or gender) by reference (to the characteristics listed in Unruh Civil Rights Act, for example<sup>30</sup>).

Even for a code that does not currently have a rule related to sex or gender discrimination, the staff believes that there would still be value in codifying a rule to provide consistency across all the codes and to address any possible future discrimination rules that could be added.

### Location Within the Code

As noted in [Memorandum 2024-6](#), the staff recommended locating the rule in the initial “General Provisions” or “Preliminary Provisions” often found at the beginning of the individual codes. The staff proposed these locations because rules with broad application are often found in these places.<sup>31</sup>

The staff confirmed that all of the codes include either general or preliminary provisions

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<sup>28</sup> See, e.g., Bus. & Prof. Code § [23428.21](#) (provides, in part, “[n]o license shall be issued pursuant to this section to any club which restricts membership or in any other way discriminates against any person in the use of any of its facilities, on the basis of race, religion, national origin, sex, or age.”); Health & Safety Code § [1317.3\(b\)](#) (“As a condition of licensure, each hospital shall adopt a policy prohibiting discrimination in the provision of emergency services and care based on ... any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, except to the extent that a circumstance such as age, sex, preexisting medical condition, or physical or mental disability is medically significant to the provision of appropriate medical care to the patient.”); Ins. Code § [10133.11\(a\)\(3\)](#) (in a part relating to life and disability insurance, requiring a notification from an insurer that the “insurer does not discriminate on the basis of race, color, national origin, ancestry, religion, sex, marital status, gender, gender identity, sexual orientation, age, or disability.”); Rev. & Tax Code § [6361.1\(b\)\(3\)](#) (defining a qualified organization for the purpose of a sales and use tax exemption as an organization that meets specified conditions including “[t]he organization does not discriminate on the basis of race, sex, nationality, or religion.”).

<sup>29</sup> See, e.g., Code Civ. Proc. § [231.7\(a\)](#), as added by 2020 Cal. Stat. ch. 318, § 2 (“A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror’s race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.”).

<sup>30</sup> See, e.g., Ins. Code § [679.72](#) (“No application for insurance specified in this chapter or insurance investigation report furnished by an insurer to its agents or employees for use in determining the insurability of an applicant shall carry any identification, or any requirement therefor, of any characteristic listed or defined in *subdivision (b) or (e) of Section 51 of the Civil Code* with respect to the applicant.” (emphasis added)).

<sup>31</sup> See, e.g., Bus. & Prof. Code §§ [1-40](#) (General Provisions); Food & Ag. Code §§ [1-51](#) (General Provisions and Definitions); Penal Code §§ [2-24](#) (Preliminary Provisions).

near the start of the code. In some cases, a code may include both general and preliminary provisions,<sup>32</sup> or may combine the general or preliminary provisions with definitions or rules of construction.<sup>33</sup>

## Section Numbering

For ease of use, the staff considered the possibility of codifying this provision with the same section number in each code. This would help clarify the relationship between the provisions (i.e., they exist as part of a unified rule that applies across the codes). Given the existing structure and numbering of the different codes, using a single section number across all the codes does not appear to be practicable. While it could be technically achieved, it would likely require an unusual section number (i.e., using a decimal or letter) and would not permit the rule to be codified in a logical location in each of the codes.<sup>34</sup>

## PROPOSED COMMENT LANGUAGE

The attached draft includes proposed comment language. This language references the federal Equal Rights Amendment as a reason for the reform and notes that the rule is codified in each code for consistency across California law. The comment language also emphasizes that this rule is consistent with the scope of anti-discrimination protections in California’s Unruh Civil Rights Act, Fair Employment and Housing Act, and law on Educational Equity.

**The staff welcomes suggestions from the Commissioners on whether this comment language should be expanded, revised, or otherwise adjusted. In particular, the staff welcomes feedback on whether this comment language should include references to federal provisions (including the Equal Rights Amendment and Title VII of the Civil Rights Act).**

## NEXT STEPS

The staff will revise the sample legislative language consistent with the directions

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<sup>32</sup> See, e.g., Evid. Code §§ [1-12](#) (Preliminary Provisions and Construction), §§ [300-413](#) (General Provisions); Fam. Code §§ [1-185](#) (Preliminary Provisions and Definitions), §§ [200-295](#) (General Provisions).

<sup>33</sup> See, e.g., *supra* note 27.

<sup>34</sup> In several codes, the items following general or preliminary provisions begin with a section number around 100. See, e.g., Title 1 (Corporations) of the Corporations Code (§§ [100-14707](#)); Division 1 (State Administration) of the Food and Agriculture Code (§§ [101-1501](#)). In some codes, the general provisions or preliminary provisions end at a much lower section number. See, e.g., Division 1 (Persons) of Civil Code (§§ [38-86](#)); Division 1 (Department of Boating and Waterways and the Boating and Waterways Commission) of the Harbors and Navigation Code (§§ [30-88](#)). In a few codes, the general provisions start at a section number above 100. See Division 1 (General Provisions) of the Commercial Code (§§ [1101-1310](#)); Division 3 (General Provisions) of the Evidence Code (§§ [300-413](#)).



provided by the Commission and will work to prepare a draft tentative recommendation for this proposed reform.

Respectfully submitted,

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Chief Deputy Director

DRAFT STATUTORY PROVISION REGARDING  
SEX [OR GENDER] DISCRIMINATION

1 \_\_\_ Code § [XX] (added). Scope of Sex [or Gender] Discrimination

2 SEC. \_\_\_\_. Section XX is added to the \_\_\_ Code, to read:

3 XX. (a)(1) For the purposes of this code, sex discrimination includes, but is not limited  
4 to, discrimination based on any of the following actual or perceived characteristics:

5 (A) Assigned sex or gender category, including female, male, or nonbinary.

6 (B) Degree of conformity to sex or gender stereotypes.

7 (C) Gender, including gender identity and gender expression.

8 (D) Pregnancy, childbirth, breastfeeding, or related medical conditions.

9 (E) Reproductive health decisionmaking, including, but not limited to, a decision to use  
10 or access a particular drug, device, product, or medical service for reproductive health.

11 (F) Sexual orientation.

12 (G) Use of health care services for reproductive health, sexual health, or gender-  
13 affirming care.

14 (H) Variations in sex characteristics, including intersex traits or differences in sex  
15 development.

16 (2) Sex discrimination also includes harassment based on the characteristics listed in  
17 subdivision (a).

18 [(b) Any reference to gender discrimination, discrimination on the basis of gender,  
19 discrimination on the basis of sex, or similar shall be understood and interpreted as a  
20 reference to sex discrimination.]

21 [(c) This section is intended to implement the protections of the California Constitution  
22 recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art.  
23 I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or  
24 pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an  
25 individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed  
26 to effectuate the purposes of these constitutional protections.]

27 **Comment.** Section XX is added to reflect California’s commitment to ensuring that “equality of  
28 rights under the law shall not be denied or abridged by [the] state on account of sex,” consistent  
29 with the language of the federal Equal Rights Amendment to the United States Constitution. While  
30 this section applies specifically to the \_\_\_ code, there are identical sections in each of the other  
31 California codes to clarify and provide consistency across all California laws governing sex [and  
32 gender] discrimination.

33 This section is intended to provide express language confirming that California’s laws  
34 prohibiting and protecting against sex [and gender] discrimination address, at a minimum,  
35 discrimination based on the listed characteristics. The scope of this rule is consistent with the broad  
36 scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the  
37 California Fair Employment and Housing Act (Government Code Sections 12900-12999), and  
38 California’s laws on Educational Equity (Education Code Sections 200-270).