

MEMORANDUM 2025-9

**Equal Rights Amendment: Revised Draft Proposed Legislation and Update on
Work to Identify and Remedy Specific Defects**

In 2022, the Legislature adopted a resolution assigning the Commission¹ to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]”² 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....³

The Commission commenced work on this topic in 2022.⁴ The Commission’s approach has two stages: first, the Commission examines 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 uses the sex equality provision to evaluate existing California law to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).⁵

This memorandum addresses both stages of the study. First, this memorandum presents updated draft language for the sex equality provision based on Commissioner and stakeholder feedback, along with proposed code locations. Second, this memorandum

¹ 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). Other materials can be obtained by contacting the Commission’s staff.

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.

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

³ [2022 Cal. Stat. res. ch. 150](#) (SCR 92 (Leyva)).

⁴ Memorandum [2022-51](#); see also Minutes ([Nov. 2022](#)), pp. 3-4.

⁵ See Memorandum [2022-51](#), p. 2.

provides stakeholder feedback identifying California laws with discriminatory language or disparate impact.

DETAILS OF REVISED DRAFT LEGISLATIVE PROPOSAL

The attached draft presents revised statutory provisions describing the scope of sex discrimination and Comment language based on Commissioner and stakeholder feedback.

Language of Discrimination Rule

Based on Commissioner feedback, the following amendments were made to the draft provisions regarding sex discrimination:

- The rule applies to both sex and gender discrimination.
- A subdivision was added clarifying that this provision shall prevail over a conflicting provision of narrower scope.
- Comment language was amended to better reflect the intended relationship of the rule and existing California Constitutional issues.
- References to federal law, including the Equal Rights Amendment, were deleted.
- Existing discrimination laws were amended and cross-referenced to avoid constitutional limitations on amendments by reference.⁶

Stakeholders recommended rephrasing subdivisions (b)(2)(C) – (E), including the following:

- Including “access to” gender affirming care and “other related health care.”
- Specifying that “childbirth, abortion, lactation, miscarriage, fertility, and contraception” are pregnancy related medical conditions.⁷

One stakeholder group additionally recommended defining the term “sexual orientation” as “heterosexuality, homosexuality, or bisexuality,” to conform with other code sections,⁸ but a different stakeholder group recognized the existing definition as limited⁹ and recommended leaving the term undefined. The staff recommends that the Commission adopt the latter suggestion.

⁶ Minutes ([May 2024](#)), p. 5.

⁷ See, e.g., Health & Safety Code § [123462](#), the Reproductive Privacy Act, which includes “prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care” as matters relating to pregnancy.

⁸ See, e.g., Educ. Code §§ [212.6](#), [66262.7](#), Penal Code §§ [422.56](#), [11410](#), and Gov’t Code § [12926](#).

⁹ Sexual orientation is widely understood to include additional identities such as pansexual, queer, and asexual. See e.g., [Sexual Orientation](#), Planned Parenthood.

Does the Commission approve the proposed revised language to the Discrimination Rule?

Locations for Rule Codification

The staff reviewed California codes to identify the most appropriate placement for the draft provisions. As noted previously,¹⁰ each code includes a section for definitions and/or principles of general applicability throughout. The staff made best efforts to follow the design of the existing code structure – if terms are alphabetized, the new definition is proposed in alphabetical order. If existing sections are grouped thematically, the staff suggests locating the new definition near like provisions.

Below is the proposed new section in each code for the definition of “sex discrimination.”

Business and Professions Code: General Provisions, Section 14.3.

Civil Code: Preliminary Provisions, Section 14.1.

Code of Civil Procedure: Preliminary Provisions, Section 17.5.

Commercial Code: Division 1, General Provisions; Chapter 2. General Definitions and Principles of Interpretation, Section 36.5.

Corporations Code: General Provisions, Section 12.4.

Education Code: Title 1. General Education Code Provisions; Part 1. General Provisions; Chapter 2. Educational Equity; Article 2. Definitions, Section 212.4.¹¹

Elections Code: Division 0.5, Preliminary Provisions; Chapter 4. Definitions, Section 353.7.

Evidence Code: Division 2. Words and Phrases Defined, Section 212.

Family Code: Division 1. Preliminary Provisions and Definitions; Part 2. Definitions, Section 136.

Financial Code: General Provisions, Section 23.

Fish and Game Code: Division 0.5, General Provisions and Definitions; Chapter 1, General Definitions, Section 9.4.

Food and Agriculture Code: General Provisions and Definitions, Section 52.

Government Code: General Provisions, Section 27.

Harbors and Navigation Code: General Provisions, Section 26.

Health and Safety Code: General Provisions, Section 29.

Insurance Code: General Provisions, Section 49.

Labor Code: General Provisions, Section 12.3.

¹⁰ Memorandum [2024-16](#), p. 2.

¹¹ This proposed placement is within the section of code referenced in the draft Comment as “California’s laws on Educational Equity.”

Military and Veterans Code: General Provisions, Section 20.
Penal Code: Preliminary Provisions, Section 7(b)(21).
Probate Code: Division 1. Preliminary Provisions and Definitions; Part 2. Definitions, 71.
Public Contract Code: Division 2. General Provisions; Part 1. Administrative Provisions; Chapter 1. Definitions, Section 1105.
Public Resources Code: General Provisions, Section 19.
Public Utilities Code: General Provisions, Section 23.
Revenue and Taxation Code: General Provisions, Section 12.3.
Streets and Highways Code: General Provisions, Section 37.
Unemployment Insurance Code: General Provisions, Section 22.
Vehicle Code: Division 1. Words and Phrases Defined, Section 552.
Water Code: General Provisions, Section 27.
Welfare and Institutions Code: General Provisions, Section 28.

Does the Commission agree with the proposed amendment locations for the Discrimination Rule?

STAKEHOLDER FEEDBACK ON CALIFORNIA LAWS

The staff sought and received feedback from stakeholders in identifying California laws with discriminatory language or that have disparate impact on individuals based on sex. As a reminder, a disparate impact occurs when a facially neutral law disproportionately adversely affects members of a protected class. This is a fact-intensive analysis, and a law fails the disparate impact legal test when there is no legitimate business reason for the law or policy and no less discriminatory means are available to achieve the law’s purpose.¹²

Discriminatory language: CDCR’s Operations Manual

The ACLU of Southern California (ACLU) suggested that the California Department of Corrections and Rehabilitation’s (CDCR) Operations Manual should be updated and clarified. Although current law acknowledges gender as female, male or nonbinary¹³ and a person’s gender may be different from an individual’s sex assigned at birth,¹⁴ CDCR’s Operations Manual uses the term “biological sex” interchangeably with

¹² Memorandum [2024-17](#), p. 8.

¹³ See, e.g., [2017 Cal. Stat. ch. 853](#) (SB 179) and Penal Code § [2605](#).

¹⁴ California Civil Rights Department, [The Rights of Employees Who are Transgender or Gender Nonconforming: Fact Sheet](#) p. 3, (November 2022). Gender identity is defined as “each person’s internal understanding of their gender, such as being male, female, a combination of male and female, neither male nor female, and/or nonbinary. A person may have a gender identity different from the sex the person was assigned at birth.” See also [2017 Cal. Stat. ch 853](#) (SB 179).

“gender” and does not include “nonbinary” in its definition of “gender identity.”

For example, the Operations Manual’s definitions include the following:

- Cross-Gender: Of the opposite biological sex. Example: Male Custody Staff patting down female inmates is cross-gender searching.
- Gender Identity: Distinct from sexual orientation and refers to a person’s internal, deeply felt sense of being male or female.¹⁵

ACLU recommends the Operations Manual be updated to reflect current laws by adding a definition for “nonbinary,”¹⁶ amending its definitions as follows, and conforming the manual’s provisions accordingly:

- Cross-Gender: Of ~~the opposite biological sex~~ a different gender. Example: Male-identifying Custody Staff patting down female-identifying inmates is cross-gender searching.
- Gender Identity: Distinct from sexual orientation and refers to a person’s internal, deeply felt sense of being male, or female, or nonbinary.

However, amending CDCR’s Operations Manual is not within the Commission’s jurisdiction. Nonetheless, the staff recommends highlighting these suggestions in the Commission’s report to the Legislature so that the Legislature may suggest CDCR consider integrating these changes in the next Operations Manual update.

Does the Commission agree with the staff recommendation?

Disparate Impact

California’s laws create a presumption against legal name change for individuals listed on sex offender registries.

ACLU also pointed to existing law requiring a court to deny a petition for a name change if it is made by an individual required to be listed on a sex offender registry unless the court determines it is in the “best interest of justice and that doing so will not adversely affect the public safety.”¹⁷ ACLU argues this presumption against granting a name change

¹⁵ State of California, California Department of Corrections and Rehabilitation, Adult Institutions, Programs, and Parole, *Operations Manual*, § [54040.3](#), p. 478, (updated through January 1, 2021).

¹⁶ Email from Amanda Goad, November 8, 2024, see Exhibit 4-9. ACLU recommends using the definition of “nonbinary” from the Federal Racial and Identity Profiling Act of 2015 Regulations ([11 CCR 999.226](#)) which states: “a person with a gender identity that falls somewhere outside of the traditional conceptions of strictly either female or male. People with nonbinary gender identities may or may not identify as transgender, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, Two Spirit, bigender, pangender, gender nonconforming, or gender variant.”

¹⁷ Code Civ. Proc. § [1279.5\(f\)](#) states in part: “Notwithstanding any other law, a court shall deny a petition for a

targets transgender individuals who “are disproportionately subjected to the registry requirements of [\[Penal Code\] 290](#)” due to “bias in the criminal legal system and involvement in survival economies.”¹⁸ ACLU asserts for individuals required to register with a nonconforming name, this law impedes their reintegration into society by potentially exposing their transgender and registry status outside of normal background checks. Despite the law’s allowance for a judge to approve a name change “in the best interest of justice” and if the change would not negatively impact public safety, ACLU believes these petitions are granted infrequently for transgender individuals. However, ACLU did not know the frequency of approvals or denials for transgender individuals nor whether any denials are due to bias against transgender individuals instead of a belief the change would not further justice and negatively impact public safety.

The law disfavoring name changes by registrants was added in 1996 by Assembly Bill 2359.¹⁹ The author of this bill was “...concerned that criminals may be changing their names in order to avoid law enforcement scrutiny or to make it easier to harass their victims.”²⁰ The original bill version did not allow for a name change under any circumstances, and the language permitting a court to approve a name change petition in the interest of justice and public safety was added later in the legislative process.²¹ Unfortunately, the committee analyses do not record the reasoning behind those amendments, nor what the Legislature considered a compelling scenario.

In 2017, the Gender Recognition Act²² made it easier for individuals to legally change their name to conform with their gender identity. Interestingly, the same author sponsored another bill²³ the same year making changes to the code sections amended by AB 2359 (although not the specific subsection), giving transgender individuals the right to change their names while incarcerated. It is unknown whether ACLU or other advocates requested the author to also change the presumption against name changes for individuals subject to sex offender registries at that time, however.

Given the lack of data as to whether petitions for name changes are being

name change pursuant to this title made by a person who is required to register as a sex offender under [Section 290](#) of the Penal Code, unless the court determines that it is in the best interest of justice to grant the petition and that doing so will not adversely affect the public safety.”

¹⁸ Email from Amanda Goad, Sept. 9, 2024, see Exhibit 4-9.

¹⁹ [1996 Cal. Stat. ch. 730](#) (AB 2359).

²⁰ Senate Rules Committee Third Reading Analysis of [AB 2359](#) (August 20, 1996), p. 3.

²¹ [AB 2359](#) (Bustamante), as introduced on Feb. 16, 1996 and [AB 2359](#) (Bustamante), as amended on August 5, 1996.

²² [2017 Cal. Stat. ch. 853](#) (SB 179). The bill also provided for a third gender option on the state driver’s license, identification card, and birth certificate and created a new procedure for an individual to secure a court-ordered change of gender.

²³ [2017 Cal. Stat. ch. 856](#) (SB 310).

disproportionately rejected for transgender individuals and the recency of the Legislature’s action in this space, the Commission staff recommends against addressing the matter at this time.

Does the Commission agree with the staff recommendation?

California health laws do not cover all genders equally.

In searching for California laws with discriminatory language or disparate impact, the staff found a number of scorecards indexing various state legislative efforts towards sex equality.²⁴ California routinely scored highly overall, although there are some areas where the state could improve. Below are specific laws and policies California could adopt to further sex equality in health.

- Medi-Cal coverage for fertility treatment.²⁵

Following previously unsuccessful attempts,²⁶ this year California passed a law requiring certain private insurers to cover fertility and infertility treatments.²⁷ However, fertility treatment is still not a benefit under Medi-Cal, the state’s Medicaid health care program. The staff found only one attempt to legislatively mandate public coverage, and this bill was pulled from legislative consideration following a report indicating significant state costs.²⁸

California currently faces a large budget deficit²⁹ and the Legislative Analyst’s Office anticipates ongoing operating shortages.³⁰ It appears the Legislature is aware of the gap in fertility coverage and has elected not to prioritize it at this time. The staff recommends highlighting this gap in its report and recommending coverage when funding is available.

²⁴ See e.g., Human Rights Campaign’s [State Scorecard: California](#), in which California achieved the highest rating, “Working toward Innovative Equality”; Movement Advancement Project’s [California Equality Profile](#), updated June 1, 2024, in which California scored of 45 of 49 (although California’s score should rise to 46.5 with the passage of [2024 Cal. Stat. ch. 868](#) (SB 957), which requires LGBTQ+ data collection); and Out Leadership’s [2024 State LGBTQ+ Business Climate Index](#), with California receiving a score of 86.5. Out Leadership’s scorecard did not publish the specific laws or policies by which California fell short.

²⁵ [Movement Advancement Project, California’s Equality Profile, Healthcare Laws and Policies](#), updated June 1, 2024.

²⁶ [AB 2029](#) (Wicks, 2022), [AB 2781](#) (Wicks, 2020), [AB 767](#) (Wicks, 2019) (see February 19, 2019 version), and [SB 172](#) (Portantino, 2017).

²⁷ [2024 Cal. Stat. ch. 930](#) (SB 729, Menjivar) requires certain private insurers, but not Medi-Cal, to cover fertility and infertility services. This law also redefined “infertility,” making it more equitable for same-sex couples.

²⁸ California Health Benefits Review Program, [Key Findings: Analysis of California Assembly Bill 2781, Treatment of Infertility](#), at iii, April 3, 2020. Medi-Cal managed care expenditures were projected to increase by over \$82 million if the proposed legislation were to go into effect.

²⁹ Legislative Analyst Office, [The 2024-25 Budget: Overview of the Spending Plan](#), p. 3, September 2024.

³⁰ Legislative Analyst Office, [The 2024-25 Budget: Multiyear Budget Outlook](#), May 23, 2024.

- Protections against nonconsensual genital surgeries and other harmful medical practices on intersex children.

The Williams Institute at the UCLA School of Law recently published “Pathways to LGBTI Protection: The Relationship Between the Social Acceptance of LGBTI People and their Legal Inclusion,”³¹ documenting legal pathways through which countries can be more inclusive to lesbian, gay, bisexual, transgender, and intersex individuals. To inform its analysis, the authors collected data on legal protections for sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC) by country.

The staff compared California’s laws against the report’s broad list of SOGIESC protections³² and determined only “explicit protections against nonconsensual genital surgeries and other harmful medical practices on intersex children” was absent in California law. (No other U.S. states have similar protections, either).

The California Legislature has attempted recently to legislate in this area, but no bills have yet passed.³³ However, the Legislature did pass a resolution in 2018 supporting the bodily autonomy of intersex youth.³⁴

The staff recommends against Commission action at this time because this is an emerging medical issue.

Does the Commission agree with the staff recommendations regarding California’s health laws?

A NEW MODEL FOR SEX EQUALITY LAWS

The ERA Project at Columbia Law School published “Realizing Sex Equality: A

³¹ Andrew R. Flores, Miguel Fuentes Carreño, Ari Shaw, [*Pathways to LGBTI Protection: The Relationship Between the Social Acceptance of LGBTI People and their Legal Inclusion*](#), UCLA School of Law Williams Institute, July 2024.

³² Andrew R. Flores, Miguel Fuentes Carreño, Ari Shaw, [*Pathways to LGBTI Protection: The Relationship Between the Social Acceptance of LGBTI People and their Legal Inclusion*](#), UCLA School of Law Williams Institute, pp. 5-6, July 2024.

³³ [SB 201](#) (Wiener, 2019) and [SB 225](#), as introduced (Wiener, 2021).

³⁴ [SCR 110](#) (Wiener, 2018) reads in part, “WHEREAS, The United Nations High Commissioner for Human Rights explained in 2015, ‘medically unnecessary surgeries and other invasive treatment of intersex babies and children... are rarely discussed and even more rarely investigated or prosecuted.... The result is impunity for the perpetrators; lack of remedy for victims; and a perpetuating cycle of ignorance and abuse.... We need to bridge the gap between legislation and the lived realities of intersex people.’” And “Resolved, That the Legislature calls upon stakeholders in the health professions to foster the well-being of children born with variations of sex characteristics, and the adults they will become, through the enactment of policies and procedures that ensure individualized, multidisciplinary care that respects the rights of the patient to participate in decisions, defers medical or surgical intervention, as warranted, until the child is able to participate in decisionmaking, and provides support to promote patient and family well-being.”

Model Policy Agenda (MPA) for State Equal Rights Amendments,”³⁵ which proposes proactive steps for states and local jurisdictions to take toward sex equality. The report argues for a more modern approach to sex equality. Instead of treating individuals equally, it argues for a “substantive equality framework” which affirmatively addresses existing disparities to achieve equity.”

Over 60 years of sex discrimination case law demonstrates that the Supreme Court’s “neutral” approach to equality—which does not permit classifications based on race or sex in the distribution of resources, services, or penalties, even if the goal is to mitigate structural inequalities—perpetuates the status quo of systems designed to discriminate. This formal equality approach only protects individuals from intentional discrimination and is largely incapable of capturing the disparate impact of neutral policies on particular social groups. Sex-based inequality is experienced not just through explicit sex-based classifications and blatant sex stereotypes in the law, but through systems and structures that appear neutral.³⁶

The MPA recommends state and local governments develop infrastructure that identifies, realigns, and prevents policies that contribute to (intentionally or not) inequalities based on sex by doing the following:

- 1) Conduct continuous government-wide Gender Impact Assessments (GIA) for existing systems and proposed policies.³⁷
- 2) Establish an oversight body to robustly interpret and implement the state Equal Rights Amendment.
- 3) Implement policies to overcome gender inequality.³⁸

These efforts are already underway in to varying degrees in California. Some local California jurisdictions, such as San Francisco and Los Angeles,³⁹ are already performing GIA audits, and California’s Civil Rights Department is dedicated to enforcing the state’s civil rights laws. As noted in the prior section, California has successfully implemented

³⁵ Naomi Young, Ting Ting Cheng, Katherine Franke, Lilia Hadjiivanova, [Realizing Sex Equality: A Model Policy for State Equal Rights Amendments](#), Columbia Law School, ERA Project, September 2024.

³⁶ Naomi Young, Ting Ting Cheng, Katherine Franke, Lilia Hadjiivanova, [Realizing Sex Equality: A Model Policy for State Equal Rights Amendments](#), Columbia Law School, ERA Project, p. 10, September 2024.

³⁷ A Gender Impact Assessment uses data to evaluate the impact existing laws and policies have on specified populations. Gender Impact Assessments and other related assessment frameworks, like Racial Equity Assessments are emerging tools that some argue are similar to assessing a policy’s budget impact. See Xavier de Souza Briggs and Richard M. McGahey, [Keeping promises while keeping score: Gauging the impact of policy proposals on racial equity](#), Brookings, Oct. 11, 2022.

³⁸ Naomi Young, Ting Ting Cheng, Katherine Franke, Lilia Hadjiivanova, [Realizing Sex Equality: A Model Policy for State Equal Rights Amendments](#), Columbia Law School, ERA Project, p. 11, September 2024.

³⁹ See, e.g., the Department on the Status of Women, City and County of San Francisco, [Gender Analysis of San Francisco Commissions and Boards 2023](#) and [Los Angeles County Gender Impact Assessment Program Reference Material](#), August 2023.

many policies to overcome gender inequality, particularly in the areas of reproductive rights, gender-based violence, and pay equity.⁴⁰ Further opportunities for action include ensuring equitable tax policies and developing tools for a solidarity economy.⁴¹

However, when enacting laws to remedy past sex discrimination the Legislature must be careful to stay within California’s constitutional parameters. Recent California efforts to implement broad remedial discrimination policies have not fared well in the courts.

California enacted SB 826⁴² and AB 979⁴³, which required publicly held corporations’ boards of directors to have a minimum number of self-identifying females and individuals from underrepresented communities (including individuals who self-identify as gay, lesbian, bisexual, or transgender) as board members, respectively.

In separate lawsuits, Superior Courts found that both SB 826 and AB 979 violated the Equal Protection Clause of the California Constitution.⁴⁴ The courts found California did not prove a compelling state interest in remedying past discrimination and the respective laws were unnecessary and not narrowly tailored to achieve that end. Both cases are currently on appeal.⁴⁵

⁴⁰ See e.g., Governor Gavin Newsom, [California Expands Access and Protections for Reproductive Health Care](#), Sept. 25, 2023; Rob Bonta, Attorney General, State of California Department of Justice, [Cyber Exploitation: Tools for Law Enforcement](#); Department of Industrial Relations, [California Equal Pay Act](#), June 2024;

⁴¹ “Solidarity economy tools include worker co-ops, credit unions, cooperatively managed loan funds, mutual aid networks, community land trusts, and limited equity housing co-ops. Although each of these tools has the potential to benefit communities, the concept of a solidarity economy requires the interlinking and interreliance of these systems. Governments can support the building of a solidarity economy through tax credit incentives, funding for research, training, capacity building, pilot programs, and dedicating government-owned property to community use.” Naomi Young, Ting Ting Cheng, Katherine Franke, Lilia Hadjiivanova, [Realizing Sex Equality: A Model Policy for State Equal Rights Amendments](#), Columbia Law School, ERA Project, pp. 38-39, September 2024.

⁴² [2018 Cal. Stat. ch. 954](#) (SB 826).

⁴³ [2020 Cal Stat. ch. 316](#) (AB 979).

⁴⁴ [Robin Crest, et al. v. Alex Padilla](#), No. 19STCV27561 (Superior Court of the State of California, County of Los Angeles, May 13, 2022), relating to SB 826 (Crest I) and [Robin Crest, et al. v. Alex Padilla](#), No. 20ST-CV-37513 (Superior Court of the State of California, County of Los Angeles, June 2, 2022) relating to AB 979 (Crest II).

In Crest I, SB 826 was challenged under the Equal Protection clause of the California Constitution (Cal. Const. art I, § 7 and § 31). Although the State claimed its compelling interest was to eliminate and remedy discrimination and increase gender diversity, the court noted that there is “no compelling governmental interest in remedying generalized, non-specific allegations of discrimination” and “the use of a suspect classification to remedy purported discrimination has not been upheld absent judicial, legislative, or administrative findings of constitutional or statutory violations.” (p. 8) Similarly, the court was unpersuaded that SB 826 was necessary to boost California’s economy or that it was narrowly tailored. The court specifically noted that the defendant “failed to show the Legislature considered gender-neutral alternatives to remedy specific, purposeful, or intentional, unlawful discrimination against women by private-sector corporations in the selection of board members.” (p. 22)

In Crest II, the judge [granted](#) the plaintiff’s motion for summary judgement using the same analysis above. In its conclusion, the court acknowledged the “social problem” of insufficient diversity on corporate boards, but argued AB 979 was the wrong solution. “Only in very particular cases should discrimination be remedied by more discrimination. And that should only happen after obvious alternative measures have been tried. Sometimes the direct approach should be the last resort, not the first.” (p. 23).

⁴⁵ [Padilla v. Crest](#) (Cal. App. 2d, Case No. B322276, filed July 25, 2022) and [Crest et al. v. Padilla](#) (Cal. App. 2d,

Private actors have also attempted, and failed, to require balanced corporate board representation. In 2021, the Security and Exchange Commission (SEC) approved the stock market [Nasdaq's](#) rules requiring companies to annually disclose board diversity metrics and, if they did not have diverse members, explain why.⁴⁶ Even though this rule did not *require* diverse directors, the rule was challenged, claiming among other assertions that it violated the First and Fourteenth Amendments of the U.S. Constitution.⁴⁷ The court held that the SEC unlawfully approved Nasdaq's rules because the proposed rules were “not consistent with the requirements of” the Securities Exchange Act of 1934.⁴⁸

The Commission needs to decide whether to approve these recommendations for release as a tentative recommendation, with or without changes.

Respectfully submitted,

Sarah Huchel
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Case No. B321726, filed July 20, 2022). Interestingly, both cases' appeals are on hold pending the California Supreme Court's decision in [Taking Offense v. State of California](#) (Cal., Case No. S270535, filed August 25, 2021). *Taking Offense* challenges the constitutionality of the Lesbian, Gay, Bisexual, and Transgender Long-Term Facility Residents' Bill of Rights [2017 Cal. Stat. ch. 483](#) (SB 219), which requires staff to use residents' preferred pronouns. The lower court found the law facially overbroad and unconstitutional under the First Amendment. Although the constitutional issues are different, all of these cases involve the same taxpayer standing issue, on which the Supreme Court [requested additional briefing](#). It is possible all three cases may be dismissed due to standing, leaving the constitutional questions unresolved.

⁴⁶ The Nasdaq Stock Market LLC Rulebook, [§ 5605\(f\)](#). See also Nasdaq, [Nasdaq's Board Diversity Rule, What Companies Should Know](#), (last updated February 28, 2023).

⁴⁷ *Alliance for Fair Board Recruitment v. Securities and Exchange Commission*, 85 F.4th 226 (5th Cir. 2023).

⁴⁸ *Alliance for Fair Board Recruitment v. Securities and Exchange Commission*, No. 21-60626, 2024 WL 5078034 (5th Cir. 2024).

DRAFT STATUTORY PROVISIONS REGARDING SEX DISCRIMINATION

1 **___ Code § [XX] (added). Scope of Sex Discrimination**

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

3 XX. (a)(1) Any provisions that prohibit discrimination on the basis of sex, discrimination
4 on the basis of gender, or similar shall also be interpreted as prohibiting sex discrimination,
5 as defined in subdivision (b).

6 (2) In case of a conflict between the provisions of this section and other provisions of
7 this code that set forth the scope of [“]sex discrimination,[”] the provisions of this section
8 shall prevail over provisions with a narrower scope.

9 (b) For the purposes of this section, the following definitions apply:

10 (1) [“]Discrimination[”] includes, but is not limited to, harassment.

11 (2) [“]Pregnancy or related medical conditions” includes, but is not limited to, childbirth,
12 abortion, lactation, miscarriage, fertility, and contraception.

13 (3) [“]Sex discrimination[”] includes, but is not limited to, discrimination based on any
14 of the following actual or perceived characteristics or actions:

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

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

17 (C) Gender, including gender identity, gender expression, and access to, and use of,
18 gender affirming care and other related health care.

19 (D) Pregnancy or related medical conditions.

20 (E) Decision-making, access to care, or potential or actual use of a drug, device, product,
21 or service relating to pregnancy or related medical conditions.

22 (F) Sexual orientation.

23 (G) Variations in sex characteristics, including intersex traits or differences in sex
24 development.

25 (c) This section reflects the existing protections of the California Constitution
26 recognizing the individual rights to pursue and obtain safety, happiness, and privacy (Art.
27 I, § 1), ensuring equal protection of the laws (Art. I, § 7), protecting the ability to enter or
28 pursue a business, profession, vocation, or employment (Art. I, § 8), and protecting an
29 individual’s reproductive freedom (Art. I, § 1.1). This section shall be liberally construed
30 to effectuate the purposes of these constitutional protections.

31 **Comment.** Section XX is added to reflect California’s commitment to the equality of rights
32 under the law. While this section applies specifically to the ___ code, there are identical sections
33 in each of the other California codes to clarify and provide consistency across all California laws
34 governing sex discrimination.

35 This section is derived from existing California constitutional protections, but not by way of
36 limitation, and intended to provide express language confirming that California’s laws prohibiting
37 and protecting against sex discrimination address, at a minimum, discrimination based on the listed
38 characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination
39 protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment
40 and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational
41 Equity (Education Code Sections 200-270).

Civil Code § 51 (amended). Unruh Civil Rights Act.

SEC. ____ . Section 51(e)(5) is amended to read:

“Sex” includes, but is not limited to any of the following actual or perceived characteristics or actions:

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

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

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

Comment. Section 51 was amended to reflect California’s commitment to the equality of rights under the law. This amendment mirrors section 14.1, which was added to the Preliminary Provisions of the Civil Code, and there are identical sections in each of the other California codes to clarify and provide consistency across all California laws governing sex discrimination.

This section is derived from existing California constitutional protections, but not by way of limitation, and intended to provide express language confirming that California’s laws prohibiting and protecting against sex discrimination address, at a minimum, discrimination based on the listed characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational Equity (Education Code Sections 200-270).

Government Code § 12926 (amended). Definitions.

SEC. ____ . Section 12926 (r)(1) is amended to read:

“Sex” includes, but is not limited to any of the following actual or perceived characteristics or actions:

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

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

(C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.

(D) Pregnancy or related medical conditions.

(E) Decision-making, access to care, or potential or actual use of a drug, device, product, or service relating to pregnancy or related medical conditions.

(F) Sexual orientation.

(G) Variations in sex characteristics, including intersex traits or differences in sex development.

Comment. Section 12926 was amended to reflect California’s commitment to the equality of rights under the law. This amendment mirrors section 27, which was added to the General

1 Provisions of the Government Code, and there are identical sections in each of the other California
2 codes to clarify and provide consistency across all California laws governing sex discrimination.
3 This section is derived from existing California constitutional protections, but not by way of
4 limitation, and intended to provide express language confirming that California’s laws prohibiting
5 and protecting against sex discrimination address, at a minimum, discrimination based on the listed
6 characteristics. The scope of this rule is consistent with the broad scope of anti-discrimination
7 protections in the Unruh Civil Rights Act (Civil Code Section 51), the California Fair Employment
8 and Housing Act (Government Code Sections 12900-12999), California’s laws on Educational
9 Equity (Education Code Sections 200-270).

From: Amanda Goad [REDACTED]
Date: Friday, September 20, 2024 at 10:29 AM
To: Sarah Huchel <shuchel@clrc.ca.gov>
Cc: Becca Cramer-Mowder [REDACTED]
Subject: RE: CLRC "ERA" project

Hi Sarah,

Thanks for your patience. Circling back at last to your request for feedback on the CLRC's Memorandum 24-16 proposal, and looping Becca from ACLU Cal Action again:

- We support the concept of standardizing a nonexclusive definition of sex/gender across codes.
- We tend to think it is not helpful to cite the federal Equal Rights Amendment or federal Title VII as bases for the change, given uncertainties around their future fate in Congress and the U.S. Supreme Court.
- We suggest adding to the statutory language a definition of sexual orientation, and would recommend using the "heterosexuality, homosexuality, or bisexuality" wording that currently appears in Education Code section 66262.7 among other statutes.
- We note that while standardizing the definitions is a positive step that may facilitate Californians' exercise of their rights to be free from gender discrimination, it is unlikely to directly address ongoing challenges Californians are experiencing.
 - For example, CDCR persists in using "biological sex" instead of "gender" in Departmental Operations Manual section 54040.3, despite Penal Code section 2606(a)(2) dictating recognition of trans people's identity, agency, and dignity and protection for the identities and preferences of transgender, nonbinary, and intersex people in carceral search situations, and despite [confirmation from the federal Department of Justice](#) that the Prison Rape Elimination Act implementing regulations prohibit imposing searches by male officers on incarcerated transgender women against their will.
 - For another example, the Legislature has not specifically required state or local agencies to update their forms, databases, and intake procedures to acknowledge the existence of nonbinary Californians, so even several years after

the Gender Recognition Act took effect, many have not done so. By the same token, some public entities are still using forms that presume a married couple consists of a man and a woman, more than 10 years after the *Perry* Supreme Court decision, or that presume the parents of a baby are a man and a woman, and so forth.

We hope that the second phase of the CLRC's effort can address these types of more specific concerns.

Please let us know if you have any questions or if we might be of assistance in later stages of this process.

-Amanda

Amanda Goad

Audrey Irmas Director, LGBTQ, Gender & Reproductive Justice Project

Deputy Director of Advocacy

ACLU of Southern California

1313 W. 8th Street #200, Los Angeles, CA 90017

[REDACTED]

pronouns: she/her or ze/zir

From: Sarah Huchel <shuchel@clrc.ca.gov>

Sent: Tuesday, September 10, 2024 3:59 PM

To: Amanda Goad [REDACTED]

Subject: Re: CLRC "ERA" project

Thank you!

From: Amanda Goad [REDACTED]
Date: Monday, September 9, 2024 at 12:02 PM

To: Sarah Huchel <shuchel@clrc.ca.gov>

Cc: Christine Parker [REDACTED], Becca Cramer-Mowder [REDACTED]

Subject: RE: CLRC "ERA" project

Hi Sarah—

Thanks for your understanding – there's end of session and then there's back to school also being a busy season for my team!

I'm looping in Becca Cramer-Mowder, one of our ACLU CalAction lobbyists, as well as Christine Parker from ACLU SoCal. We're still reviewing the ERA-inspired proposal, but wanted to get back to you on the name change question:

CCP § 1277.5, as you probably know, derives from the Gender Recognition Act of 2017, and applies to name changes to conform with gender identity. It makes that type of name change procedurally easier by waiving the hearing and publication requirements of CCP § 1277. It does not waive or affect the application of CCP § 1279.5.

CCP § 1279.5 governs, among other things, name changes for folks who are required to register pursuant to PC 290. It effectively creates a presumption of denial for any petition filed by a PC 290 registrant.

Because of bias in the criminal legal system and involvement in survival economies, trans folks are disproportionately subjected to the registry requirements of PC 290. (And of course, people who are trans are disproportionately likely to need to change their names to conform to their identities – that was the principle behind CCP § 1277.5.) As a result, the trans community is disproportionately impacted by the CCP § 1279.5 barrier to securing the name change. Moreover, applying for jobs/housing/services/etc. under a legal name that doesn't fit their current appearance and identity not only "outs" people in this situation as transgender, but can tend to "out" them as PC 290 registrants, outside of normal background checking processes, when questions arise about why they haven't secured a legal change.

While we don't have exact statistics on the frequency of approvals/denials, our understanding is that these types of petitions are very rarely successful. Because the language of § 1279.5 is restrictive (and part (f) reads as though PC 290 registrants are categorically ineligible to pursue name changes, even though part e provides a standard for rebutting the presumption of denial),

our anecdotal understanding is that dozens (at least) of transgender people around the state have had name change petitions rejected in the past several years (while many other folks have heard about the pattern and just not filed petitions given the sense of futility). We actually weren't aware of *anyone* who was able to successfully change their name under these circumstances until last year we learned of one exception, thanks to the hard work of our partners at the TGI Justice Project. We have considered trying to document the scope of the problem through PRA requests, but are concerned that they wouldn't yield accurate numbers because some Superior Court clerks decline to even accept or process name change petitions from applicants who check "yes" to PC 290 registration status on form NC-110.

I believe there are some impacted folks who would be willing to speak to their experiences with this problem if helpful.

Hope that helps clarify, and also hope to get back to you shortly on the other issues.

--Amanda

Amanda Goad

Audrey Irmas Director, LGBTQ, Gender & Reproductive Justice Project

ACLU of Southern California

1313 W. 8th Street #200, Los Angeles, CA 90017

[REDACTED]

pronouns: she/her or ze/zir

November 1, 2024:

Hi Sarah,

Leila (copied here) and I worked on this language, with input from some of our colleagues at PPFA and NWLC. We know this includes some rewriting and are more than happy to talk about it if you have thoughts/questions. We think this could set a precedent for other states so we are really trying to get it right.

Hope you have a good weekend.

Best,

Beth

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:

- (A) Assigned sex or gender category, including female, male, or nonbinary.
- (B) Degree of conformity to sex or gender stereotypes.
- (C) Gender, including gender identity, gender expression, and access to, and use of, gender affirming care and other related health care.
- (D) Pregnancy or related medical conditions, including, but not limited to, discrimination based on seeking, use or potential use, decision-making relating to, and access to care for, childbirth, termination of pregnancy, lactation, miscarriage, fertility, contraception, and any particular drug, device, product, for such care.
- (F) Sexual orientation.
- (G) Variations in sex characteristics, including intersex traits or differences in sex development.

[NOTE: We weren't sure if we originally put termination of pregnancy or you did, but we are fine with either abortion or termination of pregnancy, whatever fits your code.]

--

Bethany Sousa

pronouns: she/her

Senior Policy and Strategy Advisor

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